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EU MEMBER STATE LAW GOVERNED ISDA DOCUMENTATION- ANOTHER TOOL FOR THE BREXIT RISK MANAGEMENT TOOLKIT

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This article is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed in this article. The authors advise on matters of Irish law, only, and so comments on any other system of laws are based on a working understanding of the relevant system.

1. INTRODUCTION AND BACKGROUND

Financial and non-financial businesses across the world depend on derivatives to manage risks to which they are exposed. It may not be possible to predict future market movements with certainty but derivatives provide a key tool to lock in borrowing costs, exchange rates and prices, thus eliminating or reducing many of the uncertainties affecting business.

Derivatives market participants operating in, or doing business into, the European Union (the "**EU**") are now facing an additional risk; the potential impact on their business of the proposed withdrawal of the United Kingdom (the "**UK**") from the EU ("**Brexit**"). At the time of writing, the UK Parliament has voted against the Withdrawal Agreement negotiated by the UK Government with the EU[1]. Whereas a hard (no deal) Brexit is not inevitable, as the fall back in the absence of a finalised UK/EU withdrawal agreement by 29 March 2019, it remains a serious possibility.

As the industry association supporting derivatives market participants, the International Swaps and Derivatives Association Inc. ("**ISDA**") has a long history of creating solutions for its members, with a view to facilitating more efficient and safer derivatives markets. One of its original solutions, maintained to this day, is the production of industry standard

documentation. The availability of such documentation, created with input from ISDA's members across derivatives industry sectors, facilitates the prompt negotiation of derivatives on terms benefiting from strong legal and commercial certainty. That legal certainty is supported by various legal opinions obtained by ISDA for the benefit of its members[2].

ISDA worked closely with its membership on Brexit risk management issues leading up to, and following on from, the UK referendum on Brexit in June 2016. One of the concerns that members had raised with ISDA was the law by which ISDA's industry documentation was governed. To date, ISDA has offered users of that documentation three options by which its primary document-the Master Agreement-could be governed; the laws of England, the State of New York, and Japan. That choice, in turn, affects the courts that determine any disputes arising under that document. ISDA had identified that almost all of the Master Agreements entered into between counterparties based in the EU or European economic area were governed by English law and included a submission to the jurisdiction of the courts of England. Having identified certain benefits accruing to users from the fact that England is an EU Member State[3], ISDA undertook a diligence and member consultation exercise to determine whether there was member appetite to retain the availability of primary documentation governed by the law of an EU Member State post-Brexit and, in the event that there was such appetite, the EU Member States' laws by which they might be governed. In this regard, ISDA chose to support a civil law and a common law option, reflecting the systems of law prevalent throughout the EU, and focussed not only on whether a jurisdiction's legal regime supported the enforceability of the documentation in question but also whether it supported other essential elements of the overall ISDA documentation architecture, such as ISDA protocols (multilateral structures hosted by ISDA to facilitate the amendment of bilateral agreements between adhering parties in an efficient and scalable manner), optional arbitration agreements and clearing documentation.

Having undertaken that diligence and consultation exercise, ISDA chose to publish Irish (common law) and French (civil law) versions of each of its:

- 2002 Master Agreement (the "**2002 ISDA**");
- 1995 Credit Support Annex (Bilateral Form - Transfer) (the "**1995 CSA**"); and
- 2016 Credit Support Annex for Variation Margin (VM) (the "**VM CSA**" and, together with the 1995 CSA, the "**Annexes**" and each an "**Annex**").

Irish and French law versions of the 2002 ISDA were published in June 2018 together with updated Irish and French ISDA netting opinions[4] encompassing those versions. This was followed in December 2018, when Irish and French law versions of the Annexes, together with an updated version of the French, and a supplement to the recently published Irish, ISDA collateral opinion[5] encompassing those versions, were published by ISDA. ISDA netting opinions and ISDA collateral opinions commissioned by ISDA after publication of the Irish and French versions of the 2002 ISDA and Annexes, respectively, also encompass those versions.

