

New ISDA Master Agreement (French Law) Brings Changes for EU OTC Derivatives Market

IN SHORT

The Situation: English law-governed documents have largely dominated the European swaps and derivatives markets since the landmark ISDA Master Agreement was published in 1987.

The Development: The International Swaps and Derivatives Association ("ISDA") is launching and publishing a new ISDA Master Agreement: the 2002 ISDA Master Agreement (French law).

Looking Ahead: Given that the United Kingdom will be withdrawing from the European Union's judicial cooperation system, banks and their counterparties entering into a derivatives transaction will find benefits in using the new contractual tools offered by the 2002 ISDA Master Agreement (French law).

ISDA is launching and publishing the first civil law-governed ISDA Master Agreement: the 2002 ISDA Master Agreement (French law).

Jones Day, as ISDA's French counsel, is concurrently issuing the related French law legal opinion confirming the validity and enforceability of the provisions of this new Master Agreement.

ISDA will also shortly publish a 2002 ISDA Master Agreement governed by Irish law.

This is believed to be a defining moment for the OTC derivatives market in the Union. English law-governed documents have largely dominated the European swaps and derivatives markets since the landmark ISDA Master Agreement was published in 1987, both for netting and collateral arrangements.



The new master agreements will be the contractual tools designed to serve the needs of market users across the European Union to document their transactions and relationships.



It is hard to predict which use the market will make of these new master agreements. But it is not unreasonable to think that European banks and counterparties will see merits in using the new contractual tools offered by ISDA for their inter-continental Europe business, notably because post-Brexit:

- It is likely that the United Kingdom will fall out from the judicial cooperation system of the Union, meaning that English court decisions will lose the benefit of the automatic recognition under the Brussels 1 Regulation (recast) and will have to go through a potentially long and costly *exequatur* control process; and
- English law-governed agreements will be considered, from a Resolution and the Bank Recovery and Resolution Directive's standpoints, as third-party jurisdiction agreements, meaning that they will all need—through bilateral agreements, protocols, or any other mean—to be repapered and supplemented by contractual voluntary submission to EU resolution regimes.

Any establishment, institution, or fund established in the Union and trading under English law-governed documents will face those issues. Such new master agreements are therefore not designed to document domestic transactions on the French and Irish markets, respectively. The new master agreements will be the contractual tools designed to serve the needs of market users across the Union to document their transactions and relationships, even where no French party is involved.

Key changes from the English law form are:

- **Section 2(a)(iii)—Flawed Assets and Conditionality:** The "flawed asset theory" has no strict equivalent under civil law. Small changes have therefore been introduced to comply with French law while preserving the benefit of the conditionality and allowing for the suspension of performance. To this end, the 2002 ISDA Master Agreement (French law) incorporates the ISDA amendments published after the U.S. *Metavante* and UK *Lomas* cases following Lehman Brothers' bankruptcy in order to limit the suspension of performance within a defined period of time.
- **Section 2(c)—Netting of Payments:** This amendment is merely made to reflect that payment

netting under French law does not legally qualify as "novation."

- **Section 3—Representations:** The reference to "equity as a source of law" has been deleted. But a reference to "equity" (*équité*) has been kept. Equity is not a source of law under civil law, but it is a subsidiary standard of interpretation of the parties' intent.
- **Section 9(f)—No Waiver of Rights:** The amendment includes a qualification for a mandatory legal time limit applicable to contractual obligations under French law.
- **Section 13(a)—Governing Law:** The law of France is designed as the governing law of the Agreement.
- **Section 13(b)—Jurisdiction:** Any dispute relating to the Agreement (whether contractual or extra-contractual) should be submitted to the jurisdiction of the Paris Commercial Court and the Paris Court of Appeal. Parties have the choice to agree in the Schedule if such jurisdictions are to be exclusive or non-exclusive. Both jurisdictions have international chambers designed to have jurisdiction on "transactions in financial instruments, market standard master agreements, as well as financial contracts instruments and products." International chambers are effective for proceedings initiated from March 1, 2018.

The 2002 ISDA Master Agreement (French law) can be used together with any other existing ISDA documentation.

Users and negotiators already familiar with the 2002 ISDA Master Agreement (English law) should not have to change their standard credit protection, risk management, termination process, negotiation guidelines, and teams.

The publication of the 2002 ISDA Master Agreement (French law) is to be put into perspective with the most recent major evolution of the French judicial system. The new international chambers of the Paris Commercial Court and Court of Appeal mentioned above will operate along profoundly reformed procedures and methods:

- **English Language:** Proceedings may be conducted in English, and documentary evidence may be submitted in the original English version without being translated.
- **Specialized Judges:** Those international chambers are specifically designed and organized to hear cases relating to international trade, including, without limitation, cases relating to transactions on financial instruments and master agreements. At both levels, such chambers are composed of specialized judges, selected on the basis of their experience with international business litigation, who have a practice-based knowledge of banking and financial law and/or an updated and comprehensive training on those matters.
- **Procedural Calendar:** Procedural rules would allow a quick settlement of the dispute based on a schedule set by the judge and agreed to by the parties.
- **Experts and Witnesses:** Judges may hear parties, witnesses, and experts.

The international chamber of the Paris Court of Appeal will hear all appeals to the decisions of the international chamber of the Paris Commercial Court.

FOUR KEY TAKEAWAYS

1. The 2002 ISDA Master Agreement (French law) is the first civil law-governed ISDA Master Agreement.
2. A limited number of changes from English law are included in the 2002 ISDA Master Agreement (French law).
3. The 2002 ISDA Master Agreement (French law) can be used together with any other existing ISDA documentation.
4. The new international chambers of the Commercial Court and the Paris Court of Appeal will operate along distinctly reformed procedures and methods.



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