

EFMLG Symposium on Standard Market Documentation

**'Bankruptcy' and 'Act of Insolvency'
A Need For Harmonization In Light Of
New Legislation On Bankruptcy
Procedures?**

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Topics

- Synoptical Charta
- Issues
- Practical Ambiguities
- Observations & Recommendations

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000/2009
I. Dissolution	Yes (other than pursuant to a consolidation, amalgamation, merger)	Yes or has a resolution passed for its dissolution (other than in either case, pursuant to a Corporate Restructuring resulting in a solvent Successor Entity)	Yes "seeking any dissolution"	Yes "seeking any dissolution"
	Sec. 5 (a)(vii)(I)	Sec. 6 (I)(a)(viii)(I)	Para. 2. (a) (iv)(3rd HS)	1992: Para. 1.1.(d)(3rd HS) 2000: Para 2.1.(iv)(3rd HS) 2009: Para. 2.1.1.(d)(3rd HS)

	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000/2009
2. Non-Payment				
a) unable to pay its debts as they become due	Yes	Yes	No	No
b) fails generally to pay....	Yes	No	No	No
c) admitting in writing its inability to pay its debts as they become due	Yes	No	Yes	Yes
	Sec. 5 (a)(vii)(2)	Sec. 6 (1)(a)(viii)(8)	Para. 2 (a)(ii)	1995: Para. 1.1.(b) 2000: Para. 2.1.(ii) 2009: Para. 2.1.1.(b)

	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000/2009
3. Petition for bankruptcy, winding-up or insolvency	Yes	Yes	Yes	Yes
Initiated by	<p>1992: the party, any Credit Support Provider of such party or any applicable Specified Entities of such party,</p> <p>2002: + (a) by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organization or the jurisdiction of its head or home</p> <p>or</p> <p>(b) a person or entity not described in clause (A)</p>	<p>(a) the party</p> <p>(b) a governmental or juridical authority or self-regulatory organization having jurisdiction of the Party in a Specified Jurisdiction ("Competent Authority)</p> <p>(c) a person, other than a Competent Authority</p>	<p>anyone, apart from the counterparty to this Agreement in respect of any obligation under this Agreement</p>	<p>anyone, apart from the counterparty to this Agreement in respect of any obligation under this Agreement</p>

	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000/2009
Procedure	<p>1992: the petition, instituted or presented against it, (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation, or (B)...(next slide)</p> <p>2002: a) institutes or has instituted against it a proceeding seeking a judgement of insolvency or bankruptcy</p> <p>b) instituted or presented and results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation</p>	<p>commences an Insolvency Proceeding against itself or takes any corporate action to authorize such Insolvency Proceeding</p>	<p>presenting or filing of a petition in respect of it [the party] in any court or before any agency alleging</p>	<p>presenting or filing of a petition in respect of it [the party] in any court or before any agency alleging</p>

	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000/2009
Grace Period	<p>1992: in case petition does not result in a judgement of insolvency, the petition may not be dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof</p> <p>2002: If a petition, instituted or presented by a person or entity described in (b) above, does not result in an judgement of insolvency, the petition may not be dismissed, discharged, stayed or restrained in each case within 15 days of the institution or presentation thereof</p>	<p>if a <u>person</u> other than a Competent Authority commences an insolvency proceeding against the Party in a Specified Jurisdiction and such action is not dismissed or stayed within 30 days following the action or event commencing the Insolvency Proceeding, unless the commencement of such proceeding by such person <u>or under the given circumstances is obviously inadmissible or frivolous</u></p>	<p>30 days (debatable as reference to petition is unclear) (30 day period shall not apply for a petition for winding-up or any analogous proceeding)</p>	<p>30 days (debatable as reference to petition is unclear) (30 day period shall not apply for a petition for winding-up or any analogous proceeding)</p>
	Sec. 5 (a)(vii)(4)	Sec. 6 (1) (a) (viii)(2), (3), (5)	Para. 2. (a)(iv)(1st HS)	<p>1995: Para. 1.1 (d)(1st HS)</p> <p>2000: Para. 2.1. (iv)(1st HS)</p> <p>2009: Para. 2.1.1.(d)(1st HS)</p>

	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000 / 2009
4. Petition for restructuring	Yes	Yes	Yes	Yes
5. Appointment of	Yes	Yes	Yes	Yes
a) trustee	Yes	Not explicitly	Yes	Yes
b) administrator	Yes	Yes	Yes	Yes
c) receiver	Yes	Yes	Yes	Yes
d) liquidator	Yes, provisional liquidator	Yes	Yes	Yes
e) conservator	Yes	Not explicitly (applicability via g))	Not explicitly (applicability via g))	Not explicitly (applicability via g))
f) custodian	Yes	Not explicitly (applicability via g))	Not explicitly (applicability via g))	Not explicitly (applicability via g))
g) other similar official/analogous officer	Yes for it [the party] or for all or substantially all its assets	Yes similar official for such party or for all or any substantial parts of its assets under any bankruptcy, insolvency or similar law or any bankruptcy, insurance or similar law governing the operation of the party	Yes analogous officer for the party	Yes analogous officer for the party

