

# 2018 ISDA Arbitration Guide published – the impact on EU Counterparties

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The International Swaps and Derivatives Association (**ISDA**) published an updated arbitration guide in December 2018 (the **2018 ISDA Arbitration Guide**). It reflects a growing trend to use arbitration for cross-border transactions, particularly those involving emerging markets, and is intended to assist users by providing a range of model clauses which may be used with the ISDA 2002 Master Agreement, the ISDA 1992 Master Agreement under English/New York Law or the new Irish Law ISDA 2002 Master Agreement, which has been introduced as part of Brexit-proofing arrangements.

## ■ The Genesis of the 2018 ISDA Arbitration Guide

Practitioners have long favored litigation as a means for resolving financial transactions, even when they included an international component. English and New York laws were traditionally the chosen law and jurisdiction for these disputes. Today, however, there is an increasing number of parties to international financial transactions coming from emerging markets where it can be difficult (or impossible) to enforce foreign court judgments. Arbitration is a viable alternative. It is also one that is increasingly considered as a Brexit-fallback.

After a comprehensive consultation process with members and interested stakeholders, the newly published 2018 ISDA Arbitration Guide seeks to:

- (i) ensure updated model clauses (e.g., in light of institutional rule changes),
- (ii) include additional model clauses and options requested by users, and
- (iii) update guidance on arbitration and its key features to reflect market developments.

## ■ The Key Reason for Considering Arbitration: The Ability to Capitalize on the Wide-Spread Application of the New York Convention

Arbitration can be particularly attractive for resolving disputes arising out of international transactions because the “New York Convention” harmonizes recognition and enforcement laws applicable to arbitral awards among the approximately 160 contracting states globally and prohibits domestic courts from reviewing foreign arbitral awards on their merits.

It is more broadly applicable than its litigation counterparts – the 2005 Hague Convention, the 2007 Lugano Convention and the 2012 Brussels I Regulation, which apply to the recognition and enforcement of court decisions on a much more limited scale (the broadest of which applies to 34 countries in total, including all EU Member States).

## ■ Arbitration as a Means of Mitigation

The 2018 ISDA Arbitration Guide highlights some of the benefits of arbitration. It notes that arbitration is an effective mitigation tool for those jurisdictions where there are concerns of bias or corruption, delay, lack of experience or expertise, failure of the domestic courts to respect foreign governing laws, a lack in consistency in decision-making, and/or concerns for having to litigate in an unfamiliar and/or inconvenient language.

## ■ Model Clauses

The model clauses provided in the 2018 ISDA Arbitration Guide are intended to assist parties with the framework of their dispute resolution clauses and have been tailored to reflect ISDA user requests with respect to: arbitral institution, seat of arbitration, and applicable law. Each model clause is provided in a consistent format and identifies the necessary amendments to the underlying Master Agreement if arbitration is chosen.

### **Model clauses include:**

- **The ICC Rules**
  - London seat with English governing law
  - New York seat with New York governing law
  - Paris seat with choice of English or New York governing law
- **The LCIA Rules**
  - London seat with English governing law
  - Dublin seat
- **The AAA-ICDR Rules**
  - New York seat with New York governing law
- **HKIAC Rules**
  - Hong Kong seat with choice of English or New York governing law (arbitration clause governed by Hong Kong law)
- **SIAC Rules**
  - Singapore seat with choice of English or New York governing law (arbitration clause governed by Singapore law)
- **Swiss Rules**
  - Zurich or Geneva seat with choice of English or New York governing law
- **P.R.I.M.E. Finance Rules**
  - London seat with English governing law
  - New York seat with New York governing law
  - The Hague seat with choice of English or New York governing law with the (arbitration clause governed by Dutch law)
- **SCC Rules**
  - Stockholm seat with choice of English or New York governing law (arbitration clause governed by Swedish law)
- **DIS Rules**
  - Frankfurt am Main seat with choice of English or New York governing law (arbitration clause governed by German law)
- **DIFC-LCIA Rules**
  - DFIC seat and choice of English or New York governing law (arbitration clause governed by DFIC law)
- **VIAC Rules**
  - Vienna seat with choice of English or New York governing law (arbitration clause governed by Austrian law)

Some of the master agreements published by ISDA already contain arbitration clauses which are not included in the 2018 ISDA Arbitration Guide. This is the case with the Schedule to the ISDA 2002 Master Agreement (French law) and the ISDA/IIFM Tahawwut Master Agreement (English or New York laws), which provide for ICC arbitration in Paris, London, or New York (depending on applicable law).

Parties wanting to adapt the model clauses further to reflect their needs and should seek specialist legal advice before finalizing their transaction documentation. Consideration should also be given to the potential impact the use of model clauses may have on related contracts that build upon or otherwise interoperate with ISDA documentation architecture. Parties should note that in most jurisdictions the law of the seat of arbitration will apply for certain components of the arbitration proceedings in addition to the chosen governing law of the Master Agreement. Our specialist derivatives and dispute resolution lawyers are happy to provide you with further guidance on the practical documentation and operational impacts, including on how these fit into EU and global regulatory requirements.

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