ISDA has not yet chosen to publish Irish or

French law governed credit support documents to facilitate compliance with regulatory initial margin regimes, pending expressions of interest from members in such documents. As the law governing such documents tends to be that of the jurisdiction in which the relevant custodian is located, rather than the law governing the related master agreement, whether such documents are in due course published by ISDA will likely depend on whether parties subject to such regimes choose custodians in Ireland and France to provide the custodial services supporting such arrangements. However, in respect of recent ISDA initial margin documentation structures which separate:

- the obligation to provide initial margin and mechanical aspects of the parties' relationship in respect thereof (set out in a collateral transfer agreement to be governed by the governing law of the related Master Agreement); and
- the grant and enforcement of security over the segregated account (set out in a security agreement to be governed by the law of the place of the account, which may differ from the governing law of the Master Agreement),

ISDA has worked with counsel in England, New York, France and Ireland to ensure that the collateral transfer agreements will (where necessary, subject to the inclusion of certain prescribed language) work effectively regardless of whether the governing law of the Master Agreement is English, New York, French or Irish law.

2. CONCERNS DRIVING PUBLICATION OF IRISH AND FRENCH LAW ISDA DOCUMENTATION

As indicated above ISDA identified a number of advantages of designating the laws of an EU Member State as the governing law of ISDA documentation, with a related election for the courts of that Member State to have jurisdiction in related disputes. Concerns that, in light of the high reliance placed in an EU context on ISDA documentation governed by, and incorporating a submission to the jurisdiction of the courts of, England, Brexit could deprive users of its documents of those advantages, was the primary driver for the ISDA EU law documentation project.

The availability of the EU's highly flexible Brussels Regulation Recast[6] regime for the recognition and enforcement of judgments obtained in an EU Member State

At present, a judgment of a court of an EU Member State in a civil or commercial matter is entitled to recognition throughout the EU without undertaking any special procedure such as a declaration of enforceability (*exequatur*)[7]. Similarly, a judgment of a court of one EU Member State can be enforced in another Member State as if it had been delivered in the Member State of enforcement, without any obligation to have the judgment declared enforceable or registered in the Member State of enforcement[8].

ISDA members expressed concerns that, in circumstances where ISDA documentation is governed by English law and includes a submission to the jurisdiction of the courts of England, they would lose the benefits of this flexible EU regime

as regards the enforcement of judgments of the English courts in the remaining EU Member States (the "**EU27**") post-Brexit. Whereas judgments of the English courts may, subject to certain conditions, still be recognised and enforced in certain of the EU27 post-Brexit, loss of the convenience of the harmonised Brussels Regulation Recast regime would require consideration of the issues on a case by case basis by reference to the domestic laws of the relevant EU27 Member State. Availability of the Brussels Regulation Recast regime was considered to be a huge benefit.

The UK has signalled its intention to address this concern by independently acceding as a contracting state in the Convention of 30 June 2005 on Choice of Court Agreements (the "**Hague Convention**"), which is currently in force among the EU Member States, Mexico, Singapore, and Montenegro[9]. As pursuant to the Hague Convention three months elapses between the deposit by a state of its instrument of accession[10] and the Hague Convention entering into force for that state[11], the UK deposited an instrument of accession to the Hague Convention on 28 December 2018[12]. Such accession will not, however, resolve all concerns in this regard.

Whereas EU Member States are contracting states to the Hague Convention, which requires effect to be given in contracting states both to in scope choice of court agreements designating the courts of a Hague Convention contracting state and to the judgments of those designated courts, the Hague Convention is subject to some important limitations:

- the Hague Convention only encompasses exclusive choice of court agreements concluded after it has entered into force in the contracting state whose courts are designated. ISDA's standard English law governed documents[13] typically included a non-exclusive jurisdiction clause; although certain users of those documents may have amended such clauses to provide, instead, for the exclusive jurisdiction of the English courts[14], many outstanding ISDA documents would include the standard ISDA non-exclusive jurisdiction clause. Further, as indicated above, the Hague Convention only enters into force in a state three months after that state deposits its instrument of accession. Therefore the Hague Convention will have no effect in respect of an English law governed ISDA document that includes either:
  - ○ a non-exclusive jurisdiction clause; or
  - ○ an exclusive jurisdiction clause entered into while the UK is not a contracting state to the Hague Convention.

