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European consultations on cross-border crisis management in the financial sector

- The EU has taken numerous steps to address the financial crisis, including proposing legal and regulatory reforms
- Commission Communications
  - An EU Framework for Cross-Border Crisis Management in the Banking Sector
    - Issued October 2009
  - Commission response report
    - Issued 11 March 2010
- Conference “Building a Crisis Management Framework for the Internal Market” in Brussels on 19 March 2010
- Communication on a new EU framework for crisis management in the financial sector (20 October 2010)
- Consultation on technical details of a possible European crisis management framework (6 January 2011)
  - Commission intends to publish legislative proposal in autumn 2011
ISDA response to Commission consultations

- Continuing importance of credit risk mitigation techniques such as netting, set-off, title transfer collateral, security
- Balancing government power and flexibility with legal certainty and respect for private law contract and property rights
- Need for safeguard in relation to resolution powers, such as a partial property transfer power, to protect:
  - netting, set-off, title transfer collateral, security
  - financial market infrastructure, including clearing and settlement functions
- Need for safeguard in relation to continuity powers, including strict limit in time and effect of suspension of right to terminate transactions
- Need to resolve existing issues of legal uncertainty in European legislation (across FCAD, WUD, SFD, Insolvency Regulation)
- Need to strengthen close-out netting in European financial markets to reduce systemic risk (specific EU instrument on netting)

ISDA response (cont'd)

- Need to address the difficult issues of “foreign property” in a national resolution and applicable law; effects on non-EU jurisdictions
- Conflict of law issues:
  - Party autonomy should be respected
  - EU Rome 1 Regulation rules should apply, but perhaps with special provisions to ensure a predictable result (lex specialis)
- Query: should there be a special rule that enforceability of close-out netting arrangements shall be governed by the substantive law chosen by the parties?
  - Compare Art 25 WUDCI
- Special consideration of debt write-down (bail-in) resolution tool and power
Basel Committee on Banking Supervision
Financial Stability Board

• Report and Recommendations of the Cross-Border Bank Resolution Group (CBRG)
  – consultative document issued September 2009, for comment by 31 December 2009
  – Final report published on 18 March 2010
  – Conducted partly in parallel to equivalent EU consultation
  – Strengthening national resolution powers and their cross-border implementation
  – Firm-specific contingency planning
  – Reducing contagion
  – Strongly supports close-out netting and collateral and strengthening related legal framework
• Latest consultation by the CBRG under way (partly in co-op w/FSB)
  – An increased focus on the concept of “bail-in”

Proposal for a European instrument on close-out netting

• ISDA’s on-going dialogue with European Commission on desirability of Europe-wide strengthening of netting
• ISDA proposal (2004) to the Commission’s Securities Experts Group for a European instrument on close-out netting
• Joint proposal of ISDA and the European Financial Markets Lawyers Group (EFMLG) setting out proposed instrument in outline (2008)
• Idea given renewed impetus by financial crisis and support of G20, Basel Committee, Financial Stability Board and Commission itself in reports on financial crisis in 2009-2011
• Objectives:
  – To strengthen legal certainty by promoting convergence of the current member state netting regimes, which vary considerably in scope and content
  – To provide guidance by setting out core principles for member states without recognised netting regimes (Bulgaria, Estonia, Latvia and Lithuania) or where there are gaps or issues (various member states)
Current Commission work on netting proposal

- Proposal currently being developed by the Commission’s Internal Market DG
- Informal consultation with industry and legal experts
- Member State consultations in Dec 2010, Jan 2011, 12 April 2011 (canc’d)
- Impact study/initial proposal anticipated for autumn 2011
- Overlap with EU consultation on cross-border financial firm resolution
  - Proposal for temporary stay on early termination in connection with exercise of transfer powers

Proposal to UNIDROIT for a netting convention

- ISDA proposal in 2008
- Proposal: development of an international convention on close-out netting
  - Core rules for netting and related issues
  - Should not be limited to derivatives but should cover financial exposures more broadly (for example, spot forex, securities trading and so on)
  - Potential benefits:
    - common set of international norms for netting
    - Increase number of countries where netting works
    - Extend benefits of netting to emerging markets
    - Create a level playing field
    - Improve financial market efficiency and reduce system risk
- Importance of coordination with regional efforts, such as the proposal for a European netting instrument as well as proposed European bank recovery and resolution regime
- Adopted by Member States for Work Programme 2011-2013
- First meeting of Study Group held in April 2011
- Cross-border harmonization of special resolution regimes
Other cross border insolvency and financial firm resolution matters monitored by ISDA

- UNCITRAL Insolvency Working Group work on consolidated insolvency proceedings for enterprise groups
- Potential relevance of UNCITRAL work to resolution of financial groups operating on a cross-border basis, highlighted by CBRG report and EU Commission crisis management consultations
- UNCITRAL Legislative Guide on Insolvency
- World Bank Insolvency Task Force
- Other regional and national projects on financial sector early intervention tools and financial institution insolvency law reform: recent legislation or draft legislation in, among others, UK, Ireland, Germany, Belgium, Switzerland

For further information

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