



Irish law for OTC 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. Those participants have increasingly chosen Irish law to govern their financial transactions and the Irish courts to preside over any related disputes.

In the case of privately negotiated (“over-the-counter” or “OTC”) derivatives contracts, however, the parties’ choice of law/courts is subject to additional considerations. OTC derivatives are typically structured under industry standard documents published by the International Swaps and Derivatives Association, Inc. (ISDA), and parties rely for risk management, regulatory capital and compliance, and accounting purposes on related legal opinions commissioned by ISDA across multiple jurisdictions. The parties’ choice of law/courts for such OTC derivatives documents will, accordingly, be limited to the options made available by ISDA.

Whereas ISDA’s original choice of law and court options for its standard documents were limited to those of England, New York and, in some cases, Japan, that has now changed. In response to member demand and as part of its Brexit toolkit for members, ISDA has made available Irish law versions of its key standard documents, which are encompassed by the legal opinions that it commissions.

This is a significant vote of confidence from the preeminent representative body of the global derivatives industry for Irish law as a governing law of choice of, and the Irish courts as a forum for determination of disputes in respect of, OTC derivatives contracts. Irish law and the Irish courts are now a very real option for OTC derivatives market participants, regardless of whether there is any other Irish element to their derivatives transactions.

Why choose Irish Law and the Irish Courts for OTC Derivatives contracts?

- **Availability of Irish law governed industry standard documents and related industry opinions:** The choice of Irish law/courts for OTC derivatives is facilitated by the ISDA documentation architecture and supported by the ISDA’s library of legal opinions.
- **Legal certainty:** Ireland’s common law legal system will be familiar to those that have experienced dispute resolution before the courts of other common law jurisdictions such as England and New York. The doctrine of precedent, a key feature of that system, is particularly beneficial in the context of industry standard documents such as those published by ISDA, as it discourages multiple disputes on the same issue of interpretation and facilitates the establishment of settled interpretations of standard provisions. Further, decisions of courts

of other common law jurisdictions such as England and New York are regularly cited, treated with respect and followed by the Irish courts. This is particularly relevant in this context as the English and New York courts have produced a wealth of decisions on aspects of ISDA documents governed by English and New York law, respectively, that are common to the Irish law versions of those documents and the legal principles underpinning many of those decisions are well known to 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.
- **Ease of enforcement of judgments within the EU:** 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 under the long-established and highly successful EU Brussels Recast Regulation regime. 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.
- **The choice of the laws/courts of an EU Member State facilitates compliance with certain requirements of EU law:** EU law has imposed conditions or limitations on the choice of “third country” laws to govern, or courts to resolve disputes under, certain financial contracts, including those relating to OTC derivatives.

Banks, large investment firms and related entities that are subject to the EU Bank Recovery and Resolution Directive¹ are required to include in relevant contracts an explicit contractual acknowledgment of the potential application and effect of certain provisions of that Directive. Originally focussed on the Directive’s bail-in provisions, amendments to the Directive extended the requirement to encompass its stay resolution provisions, in each case triggering contractual remediation exercises for affected parties wishing to transact new transactions under existing documentation governed by third country laws. The use of OTC derivatives contracts governed by the laws of an EU member state avoids the need to monitor such in scope contracts for ongoing compliance with such requirements and undertake related remediation and repapering.

EU law may also require certain disputes to be resolved in an EU Member State. In scope non-EU entities providing and performing certain investment services and investment activities within the EU (which may encompass the transaction of OTC derivatives) are required by Article 46(6) of MiFIR² to offer to submit disputes relating to those services and activities to a

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.

court or arbitral tribunal in an EU Member State. A choice of Irish court agreement satisfies this requirement.

- **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.

How has Brexit impacted the choice of law/courts for OTC derivatives contracts?

For the reasons outlined above, Brexit renders the choice of English law to govern, and the English courts to resolve disputes in connection with, OTC derivatives documents to which there is an EU party significantly less attractive. However, the availability of a choice of Irish law/courts for ISDA documentation, supported by ISDA's multijurisdictional opinion library, provides OTC derivatives market participants with a robust and reliable alternative.