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30 June 2009

Ladies and Gentlemen

Green Paper on the review of the Brussels I Regulation

The International Swaps and Derivatives Association (ISDA)¹ is grateful for the opportunity to respond to the Commission's Green Paper of 21 April 2009 (the **Green Paper**)² on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **Brussels I Regulation**), which was published on 21 April 2009 along with the Commission's Report on the Brussels Regulation (the **Report**).³ We previously wrote to you regarding your review of the Brussels I Regulation by letter dated 29 August 2008, and we are pleased to see that the Commission is seriously considering possible solutions to the difficulties raised by the European Court of Justice case *Erich Gasser GmbH v MISAT Srl*,⁴ which remains our most important concern regarding the Brussels I Regulation. Our views on the *Gasser* case and the impact of that case, and related cases, on the financial markets are set out in our letter of 29 August 2008, a copy of which we attach for convenience of reference.

¹ ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry, a business that includes interest rate, currency, commodity, credit and equity swaps, options and forwards, as well as related products such as caps, collars, floors and swaptions. ISDA currently has more than 800 member institutions from 56 countries on six continents. More than half of the total membership is based in the European Union and neighbouring countries and a significant portion of the rest active participants in the European financial markets as dealers, service providers or end users of derivatives. Promoting legal certainty for cross-border financial transactions through law reform has been one of ISDA's core missions since it was chartered in 1985.

² COM (2009) 175

³ COM (2009) 174

⁴ Case C-116/02

In light of the above, question 3 and, to the extent related, question 5 are the questions of most relevance to our members. We also express below our view on a couple of other points raised by the Green Paper. The remaining issues are, of course, important, but not ones on which there is necessarily a clear consensus among ISDA members. As a general matter, we, of course, defer to national experts in Europe (including those whose expertise is in European, as opposed to national, law) regarding the details of the jurisdictional regime within Europe. We offer our comments, from our perspective as the international trade association for the over-the-counter derivatives market, which, of course, is large and important part of the financial markets more generally in Europe, on the issues arising out of the Brussels I Regulation of most immediate concern to our members.

Question 1

Our members would clearly favour any reasonable measures that would, with appropriate safeguards, facilitate the free circulation of judgments within the Community. We defer to European experts, however, on whether and, if so, to what extent improvements to the Brussels I Regulation are necessary or desirable in this regard.

Question 2

As an international trade association whose European members are actively engaged in cross-border trading, much of which is with non-European or, in the terminology of the Green Paper, “third State” counterparties, we support the sensible harmonization and rationalization of jurisdictional rules wherever that is feasible. We therefore support the proposal to extend the special jurisdiction rules of the Brussels I Regulation to third State defendants, although we acknowledge that this may need to be accompanied by special safeguards.

In other words, it might be appropriate to allow the court in an EU member state a certain discretion not to decline jurisdiction in favour of the courts of a third country State in circumstances where, for example, there might be good reasons to doubt that the proceeding would be fair to all relevant parties. We understand that this would mean introducing a degree of discretion into the determination of jurisdiction, which might seem inconsistent with the deliberately mechanical approach of much of the Brussels I Regulation. We believe, however, that the introduction of a degree of discretion is inevitable and desirable if cases involving third State defendants are to be encompassed by the Brussels I Regulation.

In principle, and again not surprisingly given our international perspective, we would favour improvements to the Brussels I Regulation to facilitate enforcement of third country judgments. It may be, however, that somewhat stronger safeguards are necessary, however, than are currently available under the Brussels I Regulation, and this may, for the reasons given above, also require giving greater discretion to courts in EU member states in relation to judgments from third State courts than those courts currently have in relation to judgments from other EU member states.

Question 3

As noted above, question 3 is the most important question in the Green Paper from the point of view of ISDA's interest in the Brussels I Regulation. We are pleased to see that three of the four solutions to the *Gasser* problem advocated in our letter of 29 August 2008, including our favoured solution of permitting the chosen court to proceed, which is listed first among the solutions described in part 3 of the Green Paper (although we assume that the order in which the solutions are presented in the Green Paper is not intended to suggest any preference of the Commission at this stage).⁵

In particular, we favour the first, second (reversing the priority rule in favour of the chosen court) and, subsidiarily and subject to certain qualifications (see below), the sixth (providing a "safe harbour" for standard form jurisdiction clauses) solutions outlined in the Green Paper. We think that the best approach is likely to involve a combination of solutions, although we would strongly advocate that the first solution in the Green Paper be included as a minimum. We continue to be of the view that the risk of parallel proceedings is remote and theoretical if the chosen court is allowed to proceed, given the practical incentives and disincentives that would come into play as a result of the introduction of this rule.

