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Scott O'Malia
Katherine Darras
Peter Werner
ISDA

Re : French Ordinance no. 2020-306 of March 25, 2020 on extension of time limits during the state of public health emergency and adaptation of procedures

Dear Katherine, Scott and Peter-

I hope you are all doing well in those challenging times.

As you might have seen, 25 Ordinances taken by the French Government pursuant to a Parliament habilitation given earlier this week, have been published this morning for immediate effect.

The Government is taking a series of measures aiming at sustaining business and maintaining liquidity during the Covid-19 mandatory lockdown.

One of these Ordinances is relating to “extension of time limits and adaptation of judicial and administrative proceedings”. Among various provisions, this Ordinance provides in its Article 4 for a general moratorium that is likely to impact a broad range of contracts. A free non-binding English translation of Article 4 of the Ordinance could be:

“Any judicial or contractual penalties, any penalty clauses, any termination or acceleration provisions, which purpose is to sanction a default in performing any obligation within a specified period of time, shall be deemed not starting nor taking effect, as the case may be, if such period has expired as between [March 12, 2020] and one month after the expiry of the state of public health emergency [i.e. up to June 12, 2020, as the current scheduled date for the end of the emergency is May 12]. Such penalties shall only take effect as from such date if and only the relevant debtor has still not performed its obligation by then.”

The most important thing however to note for the derivatives industry is that **1/ financial obligations resulting from netting agreements and related collateral arrangements covered by the French netting and collateral safe harbors***, and **2/ transactions of systems of the EU Finality Directive, are excluded from the scope of the law.**

Contracts and transactions safe harbored from the moratorium would typically cover all netting agreements for derivatives, repos or securities lending. A definition which obviously includes all ISDA Master Agreements and all ISDA Credit Support Documents, whatever their governing laws.

A free non-binding English translation of Article 1. 4°) of the Ordinance could be:

“The provisions of this Title shall not apply to financial obligations and related collateral arrangement mentioned in Articles L.211-36 et seq. of the Monetary and financial code”

* For more detail on the exact scope of the French netting and collateral safe harbors, please refer to Jones Day most recent ISDA opinions in respect of French law. We would just remind here briefly, and without this being a substitute to the more detailed analysis therein, that such safe harbors should in principle cover every transactions listed in Annex A of your standard instruction letter to counsels, *i.e.* most OTC derivatives products, transactions on financial instruments, spot FX, spot bullions, spot allowances, and cash or physically settled commodity derivatives (provided that when physically settled, they are subject to regular margin calls).

For all in-scope transactions and agreements, we believe that the moratorium does not:

- affect the enforceability of any other contractual time limits or delays (*i.e.* limits or delays not directly linked to the sanction of a default);
- prevent termination or close-out in case of serious or wilful misconduct;
- restrict enforcement of collateral, if permitted prior to a close-out ; and
- remedy contractual conditions precedent to drawdowns under committed facilities.

Hope this is helpful.

Warmest regards,

