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Item No. 6 on the agenda: Transactions on transnational and connected capital markets

(a) Principles and Rules on the Netting of Financial Instruments

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Final report of the Study Group on Draft Principles and rules on the netting of financial instruments</i>
<i>Action to be taken</i>	<i>See paragraph 25, below</i>
<i>Mandate</i>	<i>Work Programme 2011-2013</i>
<i>Priority level</i>	<i>High</i>
<i>Status</i>	<i>On target</i>
<i>Related documents</i>	<i>Draft Principles regarding the enforceability of close-out netting provisions (C.D. (91) 5(a) Add. 1); Report on the 90th session (C.D. (90) 18); Report on the progress made concerning the preparation of principles and rules on the netting of financial instruments (C.D. (90) 5(c)); Report on the 89th session (C.D. (89) 17); Proposal for an instrument on the Netting of Financial Instruments (C.D. (89) 7 Add. 2); Report on the 67th session of the General Assembly (UNIDROIT 2010 - A.G. (67) 9 rev.); Report on the 88th session (C.D. (88) 17); Proposal for a Convention on the Netting of Financial Instruments (C.D. (88) 07 Add.1); Report on the 87th session (C.D. (87) 23); Triennial Work Programme 2009-2011 (C.D. (87) 12); Report on the 63rd session of the General Assembly (UNIDROIT 2008 - A.G. (63) 10)</i>

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INTRODUCTION

1. In 2008, the International Swaps and Derivatives Association (ISDA) submitted to the UNIDROIT Secretariat a proposal for a convention on netting of financial instruments, which had found wide support among States and the industry. As a result, the UNIDROIT Governing Council, at its 87th session (Rome, 21-23 April 2008), recommended the subject for inclusion into the UNIDROIT Work Programme for the 2009-2011 triennium (C.D. (87) 23, para. 92-118 and C.D. (87) 12, para. 14). The General Assembly later deferred the inclusion of the subject in the Work Programme at its 63rd session (Rome, 11 December 2008) for two reasons: first, the Geneva Securities Convention should previously be finalised, and second, it preferred to await some more clarity on the financial markets after the upheaval following the bankruptcy of Lehman Brothers in September of that same year. The General Assembly also agreed to reconsider the Work Programme at its next session in the light of any recommendations to that effect that the incoming Governing Council and the Secretary-General may then submit (UNIDROIT 2008 – A.G. (63) 10, paras. 22-31).

2. At its 88th session (Rome, 20-23 April 2009), the Governing Council considered the matter again in the light of the proposal originally submitted by ISDA (C.D. (88) 7 Add.1). Some members raised concerns regarding the proposal, in particular relating to the level of political support for the project and relating to its proposed form and scope. The Governing Council concluded that it was premature to take a definite stand on those issues. The project should remain for inclusion in the UNIDROIT Work Programme but not be taken up yet. The Governing Council rather mandated the Secretariat to consult with Member States to ascertain the level of potential interest and requested a more detailed feasibility study identifying on the one hand the differences in the various legal systems and defining on the other hand the form and scope of the instrument (C.D. (88) 17, paras. 17-39).

3. The Secretariat informed the Governing Council, at its 89th session (Rome, 10-12 May 2010), that its initial soundings had shown interest in developing an international framework for the enforceability of netting arrangements on the part of the EC Commission and the European Central Bank and of banking federations. It further presented a new study by Dr. Philipp Paech (London School of Economics and Political Science) which showed that netting had become even more important in the aftermath of the financial crisis for its role in mitigating systemic risk. The study stressed the need not to underestimate the intricacies of such a project and suggested a two-step approach starting in a first step with a non-binding instrument on the enforceability of netting and on cross-border private law effects of supervisory moratoria (i.e. Principles or a Model Law) which could be complemented, in a second step, by a binding instrument (i.e. an international Convention) on isolated issues relevant to both aspects (C.D. (89) 7 Add. 2, p. 21). The Governing Council took note, with satisfaction, of the likelihood of extra-statutory financial support attributed to the project by the Association of German Banks and confirmed the great practical and economic interests for what it considered to be a highly topical subject in the financial and political climate. It concluded that cooperation with the Hague Conference on Private International Law would be important regarding the private international law aspects of the project. The Governing Council strongly recommended to the General Assembly the inclusion of the project in the Work Programme and the allocation of sufficient resources in order for it to be carried out as a matter of high priority (C.D. (89) 17, para. 101). At its 67th session (Rome, 1 December 2010), the General Assembly approved those recommendations and endorsed the inclusion of the netting project into the 2011-2013 Work Programme as a matter of high priority (A.G. (67) 9 rev., para. 39).