  Further, it is unclear whether an exclusive jurisdiction clause entered into while the Hague Convention was in force in the UK by reason of its status as an EU Member State would continue to be treated as one concluded after the Hague Convention entered into force in the UK once the UK had ceased to be an EU Member State but independently acceded as a contracting state to the Hague Convention. There is, of course, no settled jurisprudence on this issue[15];
- unlike under the Brussels Regulation Recast regime, judgments of a court of Hague Convention contracting state are not en-

titled to automatic recognition and enforcement in other contracting states and Chapter III of the Hague Convention anticipates a requirement to apply in the contracting state of enforcement for recognition or enforcement of in scope judgments[16];

- the recognition and enforcement afforded by the Brussels Regulation Recast regime extends to certain provisional, protective measures (e.g. pre-trial asset freezing orders) which are often crucial in cross-border cases. Such protections are not available under the Hague Convention; and

- there is a significant body of judicial authority from the Courts of Justice of the European Union and the domestic courts of EU Member States as to the scope of the Brussels Regulation Recast regime (e.g. as to the nature of an exclusive, as opposed to a non-exclusive, jurisdiction clause). While one might expect the Hague Convention to be interpreted harmoniously with other relevant international instruments, it is possible in principle for different conclusions to be reached on relevant issues. Reliance on the Hague Convention does not, therefore, afford the same level of certainty as reliance on the Brussels Regulation Recast regime.

ARTICLE 55 OF THE EU BANK RECOVERY AND RESOLUTION DIRECTIVE[17] ("BRRD")

Article 55 requires EU banks, large investment firms and other in scope entities to include a contractual recognition of BRRD's bail-in provisions in a very wide range of non-EU law governed contracts. This requirement currently applies in respect of New York law governed ISDA documents and in scope entities address it by including appropriate contractual provisions. However, the EU BRRD REFIT (regulatory fitness and performance review) process focused affected market participants on the vulnerability of such contractual fixes to legal change and the benefits of contracting under documentation governed by the laws of an EU Member State.

ADDRESSING CONCERNS DERIVING FROM ARTICLE 46(6) OF MIFIR[18]

Article 46(6) requires in scope non-EU entities providing in scope investment services or performing in scope investment activity within the EU to offer to submit any disputes relating to those services or activities to the jurisdiction of a court or an arbitral tribunal in an EU Member State. Such investment services and investment activity may encompass the transaction of derivatives under ISDA documentation. Of course, it would be possible to achieve this by maintaining English law as the governing law of the relevant document but electing for the jurisdiction of the courts of an EU27 Member State. Such a bifurcated approach is, however, is not currently provided for in ISDA documents and it would involve complexities as it would involve determinations as to matter of English law being made by the courts of an EU27 Member State (likely on the basis of expert evidence), which determinations would also be subject to the potential application of mandatory provisions of law and the public policy of the forum EU27 Member State. It would also be possible to address the issue by maintaining English law as the governing law but replacing the submission to the jurisdiction of the English courts with an agreement to refer any disputes to arbitration with a seat in the EU27. The New York Convention of 1958 has a broad

base of contracting states[19] and, in very general terms, requires such states to enforce arbitral awards without reviewing their merits. However, whereas arbitration is frequently employed in Ireland (and, to our knowledge, in many EU Member States), it is more particularly employed in construction, insurance and property disputes and is less commonly provided for in, or used to resolve disputes arising in respect of, financial contracts or contracts relating to financial services other than those concerning consumers or in emerging markets where concerns arise regarding the enforceability of foreign judgments due to a lack of comprehensive reciprocal recognition measures. Notwithstanding this, responses to member consultation undertaken by ISDA prior to publication of its 2018 Arbitration Guide[20] showed continued support from members for the availability of the Guide and the model arbitration clauses included in it so this remains an option for users of ISDA documentation. Following member consultation, the 2018 ISDA Arbitration Guide includes a model arbitration clause for use with a 2002 ISDA governed by Irish law and with a seat in Dublin, applying the Arbitration Rules of the London Court of International Arbitration. The Guide does not include a model clause for use with a 2002 ISDA governed by French law as the form of Schedule to French law version of the 2002 ISDA contains a model clause providing for arbitration in Paris under the Rules of Arbitration of the International Chamber of Commerce as an optional alternative to the choice of court provisions of that 2002 ISDA.