Regarding the sixth solution, relating to standard form exclusive jurisdiction clauses, we mentioned some caveats in our comment on this solution in our letter of 29 August 2008, namely, that (a) the rule should be formulated as a "safe harbour" rather than a mandatory requirement or preferential regime, so that non-conforming clauses benefit from the other *Gasser* solutions introduced (particularly, allowing the chosen court to proceed), and (b) any standard form exclusive jurisdiction clause should be as simple and straightforward as possible, to promote its use and minimize the risk of falling outside the safe harbour due to minor errors or omissions in the wording. Whether this solution is favoured or not, and we acknowledge that it has been criticised by some commentators, there would appear to be scope for initiatives outside the Regulation to promote the use of jurisdiction clauses in commercial agreements.

Finally, we note that the Commission referred in the Report to the Convention on choice of court agreements concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law (the **Convention**), which the Commission proposed on 5 September 2008 should be signed on behalf of the Community.⁶ We would like to endorse the Commission's observation in part 3.3 of the Report that the Community should ensure that the two regimes are coherent and operate compatibly. European contracting parties would benefit from the greater acceptability and certainty that would be conferred by the Convention on jurisdiction agreements in other countries around the world that choose to adhere to the Convention. In ISDA's view, the Community should ratify the Convention at the earliest possible opportunity.

Question 4

We have no view on this question.

⁵ At page 5 of the Green Paper.

⁶ Com (2008) 538.

Question 5

For the reasons given above and in our letter of 29 August 2008, we do not think that the risk of parallel proceedings is perhaps as great as is sometimes suggested, particularly if the solutions we favour in the context of choice of court agreements are introduced. We do believe that it makes sense to encourage consolidation of actions, and it may be appropriate therefore to introduce uniform rules to achieve this.

Question 6

We do not have particular views as an association on the questions relating to provisional measures. We do favour free circulation of provisional measures within the Community, subject to appropriate safeguards. If this can be sensibly improved, then of course we would consider that a desirable development.

Question 7

We understand that there are strong views in the market regarding the interplay between the jurisdictional rules of the Brussels I Regulation and the rules relating to arbitration. Arbitration has not traditionally been favoured in the financial markets, but that has been changing in recent years, not least in relation to dealings with counterparties in emerging market jurisdictions where arbitral awards are more easily enforced than judgments due to the widespread adoption of the New York Convention on the recognition and enforcement of foreign arbitral awards.

We do not comment on the detail of the discussion in the Report and the Green Paper on the interplay between the Brussels I Regulation and arbitration, but we do favour, of course, strengthening the effectiveness of arbitration agreements (as well as choice of court agreements), ensuring good coordination between judicial and arbitration proceedings and enhancing the effectiveness of arbitral awards.

Question 8

We do not have any particular view on the issues discussed in part 8 of the Green Paper.

We would be pleased to discuss these issues with you further should you find that helpful. We look forward to seeing in due course the Commission's legislative proposal for improvements to the operation of the Brussels I Regulation. In the meantime, please do not hesitate to contact either of the undersigned if you have any questions regarding the points raised above or desire any further information about the interest of financial market participants in these matters.

Yours faithfully

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APPENDIX
ISDA letter to European Commission dated 29th August 2008

BY E-MAIL AND BY POST

29 August 2008

European Commission
Directorate General Justice, Freedom and Security
Unit C1 - Civil Justice
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BELGIUM

For the attention of: Ms Karen Vandekerckhove

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Dear Sirs,

Review of the Brussels I Regulation

The International Swaps & Derivatives Association, Inc. (**ISDA**)¹ would like to raise an important issue relevant to the Commission's current review of the Brussels I Regulation² under Article 73 of the Regulation. The Brussels I Regulation lays down rules for the circumstances in which jurisdiction clauses, including exclusive jurisdiction clauses, will be recognised and given effect. Recent European cases have had an unfortunate impact on the integrity of exclusive jurisdiction clauses. This affects contracts across the full range of commercial and financial activity, but we would like to comment specifically on the impact of these cases on financial contracts. The cases to which we refer, and which we discuss in more detail below, raise the risk of uncertainty and increasing delays and costs in relation to the bringing and conduct of civil proceedings in European courts. This particularly disadvantages European end-users of financial services, as it increases the costs of dealing with them. This, in turn, represents a competitive disadvantage for European financial markets generally.