4. In late 2010, the Secretariat set up a Study Group of leading experts who participated in the project in their personal capacity. Additionally, the Secretariat invited a number of international public and private organisations to participate as observers in the process. Professor Stanislaw Soltysinski, member of the UNIDROIT Governing Council, agreed to chair the meetings. The

composition of the Study Group, including observers, allowed the work to benefit from input from all major constituencies and stakeholders, notably national and international supervisory bodies, academia, the legal profession and the financial industry. (C.D. (90) 5(c), para. 1 et seq.). The names and affiliations of the 19 members of the Study Group as well as the list of observers and their representatives are set out in Annex 1.

5. The Study Group held three meetings in Rome: 18-21 April 2011, 13-15 September 2011, and 7-9 February 2012, working on the basis of the documents set out in Annex 2. At its last meeting, the Study group considered that it had substantially concluded its work and agreed to submit a set of draft Principles on close-out netting to the Governing Council of UNIDROIT for further consideration.

I. RATIONALE FOR THE PROPOSED DRAFT PRINCIPLES AND RULES ON THE NETTING OF FINANCIAL INSTRUMENTS

6. Financial institutions and other financial market participants in their daily operations basically apply two types of mechanism designed to reduce their risk exposure. First, they provide to each other security or collateral. In addition, they may agree that close-out netting shall apply to the financial contracts into which they enter with each other. Both mechanisms, security/collateral on the one hand and close-out netting on the other hand, serve the same purpose, that is, to ensure that one party's exposure to the other parties' solvency and to considerable changes in the value of the relevant assets is kept at manageable levels. Both mechanisms are capable of independently mitigating counterparty risk as well as market risk. However, in practice, their functions are intimately linked: where both collateral and netting mechanisms are used cumulatively, netting reduces the exposure in the sense that much less collateral has to be put up. Taken together, security/collateral and close-out netting form the spearhead of risk management in the financial market.

7. The notion of close-out netting is a relatively new addition to the legal terminology and it is not particularly well-defined. Broadly speaking, close-out netting is often understood as resembling the classical concept of set-off applied upon default or insolvency of one of the parties. However, close-out netting encompasses many additional elements and is functionally and conceptually different from traditional set-off. A close-out netting mechanism comes into operation either by a declaration ('close-out') of one party when a pre-defined event happens, in particular default or insolvency of its counterparty ('termination event'), or it is triggered automatically when such an event occurs ('automatic termination'). The mechanism extends to a number, often hundreds, of financial contracts between the parties that are contractually included in a netting agreement.

8. Upon close-out or automatic termination, all covered contracts are terminated and the market value of each is determined under a pre-defined valuation mechanism. The sum value of all contracts is then aggregated, resulting in one single payment obligation ('net amount').¹ The net

¹ Cf. the central clauses two standard master agreements mentioned on p. 6 (capitalised terms are defined terms under the respective agreement):

- 'In the event of a termination pursuant to this Section [...], neither party shall be obliged to make any further payment or delivery under the terminated Transaction(s) which would have become due on or after the Early Termination Date or to provide or return margin or collateral which would otherwise be required to be provided or returned under the Agreement and related to the terminated Transaction(s). These obligations shall be replaced by an obligation of either party to pay the Final Settlement Amount in accordance with Section [...].' (European Master Agreement, section 6(4));
- 'Upon [close-out], no further payments or deliveries [...] in respect of the Terminated Transactions will be required to be made [...]. The amount, if any, payable in respect of an Early Termination Date will be determined pursuant [...].' (ISDA Master Agreement, section 6(c)).

amount remains the only obligation to be settled and is generally due immediately after being determined.

9. Close-out netting arrangements are widely used in the financial market by private sector entities, in particular banks, but also private non-financial institutions. In the public sector, entities such as, especially, central banks and supranational financial institutions such as development banks make use of netting arrangements. Close-out netting is typically applied to transactions such as derivatives, repurchase and securities lending agreements, and other kinds of financial transaction that tend to carry a high counterparty and/or market risk.