Perceived disadvantages of arbitration in the context of ISDA documents include the fact that it lacks a doctrine of precedent, which may reduce the predictability of the outcome of arbitration as compared to that of court proceedings in common law systems such as England and Ireland. Further, decisions of arbitral tribunals tend not to be made public and, whereas certain benefits may be derived from confidentiality, it is a serious impediment to the future development of any doctrine of precedent within arbitration. The precedential value afforded to earlier decisions of courts within common law systems is generally considered to be particularly beneficial in the case of industry standard documents, on the basis that it encourages a settled view of the interpretation of provisions in respect of which judgments have been given and accordingly reduces the likelihood of further disputes arising with respect to the same issue of interpretation. Whereas one of the perceived benefits of arbitration is the ability to choose arbitrators with particular legal or technical expertise, this is not an issue that has been raised as a specific concern in the context of the determination of derivatives disputes by the English and New York courts and was not identified as an issue of concern in respect of the Irish or French courts during ISDA's member consultation on the Irish and French law versions of the 2002 ISDA and the Annexes.

3. EU MEMBER STATE LAW GOVERNED ISDA DOCUMENTATION

As indicated above, ISDA has published Irish and French law versions of its 2002 ISDA, 1995 CSA, and VM CSA. The brief to the relevant working groups was to make to the original of each document the minimum changes required to conform that document to applicable requirements of the new governing law and, in the case of 2002 Master Agreement[21], make the changes to the choice of court and governing law provisions of the 2002 Master Agreement that were

recommended by the ISDA 2018 Choice of Court and Governing Law Guide (the "**2018 Guide**"), providing parties with the option to elect to for either the exclusive, or non-exclusive, jurisdiction of the designated courts.

The changes made to the Irish law documents were minimal. In the case of the 2002 ISDA they were limited to:

- amending Section 13(a) (Governing Law) to designate Irish law as the applicable governing law and delete the related election of applicable governing law from the Schedule to the original 2002 ISDA;
- extending Section 13(a) (Governing Law) to provide that any non-contractual obligations arising out of or in connection with the Irish law 2002 ISDA will also be governed by and construed in accordance with Irish law, reflecting the substance of the relevant 2018 Guide model clause in this regard;
- replacing Section 13(b) (Jurisdiction) to provide an option for the parties to elect in the Schedule to the Irish law 2002 ISDA for the exclusive, or non-exclusive, jurisdiction of Irish courts, reflecting the substance of the relevant 2018 Guide model clauses for submissions to the exclusive or non-exclusive jurisdiction of the English courts, and providing for a fall-back to exclusive jurisdiction, if the parties fail to make an election;
- replacing definitions of "English law"/ "English" with definitions of "Irish law"/ "Irish";
- amending the definition of "Termination Currency" to provide for euro as fall back. As was the case in the original 2002 ISDA, this will be relevant where a Termination Currency is not designated by the parties in the Schedule or the specified Termination Currency is not freely available; and
- deleting the definition of "Convention Court", as it was specific to Section 13(b) (Jurisdiction) of the original 2002 ISDA and is no longer required given the amendments made to that clause.

In the case of the Annexes the changes were limited to:

- changing the header and footer so as to identify them as Irish law versions as for use with a Master Agreement governed by Irish law;
- as the available Irish law ISDA Master Agreement is based on the ISDA 2002 Master Agreement, amending the:
  - 1995 CSA (the original of which was drafted for use with the 1992 ISDA Master Agreement) to incorporate the amendments included in the ISDA 2002 Master Agreement Protocol to adapt that original version for use with a 2002 ISDA; and
  - VM CSA (the original of which was drafted for use with either a 1992 ISDA Master Agreement or the 2002 ISDA) to remove provisions that are specific to the 1992 ISDA Master Agreement; and
- updating an EU legislative reference con-

tained in the elections and variables section of the VM CSA.

Whereas equivalent changes have been made to the French law versions subject to some technical differences[22], some additional technical changes have been made to the French law documents to conform them to French law concepts and requirements.

Of course, users of the original ISDA documents will be concerned to know that not only do the new EU Member State law versions appear very similar to the originals with which they will be familiar; they will also wish to know that they will operate in a very similar manner. In the case of the Irish law documents, the similarity of the legal systems and contract law of England and Ireland, and the precedential value afforded to decisions of the English courts before the Irish courts, will provide to users familiar with the English law versions of the 2002 ISDA and the Annexes, and related English case law, comfort that expectations as to how the Irish law versions operate should be respected.