¹ The International Swaps & Derivatives Association, Inc. (ISDA) is the global trade association representing leading participants in the privately negotiated derivatives industry, a business that includes interest rate, currency, commodity, credit and equity swaps, options and forwards, as well as related products such as caps, collars, floors and swaptions. ISDA currently has more than 825 member institutions from 56 countries on six continents. More than half of the total membership is based in the European Union and neighbouring countries and a significant portion of the rest active participants in the European financial markets as dealers, service providers or end users of derivatives. Promoting legal certainty for cross-border financial transactions through law reform has been one of ISDA's core missions since it was chartered in 1985. ISDA has been an active participant in the Commission's public consultations over the years on a wide variety of legal and regulatory measures, and has followed the evolution of the European legal and regulatory framework for the single market in financial services with close attention.

² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The purpose of this letter is therefore to highlight the problem of the enforceability of exclusive jurisdiction clauses as a serious concern for the European and, arguably, global financial markets and to present ISDA's views as to the most effective solutions to address it. Separately, we have also recommended some related ideas as being worthy of further consideration in this regard.

We thought it might be helpful if, in setting out our comments on the issues of most concern to us, we made reference to the comprehensive "Report on the Application of Regulation Brussels I in the Member States", presented to the Commission by Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer and Prof. Dr. Peter Schlosser (Final Version September 2007) (the **Report**).

The Report, of course, deals with a wide range of issues relating to the Brussels I Regulation, including the potential interaction of the Brussels I Regulation with the Hague Convention on Choice of Court Agreements (the **Hague Convention**).³ The Report does not consider the advisability of adhering to the Hague Convention, but it discusses divergences between the Hague Convention regime and the Brussels I Regulation and makes suggestions as to how the Brussels I Regulation might be amended to conform to the Hague Convention.

Our focus in this letter, however, is only on the Brussels I Regulation and, in particular, on the difficulties raised by the European Court of Justice decision in *Erich Gasser GmbH v MISAT Srl*⁴ for the enforceability of exclusive jurisdiction clauses, which are widely used in financial market contracts. The *Gasser* case concerned the interaction of Articles 17 and 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended) and therefore constitute authoritative guidance on the equivalent provisions of the Brussels I Regulation, namely, Articles 23 and 27.

In this letter, we use the terms "jurisdiction clause" and "choice of court agreement" interchangeably.

1. The problem for the financial markets: enforceability of exclusive jurisdiction clauses

It seems to us that the *Gasser* case and the English case *JP Morgan Europe Ltd v PrimaCom*,⁵ which reluctantly followed the holding in *Gasser*, have undermined the effectiveness of exclusive jurisdiction clauses in financial contracts, adding additional delay, cost and uncertainty to the already lengthy, costly and uncertain course of financial litigation.

The effect of the *Gasser* decision is that, notwithstanding the existence of an agreement falling within Article 23 of the Regulation conferring exclusive jurisdiction on the court of one member state, if a court in another member state is first seised in proceedings involving the same cause of action, then Article 27 prevails over Article 23 and the chosen court must stay any proceedings until the court first seised decides on the question of jurisdiction. As the court first seised, however, may not decide on the question of jurisdiction as a preliminary matter and may, in any event, take considerable time before it reaches a decision, the other party is denied access to justice in the chosen court for a considerable period and is likely to suffer other consequences, including loss of economic value⁶ and the incurring of substantial additional costs.

³ Text adopted by the Plenary Session of the Hague Conference on Private International Law on 30 June 2005 and opened for signature on that date.

⁴ Case C-116/02.

⁵ [2005] EWHC 508.

⁶ Loss of economic value could occur for various reasons, including its prospects of full recovery deteriorating due to the delay as a result of deterioration in the condition of its debtor and changes in financial market conditions affecting its economic hedges.

