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Re: International Swaps and Derivatives Association, Inc. (ISDA) Issues for New Jurisdictions

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

It is important to mention that OTC derivatives transactions are not very common in Honduras. Notwithstanding, the Stock Market Law includes on its article 6 numeral 26), the definition of derivatives as follows: “Are securities whose value is derived from some underlying asset such as currencies, capital assets or some other indicator such as the interest rate or stock market index amongst others.”

Additionally, the Stock Market Public Registry Regulations include the obligation of registration of derivatives: “Any contract, financial instrument or derivative and any other right of economic or patrimonial content, incorporated or not in a document, cannot be object of public offer, until it is authorized by the Commission and recorded in the corresponding Registry. Natural and legal persons may not operate in the securities market, if they are not previously authorized and registered.”

Considering there are Laws that in general contain a definition/disposition regarding derivatives, and despite the fact that there is no other specific laws or regulations that contain dispositions regarding OTC derivatives transactions, we are of the opinion that derivatives would not face an enforceability problem if no local dispositions are breached.

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.

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Taking into consideration the local legal dispositions particularly the contractual freedom granted to the parties, we are of the opinion that foreign law governed contracts are not opposed to local law. In any proceedings taken in Honduras for its enforcement, the choice of English, New York or any other foreign law as the governing law for the contracts will be recognized and given effect to, and the submission to foreign courts is valid and binding. Any final and conclusive judgment against the Honduran Entities in foreign courts would be deemed valid and enforceable in Honduras without the courts of Honduras reopening the case; provided that, the following requirements are met:

(a) the judgment has the status of “res judicata” and has been issued by a competent court, as defined in the jurisdiction of the court rendering such judgment;

(b) the Borrower was served in accordance with the laws of the place where the proceeding took place, was afforded the right of defense and was given notice of the resolution for which enforcement is being requested;

(c) the judgment complies with all formalities required for the enforceability thereof under the laws of the country of issuance and in Honduras;

(d) the judgment is not against Honduran public policy and the obligation provided under the judgment is lawful in Honduras;

(e) the judgment is not incompatible with another enforceable judgment in Honduras unless such foreign judgment was rendered first; and

(f) the judgment has been translated into Spanish, together with related documents, and satisfies the authentication requirements of Honduras.

For the party obtaining such foreign final judgment to be entitled to enforce such judgment, an exequatur proceeding for the recognition and enforcement of a foreign final judgment under Honduran law must be followed; provided, that powers of attorney in accordance with Honduran law have been granted by the party intending to enforce such judgment to its litigation attorney in Honduras.

Foreign law documents can be freely subscribed by natural persons, private companies including regulated companies such as financial institutions in general, hedge funds as well as public institutions, however, if necessary to execute the document through a Honduran court, a legal translation would be required and the Spanish translation will prevail in courts.

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 (eg the ISDA Master Agreement)?

The Civil Code contains netting provisions and particularly establishes on its article 1421 “netting” as one of the methods through which an obligation can be extinguished. Taking into consideration the aforementioned dispositions, we can confirm that netting provisions are enforceable under Honduran law, and the right to setoff is valid in the following cases:

- (i) That both debtors are main obligor under the debt obligations to be offset.
- (ii) Debt consists on a monetary amount and if not, they are of the same nature.
- (iii) Both debt obligations must be due, liquid and enforceable.
- (iv) There cannot be a dispute or retention claim against the credit obligations promoted by a third party that has been duly notified to the debtor therein.

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

The Civil Code contains the general netting provisions and does not limit the provisions to a specific person. In this regard, and taking in consideration parties have contractual freedom to agree upon their best interests, it is our opinion that netting provisions apply to all types of counterparties.

5. Is the scope of transactions eligible restricted in any way, eg 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 (ie where the underlying product is delivered)?

No, eligible transactions are no limited to certain products. The applicable laws do not contain specific dispositions regarding the scope of the transactions or its eligibility, in this regard, and taking into consideration the general principle “everything which is not forbidden is allowed”, we can conclude that eligible transactions are not limited to certain products.

6. Are financial collateral arrangements governed by foreign law recognized under local law? Would title transfer and security interest arrangements (under English and NY law) be enforceable (eg ISDA credit support documentation)?

Financial Collateral arrangements governed by foreign law are recognized under local law taking in consideration the contractual freedom granted to the parties to agree upon the clauses they deem convenient. However, depending on the type of collateral granted, it might be necessary to prepare a document governed by Honduran laws and recorded on the corresponding registries.

For example, if a collateral is a movable asset owned by a Honduran individual/entity, it must be recorded at the Movable Security Registry Office of Honduras to create a perfected security interest that grants preference with respect to other third party creditors of the party creating the collateral.

If the collateral is given over real state, in order for it to be valid and subject to execution, it must be granted in a public Instrument before a Honduran Notary and recorded in the corresponding registry.

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

As above mentioned, in any proceedings taken in Honduras for its enforcement, the choice of English, New York or any other foreign law as the governing law for the contracts will be recognized and given effect to, and the submission to foreign courts is valid and binding.

If a collateral guarantee is located in Honduras, we would then suggest local arbitration considering the execution process would be faster since local courts conduct extremely lengthy procedures that may take years in order to obtain a ruling.

General Comments

It is our understanding that the Honduran Central Bank together with the Banks and Insurance Commission is working on modifications to the Stock Market Law that include new dispositions regarding derivate transaction, to equate this law to international practices. We cannot estimate the time frame in which the modifications could be approved and entered in force but probably it will be sometime in 2018.

Our opinions herein set forth are based on our interpretation of current Honduran law, its regulations, relevant public administrative resolutions and/or judicial resolutions issued by Governmental Authorities, which are available to the public (or of which we were otherwise aware) and were valid as of the date of this opinion.

Legislation in general as well as the interpretations or resolutions that support this opinion may be amended or changed at any time by Governmental Authorities. We assume no responsibility to update our opinions to reflect any such changes.



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