

Panel Session: *Financial Regulation Hitting the Reality of Private Cross-Border Relations: Industry Observations on Cross-Border Insolvency*

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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
 - ISDA response at http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm
- 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)
 - ISDA response: http://www.isda.org/speeches/pdf/EU_CrossBorderCrisisMgmt_ISDAResponse_Mar11.pdf
 - Commission published “overview of results” (5 May 2011): http://ec.europa.eu/internal_market/consultations/docs/2011/crisis_management/consultation_overview_en.pdf
 - 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
 - <http://www.isda.org/speeches/pdf/BCBS-CBRG-ISDA-response.pdf>
- 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
- Contractual Netting Directive (1994) and Financial Collateral Arrangements Directive (2002) dealt with netting but did not set out core principles
- 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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