

# 2018 ISDA Choice of Court and Governing Law Guide: What you need to know

On 27 February 2018 the International Swaps and Derivatives Association, Inc. (**ISDA**) published the *2018 ISDA Choice of Court and Governing Law Guide* (the **Guide**). This follows a consultation in 2017 where it was felt that revisions to the jurisdiction and governing law clauses were necessary to take account of recent developments such as the 2005 Hague Convention.

Most OTC derivatives are governed by either the ISDA 1992 Master Agreement (the **1992 Agreement**) or the ISDA 2002 Master Agreement (the **2002 Agreement**), which contain standard jurisdiction and governing law clauses (based on English or New York law), which were first published in 1987 and then revised in 2002.

The Guide provides optional model forms of non-exclusive and, for the first time, exclusive jurisdiction clauses as alternative governing law clauses. This reflects the increased move in favor of exclusive jurisdiction clauses.

When entering into new transactions, parties to an ISDA Master Agreement may choose between these new model clauses or the current jurisdiction and governing law provisions contained in Section 13 of the 2002 Agreement and 1992 Agreement. The new model clauses do not amend any existing jurisdiction agreements contained in the 1992 or 2002 Agreements.

The Guide takes into account the latest regulatory changes since 2002 (in particular, the 2005 Hague Convention, which promotes the use of exclusive choice of court agreements and the 2012 Brussels I Recast, which governs jurisdiction issues within the European Union).

In addition, the Guide provides non-binding comprehensive guidance on these new model clauses, which is supplemental to the existing 1992 and 2002 ISDA User's Guides.

## Governing Law

The Governing Law clauses in both the 1992 and 2002 Master Agreement state that the Agreement shall be governed by and construed in accordance with the law specified in the Schedule (English or New York Law) as non-exclusive choices save for certain exceptions. The current Governing Law clauses only cover contractual obligations.

However, the new Governing Law model clause in Appendix D of the Guide expressly offers to cover non-contractual obligations as well:

*The following provision should be included in Part 4 (Miscellaneous) of the Schedule:*

*Section 13(a) – Governing Law shall be deleted in its entirety and replaced with the following:*

*“Governing Law. This Agreement and any non-contractual obligations arising out of or in connection with it will be governed by and construed in accordance with the law specified in the Schedule.”*

ISDA states that these drafting changes are for clarification only and should not be taken to imply that the current language in the 1992 or 2002 Agreements should be construed narrowly.

The model governing law clause in Appendix D is for use where parties have selected either English law or New York law as the governing law.

## Choice of court

A dispute resolution clause is a provision by which the parties elect, in the ISDA Schedule, which courts should hear their disputes in order to avoid uncertainty.

The existing jurisdiction clauses in the 1992 and 2002 ISDA Agreements provide:

- a non-exclusive jurisdiction of the English Courts for ISDA Master Agreements governed by English law;
- a non-exclusive jurisdiction of the New York Courts for ISDA Master Agreements governed by New York law.

A non-exclusive jurisdiction may allow another judge to exercise jurisdiction in certain circumstances.

ISDA provides for the first time, in this Guide, the following new exclusive jurisdiction model clauses:

- one in favor of the English Courts (in Appendix A);and
- the other in favor of the New York Courts (in Appendix B).

In response to comments from ISDA members regarding the ambiguity of the existing non-exclusive jurisdiction clause, the Guide also provides, in Appendix C, a new and simplified non-exclusive jurisdiction model clause.

The new model jurisdiction clauses in the Guide contain wording that can be used to replace the existing jurisdiction clause (in section 13 of the ISDA Master Agreement). Parties wishing to amend existing agreements will need to include the additional wording in an amended Schedule to incorporate the new clauses, deleting the existing provision.

The Guide also provides a new definition of “Proceedings” (namely, “*any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement...*”), which incorporates pre- or non-contractual matters.

## Final thoughts

Whilst this Guide was not developed as a direct result of the UK’s anticipated withdrawal from the EU (Brexit), the greater clarity and legal certainty that it offers is a helpful development.

ISDA is currently also working on adding in EU Member State (namely French and Irish) governing law and jurisdiction provision options to its documentation, in light of Brexit.

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