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Dear Ms McMahon

Revision of the Brussels I Regulation

The International Swaps and Derivatives Association (**ISDA**) is grateful for the opportunity to respond to the Ministry of Justice Consultation Paper CP18/10 "Revision of the Brussels I Regulation – How should the UK approach the negotiations" (the **Consultation Paper**). As requested by the "About you" section of the Consultation Paper (page 28), we set out information regarding ISDA in Annex 1 to this letter. The Consultation Paper refers to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters published on 14 December 2010 (the **Commission Proposal**), which proposes a recasting of council Regulation (EC) No 44/2001, commonly known as the "Brussels I Regulation".

ISDA has followed the development of European legislation in relation to private international law matters over a number of years, given the importance to the efficiency and resilience of the derivatives market (and in the financial markets more generally) of legal certainty in relation to:

- determination of the law which applies to a dispute in relation to a financial transaction or in relation to a transfer (of ownership or by way of security) of securities or other financial assets

- determination of the court or arbitral forum that will hear and decide the dispute

- enforcement of any subsequent judgment or arbitral award

In other words, it is particularly important to the cross-border derivatives market that there be legal certainty in relation the rules governing conflict of laws, jurisdiction and enforcement of judgments and arbitral awards.

We have generally supported the harmonisation of European rules in relation to these issues, but with a careful eye to ensuring that the harmonised rules are fair, certain and cost-effective. We have taken a specific interest in issues arising in the context of the revision of the Brussels I Regulation.[1]

Our members are active participants in the financial markets based in the City of London, which is the leading financial centre in Europe and one of the leading financial centres globally. English law is one of the two principal governing laws (the other being New York law) normally chosen to govern an ISDA Master Agreement and the derivatives transactions entered into under it. The ISDA Master Agreement is by far the most commonly used standard form master agreement for cross-border derivatives transactions.

There are various versions of the ISDA Master Agreement, but virtually all cross-border transactions under an ISDA Master Agreement are governed either by the 1992 ISDA Master Agreement (Multicurrency – Cross Border) or by the 2002 ISDA Master Agreement. The differences between these forms are not relevant for purposes of the issues discussed in this letter at the level of policy. Each form of the ISDA Master Agreement deals, in Section 13(a), with the parties' choice of governing law (the parties electing either English law or New York by stipulation in Part 4 of the Schedule) and provides, in Section 13(b), for an express choice of court agreement, in the form of a submission to the jurisdiction of the English courts or the New York courts, according to the elected governing law. There are differences in the detail of Section 13 of each form, but these differences do not affect the substance of our response to the questions raised by the Consultation Paper.

As an international trade association, we defer to national legal experts as to whether elements of the Commission Proposal are in conflict with specific details of the current private international law regimes in the constituent jurisdictions of the United Kingdom, namely, England and Wales, Scotland and Northern Ireland. In this regard, we have had the opportunity to review a near final draft of the response of the Financial Law Committee of the City of London Law Society to the Consultation Paper, the members of which are experts on relevant English law as it affects the financial markets and members of law firms which are members of ISDA. We do not feel that it is necessary or appropriate for ISDA as an international trade association to respond to the Consultation Paper at the level of detail of the CLLS FLC response or necessarily to address every point raised by the Consultation Paper, but we believe that our conclusions below are broadly consistent with the general conclusions reached by the CLLS FLC and we defer to that Committee's response as to the detail.

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[1] See our letter to the European Commission of 30 June 2009 responding to the Green Paper on the review of the Brussels I Regulation, and our earlier letter of 29 August 2008 on the Commission's Review of the Brussels I Regulation. Each of these is available on the ISDA website at http://www.isda.org through the "Comment letters" link on the left side of the home page. ISDA has also previously corresponded with the UK Ministry of Justice (and its predecessors, the Lord Chancellor's Department and the Department of Constitutional Affairs) about civil justice matters. See, for example, our letter to you dated 25 June 2008 in response to your consultation on whether the UK should opt in to the Rome I Regulation.

Q1. Is it in the national interest for the Government, in accordance with its Protocol to Title V of the Treaty on the Functioning of the European Union, to seek to opt in to negotiations on the revised Brussels I Regulation? If not, please explain why.

We believe that it is in the national interest of the United Kingdom to opt in to the negotiations on the revised Brussels I Regulation. It is also in the interest of the market in cross-border derivatives transactions in Europe, given the importance of English law and jurisdiction to that market, as outlined above.

By opting in, the United Kingdom will:

(a) be able to avail of the clearly favourable aspects of the revised Brussels I Regulation, in particular, the resolution of the difficulties raised by the case of *Erich Gasser GmbH v MISAT Srl* (Case C-116/02), which has been the principal focus of ISDA's prior correspondence with the Commission in relation to the Brussels I Regulation;[2] and

(b) be in a much stronger position to influence the substance of the Brussels I Regulation in relation to other, potentially more controversial, aspects.

In relation to (b), we note that the revised Brussels I Regulation will affect United Kingdom market participants transacting cross-border in Europe whether or not the United Kingdom opts in. It is therefore in the national interest of the United Kingdom to opt in, in order to ensure that it has the best possible opportunity to put forward its views as to how to ensure that the revised regime is as robust, clear and fair as possible.

Q2. What are your views on the specific issues raised in [the Consultation Paper] which concern the changes proposed by the Commission in the draft Regulation [set out in the Commission Proposal]?

