# Cross-border Disputes in the Financial Sector: A Trend towards Arbitration and the Release of the ISDA Arbitration Guide

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Financial markets participants traditionally opt for the jurisdiction of the sophisticated English or New York courts to resolve disputes arising out of complex financial transactions. However, the globalization of financial markets and the increasing involvement of parties from emerging market jurisdictions in particular, concurrently with the recent financial depression, have caused stakeholders to seek alternative methods of dispute resolution, cultivating favorable conditions for the emergence of international arbitration as a means for resolving cross-border financial disputes.

**Arbitration vs. Litigation**

Lately, arbitration in financial disputes appears to have gained ground against the traditional practice of choosing court litigation, mainly due to its distinct advantages regarding enforceability. Still, the financial sector is moving towards arbitration with caution, considering some basic shortcomings of arbitration; for example, the lack of fast-track procedures or time delays that might occur due to fewer restrictions on the submission of documentation (by contrast with civil law proceedings). A recent survey held by the Queen Mary College, University of London and PricewaterhouseCoopers revealed that, while the great majority of in-house counsel in financial services firms consider arbitration to be "well suited" to their industry, nevertheless, when they were asked to make a choice, more often they decided on litigation.

Their approach is justified by two perceived advantages of litigation: first, the availability of summary and default judgments, which become relevant in common overdue payments cases; second, the inherent conviction that "bank-friendly" jurisdictions exist, a belief that derives from the distinctive strictness of English law in the field of contractual obligations that gives primacy to the wording of the concluded agreements and thus, allows a degree of predictability.

On the other hand, the increasing attractiveness of investments in emerging markets has rendered the jurisdiction issues more complicated. Judgments made by local courts may fail to be effectively enforced due to the absence of reciprocal enforcement arrangements among the jurisdictions involved. Arbitration offers an attractive solution to those difficulties through the application of the New York Convention, which has been ratified by almost every trading nation.

Furthermore, the parties resorting to arbitration generally have the discretion to choose arbitrators

who demonstrate technical knowledge applicable to the dispute. Financial transactions and investment products can be complicated, and arbitration enables the parties to have a decision-maker who is an expert in the field, as is the case in the national courts of certain jurisdictions, i.e. the traditionally preferred English and NY courts.

Finally, apart from the already well-known reasons for choosing arbitration (such as confidentiality, neutrality, party autonomy, cost and time effectiveness, as well as finality), recent developments have aimed to further facilitate the settlement of financial disputes. For example, the P.R.I.M.E. arbitration rules allow for shorter timelines aiming at prompt dispute resolution while the ICC has introduced the emergency arbitral proceedings. Accelerated proceedings suit the financial services industry well, since urgent measures may be necessary upon liquidation of assets or to save costs and time in cases where the respondent raises very weak defenses to a claim. Recent revisions to arbitral rules also facilitate consolidation and joinder of parties – a common problem in complex finance transactions. In particular, the new HKIAC rules provide for effective multi-party and multi-contract arbitration by enhancing the existing joinder provisions, and now allowing the consolidation of two or more arbitrations at a party's request.

Moreover, P.R.I.M.E. Finance has introduced a transparency feature, by stimulating the publishing of arbitral awards with the parties' anonymity preserved as long as neither party objects within a month of receipt of the award. This policy will allow the institution to develop a body of decisions on financial disputes and gradually form a precedent through a reachable database of arbitral awards that will increase legal certainty for those interested in settling their cases through arbitration.

The trend towards arbitration for financial disputes settlement is evident by a number of important cases decided by arbitral tribunals. The popular Abaclat v Argentina and Deutsche Bank v Sri Lanka examples, as well as the submission before arbitral tribunals of Greek investors' claims against Cyprus show that banking and finance disputes might be settled through arbitration.

**The ISDA Arbitration Guide**

The detected trend towards arbitration in the financial sector has been reinforced by the initiative of the International Swaps and Derivatives Association (ISDA) to produce Model Arbitration Clauses for its Master Agreements. Among other things, ISDA provides standard documentation material for over-the-counter (OTC) derivative transactions, aiming thereby to ensure the enforceability of their netting and collateral provisions and to reduce credit and legal risk.

ISDA Master Agreements include litigation clauses in favor of the English or New York courts. However, on September 9, 2013 ISDA released its "Arbitration Guide" (the Guide), which is intended to show how to use arbitration as an effective tool to resolve disputes in the swaps and derivatives markets. The Guide is the result of a long consultation process, which began in January 2011 and aimed at gauging the potential interest in the use of arbitration under Master Agreements by those involved in financial markets. The consultation process generated feedback over a period of a year from practitioners in many jurisdictions on the practical aspects of using arbitration in derivatives markets. The feedback indicated a widespread desire on the part of ISDA members for guidance on how to use arbitration in ISDA transactions.

In its final form, the ISDA Arbitration Guide contains eleven Model Arbitration Clauses divided into seven appendices, each one corresponding to one of the recommended institutions. The Model Clauses are primarily designed to be included in new ISDA-governed agreements (in a Schedule to an ISDA Master Agreement), but they can also be incorporated into existing ISDA-governed transactions. The Guide includes an explanatory memorandum to provide an overview of arbitration and the Model Clauses are accompanied by explanatory notes regarding their practical implementation.

Each Model Clause provides for the law governing the Master Agreement and the agreement to arbitrate, especially in cases where the governing law of the Master Agreement and the law of the seat of arbitration do not coincide, thus clarification is necessary. The Model Clauses further contain an arbitration clause covering the choice of procedural rules, seat, language, number of arbitrators and appointment process. In addition, each Model Clause contains provisions revoking the jurisdiction clause in the Master Agreement and amending the wording of those sections of the ISDA Master Agreements that are affected by the arbitration clause, namely the Process Agent and the Sovereign Immunity Waiver provisions.

The combinations of arbitration rules, seat and governing law are set out in the Guide. ISDA has clarified that the choice of combinations that finally appear in the Guide is based on the responses it has received by its members and does not express any preference on behalf of the Association. The seats of arbitration suggested correspond to the financial hubs of our world as anticipated and serve well the parties involved in leading financial markets. It is noteworthy that during the consultation process it was debated whether substantive laws other than English and New York law should be offered as options; this was finally rejected for the sake of maintaining the universal governing law standard offered by the ISDA Master Agreements.

As indicated in the Guide, the Model Clauses may be amended by the parties according to their specific preferences or may be supplemented with provisions adapted to the particular requirements of each agreement. In any case, ISDA recommends that members use the Model Clauses with care and take specialist advice before amending them, since uninformed alterations could lead to enforcement difficulties in certain jurisdictions.

**Summary**

Ultimately, the inclusion of arbitration clauses in ISDA documentation should work as a catalyst in the promotion of arbitration as a mechanism for effective dispute resolution in the financial industry. It is a great opportunity for arbitration professionals to examine further the potential applications of this binding ADR process into the constantly evolving, demanding but at the same time promising financial sector.