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Guide to the Use of Derivatives

The Enforceability of Netting Agreements in the Ivory Coast

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ABBREVIATIONS AND ACRONYMS

2014 Uniform Act	Uniform Act On Commercial Companies And The Economic Interest Group (*Acte Uniforme révisé relatif au droit des sociétés commerciales et du groupement d'intérêt économique*) adopted on January 30, 2014 in Ouagadougou, Burkina Faso
AUPCAP	Uniform Act Organizing Collective Proceedings for Wiping Off Debts (*Acte Uniforme portant organisation des Procédures Collectives d'Apurement du Passif*) dated September 10, 2015 and adopted by the OHADA
AUVE	Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures adopted on April 10, 1998 in Libreville, Gabon
BRVM	Regional Securities Exchange (*Bourse Régionale des Valeurs Mobilières*) of the WAEMU, created on December 18, 1996 in Cotonou, Benin
CAEMC	Central African Economic and Monetary Community (*Communauté Economique et Monétaire de l'Afrique Centrale, CEMAC*), established on March 16, 1994 in N'Djamena, Chad, and became operational on February 5, 1998 after the Conference of Head of States and Governments of the *Union Douanière et Economique de l'Afrique Centrale* (UDEAC) member states in Libreville, Gabon
CBCAS	Central Bank of Central African States (*Banque des Etats de l'*Afrique *Centrale, BEAC*), the central bank of the CAEMC located in Yaoundé, Cameroon
CBWAS	Central Bank of West African States (*Banque Centrale des Etats d'Afrique de l'Ouest*, BCEAO), the central bank of the WAEMU located in Dakar, Senegal
CCJA	Common Court of Justice and Arbitration of the OHADA located in Abidjan, Ivory Coast
CFA franc	Official currency of the member states of the WAMU and of the member states of the CAEMC
Convention Annex	Annex to the Convention dated April 6, 2007 governing the Banking Commission of WAMU as amended by Decision n° 010 of 29/09/2017/CM/UMOA
Forex Regulation	Regulation n° 09/2010/CM/UEMOA dated October 1, 2010 on the external financial relations of WAEMU member states including its annexes
Forex Schedule II	Schedule II of the Forex Regulation
ICC	Ivorian Civil Code
Instruction 01	Instruction of the BCEAO n° 01/07/2011/RFE dated July 13, 2011 "*relative à l'exécution des règlements avec l'étranger ou avec les non-résidents*"
Instruction 04	Instruction of the BCEAO n° 04/07/2011/RFE dated July 13, 2011 "*relative à la couverture du risque de change et du risque de prix par les résidents sur les opérations commerciales et financières avec l'extérieur*"
ISDA	International Swaps and Derivatives Association, Inc., the principal office of which is located at 10E. 53rd street, 9th Floor, New York 10022, United States

ISDA MA	ISDA Master Agreement published in 2002
Ivorian Banking law	*Loi-Cadre portant réglementation bancaire* of the WAMU, as implemented in Ivory Coast by bill (*ordonnance*) n° 2009-385 dated December 1, 2009 and its subsequent amendments
OHADA	Organisation for the Harmonization of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*)
OHADA Treaty	Treaty organizing the OHADA, signed in Port-Louis, Mauritius on October 17, 1993, revised in Quebec, Canada, on October 17, 2008
Prudential Decision	Decision of the Council of Ministers of the West African Monetary Union n° 013/24/06/CM/UMOA dated June 24, 2016, together with its annex, regarding the prudential framework applicable to credit institutions and financial companies of the WAMU (*Dispositif prudential applicable aux établissements de credit et aux companies financières de l'Union Monétaire Ouest Africaine*) enforceable as from January 1, 2018
WAEMU	West African Economic Monetary Union (*Union Economique et Monétaire Ouest Africaine*, *UEMOA*) constituted under the WAEMU Treaty
WAEMU Treaty	Treaty of the West African Economic and Monetary Union signed in Dakar on January 10, 1994, as amended
WAMU	West African Monetary Union (*Union Monétaire Ouest Africaine*, *UMOA*) constituted under the WAMU Treaty
WAMU Banking law	*Loi-Cadre portant réglementation bancaire* of the WAMU
WAMU Treaty	Treaty of the West African Monetary Union which entered into force on May 12, 1962 as amended and supplemented by the WAEMU Treaty

CAVEAT

This guide on the use of derivatives in the Ivory Coast ("**Guide**") is not a legal opinion and has only been drafted to give a clearer view on the regulatory framework for the netting of derivatives contracts in the Ivory Coast. It does not purport to be a comprehensive review of the Ivorian legal framework on netting. However, it constitutes the basis for further discussions of a comprehensive legal opinion regarding netting in the Ivory Coast.

