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Dear Mrs McMahan

### **Rome I - European Commission Review of Article 14: Assignment**

The International Swaps and Derivatives Association (**ISDA**)<sup>1</sup> is grateful for the opportunity to respond to the Ministry of Justice Discussion Paper “Rome I – European Commission Review of Article 14: Assignment” (the **Discussion Paper**). ISDA has followed the evolution of the Rome I Regulation since the Commission Green Paper in 2003, to which we responded by letter dated 12 September 2003. We also responded to UK consultations on the Rome I Regulation by letter dated 28 February 2006 (addressed to Brian Penn at HM Courts Service) and 25 June 2008 (addressed to you).<sup>2</sup> Our members have a longstanding interest in the European private international law regime as it applies to financial contracts.

The issues raised by the Discussion Paper are among the more important issues for our members, given the importance of clarity in relation to the law that determines proprietary effect of the voluntary assignment of a claim, as this would encompass the security assignment of a debt claim (for example, cash collateral held with a third party custodian) as well as the security assignment of a close-out amount due under an ISDA Master Agreement (the latter being a common feature of structured financings).

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<sup>1</sup> 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 currently has more than 840 member institutions from 58 countries on six continents. 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.

<sup>2</sup> Copies of each of these letters are available on the ISDA website at [http://www.isda.org/c\\_and\\_a/collateral-Financial.html](http://www.isda.org/c_and_a/collateral-Financial.html).

We understand that you have received a number of detailed responses from a variety of other trade and professional bodies, as well as leading academics and practitioners, to the Discussion Paper, and we have had the opportunity to review a number of those responses in draft form, which appear to indicate a fair degree of market consensus (with academic opinion apparently a bit more divided) supporting the proposed UK compromise, at least in relation to the principal rule that should be applicable to the effectiveness of an assignment or subrogation of a claim against third parties and the priority of an assigned or subrogated claim over a right of a third party.

We have seen the response of the Financial Markets Law Committee, which appears to provide technical support for the market consensus. We have also read the paper written by Professor Trevor Hartley on “Voluntary Assignments: Article 14 of the Rome I Regulation”, which was circulated to you and a number of other interest financial market participants, academics and legal practitioners in February 2010. We respectfully agree with his views.

We do not propose to respond in detail, given that others have already done so, but we do wish to indicate that we are generally supportive of the UK compromise as it relates to the issues discussed in paragraphs 5 to 21 of the Discussion Paper. This is consistent with the approach to these issues we advocated in our commentary on the December 2005 Commission Proposal in our letter to Brian Penn of HMCS of 28 February 2006.

We understand that the issues are complex and that the UK compromise is an endeavour to reach a sensible and practical result broadly acceptable to EU member states, rather than the result that might be considered optimal from a purely academic point of view. We also acknowledge, as does the Discussion Paper, that the most appropriate rule for financial contracts may not be the most appropriate rule for other areas, such as factoring or some of the other areas discussed in paragraphs 22 to 24. Obviously, all of these areas have some relevance directly or indirectly to the derivatives markets, but we feel it is appropriate to defer to others more directly concerned with those areas as to the appropriate rule that should apply in each case, although we would like to make a brief comment on the appropriate rule for securitisations and structured financings.

We understand that the securitisation and structured financing sector also generally favours the law of the assigned claim as the appropriate law to govern what are referred to in the Discussion Paper as “paragraph-3 issues”. We note that the Discussion Paper identifies, in the first bullet point under paragraph 22, the careful drafting that will be necessary to distinguish the rule applicable to securitisations and structured financings, on the one hand, from the rule applicable to bulk assignments of commercial receivables (factoring), on the other hand. That is, of course, only necessary if it is ultimately agreed that different rules should apply for each sector. This seems likely, however, in view of the basic rule in Article 30 of the UN Convention on the Assignment of Receivables in International Trade, which refers to the law of the State in which the assignor is located.

We would be pleased to meet with you to discuss any of the issues arising out of the Discussion Paper. In the meantime, please do not hesitate to contact either of the undersigned if we can be of assistance in relation to these issues.

Yours faithfully

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