



July 2018

Brexit and the Irish Law ISDA Master Agreement

1. Introduction

With the reality of Brexit continuing to loom large in the financial services industry generally and market participants looking to formulate their contingency arrangements for whatever form Brexit may take, the publication of an Irish law ISDA Master Agreement by the International Swaps and Derivatives Association (“ISDA”) is a welcome development. The ISDA Master Agreement is the globally accepted form of agreement used by large corporations, financial institutions and investment vehicles to document their over-the-counter derivative transactions.

2. Governing Law – Why is it important?

Until now users of derivatives had the choice of either English law or New York law to govern the terms of their derivative trading under the ISDA Master Agreement and the corresponding choice to submit to the jurisdiction of the English courts or New York courts for the resolution of their disputes. To date, the English law option has more often than not been the preferred option for those counterparties whose operations are substantially carried out in the EU and who seek to ensure that their contracts are governed by a law within the EU legal framework. The benefits for users of derivatives of using ISDA Master Agreements governed by a law within the EU legal framework include:

- ▣ the automatic recognition and enforcement of judgments obtained in one EU Member State in other EU Members States;
- ▣ the legislative framework protecting financial collateral arrangements and providing certainty on certain insolvency related matters.

For further information on any of the issues discussed in this article please contact:



Etain de Valera

DD:+ 353 (0)1 673 1739

etain.devalera@dilloneustace.ie

3. Irish law – A realistic alternative

The introduction of an Irish law governed ISDA Master Agreement as an alternative to the English law governed ISDA Master Agreement is a logical move in light of Brexit. In many ways it will allow for "business as usual" with respect to the governance of derivatives trading by those entities which have to date used English law governed ISDA Master Agreements. Irish law and English law are both common law systems and are substantially similar in many respects. It is worth noting that only those provisions relating to governing law and submission to jurisdiction have been amended in the Irish law version of the ISDA Master Agreement. Irish courts will often have regard to decisions of the English courts with respect to points of law and this will likely be particularly the case as Irish courts are asked to consider disputes arising out of the Irish law governed ISDA Master Agreement.

All of this is good news for the Irish financial services industry and will be of particular interest to those regulated investment funds, insurance companies and other financial institutions that are established in Ireland. The prospect of being able to enter into Irish law governed agreements and to ensure that any proceedings arising out of those agreements will be heard in the Irish courts will no doubt give those entities greater legal certainty as to the impact of Brexit on their derivatives trading whether derivatives form a core part of the investment strategy or are used for hedging and other efficient portfolio management purposes.

As you consider your Brexit contingency arrangements and review the contractual framework in which your trading activities operate, Dillon Eustace is well placed to assist and advise with respect to the negotiation of your contractual arrangements, the benefits of electing to use the Irish law ISDA Master Agreement and any proposal to transition existing arrangements governed by English law to Irish law governed ISDA Master Agreements.

Etain de Valera
Dillon Eustace
12 July 2018

DILLON  EUSTACE

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2018 Dillon Eustace. All rights reserved.