

Close-Out Netting Clauses from a Comparative Perspective

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Abstract : A Close-out netting clause is a clause within master agreements which reduces credit risks. This clause contains the parties' advance agreement that the occurrence of a certain event (such as the commencement of bankruptcy proceedings) will result in the termination of the contract and that their mutual claims will be calculated as a net lump-sum to be paid by one party to the other. The legal treatment of the enforceability of close-out netting clauses opens up many legal matters in comparative legal systems because it is not uniformly treated in comparative laws. Certain legal systems take a liberal approach and allow the enforcement of close-out netting clauses. Others are much stricter, and they limit or completely prohibit the enforcement of close-out netting clauses through the mandatory provisions of their national bankruptcy laws. The author analyzes the concept of close-out netting clauses in selected comparative legal systems and examines the differences in their legal treatment by using the historical, analytical, and comparative method. It results that special treatment of the close-out netting in national laws with a liberal approach is often forced by financial industry lobbies and introduced in national laws without the justified reasons. Contrary to that in legal systems with limited or prohibited approach on close-out netting the uncertain enforceability of the close-out netting clause causes potential credit risks. The detected discrepancy on the national legal treatment and national financial markets regarding close-out netting lead to the conclusion to author's best knowledge that is not possible to use any national model of close-out netting as a role model which perfectly fits all.

Keywords : close-out netting clauses, derivatives, insolvency, offsetting

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