In some instances this has permitted a party, acting in bad faith, to gain a tactical advantage by deliberately commencing proceedings in a court other than the court originally agreed upon by the parties. The purpose of such a tactic is generally to pre-empt action by the other party (or parties) in the originally chosen court, in the hope of frustrating or delaying the litigation, often with a view to forcing a more favourable settlement from the other party (or parties) than would otherwise have been the case.⁷

The problems posed by the *Gasser* decision for the financial markets were highlighted by the *PrimaCom* case mentioned above. Although the German court, which was not the chosen court in that situation but the court first seised, eventually reached the correct decision and declined jurisdiction in favour of the chosen court, it did so only after a delay of nine months. We understand that the German court in *PrimaCom* expressly declined to determine jurisdiction in advance of dealing with the substance. If this is correct, it demonstrates the advantage of a uniform rule across Europe that jurisdiction should be determined as a preliminary matter before considering the substance of a case. This is discussed further below.

The Report, discussing the *PrimaCom* case, suggests that nine months “seems perfectly adequate for a proper administration of justice”, but it also acknowledges that this is a view “from a generalizing perspective” and suggests that a delay of nine months “might be too long for the specific purposes of the cross-border loan business”.⁸

We would go further and assert that, in the context of the financial markets more generally, this length of delay creates unacceptable uncertainty, distortion in normal commercial behaviour⁹ and loss of value for financial creditors,¹⁰ in addition to the costs incurred in relation to the proceedings in the “wrong” court.¹¹ Taken together, these factors represent an impediment to the efficient operation of European financial markets. We urge the Commission to take the opportunity of its current review of the Brussels I Regulation to adopt, ideally, all of the solutions recommended below to eliminate this impediment to market efficiency.

2. Solutions

The Report suggests possible solutions to the problem raised by the *Gasser* case. We endorse the following solutions and urge the Commission to consider them carefully. These solutions are not mutually exclusive and, in fact, as discussed below, in our view the best approach would be the combined implementation of all of them.

⁷ The *Gasser* and *PrimaCom* cases are both examples of cases where a party commenced proceedings in a court other than the chosen court, with the effect of frustrating or delaying proceedings in the chosen court. Another example is *Continental Bank NV v Aeakos Compania Naviera SA* [1994] 1 WLR 588. We are not suggesting that any of the parties in these cases was necessarily acting in bad faith, however these cases indicate that the scope exists for a party to abuse the current rules for the purpose of frustrating or delaying proceedings in the chosen court.

⁸ Para. 428 of the Report.

⁹ See, for example, para. 427 of the Report.

¹⁰ See note 6.

¹¹ Such costs could include not only the cost of appearing to dispute jurisdiction but even the costs of having also to argue the merits of the case where the court first seised does not consider jurisdiction as a preliminary matter.

(a) *Permit the chosen court to proceed*

The Brussels I Regulation could be amended to permit the court chosen by the parties in an exclusive jurisdiction clause to rule on its own jurisdiction and, if it decides that it has jurisdiction (regardless of whether another court is seised), to proceed to address the merits of the case.

This solution is the best and most practical solution. This solution on its own may not fully address the risk of parallel proceedings and inconsistent judgments, the prevention of which is an important policy concern highlighted by the ECJ in *Gasser*. We think, however, that this risk is relatively remote and theoretical. We believe it can, in any event, be ameliorated by implementing this solution together with a couple of other amendments discussed below.

The risk of parallel proceedings will be remote because permitting the chosen court to proceed will destroy the effectiveness of the tactic of deliberately initiating proceedings in a court other than the court chosen. A party will simply not have an economic incentive to incur the cost of proceeding in a non-chosen court knowing that such action will not delay proceedings in the chosen court which it will also have to defend.

It is even more unlikely that the non-chosen court would conduct proceedings to the point of rendering a judgment, potentially inconsistent with the judgment of the chosen court. Indeed, there is a good argument that the non-chosen court would be required to recognise any earlier decision of the chosen court to take jurisdiction on the basis that such a decision constitutes a “judgment” within the meaning of Article 32.

(b) *Require a court first seised to stay its proceedings where another court is chosen under an exclusive jurisdiction clause*

The risk of parallel proceedings and inconsistent judgments can be further reduced by requiring a court seised of an action to stay its proceedings where another court is chosen under an exclusive jurisdiction clause.

