MEMORANDUM

DATE: *October 18, 2016*
TO: *International Swaps and Derivatives Association, Inc.*
ATTN.: *Katherine Tew Darras*
RE.: *ISDA - Uruguay*

I. Query

Following please find our answers to your questions in regard to "over-the-counter" ("OTC") derivatives transactions the ISDA Master Agreement and, including among others the following issues: enforceability, close out netting and set off, collaterals, choice of law problems in our jurisdiction. Unless otherwise indicated, our answers are the same regarding the 1992 and 2002 versions of the ISDA Master Agreement. Capitalized terms used but not defined herein have the same meaning as in the ISDA Master Agreement.

II. Answer

1. Introductory remarks

As a general comment, it is important to bear in mind that transactions with OTC derivatives are still uncommon in the Uruguayan market. As a consequence, there are no special laws or regulations dealing with derivatives nor are there any cases or precedents nor legal doctrine on the matter. This is, hence, a warning that our opinions are based exclusively on our interpretations of the law and its major principles (such as the principle of freedom to enter into any transactions to the extent not forbidden by the law). Moreover, please take note also that the legal framework to which this questionnaire refers is unclear and constitutes a gray area on certain issues (master agreements, specific transactions within such framework, master security agreements, choice of law problems in Uruguay, termination provisions, set-off, close-out netting, etc.)

2. Initial Questions

1) Do OTC derivatives transactions face an enforceability problem (e.g. due to anti-wagering provisions etc under local law)?

OTC derivative transactions will not face enforceability problems provided that certain circumstances are met. Under Uruguayan law, corporations have the ability to enter into Derivative Transactions (governed by the ISDA Master Agreement), provided that such transactions are reasonably related to

the purpose of the relevant Uruguayan entity (for example, that the Derivative Transaction is entered into for hedging purposes). Certain entities, such as banks, may enter into Derivative Transactions freely since these transactions fall within the purpose and business they carry out.

2) Are there any issues with foreign law governed contracts (mainly English and New York law) when used for cross-border transactions into your jurisdiction? For example, some countries may restrict the use of foreign law and language documents when it comes to contracting with local public law or state entities.

Under Uruguayan conflict of law rules the parties to an agreement are not allowed to choose the applicable law to the relevant agreement. On the contrary, the applicable law shall be determined by the application of the Uruguayan conflict of law rules. A choice of law will be considered valid and upheld by an Uruguayan Court, only if the law determined to be applicable pursuant to Uruguayan conflict of law rules allows such choice of law.

A choice of New York or UK would only be valid if: **(a)** such is the applicable law determined by applying Uruguayan conflict of law rules; or **(b)** the applicable law determined by applying Uruguayan conflict of law rules allows for such choice of law.

3) Are there provisions (of a statutory, customary, common law, etc. nature) in local law that provide for the enforceability of close-out netting? Is close-out netting defined in addition to set-off under local law? Does local law allow netting in accordance with the terms of the underlying contract (e.g. the ISDA Master Agreement)?

Close-out netting provisions are generally enforceable against any Uruguayan Corporation under the laws of Uruguay provided that they are stipulated in the ISDA Master Agreement. However, in the case of a bankruptcy situation, the following applies.

Bankruptcy Act 18.387 (the "**Bankruptcy Act**") provides in Section 65 that once the bankruptcy has been declared by court no set off is feasible in relation to credits not due before the declaration's date.

Given that set off is permitted before the bankruptcy is judicially declared, theoretically a solution for the "netting issue" could consist in introducing "*Automatic Early Termination*" (AET) clauses within an agreement so that all outstanding obligations shall become immediately due before the bankruptcy has been declared and set off takes place prior to the bankruptcy's declaration (this alternative is suitable specially for situations where the event that triggers automatic early termination occurs prior to the declaration of bankruptcy, for example the mere filing of bankruptcy).

Further, Section 68, paragraph 5 of the Bankruptcy Act (under the chapter named "Effects on Contracts") provides that contractual provisions that declare automatically terminated an agreement or enable any party to terminate the agreement in case of insolvency or declaration of bankruptcy shall be null and void.