4. SIMILARITIES BETWEEN THE LEGAL SYSTEMS AND CONTRACT LAW OF IRELAND AND ENGLAND OF RELEVANCE TO ISDA DOCUMENTS

Ireland shares a common law tradition with England[23] and decisions of the English courts are persuasive in the Irish courts in many areas of practice, including those of relevance to the Irish law versions of the 2002 ISDA and Annexes. Irish contract law is similar in many respects to that of England, including in respect of concepts applied by the English courts in interpreting the English law versions of the 2002 ISDA and the Annexes[24].

SOURCES OF LAW

Reflecting the approach taken in England, the primary sources of modern Irish law are:

- statute law;
- EU law;
- delegated legislation; and
- common law, reflected in judgments of the courts of Ireland.

Common law of Ireland may also be drawn from the judgments of courts of other common law jurisdictions such as England, Northern Ireland, New Zealand and the jurisdictions of the United States of America, Canada and Australia, which are considered to be of persuasive value before the Irish courts.

Similar to the position in England, Irish statute law is enacted by a two house legislature, the Oireachtas. Indeed, some pre-1922 statutes still in force in Ireland were enacted by the Parliament of the former United Kingdom of Great Britain and Ireland, evidencing the close connection between our jurisdictions' systems.

Unlike England, Ireland has a written Constitution, adopted and amendable only by referendum, which is superior to all law other than that of the EU in its proper sphere of operation. Like the courts of the United States of America, the Irish courts have pursued an activist approach in interpreting the Constitution. Private property rights are among the rights protected by the Constitution and constitutional rights to fair hearing and the judicial determination of disputes affect

the implementation of Irish rules of civil procedure; it is, for example, on this basis that there is no procedure in Ireland for the hearing of matters by judges in chambers.

As regards common law, the Irish courts, like the English courts, apply a system of hierarchy, so that a decision of the highest court with jurisdiction in Ireland (the Court of Justice of the European Union) or, in the case of matters not raising issues of pure EU law, the Supreme Court, will "bind" all lower courts, i.e. all lower courts must adopt the same reasoning as the higher court in any case in which the same issue arises, whether or not the lower court thinks that to do so would be the correct decision. This is called the system of "precedent" and is a principle of the common law that applies across common law jurisdictions. Importantly, decisions of other common law jurisdictions' courts may, in relevant issues, have persuasive value before the Irish courts. This will be of significant importance given the many decisions of the English courts on issues relating to the English law versions of the 2002 ISDA and the Annexes that will be of relevance to the Irish law versions of those documents.

CIVIL PROCEDURE

As in England, civil litigation in Ireland is adversarial in nature. It remains predominantly oral in form and culture; perhaps even more so in Ireland than in England, in that the majority of cases proceed to trial on all issues raised in pleadings, presided over by a single judge. Claims for defamation and false imprisonment are the only civil claims commonly tried by jury. The major limitation periods within which proceedings must be initiated are similar to those in England; six years for simple contract and torts generally. However, as many Irish cases pertaining to the new Irish law versions of the ISDA documents are likely to be heard before the Commercial Court, we have addressed issues specific to it below.

COMMERCIAL COURT

The Commercial Court—a division of the High Court established in 2004—is the primary forum for the determination of substantial commercial disputes in Ireland and is likely to be that of most relevance to disputes relating to ISDA documentation. It has dramatically reduced the timelines for disposing of commercial disputes; many cases are disposed of within weeks or a few months.

Important features of the Commercial Court include that:

- cases are admitted on application—there is no automatic right of entry;
- application for entry must be made early in proceedings;
- cases must normally involve a claim valued at or above €1 million;
- admissible cases include (but are not limited to) those concerning interpretation of business documents and contracts and banking and financial services;
- its rules afford the court considerable flexibility in managing cases, providing for directions hearings, case management conferences, and pre-trial conferences. It runs extremely stringent case management procedures and generally delivers judgments

promptly. The aim is to ensure that cases proceed justly, expeditiously, and at a minimum cost. Compliance with orders and timetable deadlines is monitored and there may be cost penalties in the event of unjustified delay.

APPEAL

Appeals from the Commercial Court would typically be to the Court of Appeal, in the first instance, and ultimately to the Supreme Court. Procedural rules established for each of those courts in recent years again provide for active case management directions, aimed at ensuring that proceedings proceed justly, expeditiously, and at a minimum cost.