(c) *Provide a “safe harbour” for use of a standard form of exclusive jurisdiction clause*

In some cases, a court is faced with the difficulty of determining whether a particular agreement clearly provides for the exclusive jurisdiction of the courts of a particular jurisdiction. In such circumstances, it would be difficult to determine whether the rules suggested in (a) and (b) would apply. A further difficulty would be determining which law governs the question of whether an exclusive jurisdiction clause is valid. Both of these issues are discussed in the Report.¹²

The Report suggests that a possible solution to this difficulty would be requiring parties entering into a contract in the context of “international trade or commerce” to use a standard form of exclusive jurisdiction clause,¹³ that is, a standard form set out in European legislation (for example, in an annex to a future revised version of the Brussels I Regulation).

¹² See, for example, paras. 374 *et seq.* of the Report.

¹³ See paras. 449 *et seq.* of the Report.

The use of such a clause would certainly lessen some of the difficulties that might otherwise arise in certain cases as the clause would provide *prima facie* evidence that the parties had chosen a specific court as having exclusive jurisdiction for the purposes of Article 23 of the Brussels I Regulation, providing a more certain ground for the rules proposed in both (a) and (b) above. The use of such a standard form clause would, in most circumstances, make manifest the non-chosen court's lack of jurisdiction.

We believe that the idea of a standard form clause is worth considering as a reinforcement to the rules suggested in (a) and (b) above, but subject to two important qualifications. First, we would suggest that this should be formulated as a "safe harbour" condition for automatic recognition rather than as a mandatory requirement, so that rules (a) and (b) would still apply to an exclusive jurisdiction clause that did not fully conform to the standard form. There would be a significant incentive, of course, to use the standard form clause to increase legal certainty for the parties and facilitate the administration of jurisdiction decisions by member state courts. But parties who chose not to use the standard form (or to vary it in some way) or do not use it for some other reason ought still to have their agreement for purposes of Article 23 respected and protected from the mischief currently permitted by the ruling in *Gasser*.

Secondly, we believe that it is important that a standard form exclusive jurisdiction clause should be as simple and straightforward as possible. This will promote its use and minimise the risk of an exclusive jurisdiction clause in a particular contract being deemed not to satisfy the proposed rule due to minor errors or omissions in the wording.

(d) *Non-recognition of a judgment of the non-chosen court*

The Report considers the suggestion that Article 35 of the Brussels I Regulation could be amended to provide that a judgment rendered by a court other than the chosen-court that took jurisdiction despite an exclusive jurisdiction clause would not be enforceable in other member states. The Report does not appear to favour this, believing it to be inconsistent with the principle of mutual trust that was discussed in *Gasser* and is one of the core principles of the Brussels I Regulation. Nonetheless, there are other exceptions in Article 35, and there is a need to balance policy objectives. In our view, the need to prevent parties abusing the principle of mutual trust by acting in bad faith to undermine the efficient functioning of the internal market ought to take priority. Therefore we urge the Commission to propose such an amendment.

The inclusion of a rule refusing recognition to a judgment obtained from a court other than the chosen court would also provide a significant disincentive to a party considering a "pre-emptive strike" by deliberately initiating proceedings in a court of a jurisdiction other than the chosen jurisdiction.

In addition to proposing the foregoing amendments to the Brussels I Regulation, we would urge the Commission to encourage strongly member states:

- (1) to amend their civil procedure rules to provide for jurisdiction to be determined, where appropriate, as a preliminary matter, that is, before the substance of the case is considered; and

- (2) to require such a determination to be made promptly, not only for the benefit of the parties to any particular litigation but also for the efficiency and reputation of the European judicial system in relation to civil and commercial matters.

We would be pleased to discuss any of the above issues or suggestions in more detail if you would find that helpful. We assume that there will be a detailed consultation by the Commission on proposed amendments to the Brussels I Regulation, and we would be pleased to participate in such a consultation.

Our members believe that the problems raised by the *Gasser* and *PrimaCom* cases for resolution of financial disputes in the European market are serious, and the opportunity should not be lost to solve them in the context of the current review of the Brussels I Regulation. Please do not hesitate to contact either of the undersigned if we can be of further assistance in relation to this important matter.

Yours faithfully

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