

SERBIA: INSOLVENCY/DERIVATIVES

CLOSE-OUT NETTING PERMITTED UNDER NEW BANKRUPTCY LAW

The new Law on Bankruptcy (Zakon o stečajju, Official Gazette of the Republic of Serbia, n.104/09) partially ends legal uncertainties as to the enforceability of ISDA Master Agreements or similar netting agreements against Serbian parties in the event of insolvency. The new Law explicitly addresses close-out netting in the context of “financial contracts” including financial derivatives, repo transactions and securities lending arrangements.

The new Law limits eligibility for close-out netting only to financial contracts that were entered into prior to filing the petition for opening bankruptcy proceedings. The right to set-off (netting) must be established no later than the moment of opening such proceedings.

The wording of the relevant provision unfortunately seems to condition the validity of early contract termination by notice for a bankruptcy-related event on the requirement to submit the termination notice to the bankruptcy debtor within three days of opening bankruptcy proceedings. In many cases, the non-defaulting party may not be able to send a notice of termination to the bankruptcy debtor (i.e., bankruptcy administrator) within such a short deadline, because the non-defaulting party may not be aware that the triggering event has occurred. Therefore, parties will want to consider automatic early termination, if such an option is available under the pertinent master agreement.

The terminating party must register its entire (i.e., gross) claim and the set-off notice with the bankruptcy court no later than the deadline for registering claims in bankruptcy proceedings (a maximum 120 days from the gazetting of the decision on the opening of bankruptcy proceedings). Failure to do so results in the loss of the right to set-off.

The close-out netting provisions of the new Law on Bankruptcy are a welcome and progressive legislative development. The real challenge, however, lies ahead - in application of these provisions by the courts, which have not yet had experience with legal issues specifically arising in the context of derivative, repo or similar transactions.

Contact

BOJOVIĆ · DAŠIĆ · KOJOVIĆ
Advokati/Attorneys at Law
Dobračina 38
11 000 Beograd, Serbia
Tel: +381 11 3284 212
Fax: +381 11 3284 213
E-mail: office@bdklegal.com