

2013 ISDA Arbitration Guide Published

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On 9 September 2013, the International Swaps and Derivatives Association, Inc. (ISDA) published its 2013 ISDA Arbitration Guide. The decision to introduce optional arbitration clauses for the 1992 and 2002 ISDA Master Agreements follows a consultation process that started in 2011 with ISDA's memorandum on the use of arbitration under an ISDA Master Agreement.

ISDA's guide is intended to help users and practitioners when including an arbitration clause in either the 1992 or 2002 versions of the ISDA Master Agreement. The 1992 and 2002 ISDA Master Agreements are the international industry standard agreements for the documentation of derivative transactions traded over-the-counter (OTC) rather than on an exchange. The ISDA Master Agreements are widely used around the globe for all types of OTC derivative transactions such as interest rate swaps, foreign exchange derivatives, equity derivatives, credit default swaps, commodity derivatives, etc.

Whereas financial institutions historically took a more conservative approach — clearly preferring litigation in state courts over arbitration — the introduction of the optional arbitration clauses represents yet another milestone showcasing that the financial industry is discovering arbitration as an alternative to litigation. Parties are especially choosing to arbitrate when dealing with counterparties seated in emerging countries where enforcing a foreign judgment is difficult or practically impossible. In contrast, a foreign arbitral award would be possible under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

ISDA's guide provides a high-level overview and introduction to some of the relevant concepts and benefits of using arbitration clauses.

The guide also offers 11 different model arbitration clauses, referring to the arbitration rules of the following seven prominent arbitration institutions:

- (1) International Chamber of Commerce (via inclusion of ICC Rules)
- (2) London Court of International Arbitration (via inclusion of LCIA Rules)
- (3) American Arbitration Association-International Centre for Dispute Resolution (via inclusion of the AAA-ICDR Rules)
- (4) Hong Kong International Arbitration Centre (via inclusion of the HKIAC Rules)
- (5) Singapore International Arbitration Centre (via inclusion of the SIAC Rules)
- (6) Swiss Chambers' Arbitration Institute (via inclusion of the Swiss Arbitration Rules)
- (7) Panel of Recognized International Market Experts in Finance Arbitration Rules (via inclusion of the P.R.I.M.E. Finance Rules)

The last was inaugurated as an international facility for resolving complex financial disputes in 2012. As there are options for some of the basic clauses regarding seat and/or the applicable governing law, the guide provides for a total number of eleven different clauses.

- The ISDA Master Agreement documentation, in essence, consists of:
- The form of master agreement itself
- A schedule thereto to be negotiated among the parties
- Annexes for the delivery of collateral (if applicable)
- Trade confirmations which may incorporate any applicable set of transaction type specific definitions such as the 2006 ISDA Definitions, the 2011 ISDA Equity Derivative Definitions, the 2003 ISDA Credit Derivatives Definitions, etc.

Within this architecture the model arbitration clauses published by ISDA are intended to form part of the schedule to the ISDA Master Agreement.

ISDA's move towards arbitration was in part prompted by an increasing diversity in the counterparties and jurisdictions involved in derivatives and a recognition that arbitral awards may frequently be more easily enforced than court judgments, particularly in certain emerging markets. The recent inauguration of P.R.I.M.E. and the rise of financial disputes registered with the ICSID demonstrate the growing need for arbitration as a dispute resolution mechanism in the financial industry.

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About the Publication

Latham & Watkins International Arbitration Newsletter is a regular publication produced by the firm's global International Arbitration team designed to highlight important news, legal issues and developments in a practical and informative way.

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