However, such regulation would be only applicable if the agreement were such AET is stipulated is to be governed by Uruguayan law. It should be noted that the Bankruptcy Act provides that the provisions

in such law (as is the case for Section 68.5) do not apply to agreements that are governed by a foreign law, whereby in such agreements it will be the governing law to these that will determine if AET clauses within the prior bankruptcy period are valid or not. Therefore, we understand that if an agreement with an AET linked to bankruptcy declaration is governed by a law that validates such clauses, then the AET clause shall be applicable. This reasoning is based on Section 241 of the Bankruptcy Act.

Consequently, a Uruguayan court (if the agreement were to be governed by Uruguayan law) in charge of the Uruguayan counterparty's bankruptcy could, supported by section 68 of the Bankruptcy Act, challenge the validity of any set off performed outside Uruguay pursuant to AET clauses within the Agreement. In any event even in such case, if the set off was performed abroad, the relevance of the prior effect would depend on whether a New York or English court would actually enforce said decision originating from a Uruguayan court.

4) In case there are netting provisions under local law, do they apply to all types of counterparties, e.g. financial institutions, corporations (commodity trading firms, utilities, manufacturers, etc), SPVs, public law entities (municipalities, central bank, development banks, etc)?

With respect to corporations and SPVs[1] please refer to our answer to question 3 above.

Regarding public law entities, please bear in mind that none of the national and local Governments, national and local Government Agencies and Authorities, including the Central Bank of Uruguay, state-owned commercial companies and banks, or any of their respective properties has any immunity (i) from jurisdiction of any court, (ii) from set-off or any legal process in the courts of Uruguay other than attachment prior to judgment and attachment in aid of execution or (iii) from set-off or any legal process in any court other than a court of Uruguay (whether through service or notice, attachment prior to judgment, attachment in aid of execution or otherwise). Additionally, public law entities are not subject to the Bankruptcy Act. Consequently, section 68 of the Bankruptcy Act does not apply.

If counterparties to the ISDA Master Agreement are banks or financial entities supervised by the Central Bank of Uruguay there is a specific procedure applicable to banks' liquidation or bankruptcy which is regulated by Act 18.401 as of 2008 (hereinafter the "**Banks' Act**"). Pursuant to the Banks' Act, the Central Bank of Uruguay is vested with the authority to decide on the restructuring procedure that the bank shall have to undertake or to declare the liquidation of the insolvent bank, being the Corporation for Banks Savings Protection ("*Corporación de Protección del Ahorro Bancario*") the entity that will decide and also will be in charge of the potential liquidation.

The specific procedure applicable to banks could disrupt close-out netting provisions due to the fact that the Corporation for Banks Savings Protection may decide to create a fund to which the assets

[1]Please take into account that "Special Purpose Vehicles" are usually incorporated as corporations, trusts or limited liability companies.

and liabilities of the insolvent banks are contributed, and under this “fund” structure, set off or netting provisions may not apply.

Furthermore, the Banks’ Act provides that the suspension of activities (resolved by the Central Bank of Uruguay) shall imply the automatic suspension of the creditors’ right to claim payment from the suspended entity, while such suspension of activities is in force. Please note that the suspension of activities may (although not necessarily) be followed by the liquidation of the bank, being in this case the “fund” structure a possibility. In our opinion, it could be argued that this provision should not affect agreements that are validly governed by a foreign law and therefore, the automatic suspension of a creditor’s right should not be applicable. However this is a grey area for which there are no precedents to guide our conclusions.

5) Is the scope of transactions eligible restricted in any way, e.g. to certain products (rates, currencies, equities, credit etc). What about commodity products (gas, coal, oil, metals, agricultural, ***etc) and "new" products (emissions allowances, freight rates, weather*** **variables etc)? Is there a different treatment for financially settled transactions as opposed to physically settled ones (i.e. where the underlying product is delivered)?**

No.

6) Are financial collateral arrangements governed by foreign law recognized under local law? In particular, would title transfer and security interest arrangements (under English and NY law) be enforceable (e.g. ISDA credit support documentation)?

Under Uruguayan conflict of law rules, the law where the collateral is located at the time of execution of the pertinent agreement will govern the validity and perfection of the security interest created over such collateral.

