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October 6, 2021

Louissette Cameron, Clerk
Committee on Culture and Education
National Assembly
Pamphile-Le May Building
1035 des Parlementaires Street
3rd Floor
Québec (Québec) G1A 1A3
cce@assnat.qc.ca

Dear Ms. Cameron:

Re: Special consultations and public hearings on Bill 96, *An Act respecting French, the official and common language of Québec* (“Bill 96”)

The International Swaps and Derivatives Association, Inc. (“**ISDA**”) appreciates the opportunity to provide comments to the Committee on Culture and Education of the National Assembly (the “**Committee**”) with respect to Bill 96 and the amendments it would bring to the *Charter of the French Language* (the “**Charter**”).

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 960 member institutions from 78 countries, including entities based in Québec. 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 web site: www.isda.org.

Québec companies in all industries enter into derivatives transactions to mitigate risk that comes from changing interest rates and exchange rates, as well as credit, commodity and equity prices. For example, Québec pension funds use derivatives to manage interest rate and inflation risk, which is critically important to protect the value of pension plans for future Québec retirees. Another example is Québec exporters, which use derivatives to achieve certainty in the rate they can convert future overseas revenue, which creates



stability and keeps them competitive. Banks also use derivatives to manage their interest rate risk, enabling them to expand lending to individuals and businesses.

ISDA has been actively engaged for many years with providing input on regulatory reforms impacting derivatives in major jurisdictions globally, including Canada. While this may not have been intended, ISDA is concerned that Bill 96 could impact access for Québec market participants to the global derivatives markets, and accordingly ISDA is pleased to provide feedback regarding Bill 96 on behalf of its members.

More particularly, ISDA is concerned with the formulation and effect of section 44 of Bill 96, which amends section 55 of the Charter, in particular given the proposed civil sanctions that would be enacted pursuant to section 114 of Bill 96.

Global derivatives markets function efficiently in large part because market participants have agreed on a number of ISDA reference documents, agreements and definitions that are consistently incorporated by reference into individual derivative and swap agreements in respect of transactions between market participants, including entities based in Québec and regardless of whether they are members of ISDA. These documents are voluminous, subject to frequent revision and are the result of a truly global effort by market participants to achieve consensus on this common documentation to maximise market efficiency. Because ISDA is a global association with member institutions hailing from 68 countries, this documentation is developed in English only.

When two market participants enter into an agreement in respect of a particular derivative or swap transaction, this agreement is always able to be negotiated, such that it cannot be considered a contract of adhesion under article 1379 of the *Civil Code of Québec*. However, for efficiency and because the ISDA documentation reflects global market standards, such agreements invariably refer to ISDA documentation, generally available only in English. In that sense, one could argue that the agreements in question, while not contracts of adhesion, do contain standard clauses (ie the ISDA documentation) and are therefore subject to section 55 of the Charter.

Section 44 of Bill 96 could be construed as prohibiting Québec market participants from entering into swap or derivative agreements that refer to ISDA documentation, because such documentation is not available in French. This could significantly impair the ability of Québec market participants to access the liquidity opportunities afforded by such instruments at competitive rates, putting Québec market participants at a significant disadvantage, most importantly by impairing their ability to manage and adequately hedge risk and raise funding, for example to maintain operations and invest in new market opportunities. Indeed, ISDA is concerned that without the adjustments proposed below, the ability of Québec market participants to transact with a wider range of global

financial institutions could be impaired, reducing competitiveness in respect of the offerings available to Québec market participants.

Moreover, while derivative and swap transactions are consistently negotiated, where a transaction involves a central clearing counterparty (CCPs), a swap execution facility (SEFs) or a trading platform, the contractual stipulations that govern their involvement could be considered contracts of adhesion. However, these entities play a key role in ensuring market safety and efficiency on a global scale by mutualizing counterparty credit risk (CCPs and clearing platforms) and by facilitating trading (SEFs and trading platforms). Again, ensuring that Québec market participants can continue to access these mechanisms is crucial to ensuring access to the broadest range of financial products on the most competitive terms.

To achieve this aim, ISDA members therefore wish to propose two solutions that, taken together, could remedy the difficulties outlined above:

1. Proposed amendments to section 44 of Bill 96

ISDA would recommend section 44 of Bill 96 be amended to read as follows (proposed amendment underlined):

“Section 55 of the Charter is amended

(1) by striking out “printed”;

(2) by replacing the second sentence by the following sentences: “The parties to such a contract may be bound only by its version in a language other than French if, after examining its French version, such is their express wish. The documents related to the contract may then be drawn up exclusively in that other language.”;

(3) by adding the following paragraphs at the end:

“No party may, unless the other party has examined the French version of the contract referred to in the first paragraph and has explicitly expressed willingness to do so,

(1) make the other party adhere to a contract of adhesion drawn up in a language other than French;

(2) enter into a contract with the other party that contains a standard clause drawn up in a language other than French; or

(3) send the other party a document related to either of those contracts if the document is drawn up in a language other than French.



