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BY E-MAIL

European Commission
Directorate-General Justice and Home Affairs
Unit C1 - Civil Justice (LX46 0/26)
B-1049 Brussels
BELGIUM

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Dear Sirs,

We are grateful for the opportunity to respond to your consultation on the draft Convention on “choice of court agreements” (the *Draft Convention*) prepared by the Hague Conference on Private International Law (the *Hague Conference*).

The International Swaps and Derivatives Association, Inc. (*ISDA*) is the global trade association representing leading participants in the private 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. Additional information on ISDA, its European membership and its interest in the development of European and international law affecting the financial markets is set out in the Annex to this letter.

ISDA was chartered in 1985 and today numbers over 600 member institutions from 46 countries on six continents. These members include most of the world's major institutions who deal in, and leading end-users of, privately negotiated derivatives as well as associated service providers and consultants.¹

¹ For further information on ISDA, please consult our website at <http://www.isda.org>.

Promoting the enhancement through law reform of legal certainty for cross-border financial transactions is one of ISDA's key missions. A considerable proportion of the resources of ISDA and its members are devoted to acquiring legal opinions from a wide range of jurisdictions on netting and collateral arrangements, and related issues, as well as promoting law reform and participating in consultations on legislative and regulatory developments affecting the financial markets. ISDA was actively involved, for example, in the consultative process that led to the adoption in December 2003 by the Hague Conference of its Convention on the law applicable to certain rights in respect of securities held with an intermediary (the *Hague Securities Convention*).

We understand that you have already received comments from a number of sources, including detailed comments from national legal experts on the numerous technical issues of private international law raised by the Draft Convention.

We wish to comment, therefore, on certain aspects of the Draft Convention of immediate concern to ISDA and its members:

1. In contrast to the Hague Securities Convention, in relation to which there was a detailed and open consultative process involving financial market participants as well as national governments, academics and private legal practitioners, the degree of consultation directly by the Hague Conference on the Draft Convention has been insufficient. To ensure that any future Convention on jurisdiction and choice of court agreements enhances legal certainty and strengthens the legal infrastructure for cross-border financial dealings it is vital that market realities are taken into account. This can only be assured if financial market participants are properly consulted. We therefore urge the Commission to ensure that the Hague Conference does expand the scope of its consultative process on the Draft Convention.
2. Our second point illustrates our more general first point: it appears that the Draft Convention is limited to exclusive choice of court agreements. In other words, it excludes from its scope contractual clauses that select the courts of more than one jurisdiction, or that select differently in relation to each party or that provide for non-exclusive jurisdiction. Yet such clauses are commonly used, for example, in the 1992 and 2002 versions of the ISDA Master Agreement. A number of surveys have shown that the ISDA Master Agreement is by far the most commonly used document for cross-border dealings in privately negotiated derivatives transactions. In fact, such clauses are common in financial documents more generally. The Draft Convention should therefore deal with these possibilities, and the issues they raise. We therefore urge the Commission to urge the Hague Conference to consider the question of the scope of the Draft Convention, specifically in relation to these issues.
3. There are a number of other aspects of the Draft Convention which could clearly bear further thought and development, and we expect that these issues have been dealt with in more detail by national legal experts responding directly to your consultation.

We thank you once again for the opportunity to respond to your request for comments on the Draft Convention. If you would like to discuss any of the points raised in this letter, please do not hesitate to contact Edward Murray of Allen & Overy (ed.murray@allenoverly.com), who is the Chairman of our Collateral Law Reform Group), or the undersigned.

We are pleased that the Commission has launched this consultation, and we would be delighted to provide any further information or assistance, for example, regarding international financial market practice, that will help to ensure that any future Convention on these issues is relevant to and enhances legal certainty for cross-border financial dealings as well as cross-border commercial dealings more generally.

Yours faithfully,

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