Consequently, in order to ensure the validity and enforceability of the choice of law clause in the security interest agreement, no collateral should be held in Uruguay nor be issued (in case of securities) by Uruguayan issuers (in the latter case, to avoid the risk of a security issued by a Uruguayan issuer to be deemed located in Uruguay). Please bear in mind that it is not clear in the case of securities (shares or bonds), whether they are deemed to be located in the country where they exist at the time of the creation of a security interest, should they be in a certificated form, or in the country of the issuer. Notwithstanding such debate, the most reputed scholars stress that such valuables are regarded located at the domicile of the company that has issued these valuables.

Uruguayan courts would recognise the validity and enforceability of a security interest agreement or title transfer, provided that these agreements are governed by New York law and English law and the choice of New York and English law, respectively, is a valid choice of law under such New York law or English law.

In this case, the law of the jurisdiction in which a collateral is located applies and shall govern to all questions relating to the formalities and other requirements pertaining to the creation, perfection, recognition and enforcement of the secured party’s rights, title or interests in such collateral.

In all cases, the courts of Uruguay would recognise the validity of a security interest or title transfer created under the agreement, provided that they recognise the choice of NY or English law is a valid choice of law. Were they to determine such choice of law invalid, they would apply Uruguayan law to such security interest to verify whether it has been correctly perfected.

7) Any other issues under local law (e.g. conflict of law rules; jurisdiction issues (eg arbitration recommended)?

In reference to conflict of law rules and jurisdictional issues, please refer to our answers to questions 2 and 6.

In regard to arbitration, and as we already mentioned above, Uruguayan courts will enforce a judgment of a foreign court as well as an arbitration award provided that such judgment or award is ratified by the Uruguayan Supreme Court (by means of the "exequatur" procedure).

The exequatur proceedings, even though the issue is debatable, also apply to arbitration awards, except where an applicable treaty provides otherwise. Therefore we do not specially recommend arbitration since an arbitral award would not be speedier than a judgment of a foreign court. An arbitration award rendered in the United Kingdom or in the United States would have to go through an exequatur proceeding before the Uruguayan Supreme Court of Justice.

An Uruguayan court will enforce a claim in any foreign currency without converting such foreign currency into local currency.

Foreign judgments may be enforced by Uruguayan courts provided that certain requirements and formalities are met. The requirements for a foreign judgment to be enforceable in Uruguay call for an "*exequatur*" decision of the Supreme Court of Justice of Uruguay deciding that the foreign judgment may be enforced in Uruguay.

After such decision, the judgment creditor may seek enforcement thereof by filing a summary action in a lower jurisdictional court. The "exequatur" decision to be granted by the Supreme Court can be rendered after a procedure in which both parties, and the District Attorney, can present their arguments. This does not mean a re-litigation, but a procedure whereby evidence must be given that: (a) the foreign judgment is not contrary to principles of international public order of Uruguay; (b) the defendant must have been informed of the claim brought against him and must have had a reasonable time to prepare his defense and produce his arguments; (c) the foreign judgment must have been rendered by a court of competent jurisdiction (please note that Uruguayan courts will not review the merits of foreign judgments but will scrutinize the rendition forum's jurisdiction) and (d) the foreign judgment should no longer be subject to ordinary means of appeal according to the law of the country in which the judgment was rendered ("*res judicata*").

Also related to the aforementioned substantive requisites the judgment creditor must produce: (i) a complete copy of the foreign judgment; (ii) documentary evidence that the defendant was served with the claim and all pertinent writs according to the due process of law in the foreign jurisdiction; (iii) the

defendant has had "his day in Court" that is, he has been granted with all the rights to defend himself before Court; (iv) an authenticated and legalized or apostilled (as applicable) copy of the order which declares that the original judgment is final ("*res judicata*") and (v) authenticated and legalized or apostilled (as applicable) copies of the legal regulations upon which such order is based.

For further information and advice on the application of the laws of Uruguay to OTC derivatives transactions as well as enforceability of ISDA Master Agreement, please contact:

Nicolás Herrera (nherrerea@guyer.com.uy), Tel: (00598) 2902 1515, ext.120

Nicolás Piaggio (npiaggio@guyer.com.uy), Tel: (00598) 2902 1515, ext. 107

Alejandro Miller (amiller@guyer.com.uy), Tel: (00598) 2902 1515, ext. 128

Carolina Herrera (cherrera@guyer.com.uy), Tel: (00598) 2902 1515, ext. 343