
The ISDA Annual General Meeting was hosted in Singapore in April 2013 and one of the hot topics discussed by delegates was the review by ISDA of its Master Agreement to include model arbitration clauses.

Following an in-depth consultation with ISDA members, ISDA’s newly released 2013 ISDA Arbitration Guide includes a new set of model clauses, along with a supplemental guide presenting an overview of the key features of arbitration. The arbitration agreements will provide users with a ready-made set of clauses with a variety of seats and institutional rules to insert into the ISDA Master Agreement.

Traditionally, there has been something of an anathema towards arbitration among financial institutions but certainly since 2008, we have witnessed an increasing number of arbitration clauses in sovereign international lending, structured financing and project financing documentation in this region. There are a number of reasons for this shift towards arbitration.

**Enforceability of awards**

One reason behind the adoption of arbitration clauses in these kinds of transactions is that parties can rely on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, where an arbitration award made in one convention state may be recognized and enforced in up to 148 other convention states, subject to limited grounds for refusal of enforcement.

Although treaties exist for the reciprocal enforcement of court judgments, they are much more limited in application than the New York Convention. With more and more counterparties to international derivative transactions coming from emerging markets (where the coverage of reciprocal enforcement treaties is particularly sparse), arbitration may increasingly represent the most practical option from an enforceability perspective.

**Arbitrator expertise**

Despite the well-known advantages on enforceability, financial institutions have traditionally preferred litigation, often in common law courts (typically Hong Kong, England, New York or Singapore), over arbitration.

While courts in these jurisdictions are acknowledged to have a sophisticated understanding and experience of derivatives and other often complex financial products, the arbitration community is swiftly catching up in this regard. In fact, flexibility in appointing arbitrators is a significant advantage over the litigation of derivatives disputes in the courts, as users can be confident in selecting a neutral arbitrator who understands the technical issues in question.
In this competitive market and with rising numbers of arbitrations in the financial sector, arbitration institutions in Asia have also responded by actively seeking out some of the world’s leading experts on derivatives disputes to join their respective panels of arbitrators. SIAC, for instance, maintains a roster of over 380 of the world’s leading arbitrators from 32 jurisdictions. Nearly all those listed in "The Who’s Who Commercial Arbitration 2013" are on the SIAC panel and indeed four of the top 10 arbitrators listed are on the SIAC Court of Arbitration.

The SIAC panel list is a helpful guide, providing users with access to the CVs of panel members, who are selected as talents in their fields. A myth of institutional arbitration is that users are confined to only selecting arbitrators listed on the panel. Like many institutions in Asia, however, SIAC is flexible when it comes to permitting the parties a right of selection of an arbitrator. It does not operate from a closed list, nor is it mandatory for parties to appoint an arbitrator listed on its panel. SIAC has also been known to appoint arbitrators from outside the panel in appropriate cases.

To a certain extent, users can tailor the expertise of the Tribunal to match the subject matter of a particular dispute. By way of example, we were recently involved in a derivatives-related arbitration where, although the ISDA Master Agreement was governed by English law, the main issues in dispute revolved around compliance with the relevant regulations of the Reserve Bank of India. In these circumstances, the parties were able to nominate arbitrators with experience in the Indian judicial system and the relevant legislation. Tailoring a panel of judges to hear the dispute in question would simply not be possible in the courts.

The following case study of a derivatives dispute before an SIAC tribunal demonstrates the kind of mis-selling cases which have been a feature of court-based litigation in the wake of the global financial crisis, which are also being resolved before arbitral tribunals:

A dispute arose between a private investor and a wealth management company in relation to a particular account managed by the company. The disputes related to derivative transactions which substantially comprised accumulator type products.

The Claimant alleged that the Respondent did not provide proper advice on the nature of transactions and the returns to be expected and particularly that: (i) the transactions were complex and carried substantial risk; (ii) correct advice was not provided on the impact of the transactions on the correlation and diversification of the portfolio; and (iii) correct advice was not provided on risk assessment and damage control should losses arise. The claim amount was in the region USD 90 million.

