Global: New model jurisdiction and governing law clauses for use with ISDA Master Agreements.

The International Swaps and Derivatives Association (ISDA) has published the 2018 ISDA Choice of Court and Governing Law Guide. The Guide contains new model exclusive, and non-exclusive, jurisdiction clauses and a revised model governing law clause. These can be used to replace the standard provisions in either the 1992 or 2002 Master Agreements. Linklaters is pleased to have advised ISDA on the consultation process and the drafting of the Guide.

Background

The vast majority of cross-border OTC derivative transactions are governed by the terms of the ISDA Master Agreements published by ISDA. There are two main versions of the ISDA Master Agreement currently in widespread use, namely, the ISDA 1992 Master Agreement (Multicurrency – Cross Border) which was published in June 1992 and the ISDA 2002 Master Agreement which was published in January 2003. Both the 1992 and 2002 Master Agreements contain standard provisions as to jurisdiction and governing law (based on New York or English jurisdiction and law, depending on the parties' choice). These were first published in 1987 and underwent revision for the 2002 Master Agreement.

ISDA’s consultation on new model jurisdiction and governing law provisions

To account for developments since the provisions on jurisdiction and governing law were drafted for the 1992 and 2002 Master Agreements, ISDA, on 12 July 2017, opened a consultation on updating the clauses. During the consultation, members noted that, given that there have been a number of important legislative developments since the provisions were originally formulated, the language used in the jurisdiction provisions of the Master Agreements could be updated. Such comments stem from the fact that the provisions were originally drafted taking into account the legal instruments dealing with courts’ jurisdiction at the time those provisions were drafted. However, international legislation has evolved since then (such as the coming into force of the Brussels I Regulation, the Lugano Convention 2007 and the Brussels I Recast).

Another important change since the 1992 and 2002 Master Agreements were published is the Convention of 30 June 2005 on Choice of Court Agreements (the “Hague Convention”) which seeks to promote the use of exclusive jurisdiction clauses in international contracts by requiring effect to be given both to such clauses and to the judgments of courts nominated thereunder. Both the existing jurisdiction clauses contained in the 1992 and 2002 Master Agreements do not, because of their form, fall within the basic scope of the Hague Convention.
is generally restricted to where the jurisdiction clause is *wholly* exclusive in favour of one Contracting State only. While the Hague Convention’s geographic reach is limited at present, as more states ratify the Hague Convention, it is only likely to increase in relevance. A further view which emerged during the consultation was, accordingly, that any revision should provide a form of clause which, where the Hague Convention is otherwise relevant, would fall within its scope. The model exclusive jurisdiction clauses further described below are accordingly of that form.

During the consultation, members also expressed their desire for express language to clarify that the “Proceedings” definition referred to in the jurisdiction clauses expressly includes disputes which do not arise directly from the interpretation and operation of the contracts but are matters such as non-contractual rights and obligations arising from, out of, or in connection with, the ISDA Master Agreements. With regards to governing law, members expressed their strong preference, partly driven by the advent of the Rome II Regulation in the EU, that non-contractual obligations should be governed by the same law as the contractual obligations.

**Key features of the Guide**

In light of the feedback from members, ISDA, on 27 February 2018, published the 2018 ISDA Choice of Court and Governing Law Guide which offers new model clauses which users may choose to include in future transactions. A copy of the Guide can be found here.

The Guide offers two model forms of jurisdiction clauses: a straightforward exclusive jurisdiction clause and, alternatively, a straightforward non-exclusive jurisdiction clause. An exclusive jurisdiction clause requires that disputes covered by the clause be resolved solely in the nominated courts and nowhere else. In contrast, a non-exclusive choice of court in favour of a specified jurisdiction does not preclude a party from commencing a claim other than in the specified court, but the non-specified court will need to determine, pursuant to the rules which apply before it, whether it has jurisdiction to hear the claim which has been made.

Whether to select exclusive or non-exclusive jurisdiction is likely to be a commercial decision, depending on factors such as the relative bargaining position of the parties, where they and their assets are located and the difficulty of enforcing foreign court judgments in different jurisdictions. An exclusive jurisdiction clause is more likely to prevent parallel or multiple proceedings and inconsistent judgments in different national courts and avoids the attendant risk and expense. On the other hand, a non-exclusive jurisdiction clause is more likely to preserve a party’s ability to sue the counterparty in a number of possible venues as and when the need arises. For example, it may preserve a party’s flexibility to bring proceedings in other jurisdictions where a counterparty has assets but against which enforcement of an English or New York court judgment may be difficult (for example, because of local law provisions).

The Guide contains the following optional model clauses:

(i) Model exclusive jurisdiction clauses at:

   a) Appendix A: for use when English law is selected as the governing law in the Schedule; or

   b) Appendix B: for use when the laws of the State of New York are selected as the governing law in the Schedule.
(ii) A model non-exclusive jurisdiction clause at Appendix C to be used irrespective of whether English law or the laws of the State of New York is selected as the governing law in the Schedule.

(iii) A model governing law clause covering both contractual and non-contractual obligations at Appendix D to be used irrespective of whether English law or the laws of the State of New York is selected as the governing law in the Schedule.

Each model clause is intended to form part of the Schedule to the parties’ Master Agreement. The clauses have been drafted on the assumption that parties will include them when entering into a new Master Agreement. The model clauses do not automatically amend existing jurisdiction agreements contained in 1992 or 2002 ISDA Master Agreements already entered into. Parties seeking to amend existing agreements will need to include additional wording in an amended Schedule to reflect that fact.

Parties are of course free to continue to use the current jurisdiction and governing law provisions contained in Section 13 of the 2002 and 1992 Master Agreements respectively. However, given that the new model clauses offer greater legal clarity and certainty, parties entering into ISDA Master Agreements would be well advised to familiarise themselves with the Guide and the new model clauses contained therein.

Similar to the approach adopted by ISDA for its Arbitration Guide, the intention is that the ISDA Choice of Court and Governing Law Guide will be a “living document” that will be updated from time to time – depending on member demand – by adding any subsequently developed ISDA model jurisdiction or governing law clauses as additional appendices and by amending the commentary in the Guide appropriately.

Linklaters were instructed by ISDA to advise on the consultation process and the drafting of the Guide.