

Common Legislative Issues

Conference on Netting of OTC
Financial Contracts in Latin America
and the Caribbean

November 10, 2000

Common Legislative Issues

- Foundational Issues
- Bankruptcy Avoidance Issues
- Multibranch Netting Issues
- Collateral Issues
- Miscellaneous Issues
- Model Netting Act

Foundational Issues

- Conflict of Law Rules
- Finality of Payments
- Basis of Netting
- Scope of Covered Entities
- Scope of Covered Transactions

Conflict of Law Rules

- Need to adopt rules recognizing the enforceability of choice of law of parties to a netting contract.
- This issue is also important in the multibranch netting context, noted subsequently.

Finality of Payments

- This issue is sometimes overlooked, but it is important to consider when a payment is final in the currency of the country adopting the netting legislation.

Basis of Netting

- Is a written agreement required?
- Is an oral agreement enforceable?
- Set-off vs. netting?

Scope of Covered Entities

- Financial institutions only?
- Professional counterparties?
- Insurance companies?
- Corporates?
- Funds?
- Supranationals?
- Individuals?

Scope of Covered Transactions

- Perhaps the most important issue.
- Enumeration of types of contracts?
- Netting of all “payments”?
- Coverage of “spot” transactions.
- Equity/Credit/Exotic Derivatives
- Cross-product?

Bankruptcy Avoidance Issues

- “Preferences.”
- Fraudulent conveyances (actual vs. “constructive”).
- Stays.
- Cherry-picking.
- Optional vs. automatic termination.

Multibranch Netting Issues

- Treatment of onshore entities with global operations and offshore branches or offices.
- Treatment of foreign branches and offices of offshore entities.
- Model Netting Act Part II.

Collateral Issues

- It is necessary to make clear how collateral will be treated.
- Enforceability of collateral onshore.
- Choice of law for offshore collateral.
- Bankruptcy avoidance issues.

Miscellaneous Issues

- Enforceability of confirmations.
- Electronic communications as evidence of contract.
- Gambling or “gaming” laws.
- Attachment.

Model Netting Act

- Promulgated by ISDA.
- Useful as a basis for beginning to think about legislation.