**Accelerated timelines**

We now turn to the second most commonly-cited reason why financial institutions have traditionally resorted to the courts to resolve derivatives disputes – the availability of summary judgment. This is an efficient procedure in the common law courts which provides for a quick judgment in cases where there is no reasonable prospect of a successful defence.
In July 2010, SIAC surveyed its users on the arbitration rules then in force. The majority of respondents to the survey stated that they would like a procedure that was similar to summary judgment but provided an award which was enforceable under the New York Convention. In response to the survey, SIAC introduced the Expedited Procedure under Rule 5 of the SIAC Rules.

The Expedited Procedure could be described as "Summary Judgment Plus". It is a process designed to apply to the sorts of disputes where summary judgment applications may be made but it complies with all the touchstones of the New York Convention (in particular, the right to a fair hearing)\(^1\). Where the Expedited Procedure applies, the award (barring exceptional circumstances) shall be made within six months from the constitution of the Tribunal.

One advantage that this process has over summary judgment is that it caters well for certain types of claims in the finance sector which, while the merits may be relatively straightforward, do not lend themselves to be decided by a documents-only process. Allegations of misrepresentation related to mis-selling of products, for instance, require proof and rebuttal by oral evidence and cross examination. In our experience, we have found that the Expedited Procedure accommodates proper examination of the issues in dispute, while ensuring that the arbitral process advances efficiently.

Parties can now choose to apply the Expedited Procedure: (i) in their contracts by using the SIAC Expedited Procedure Model Clause; or (ii) after a dispute has arisen, by agreement between the parties. Alternatively, a party can choose to make an application to the SIAC for the Expedited Procedure if the amount in dispute does not exceed the equivalent amount of S$5 million or in cases of exceptional urgency. Financial institutions in the region have taken positively to this innovation and it is now not uncommon to see parties pre-agreeing to the Expedited Procedure in their dispute resolution clauses.

One arbitration in which we acted recently is a neat example of how simple disputes, of the sort in which financial institutions are regularly involved, can be resolved efficiently under the Expedited Procedure:

The case involved an agreement between a private equity fund and an investor. The Claimant was from Norway and the Respondent from the UK.

Disputes arose as to the mode of redemption, i.e. whether it was to be monetary or whether redemption could be achieved by way of grant of equity held by the fund in other companies. The Claimant insisted that it was to be monetary. The amount in dispute was approximately USD2 million. The dispute centred on the interpretation of a single clause in the contract between the parties and was not complicated. The Claimant applied to use the Expedited

\(^1\) Art. V(1)(b) of the New York Convention provides that an award may be denied enforcement where "... the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case".
Procedure and, although the Respondent resisted, the Chairman of SIAC determined that the Expedited Procedure would apply.

The timelines in the case proceeded broadly as follows:

11 March 2011 – Notice of Arbitration filed
14 March 2011 – SIAC communicated commencement of arbitration to parties
06 April 2011 – Renowned Singaporean arbitrator approached for appointment by SIAC
07 April 2011 – Chairman of the SIAC appointed the arbitrator
07 October 2011 – Signed award delivered to parties

Total time between filing and rendering of Award – 6 months, 26 days

Total time between constitution of Tribunal and rendering of Award – 6 months

Where the amount in dispute is more substantial, disputes can still be resolved within a relatively short timeframe. In the following example, a dispute involving hedging transactions was resolved in around 15 months:

A dispute arose between a UK claimant and an Indonesian respondent under a 2002 ISDA Master Agreement entered into by the parties to execute a number of copper hedging transactions structured as target redemption swaps.

Due to the global financial crisis, the price of copper dropped substantially causing the Respondent to fail to pay as required. Despite further restructuring, disputes arose which were the subject matter of this arbitration.

The claims included unpaid amounts in addition to crystallized unwinding costs as result of the restructuring and were in the amount of about USD 20 million. The case was completed in about 15 months by a very eminent tribunal of three arbitrators.