	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000 / 2009
6. Restructuring	Yes	Yes	Yes	Yes
a) general assignment	Yes	Yes	Yes	Yes
b) arrangement	Yes	No	Yes (including coluntary arrangement)	Yes (including voluntary arrangement)
c) composition	Yes	Yes	Yes	Yes
d) amicable settlement	No	Yes	Yes	Yes
e) reorganisation	No	No (...the expression [Insolvency Proceeding] does not include a solvent corporate reorganisation,)	Yes	Yes
	Sec. 5 (a)(vii)(3)	Sec. 6 (1)(a)(viii)(7)	Para. 2.(a)(i)	1992: Para. 1.1.(a) 2000: Para. 2.1.(i) 2009: Para 2.1.1(a)

Derived from	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000 / 2009
7. Possession Taking/Enforcement by a Secured Party of substantial all assets	<p>Yes <i>a secured party has taken possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process, levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days (2002: 15 days) thereafter</i></p> <p>Sec. 5 (a)(vii)(7)</p>	<p>No</p>	<p>No</p>	<p>No</p>

Derived from	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	GMSLA 1995 / 2000 / 2009
8. Furtherance of any of the foregoing acts	Yes or indicating its consent to, or approval of, or acquiescence in Sec. 5 (a)(vii)(9)	N/A	N/A	N/A
9. Event, which has an analogous effect to any of the events specified above	Yes causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction , has an analogous effect to any of the events specified in clause (1) to (7) Sec. 5 (a)(vii)(8)	Yes causes or is subject to any event which, under the laws of Specified Jurisdiction , has an effect which is analogous to any events specified in Nos. (1) to (8) Sec. 6 (1)(a)(viii)(9)	Yes <i>Para. 2.(a)(iv)(2nd HS): "...or similar relief"</i> <i>Para. 2.(a)(vi): "... (or any analogous proceeding)"</i>	Yes <i>1995: Para. 1.1.(d)(2nd HS), 2000: Para. 2.1.(iv)(2nd HS) 2009: Para 2.1.1. (d)(2nd HS): "...or similar relief"</i> <i>1995: Para. 1.1.(d)(2nd HS) 2000: Para. 2.1.(iv)(2nd HS) 2009: Para 2.1.1. (d)(2nd HS) "...or any analogous proceeding)"</i>

Wrap-up

1. Dissolution and Corporate Reorganisation (*solvent corporate..*)
2. Non Payment – *Admits in writing*
3. Filing and Presenting for insolvency: who? Where? Which Grace Period, if any? Exemption for inadmissible or frivolous filling ?
4. Petition for Restructuring – solvent corporate reorganisation ?
5. Enforcement by Secured Party
6. Catch all clause?

Practical Ambiguities

Ambiguities stemming from the jurisdiction applicable:

Example

According to Article 76 of the Italian Banking Law (D. Lgs. 385/93), the Bank of Italy may, in certain cases, order a temporary management (*gestione provvisoria*) of an Italian Financial Institution by vesting the Receivers (*Commissario*) with the powers to manage such Bank (the “Temporary Management”). According to Paragraph IV of the ISDA Opinion for Italy (dated 3 May 2006, as amended), such Temporary Management, although it may be qualified as a “reorganisation proceeding”, intended to assist businesses which are undergoing what is deemed to be a temporary situation of financial difficulty (rather than a “liquidation proceeding”), also constitutes an “insolvency proceeding” covered by the ‘broad set of insolvency related’ Events of Default dealt with in Section 5(a)(vii) of the ISDA Master Agreement. Consequently it appears that the Non-defaulting Party to an ISDA Master Agreement would not be prohibited from exercising its right under the termination and close-out netting provisions thereof (at least unless a suspension of payments were ordered by Bank of Italy). - Contested by the *Commissario*

Ambiguities stemming from the relevant Master Agreement wording:

Example

In the GMRA 1995 para. 10 (a) (iv) and 2000 para 10 (a) (vi): the carve out for not having to send a notice specifies *inter alia* the appointment of a liquidator or analogous officer. In the case of Lehman Brothers International (Europe) the question arose whether an administrator would be such analogous officer?

On the one hand the definition of Act of Insolvency in paragraph 2(a)(iv) and an Event of Default under paragraph 10(a)(iv) of the GMRA 95, suggest that the appointment of an administrator under English law would not be treated as a ‘liquidator or analogous officer’, and so the carve out for not having to send a Default Notice does not apply. On the other hand the definition contained in paragraph 2(a)(v) for Act of Insolvency then explicitly makes reference to administrator, liquidator etc.. so that this could be read in conjunction with “or analogous officer” in paragraph 10(a)(iv).

Observations & Recommendations

1. The differences and ambiguities in the various Master Agreements – as far as related to the contractual framework – in defining „bankruptcy“ or „insolvency“ show a clear need for harmonization. Otherwise market participants may or may not have an Event of Default with the same counterparty/client if different products are documented under different product specific Master Agreements types.
2. This is also an argument for a true Global Cross Product Master Agreement
3. Regulators and legislators are likely to implement special specific pre-insolvency regimes to prevent struggling financial institutions considered to be system critical from insolvency.
4. Any contractual provision, in particular a broad definition of insolvency, which may give rise to an Event of Default, thereby hampering or limiting the envisaged purpose of the above referenced special regime, is likely to be put aside as being considered detrimental. Revision of definitions should be reviewed against this background.