No party to a contract referred to in the first paragraph may require from the other party any sum whatsoever for the drawing up of the French version of the contract or of the related documents.

This section does not apply to a contract of employment and the related documents.

This section does not apply to a contract by mutual agreement in which the special terms and conditions specific to the parties were negotiable between them.”

ISDA understands the desire to ensure that Québec consumers and businesses are provided with a true choice of entering into adhesion contracts in the language of their choice, and the aim of achieving this through a requirement that all adhesion contracts be drafted in French and first presented to the adhering party in French.

That said, extending this requirement to all contracts containing standard clauses, even contracts that are not of adhesion, results in a broader scope to the amendments proposed in section 44 of Bill 96. Indeed, all adhesion contracts contain standard clauses, but not all contracts that contain standard clauses are adhesion contracts. The swap and derivative agreements that refer to ISDA documentation are a prime example of this.

Without greater clarity regarding the application of this rule to negotiable agreements in the private sector, financial institutions will find it difficult to conduct business, particularly with other financial institutions outside of their jurisdiction. The use of choice of language clauses in negotiable agreements illustrates the uncertainty of market participants regarding the scope of the rule in Quebec. Under the proposed amendments, it is even more likely that firms will not know whether they can or cannot draw up these private, negotiable contracts in a mutually agreed upon language. ISDA urges the Quebec government to adopt this recommendation to ensure clarity in the market and avoid any confusion while ensuring that derivatives use in Quebec remain competitive taking into account the derivatives market’s global nature.

Despite the OQLF’s position on the inapplicability of the requirement in section 55 to negotiable agreements in the private sector and Quebec Courts’ affirmation of such position, there is widespread uncertainty among Quebec businesses regarding the application of this rule. Companies frequently include choice-of-language clauses in negotiable agreements, pointing to a widespread uncertainty regarding the scope of application of the rule in Quebec’s private sector at large. If section 44 of Bill 96 is adopted as proposed, this uncertainty will be amplified due to the removal of the phrase “they may be drawn up in another language as well at the express wish of the parties” in section 55. ISDA urges the Quebec government to adopt this recommendation in order to avoid confusion and uncertainty in the Quebec market. ISDA maintains that this recommendation takes into account the rationale for section 55 to protect individuals and business in Quebec when the special terms and conditions specific to the parties were not

negotiable, while ensuring that no unintended consequences will result from the amendments.

2. Amending section 45 of Bill 96 to allow contracts in respect of transactions involving CCPs, SEFs and trading platforms to continue to be concluded in a language other than French

ISDA recommends that section 45 of Bill 96 be amended as follows:

“The Charter is amended by inserting the following section after section 55:

“55.1 Despite section 55, parties may enter into agreements on trading platforms and with central clearing counterparties that are drawn up only in a language other than French. In the case of legal persons and enterprises, financial instruments and contracts whose object is the management of financial risks, including currency exchange or interest rate exchange agreements, contracts for the purchase or sale of options, or futures contracts, may be drawn up only in a language other than French.

55.1 55.2 The following documents must be drawn up in French: [...]”

This recommendation extends the safe harbour provisions already proposed under section 13 of Bill 96 to the private sector as well.

The proposed amendment to section 21 of the Charter adds a safe harbour provision to the requirement that contracts entered into by the civil administration, including the related sub-contracts, be drafted exclusively in the French language:

“Loan contracts may nevertheless be drawn up both in French and in another language. The same applies to financial instruments and contracts whose object is the management of financial risks, including currency exchange or interest rate exchange agreements, contracts for the purchase or sale of options, or futures contracts.”

By adding such a safe harbour provision to section 21, the National Assembly is already acknowledging that it is necessary to ensure the ability of the government to enter into contracts relating to Financial Instruments in languages other than French. ISDA believes that this safe harbor should also be extended to include the private sector, as well as the public sector. ISDA would encourage Quebec to not subject Quebec’s private sector to more stringent language obligations than it imposes on its public sector.

This recommendation also ensures that Quebecers will have the ability to enter into agreements on trading platforms (which includes SEFs) and with CCPs.

The international regulatory community have long recognized the efficiency and risk management benefits gained from market use of central counterparty clearing houses (CCPs) and swap execution facilities (SEFs). CCPs and SEFs realize better risk



management when including a greater number of counterparties. This recommendation ensures that businesses in Quebec may take advantage of these trading platforms and will not suffer a disadvantage due to lower liquidity for trading derivatives and other financial instruments with global market participants.

ISDA and its members would like to reiterate our appreciation to the Committee for the opportunity to provide feedback on Bill 96. We are happy to discuss our responses and to provide any additional information that may be helpful.

Thank you for your consideration of these important issues to market participants. Please contact the undersigned if you have any questions or concerns.

Yours very truly,

A handwritten signature in blue ink, appearing to read "K. Darras", written over a horizontal line.

Katherine Tew Darras

General Counsel