**Scrutiny of awards**

Another signature feature of the Expedited Procedure is that the arbitrator’s award is scrutinized in the same way as all awards rendered under the SIAC rules. SIAC awards have been recognized and enforced by, among others, the courts of Australia, China, Hong Kong, India, Indonesia, New York and Vietnam. Arguably, the scrutiny of awards plays a key part in SIAC's successful record of recognition and enforcement of awards in foreign courts.

In practice, the scrutiny of awards serves a few practical needs. First, it simply helps arbitrators avoid simple typographical and computational errors, which are fairly common. Second, it helps to ensure that the procedural history of the case is properly recorded, including references to dates, clauses, party names, witnesses, reproduction of portions of documents and
agreements. This is particularly relevant in the case of a non-participating Respondent when it is crucial to record the Tribunal's efforts to keep the Respondent informed of the progress of the proceedings to provide it with full opportunity to participate.

Third, the scrutiny process helps to ensure that issues raised in the case have been appropriately dealt with by a tribunal, and that there are no contradictory findings of fact or law. Last and perhaps most importantly, the process helps to ensure that the award satisfies any local requirements in a jurisdiction where the award is likely to be enforced.

In a recent case, the SIAC Registrar’s scrutiny of an award picked up on an error in the narrative of the procedural history. While the Tribunal had mistakenly recorded a party as having failed to address the Tribunal on a legal point in dispute, according to SIAC’s records, that party did in fact file its substantive submissions on time. In this way, scrutiny of the award helped to eliminate a potential ground for challenge of the Tribunal's decision on the basis of procedural fairness and natural justice. The Registrar was also able to ensure that the Tribunals’ reference to the current average LIBOR interest rate was checked and updated.

Confidentiality

Another feature of arbitration that makes it an attractive alternative for the resolution of disputes in the derivatives and banking sector is the confidentiality of the proceedings. During the discovery process in court proceedings, which may be open to the public and the media, banks could be forced to disclose confidential information about their internal operations and customer relationships.

Arbitration proceedings conducted at SIAC are private and confidential in nature. Under the 2010 and 2013 SIAC Rules, all matters relating to the proceedings (including the pleadings, evidence etc.) are to be treated as confidential, with certain exceptions, for example, permitting disclosure as necessary for the purposes of enforcement of an award.

Further, the SIAC Code of Ethics for arbitrators also prescribes that arbitration proceedings shall remain confidential and that an arbitrator should not use confidential information acquired during the course of the proceedings to gain personal advantage or advantage for others, or to adversely affect the interest of others.

In court proceedings the adverse publicity which is generated (in particular by vexatious or unmeritorious opponents) can force banks or financial institutions into premature settlement. Meanwhile, we have found that arbitration, away from the spotlight, offers parties the opportunity to resolve disputes purely on the merits of the case.

Limited right of appeal

Another attractive feature of arbitration in Singapore is the limited right of appeal and the finality of the arbitration process. Rather than facing the possibility of multiple appeals through
the courts, an arbitral award generally represents the final settlement of a dispute, allowing the financial institution to get on with its business. The Singapore courts, in particular, are well-known for being "arbitration-friendly" and averse to any attempt to retry a dispute on its merits.

**The future for derivatives arbitration**

The derivatives and banking sector is likely to be a growth area for arbitration over the coming years. The 2013 ISDA Arbitration Guide, including the ISDA model arbitration clauses, will be a useful tool which will encourage parties to ISDA Master Agreements who may not previously have thought about it to consider carefully the merits of opting for arbitration.

The publication of the 2013 ISDA Arbitration Guide and the increasing number of derivative-related disputes coming before SIAC tribunals demonstrate that users now have greater faith in resolving derivatives disputes by arbitration. The establishment of PRIME Finance, an institution set up in 2012 to assist with the settlement of disputes on complex financial transactions, also points to the increasingly rich pool of arbitration expertise in the derivatives sector.

We anticipate that banks and financial institutions will more likely turn to arbitration, with increasing numbers of disputes that in the past were in the domain of the courts being resolved by arbitration.