LANGUAGE

Proceedings are held in the English language.

CONTRACT LAW

For the most part, the formation, validity and operation of contracts in Ireland are governed by common law and the general principles of contract law in Ireland are broadly similar to those under the laws of England. Although there are some key differences, those significant differences tend not to be relevant to ISDA documents. For example[25], Irish common law includes strict privity of contract rules, whereby subject to limited exceptions, a third party may not enforce a benefit afforded to him by a contract to which he is not privy. Under Irish law, appropriate agency, trust or deed poll arrangements are needed to enable benefits under a contract to be sued upon by a third party. Whereas privity of contract rules have been modified by statute in England so that a third party can enforce a contract, or a term of a contract, which is made for its benefit if the contract expressly states that it may do so, or if the term purports to confer a benefit on them and the contracting parties cannot show that it did not intend the term to be enforceable by the third party[26], parties typically include in an ISDA document governed by English law an express acknowledgment that no such statutory rights arise in respect of that document.

5. CONCLUSION

At the time of writing, there is significant uncertainty as to whether and, if so, when and on what terms, the UK will withdraw from the EU. However, the availability of EU law governed ISDA documentation provides derivatives market participants with a key tool to protect against certain risks posed to them by that withdrawal.

ENDNOTES:

[1]The Withdrawal Agreement is the text of a treaty on the withdrawal of the UK from the EU and the European Atomic Energy Community on which political agreement was reached by the UK Government and the Council of the EU which, subject to signature, ratification and approval by the parties, was to enter into force on 30 March 2019. The Withdrawal Agreement included provisions for a transition period to start on 30 March 2019 and end on 31 December 2020 or such later date as was agreed by the UK and the EU (the "transition period"). In accordance with the Withdrawal Agreement, during the transition period, EU law (including the Brussels Regulation Recast referred to below in this article), would have continued to be applicable to and in the UK and the UK would have been treated as an EU Member State for the purposes of international agreements concluded by the EU, including the Hague Convention.

[2]McCann FitzGerald acts as Irish counsel to ISDA, providing the various Irish legal opinions

made available to its members.

[3]See further section 2 below.

[4]Reference to a jurisdiction's "ISDA netting opinion" is to the opinion of counsel to ISDA in that jurisdiction on the enforceability of the early termination and close-out netting provisions of the ISDA Master Agreements and certain related matters under the laws of that jurisdiction.

[5]Reference to a jurisdiction's "ISDA collateral opinion" is to the opinion of counsel to ISDA in that jurisdiction on issues relating to the enforceability of the collateral arrangements the subject of certain ISDA credit support documentation, including the Annexes, under the laws of that jurisdiction.

[6]Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[7]Article 36 of the Brussels Regulation Recast.

[8]Article 39 of the Brussels Recast Regulation. Under Articles 45 and 46 of the Brussels Regulation Recast, a party can apply for recognition or enforcement to be refused on certain restricted grounds, including where it would be manifestly contrary to public policy in the enforcing state, where (in the case of default judgments) the defendant was not properly served with the proceedings in sufficient time to arrange for his defence and where the judgment is irreconcilable with a judgment given between the same parties in the enforcing state.

[9]Three other jurisdictions (China, Ukraine and the United States of America) have signed, but not ratified, the Hague Convention and so it has not taken effect in those jurisdictions.

[10]In compliance with Article 27 of the Hague Convention.

[11]Article 31 of the Hague Convention.

[12]As that instrument of accession was deposited after the UK Government had reached political agreement with the EU, but before the UK Parliament had voted, on the Withdrawal Agreement, it is expressed to be conditional on the Withdrawal Agreement not being ratified and approved by the UK and the EU. It provides that, in the event that the Withdrawal Agreement is signed, ratified and approved by the UK and the EU and enters into force on 30 March 2019, the UK will withdraw the instrument of accession and, in that case, for the duration of the transition period as provided for in the Withdrawal Agreement, the UK will be treated as a Member State of the EU and the Hague Convention will continue to have effect accordingly. Interestingly, the conditionality of the instrument of accession is expressed solely by reference to the Withdrawal Agreement on which political agreement was reached at the time that instrument of accession was deposited and not any alternative withdrawal agreement that may ultimately be agreed between the UK and the EU.