10. Regulatory authorities (most recently, the Financial Stability Board (FSB) and the Cross-border Bank Resolution Group of the Basel Committee on Banking Supervision) strongly encourage the use of close-out netting arrangements (alongside collateral) because of their beneficial effects on the stability of the financial system.

11. However, these beneficial effects are particularly palpable in the event of the insolvency of a counterparty. In that case, the use of close-out netting assumes that the legal effects stipulated to that end by the parties (the close-out netting provision) will be recognised by and be enforceable under the applicable insolvency law. Globally, however, the current status quo is that while many jurisdictions² recognise netting in insolvency, the extent to which they do so and the scope and legal effects differ. Other jurisdictions do not clearly recognise netting, and the legal practice in such jurisdictions often resorts to the principles governing set-off, failing to recognise the fundamental differences between the two mechanisms. This global 'patchwork' is unsatisfactory in cross-jurisdictional situations, since it exposes the financial market participants' risk management to unnecessary legal uncertainty and may even jeopardise it.³

12. An additional aspect of the enforceability of netting agreements has come to the fore since the beginning of the recent financial crisis: regulatory authorities, while underlining the usefulness of netting, have contemplated the need for a brief stay on the netting mechanism in pre-insolvency or insolvency situations affecting a financial institution, so as to allow the regulator the time needed to decide if and how to save an ailing entity for reasons of systemic stability. The Financial Stability Board has recently provided guidance as to how the regulatory interest should be reconciled with financial firms' and its regulators' needs to rely on the enforceability of close-out netting for risk management and mitigation purposes.

13. The emerging international regulatory consensus regarding the interplay between close-out netting and bank resolution is set out in the FSB report on bank resolution.⁴ However, this newly developing regulatory approach has to deal with a patchwork where the relevant legal mechanisms in which close-out netting is embedded are not compatible or comparable across borders. Therefore, the sensitive connection of regulatory measures such as a stay on termination, on the one hand, or portfolio transfers to the essential insolvency and commercial law framework, on the other hand, might fail in certain cases. Notably, stays on close-out netting in bank resolution procedures risk being ineffective in other jurisdictions and the cross-border transfer of portfolios of

² According to a list regularly updated by the International Swaps and Derivatives Association (ISDA), the following jurisdictions have accommodated close-out netting in their law: Andorra, Anguilla, Australia, Austria, Belgium, Brazil, British Virgin Islands, Canada, Colombia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Mauritius, Mexico, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, United Kingdom and the United States. According to the same list, netting-friendly legislation is under consideration in the following jurisdictions: Argentina, Chile, Pakistan and Seychelles. Source: http://www.isda.org/docproj/stat_of_net_leg.html.

³ Cf. for a detailed analysis Document 2, 1st Part, in particular pp. 32 *et seq.*

⁴ Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, October 2011, section 4, in particular section 4.3.

financial contracts covered by close-out netting agreements might subsequently turn out to be flawed. This situation calls for a more harmonised and streamlined framework regarding close-out netting on which market participants and regulatory can rely across all financial markets.⁵

14. First steps have already been taken towards an international consensus on the principles underlying the legal cornerstones regarding enforceability of close-out netting agreements. The Geneva Securities Convention sets out an optional framework for the protection of collateral transactions. This protection extends to netting agreements provided they are concluded as part of a collateral transaction. The Convention therefore contains a definition of close-out netting and a key rule on enforceability.⁶

15. Furthermore, netting has also been recognised in the work of UNCITRAL on cross-border insolvency. Notably, the Legislative Guide on Insolvency Law refers to the enforceability of netting as a feature to be considered when designing insolvency law, and advises that netting of financial contracts should be allowed under the applicable insolvency procedure.⁷

16. The text proposed by the Study Group shall provide detailed guidance on how greater legal certainty in respect of close-out netting can be achieved.

