



ISDA Issues Long-Awaited Arbitration Guide

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In September 2013, the International Swaps and Derivatives Association, Inc. ("ISDA") issued its Arbitration Guide. The ISDA Guide addresses a continuing trend toward arbitration in cross-border transactions, particularly those in the financial sector. The ISDA Guide resulted from work over the last two years to develop recommended alternative arbitration language for use within the ISDA Master Agreements (2002 and 1992), which are the standard global forms for over-the-counter (OTC) derivatives transactions. A copy of the ISDA Guide is available by [clicking here](#).

The ISDA Guide first provides an overview of arbitration, and particularly arbitration for cross-border transactions. For example, the Guide explains the significance of the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The ISDA Guide also highlights the importance of the "seat of arbitration," the location that provides the governing procedural law of the arbitration, the place whose courts have certain powers as it relates to the arbitration (such as the power to replace an allegedly biased arbitrator), and the place where the award is ultimately made. The model clauses suggest to members eight different seats of arbitration: London, New York, Paris, Singapore, Hong Kong, Zurich, Geneva and The Hague.

As part of the advice given to members, the ISDA Guide not only explains some of the key elements of arbitration, including the value of an arbitration award versus a judgment in litigation, the significance of the New York Convention and the necessity of neutrality, but also focuses on the finality of an arbitration award. To that end, the ISDA Guide provides some insight into the finality and enforceability of awards rendered in each of the eight seats proposed for use with the model clauses, as well as the confidentiality of arbitration conducted in each of those jurisdictions.

The model clauses in the ISDA Guide are intended for use in the 1992 ISDA Master Agreement (Multicurrency – Cross Border) and the 2002 ISDA Master Agreement. Those Master Agreements provide the general framework for the parties' agreement. The parties then tailor that agreement to their particular transaction through the use of a Schedule that makes elections among various options available in the Master Agreement. To enable the model arbitration clauses, parties can insert one of the model clauses to replace Section 13(b) (the jurisdiction clause) in the Schedule to the relevant Master Agreement. Additional amendments effected through the use of the arbitration model clauses adapt other provisions of the Master Agreement (such as the waiver of sovereign immunity) so that they operate seamlessly with the choice of arbitration.



The model clauses provide options for arbitration under the International Chamber of Commerce (ICC) Rules; London Court of International Arbitration (LCIA) Rules; International Centre for Dispute Resolution (ICDR) Rules; Hong Kong International Arbitration Centre (HKIAC) Rules; Singapore International Arbitration Centre (SIAC) Rules; Swiss Rules of International Arbitration; or, the Panel of Recognised International Market Experts in Finance Arbitration Rules (P.R.I.M.E. Finance Rules). This table summarizes the options:

Arbitration Rules	Seat of Arbitration	Governing Law
ICC	London	English law
	New York	New York law
	Paris	English or New York law
LCIA	London	English law
ICDR	New York	New York law
HKIAC	Hong Kong	New York or English law for the contract, Hong Kong law for the arbitration clause
SIAC	Singapore	New York or English law for the contract, Singapore law for the arbitration clause
Swiss	Geneva or Zurich	English or New York law
P.R.I.M.E.	London	English law
	The Hague	English or New York law for the contract, Dutch law for the arbitration clause

Perhaps the most significant advice in the ISDA Guide appears in its final section. Members are cautioned that the model clauses are mere guidance, and parties should seek appropriate legal and other advice to best tailor and utilize the model clauses in their cross-border transactions. For example, members may wish to consult with counsel to discuss whether, and how, to tailor the model clauses to restrict (or allow) discovery, to better ensure confidentiality of the proceedings and award, to mandate particular qualifications for potential arbitrators or to allow for accelerated proceedings.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

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