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The logo for Matheson, featuring the word "Matheson" in a white serif font, underlined, set against a red rectangular background.

ISDA's proposal to offer Irish law derivatives documentation

Derivatives are used by almost every large corporation and financial institution in the world to manage certain risks arising in their businesses. Such risks include, for example, risks arising from changes to currency exchange rates, interest rates and changes to commodity prices.

To facilitate the maintenance of efficient and liquid derivatives markets, participants in those markets tend to use standard form documentation to avoid the need for lengthy document negotiation. The standard form documentation used is published by a global industry body headquartered in New York, the International Swaps and Derivatives Association, Inc. (more commonly referred to as "ISDA"). For the past 25 years, ISDA's documentation has offered participants in cross-border derivatives markets a choice of two governing laws, English law or New York law. That choice determines, as between any two parties making the choice, whether English law or New York law principles of contract law would apply to their trading relationship and whether the English courts or the New York courts would be used to resolve any disputes that may arise between the two parties.

ISDA recently decided to explore adding other European governing law and jurisdiction options to its documentation offerings in addition to English and New York law. ISDA stated that it is considering Irish law and French law for such purposes. The proposal of Irish law as an alternative to English law is an obvious and natural choice, given the similarity of the two legal systems, arising from the two legal systems operating in the same language and sharing a common law tradition.

Matheson has been assisting ISDA in its consideration of the Irish law proposal and we see this as an interesting and very positive development for Ireland. Irish contract law, being so similar to English contract law, shares most of the advantages that have resulted in English law becoming the dominant choice of law to document international financial transactions and large infrastructure projects throughout Europe, the Middle East and in Asia. In a "hard Brexit" scenario some of the traditional benefits offered by English law may be weakened. In that context it is understandable why Irish law could be seen as offering the derivatives markets a strong solution, to preserve the *status quo* in terms of contractual legal certainty. Due to the similarity of the Irish and English legal systems, it is routine for Irish commercial courts to be asked to take account of relevant English case law when considering issues that have not previously been determined in the Irish courts. That practice of taking account of English case law should reassure commercial parties choosing Irish law to expect a high level of consistency in terms of how an Irish court would construe derivatives contracts compared to how they have been construed by the English courts.

The option to use Irish law governed ISDA derivatives documentation, should that option materialise following ISDA's enquiries, would be likely to appeal immediately to the significant investment funds and corporate treasury management industries established in Ireland, as well as for hedging activities within the Irish market. Whether there would be more widespread adoption of Irish law governed ISDA documentation internationally depends entirely on how the Brexit negotiations unfold, so would be pure speculation at this stage. Nevertheless, it is sensible that ISDA should explore contingency options at this stage so that the market has some strong solutions available should unforeseen difficulties arise.

Please contact **Christian Donagh** (christian.donagh@matheson.com) with any questions.