Abolition of Exequatur

We support the proposed abolition of exequatur, but only subject to improvement of the safeguards for defendants in the Commission Proposal. Clearly there is a balancing to be done to ensure that the cost of the safeguards does not nullify the benefit of the abolition in terms of efficiency, reduction of delay and reduction of cost of enforcement.

We believe that the proposed safeguards are likely to be insufficient to protect the legitimate interests of defendants. In particular the retention of a public policy safeguard needs to be carefully considered.

We believe that the free circulation of judgments within the European Union, which the abolition of exequatur (with appropriate safeguards) would help to achieve, is one of the most important benefits that European harmonisation in the area of civil justice is capable of delivering and should deliver.

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[2] Our letters to the Commission referred to in note 1 above set out our view of the difficulties caused by the *Gasser* case for financial market transactions and, indeed, for commercial transactions more generally. These issues are, of course, well known to the Ministry of Justice.

The operation of the Regulation in the international legal order

In our letter to the Commission of 30 June 2009 responding to the Commission Green Paper, we cautiously supported the principle of harmonization and rationalization, where appropriate, of jurisdictional rules internationally, subject always to appropriate safeguards. In light of the Commission Proposal and the commentary in the Consultation Paper, it would appear that, rather than extending the jurisdiction rules of the Brussels I Regulation to defendants domiciled outside the EU in the manner set out in the Commission Proposal, it would perhaps be more appropriate, at this stage, to focus on harmonising jurisdiction rules at the international level. The most suitable forum for such work would presumably be the Hague Conference on Private International Law.

We support the view that Article 23 of the Brussels I Regulation should have full "reflexive" effect in relation to exclusive jurisdiction clauses, meaning that a court in a Member State should be able to refuse to take jurisdiction where there is a valid exclusive jurisdiction clause in favour of a third state court.

Proposed changes in relation to choice of court agreements

As previously noted, the principal issue on which we have previously commented to the Commission in relation to the Brussels I Regulation has been the effect of the *Gasser* decision. We therefore support the Commission's proposals in this regard, summarised in paragraphs 39 and 40 of the Consultation Paper.

We agree that this approach has the additional benefit of easing the path toward EU ratification of the 2005 Hague Convention on Choice of Court Agreements, which we would support. It would strengthen legal certainty in, and therefore the safety of, the European financial market to have a common set of rules internationally on the recognition and enforcement of choice of court agreements. It is important that the revised Brussels I Regulation and the Convention regime should be aligned as closely as possible, and we will continue to urge the EU to ratify to the Convention.

Proposed changes to improve the interface between the Regulation and arbitration

We welcome the general thrust of the Commission Proposal in relation to arbitration, deferring to national legal experts in relation to the details of the proposals. It is, of course, important that the revised EU regime does not conflict with the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, which has been widely relied upon by our members in their dealings with emerging market counterparties.

Proposals designed to ensure the better coordination of legal proceedings before the courts of Member States

We welcome the proposed rule that the court first seised should decide on jurisdiction within six months. Six months is, of course, a long time in the financial markets and this alone would not be a sufficient solution of the *Gasser* issue, but, as discussed above, we

believe that that is now effectively addressed by the proposals in relation to jurisdiction agreements.

We support, in principle, the exchange of information between courts in appropriate circumstances, but acknowledge that this raises practical issues and cost-benefit issues, and we agree with the view that this should not become a source of delay for potential litigants.

Proposals aimed at improving access to Justice

We do not believe that it is appropriate to include intangible moveable assets within the scope of a special jurisdiction rule that is based on the principle of location, for the reasons that have been aired extensively in the context of the Hague Securities Convention. The Hague Securities Convention, of course, concerns the determination of the applicable law rather than jurisdiction, but the conceptual difficulty, if not impossibility, of reliably assigning a location to an intangible so that *ex ante* certainty is achieved is the same.

Q3. Do you agree with the tentative impact assessment? If not, please explain why.

We do not comment on the tentative impact assessment, as we believe that others are in a better position to assess whether the tentative impact assessment is accurate in relation to the United Kingdom.

Q4. Are there any other specific comments you may wish to make?

We have no additional comments to make.

Please do not hesitate to contact either of the undersigned if we can provide further information about the privately negotiated derivatives market or other information that would assist in your decision whether to opt in to the revised Brussels I Regulation.

Yours faithfully

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Annex 1

INFORMATION ABOUT ISDA

The Consultation Paper requests certain information from each respondent. The address of our European office appears on the first page of this letter. The addresses of our other offices, including our head office in New York, may be found on our website at http://www.isda.org through the "Contact us" link at the top of the home page.

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 has 800 member institutions from 54 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities.

More than half of ISDA members are based in the European Union and neighbouring countries and most of the other members are 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's membership encompasses members carrying out European regulated activities, including banking and investment services, as well as many end-users of derivatives, who are not themselves regulated[3] but are protected by financial regulation. Further details of ISDA's membership structure, including a list of the names of its primary, associate and subscriber members, is available from our website at http://www.isda.org through the "Membership" link on the left side of the home page.

[3] i.e., not regulated in relation to their derivatives activities, although many end-users may be regulated as to part or all of their other business activity, for example, insurance companies, pension fund trustees and administrators, licensed public utilities and so on. Many end-users are, of course, large industrial and commercial corporations using derivatives to manage interest rate, currency and other business-related risks.