

Irish law for EU Derivatives Contracts

With a deep financial heritage deriving from the establishment of its International Financial Services Centre in the 1980s, Ireland has long been a jurisdiction of choice in which to undertake sophisticated financial transactions and is home both to global financial market participants and indigenous participants focused on global financial markets. That heritage and connection has increasingly led those participants to choose Irish law to govern their financial transactions and the Irish courts to preside over any related disputes.

Until recently, the position regarding derivatives differed. Privately negotiated (off exchange) derivatives are typically structured under industry standard documents published by the International Swaps and Derivatives Association, Inc. (ISDA), with reliance placed on legal opinions commissioned by ISDA for risk management, regulatory capital, and accounting purposes.

The governing law options for those standard documents were originally limited to English, New York and, in some cases, Japanese, law, with that choice of law affecting the courts that would determine any related disputes. As a result, notwithstanding that global and indigenous derivatives market participants transacted complex derivatives from and into Ireland, they rarely chose Irish law to govern their derivatives documents or the Irish courts for related disputes.

A recent ISDA initiative has changed this and put the choice of Irish law, and the Irish courts, squarely on the agenda for derivatives market participants. In response to member demand and as part of its Brexit toolkit for members, ISDA made available Irish law versions of its key documents through 2018/2020. The legal opinions that it commissions, which are of such importance to derivatives market participants, now encompass the Irish law versions.

Irish law and the Irish courts are now a very real option for derivatives market participants, regardless of whether there is any other Irish element to their derivatives transactions.

Why choose Irish Law for EU Derivatives contracts?

- **Availability of Irish law governed industry standard documents and related industry opinions:** ISDA has made available Irish law versions of its key documents, supported by legal opinions commissioned by multiple jurisdictions, and relied on by ISDA members for risk management, regulatory capital and accounting purposes.
- **Legal certainty:** Ireland's common law legal system affords precedential value to earlier decisions of its own courts and, in the absence of relevant such decisions, treats relevant decisions of the courts of other common law jurisdictions (including England and New York) as of persuasive value. This is particularly beneficial in the context of industry standard documents as it discourages multiple disputes on the same issue of interpretation and facilitates the establishment of settled interpretations of standard provisions.

The similarity of the contract laws, and other relevant legal principles, of Ireland and England means that, in the case of decisions of the English courts, the legal principles underpinning those decisions will be known to, and recognised by, the Irish courts.

- **Sophisticated, specialised court system:** Disputes relating to derivatives documents are likely to be determined by Ireland's Commercial Court in the first instance. Its stringent case management procedures, tight timelines and close monitoring of compliance with orders and deadlines ensure that proceedings, which are undertaken in the English language, proceed expeditiously and in a cost-efficient manner.
- **Deep Talent Pool:** Given its deep financial heritage, there is a large pool of experienced legal advisers in Ireland who are highly recognised internationally and who have extensive experience in multi-jurisdictional financial transactions.
- **Availability of EU Brussels Recast Regulation Regime:** A judgment of an Irish court in a civil or commercial matter is entitled to recognition, and can be enforced as if it had been delivered, in any other EU Member State. No other regime, including the Lugano Convention to which the UK has applied to accede (but for which accession the EU's agreement is required and has not been given) and the Hague Convention on Choice of Court Agreement to which the UK has acceded, provides equivalent benefits.
- **Using derivatives documents governed by the laws of an EU Member State facilitates compliance with certain requirements of EU law:** Using an Irish law governed contract obviates the need for a party that is subject to Article 55 of the Bank Recovery and Resolution Directive to include a contractual recognition of that Directive's bail-in provisions, monitor it for ongoing compliance with Article 55 as amended from time to time and undertake any related remediation and repapering. A choice of Irish courts agreement satisfies the Article 46(6) of MiFIR requirement for in scope non-EU entities providing and performing certain investment services and investment activities within the EU (which may encompass the transaction of derivatives) to offer to submit disputes relating to those services and activities to a court or arbitral tribunal in an EU Member State.

How will BREXIT impact on Derivatives?

For the reasons outlined above, Brexit renders the choice of English law to govern, and the English courts to resolve disputes in connection with, derivatives documents to which there is an EU party significantly less attractive. However, ISDA's new Irish law governing law/choice of court option provides derivatives market participants with a robust and reliable tool to address these concerns.

1. Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, as amended or the 'Bank Recovery and Resolution Directive'.

2. Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.