II. OVERVIEW OF PROPOSED SOLUTION

17. The Study Group has taken a drafting approach which is comprehensive, functional and principles-based.

A. Comprehensive approach⁸

18. First, the Study Group felt that the Principles should address all potential obstacles to the enforceability of close-out netting provisions. These obstacles were the following:

(a) *Different domestic approaches to the understanding of the nature of close-out netting.* This issue is now addressed in Principle 1 – Definition of ‘Close-out netting’. The principle and accompanying commentary address, amongst other things, (i) the difference between statutory set-off and close-out netting, (ii) the issue of mutuality and close-out netting in a multilateral environment, and, (iii) the functionality of the mechanism under which the ‘net’ amount is calculated and how it can be achieved using different legal concepts;

(b) *Different understanding regarding parties eligible for close-out netting.* This issue is now addressed in Principle 2 – Definition of ‘eligible party’. The accompanying commentary explains domestic law uses to restrict the scope of close-out netting by either restricting it to certain types of parties, or restricting it to certain types of financial contract, or employing a combination of both. Further, the commentary explains why, with a view to international compatibility, it is more stringent to use the type of financial contract as the main trigger for restricting the scope, which in turn entails opening the list of eligible parties to all types of parties except ‘consumers’;

⁵ Cf. for a detailed analysis Study 78C Doc. 2, 2nd Part, in particular pp. 68 *et seq.*

⁶ UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted in Geneva on 9 October 2009; in particular Article 31(3)(j) and Article 32(3).

⁷ UNCITRAL, Legislative Guide on Insolvency, 2005, Recommendations 7(g) and 101-107.

⁸ More detailed explanation on the role of and solution provided by each of the draft Principles can be found in the current draft text (*cf.* C.D. (91) 5(a) Add. 1).

(c) *Different understanding regarding financial contracts eligible for netting.* This issue is now addressed in draft Principle 3 – Definition of ‘eligible financial contract’. In light of the wide definition of eligible parties, the Study Group is proposing a list of eligible contracts clearly confined to financial markets and commodities markets. Notably, the list covers derivative instruments, repurchase agreements, securities lending agreements, title-transfer collateral and contracts for the sale or purchase of securities, currency, precious metals, commodities, etc. The Study Group decided not to include loans and deposits as eligible contracts as this would have widened the scope in a way which is highly controversial amongst regulators;

(d) *Different formal requirements applied to close-out netting provisions.* A number of different cases arise in this context. These are addressed in draft Principles 4-6 on formal requirements for close-out netting provisions. First, the Study Group considered that requirements for notarisation or registration of close-out netting agreements would be contrary to cross-border legal certainty. It therefore settled on writing as the maximum to be set by legislators, which is also the rule applicable in the EU. Further, the Study Group felt that the law should not require the use of standard market documentation such as, for example, the ISDA Master agreement. Standard market documentation is regularly designed in such a way as to allow for modifications agreed upon by the parties. It is unclear whether modified documentation would still pass the requirement of being ‘standard documentation’. Lastly, the Study Group considered it needed to be made clear that failure to comply with requirements to report financial transactions to a supervisory database (trade repository) must not give rise to questions regarding the enforceability of close-out netting;

(e) *Different levels of protecting the enforceability of close-out netting.* This issue is now addressed in draft Principle 7 – Enforceability of close-out netting. This is the core principle of the set. It is a complex principle, too, as both situations, pre- and post-opening of an insolvency proceeding, must be covered. Some typical dangers to enforceability occur in both scenarios, while others occur only with the opening of the insolvency proceeding. First, the principle will help to abolish rules requiring prior court authorisation or similar clearance before close-out netting can take place. Second, the principle makes clear that the ‘bad-apple doctrine’ should not apply, i.e., unenforceable or ineligible contracts which are covered by the netting provision should not ‘spoil’ close-out netting in respect of all the other contracts. Lastly, the principle addresses a number of typical tools of insolvency law, like ‘cherry picking’, stays and avoidance by the insolvency administrator. These tools should not apply in relation to close-out netting. However, it is worth stressing that rules on avoidance for fraud, misrepresentation, etc. are not affected by this principle and should continue to apply.

19. The Study Group, at its last session, decided to include an additional principle (draft Principle 8 on the interaction with resolution regimes). The inclusion of such a principle was felt necessary in order to make clear that the future UNIDROIT Principles are designed to support, and be complementary to, the set of regulatory measures for effective resolution of financial institutions which are currently being developed by the FSB and the entire supervisory/regulatory community. This Principle, therefore, will not provide for additional substance on the question but rather explain the potential interaction between the future principles and the emerging global resolution framework.

