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ISDA, Clifford Chance, R3 and the Singapore Academy of Law Publish Smart Contracts Paper

SINGAPORE, January 13, 2020 – The International Swaps and Derivatives Association, Inc. (ISDA), Clifford Chance, R3 and the Singapore Academy of Law have published a new whitepaper that provides analysis on the legal issues relating to the use of smart derivatives contracts on distributed ledger technology (DLT).

DLT and smart contracts have the potential to significantly increase efficiency and automation in the derivatives market. However, the perceived lack of legal certainty when trading derivatives on a DLT platform could hamper broad-scale adoption.

While some jurisdictions have published or are developing their own legal analysis on some of these issues, the use of DLT in a global, cross-border context raises a number of questions from a private international law perspective that are important to the derivatives industry.

Given the inherent uncertainty about where data, assets and even counterparties are located in a DLT environment, a key question is how to determine which law applies and what should happen when there are conflicts of governing law.

The paper provides analysis on the critical issues, including:

- **Choice of law and enforceability:** The paper explores whether the introduction of DLT or a platform provider to a typical trading relationship impacts the parties' choice of law, or affects how contractual disputes are resolved. This is critically important to derivatives market participants, as an unexpected change in applicable law could undermine the legal enforceability of netting and collateral arrangements.

The analysis concluded it is unlikely an English or Singaporean court would disapply an express choice of law by the contracting parties, whether under ISDA documentation or in any other agreement between the parties and a platform provider.

- **Digital assets:** The paper also considers use of digital assets for payments or exchanging collateral on certain DLT platforms. The analysis found there are challenges in identifying the precise location of digital assets, which could lead to uncertainty over which jurisdiction's laws would apply.

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In response, the paper recommends that, where these issues exist, parties are permitted to agree on a common ‘law of the platform’ – a uniform choice of law that the parties agree will govern all transactions conducted on the DLT platform.

“DLT offers a great opportunity to reduce inefficiencies and increase automation in the derivatives market, but a number of legal issues need to be addressed to fully realize this potential. This paper provides greater certainty to participants using DLT for derivatives, and helps the industry move a step closer to the operational and cost efficiencies that greater automation will provide,” said Scott O’Malia, ISDA Chief Executive.

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About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 900 member institutions from 72 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers.

Information about ISDA and its activities is available on the Association’s website:

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