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Dear Ms Saastamoinen,

Consultation on jurisdiction and the recognition and enforcement of judgments on a worldwide level

Thank you for providing ISDA with an opportunity to complete your questionnaire and to comment on issues regarding jurisdiction and the recognition and enforcement of judgments on a worldwide level. We have sought to answer the questions asked in the questionnaire but, as many of the questions appear to seek information from individuals and corporates rather than trade associations, we have instead chosen to respond in writing by addressing some key issues highlighted in the questionnaire.

ISDA is the global trade association for privately negotiated derivatives transactions (over-the-counter (OTC) derivatives) and publisher of the global standard contract for cross-border transactions in OTC derivatives (ISDA Master Agreement). ISDA's registration number in the relevant EU register is 46643241096-93. Since 1985, ISDA has worked to make the global OTC derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC 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 including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available at www.isda.org.

ISDA's opinion is that it would be a positive move to seek to progress in the discussions about the Hague Judgments Project. Most of our members are financial institutions and various types of corporates active in the trading of derivatives across the globe. The majority of ISDA members operate across global markets. As far as the scope of EU legislation goes, many EU-based ISDA members operate beyond or outside of the scope of the regime under EU Brussels 1 Regulation (and Lugano Conventions) or any bilateral treaties on the mutual recognition of judgments. Cross-border derivatives transactions are increasingly focused on markets outside the EU, the non-EU/EEA/EFTA jurisdictions in Europe, Central Asia, Asia-Pacific, the Americas, the Middle East and Africa. This means that EU domiciled counterparties increasingly have to assess the degree of legal risk when

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transacting with counterparties whose assets are primarily located outside the scope of the European Union regime (or any bilateral treaties entered into by Member States). This includes matters around the validity of the choice of law provisions in standard contracts. An issue closely related to the choice of law governing the contract is the validity of the choice of dispute resolution forum. Market participants need to consider whether they can get a speedy and reliable resolution of any dispute under their contract and achieve enforcement of the relevant judgment or award in the jurisdiction of their counterparty.

The options available under an ISDA Master Agreement provide for London (or – alternatively - New York) courts as the jurisdiction forum. In both cases the risk of an English (or New York, but also, more generally, under any other EU Member State law) judgment not being enforceable in the jurisdiction in which the counterparty has its assets or may have its assets is an issue regularly faced by ISDA members. In practice there are difficulties in enforcing English (and, more generally, any other EU Member State) judgments in many jurisdictions across Africa, Asia-Pacific, the CIS region and the Middle East. There are some exceptions with regard to certain jurisdictions, but these are very rare.

In some cases, counterparties resort to arbitration proceedings in order to benefit from the perceived advantages of the enforceability of awards subject to the New York Convention. In this regard we also take note of the on-going EU discussions around the signing/ratification of the Hague Choice of Courts Convention. A similar discussion is needed with regard to the enforceability of judgments across the globe. The Hague Judgments Project provides a good starting point toward this goal. We understand that the European Commission is considering signing the Hague Choice of Courts Convention. Ratification of that Convention would further enhance legal certainty around exclusive choice of court agreements as well as provide for the recognition and enforcement in Contracting States for judgments from courts designated in an exclusive choice of court agreement.

The recast EU Brussels 1 Regulation is certainly a major step forward on a number of aspects. One area where there seem to be issues remaining is the international scope of “lis pendens”. There appears to be no rule in the revised version that allows Member State courts to decline jurisdictions where the counterparties have contractually agreed that non-EU courts shall have jurisdiction and where the EU domiciled counterparty has commenced proceedings in a Member State court. Such a scenario will become relevant in the context of pre-emptive proceedings initiated contrary to an exclusive jurisdiction clause that designates a non-Member State court. This might increase the chances for continuing parallel proceedings in such a scenario. Ratification by the European Union of the Hague Choice of Court Convention in conjunction with pushing forward the Hague Judgments Project might help in addressing a number of remaining issues in this area.

Progress on both the Hague Choice of Courts Convention and the Hague Judgments Project would allow commercial counterparties greater opportunity to have their contractual disputes heard by the courts of the country of the governing law and courts of their choice because any judgment from a court of an state whose courts has been chosen would be enforceable in other Contracting States where a counterparty may have its assets. This scenario makes cross-border transactions more predictable and reduces the potential for costly delays. It is also possible that a (new) Hague Judgments Convention may reduce the need for counterparties to seek local law advice as to the prospects of enforcing court judgments in a number of potentially affected jurisdictions. This would further reduce costs and save time.

Finally, one should encourage the Hague Conference on Private International Law to draft a concise instrument. We note the New York Convention is short and contains relatively limited provisions, yet it has widespread support and is widely acknowledged as being a very successful instrument. The format of the Hague Securities Convention is another example for a concise legal instrument. Perhaps an approach similar to the format of the aforementioned instruments might be possible in order to gain wide acceptance among states across the globe.

We hope you find these comments helpful. We would be delighted to discuss this further with the European Commission. Please do not hesitate to contact me with any questions.

Yours sincerely,

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