[13]Including the 2002 ISDA. As each Annex is structured so as to supplement and form part of the Master Agreement to which it relates, it does not include a separate choice of court provision as that contained in the relevant Master Agreement applies to it.

[14]Following member consultation, and in recognition of the fact the jurisdiction provisions of the available English and New York law governed Master Agreements may be regarded as somewhat outdated given a number of important legislative developments since they were originally formulated, ISDA published its 2018 Choice of Court and Governing Law Guide to provide (among other matters) optional model forms of exclusive and non-exclusive jurisdiction clauses, and guidance on the use of those model provisions, which members can choose to replace the current provisions in the English and New York law versions of those Master Agreements.

[15]The Explanatory Memorandum to The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, a UK statutory instrument made under the UK European Union (Withdrawal) Act 2018, appears to support a view that it would not continue to be treated as such; see sections 2.9, 2.16 and 2.17 of that Explanatory Memorandum, available at http://www.legislatio

n.gov.uk/uksi/2018/1124/memorandum/contents.

[16]For example, under section 5 of Ireland's Choice of Court (Hague Convention) Act 2015, an application under the Hague Convention for recognition or enforcement in Ireland of a judgment obtained in a contracting state other than Ireland must be made to the Master of the High Court and shall be determined by him or her by order (including an order for the recognition or enforcement of a judgment in part only) in accordance with the Hague Convention. The EU regime in effect prior to the Brussels Regulation Recast regime required judgment creditors that wished to enforce a judgment of the courts of one EU Member State in another EU Member State first to have the judgment declared enforceable or registered in the Member State of enforcement. Removal of this requirement in the Brussels Regulation Recast was considered to facilitate the process of cross-border enforcement greatly.

[17]Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

[18]Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

[19]The Geneva Protocol of 1923 and Geneva Convention of 1927 and the New York Convention of 1958 each have force of law in Ireland, and the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended up to 2006) applies in Ireland, pursuant to the Arbitration Act 2010.

[20]An updated version of the original ISDA 2013 Arbitration Guide.

[21]Each Annex is structured so as to supplement and form part of the Master Agreement to which it relates. It therefore does not include a separate governing law or choice of court provision as those contained in the relevant Master Agreement apply to it.

[22]For example, the submission to the exclusive or non-exclusive jurisdiction of the French courts in the French law version of the 2002 ISDA is to specific such courts, being the special chambers for international business disputes of the Commercial court of Paris and Paris Court of Appeal, and the designation of the law governing, and choice of courts for disputes in respect of, non-contractual obligations is provided as an optional election in the Schedule to that version.

[23]References in this section to "England" and "English" include reference to "Wales" and "Welsh", reflecting the approach taken to those terms in the 2002 ISDA and any Annex supplementing and forming part of a 2002 ISDA.

[24]By way of example, in the case of **Lehman Brothers Special Financing Inc** v **National Power Corporation** [2018] EWHC 487 (Comm), the English court distinguished between the approach taken to calculating the early termination amount payable under a 1992 ISDA Master Agreement and the 2002 ISDA, confirming that the terms of the 1992 ISDA imposed a "Wednesbury" standard of reasonableness on the Determining Party (i.e. the Determining Party must act rationally and its decision may be challenged if it is one that no reasonable Determining Party could reach) whereas the 2002 ISDA imposed an objective standard (i.e. what would a reasonable person have done in the same situation as the Determining Party) rather than a rationality standard. These concepts are recognised under, and would also be distinguished, under Irish law.

[25]Other differences include that (a) whereas the position under Irish law in relation to misrepresentation is broadly similar to English law, this aspect of contract law in England is governed by the Misrepresentation Act 1967 but there is not equivalent Irish legislation; (b) Ireland does not have an equivalent to the English Unfair Contract Terms Act 1977 that would apply to non-consumer, business-to-business contracts and (c) whereas in England, the ability of a party to re-

cover money paid under a contract before the occurrence of a frustrating event depends on the applicability of the Law Reform (Frustrated Contracts) Act 1943, Ireland has no legislation specifically dealing with the effects of frustration of a contract and common law rules apply.

[26]Pursuant to the Contracts (Rights of Third Parties) Act 1999.