B. Functional approach

20. At present, the domestic law of financial markets employs different legal techniques with a view to guaranteeing the enforceability of close-out netting provisions. Some declare contractual close-out netting provisions enforceable even in the event of the insolvency of one of the parties. The insolvency statutes of other jurisdictions mandate a process of offsetting or compensating financial contracts between the solvent and the insolvent party that yields the same effect as that

achieved under a contractual close-out netting provision ('statutory insolvency set-off'). Both models, as well as a combination of both, are in principle capable of achieving legal certainty regarding the enforceability of close-out netting. Further, domestic laws employ various techniques to achieve the result of 'paying only the "net" amount'. Notably, varying combinations of the concepts of termination of contracts, acceleration of contracts or settlement, contractual or statutory set-off, and 'novation' are used.

21. The Study Group felt it unnecessary to embark on harmonising the legal concepts under which enforceability of close-out netting is achieved. This is not only because conceptual harmonisation is generally much more challenging in technical and political terms, it is also unnecessary. The aim of the draft Principles is to foster the enforceability of close-out netting provisions in respect of certain types of contract concluded between certain types of parties. It appears possible to achieve this aim under any of the various legal concepts used in the various jurisdictions. Therefore, functionality will be the most efficient approach to achieve the aims of this project.

C. Soft law approach

22. The Study Group drafted the rules it is proposing in the form of principles, accompanied by a detailed commentary. It was felt that recommending the development of principles was more appropriate than recommending the creation of a binding instrument, even though a functional approach to the drafting would have been conceivable under either type of instrument. The Study Group, in its deliberations on this topic, was led by considerations of timing and impact.

23. First, as regards timing, the Study Group felt that it would be crucial to make the future Principles available as an international benchmark in the very near future. Financial markets around the globe will start assessing their netting laws as a follow-up to the standards for resolution of financial institutions issued by the Financial Stability Board. The development of a binding instrument, by its nature, would probably take too long.

24. Second, the Study Group is convinced that the instrument will achieve greater impact, apart from the aspect of timing and speed, in the form of principles than it could in the form of binding rules. Chiefly, this perception is due to the fact that the negotiation of a binding instrument generally entails the inclusion of a number of exemptions in the text, or more generally, there is considerable potential for the content being watered down in the course of governmental negotiations. A diluted and fragmented text would, however, be incompatible with the aim of seeing the Principles becoming an international 'benchmark' or 'best practice' document, used by legislators, regulators and market participants alike to assess the legal framework regarding close-out netting.

ACTION TO BE TAKEN

25. *The Secretariat would invite the Council to take note of the progress made by the Study Group and to endorse the proposal for convening a Committee of governmental experts to consider and finalise the Draft Principles.*

Annex 1**LIST OF PARTICIPANTS**

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Annex 2**LIST OF WORKING PAPERS***Documents prepared for the first meeting of the Study Group (18-21 April 2011)*

- Doc. 1:
Preliminary draft agenda - March 2011
- Doc. 2:
Preliminary draft Report on the need for an international instrument on the enforceability of close-out netting in general and in the context of bank resolution, prepared by Philipp Paech, London School of Economics and Political Science - March 2011
- Doc. 3:
A first tentative structure for Principles regarding the enforceability of netting agreements, prepared by Philipp Paech, London School of Economics - April 2011
- Doc. 4:
Report on the first meeting - July 2011

Documents prepared for the second meeting of the Study Group (13-15 September 2011)

- Doc. 5:
Annotated draft agenda - July 2011
- Doc. 6:
Revised Preliminary Draft of Principles regarding the enforceability of Close-out Netting Agreements - August 2011
- Doc. 7:
Overview Payment, Clearing and Settlement Systems - September 2011
- Doc. 8:
ISDA Note on eligible financial contracts - September 2011
- Doc. 9:
Report on the second meeting - December 2011

Documents prepared for the third meeting of the Study Group (7-9 February 2012)

- Doc. 10:
Annotated draft agenda - January 2012
- Doc. 11:
Preliminary Draft of Principles regarding the enforceability of Close-out Netting Agreements prepared by Philipp Paech, London School of Economics and Political Science - January 2012
- Doc. 12:
Report of the third meeting - February 2012