This guide is composed of two parts: an overview of the financial, political and legal framework and a legal analysis of the derivative contracts netting regime in the Ivory Coast. Given the patchwork legislation at local and regional levels, it is important to understand the legal and economic organisation of the Ivory Coast, alone and as part of Western Africa, before examining the netting regime in the Ivory Coast.

Finally, please note that our Guide focuses on the mechanism of close-out netting of international derivatives transactions (*i.e.* where one party is outside the Ivory Coast). We have not examined the legal regime applicable to close-out netting for domestic derivatives transactions.

1 COUNTRY OVERVIEW

1.1 Economic Area of the franc zone

The Ivory Coast belongs to the integrated economic area known as the franc zone The franc zone is composed of fourteen countries including:

- on the one hand, eight countries of West Africa that first created their common Central Bank located in Dakar, Senegal: the *Banque Centrale des États de l'Afrique de l'Ouest* (the "**BCEAO**") (Central Bank of West African States, "**CBWAS**")[1]. Thereafter, these eight West Africa States created the West African Monetary Union (the "**WAMU**") through the Treaty of the West African Monetary Union (the "**WAMU Treaty**")[2], supplemented by the West Africa Economic and Monetary Union (the "**WAEMU**") ; the official currency is the CFA franc, with its acronym being "**XOF**".
- on the other hand, six countries[3] of Central Africa, brought together in particular within the framework of the treaty establishing the Central African Economic and Monetary Community, the "**CAEMC**" (*Communauté Économique et Monétaire de l'Afrique Centrale*, "**CEMAC**") and decided the location in Yaoundé, Cameroun of the Central Bank of Central African States (the "**CBCAS**")[4] ; the official currency is the CFA franc, whose acronym is "**XAF**".

France is a statutory member of the franc zone and entered into a monetary cooperation agreement with the CBWAS on December 4, 1973 and the CBCAS on November 23, 1972. These two homogeneous zones apply exchange control regimes and are based on a framework of monetary cooperation with France, first guaranteeing parity between the CFA franc and the French franc until January 1, 1999. Then, in its decision of November 23, 1998, the Council of the European Union recognized the previous agreements and the continuation of this framework of monetary cooperation. Since January 1, 1999, the Euro has replaced the franc on the basis of an exchange rate of 1 Euro = 655.957 CFA francs and 1000 CFA francs = 1.52449017 Euros.

The central banks of the CFA zones are not themselves in charge of the management of the parity of their currency with the Euro which is entrusted to the French Treasury, *i.e.* the state budget. Foreign exchange reserves of the two CFA zones are deposited with the French Treasury and the French Treasury in turn provides an unlimited guarantee of convertibility of the currencies issued by the issuing institutions of the franc zone. In exchange for this convertibility, foreign exchange reserves are centralized at two levels: the countries of both the WAEMU and CAEMC zones centralize their foreign exchange reserves with their central banks, which are obliged to deposit 50% of such reserves with the French Treasury in operational accounts opened in the

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[1] The CBWAS was created on April 4, 1959 as a result of the transformation of the Issuing Institute of French West Africa and Togo. It was created by the Ivory Coast, Dahomey (Benin), Upper Volta (Burkina Faso), Mauritania (which exited in 1973), Niger, Mali and Senegal. Togo joined the project in 1963 and Guinea-Bissau in 1997. It replaced the Issuing Institute of French West Africa and Togo. It is currently composed of 8 countries.

[2] The WAMU Treaty entered into force on May 12, 1962 (Source CBWAS). It formalizes the institutional framework in favour of a monetary union between its members already brought together within the CBWAS created in 1959. The WAMU Treaty was transformed and supplemented by the WAEMU Treaty signed in Dakar on January 10, 1994. One of the main tasks of these treaties is to ensure the implementation of the common economic and monetary policy to create a single economic and financial market. These two treaties coexist, encompass the same countries and the same bodies, but remain autonomous. For example, the WAMU Treaty was amended on January 20, 2007 but the WAEMU Treaty dated 1994 has not been further amended since it already takes into account the amendment of the WAMU Treaty by reference.

[3] Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon and the Republic of the Congo.

[4] The CBCAS is the central Bank of the CAEMC created on November 22, 1972.

name of each zone (above this threshold, optional deposits are possible on a "special levelling account"). These accounts are remunerated at the marginal lending rate of the European Central Bank and offer the possibility of an unlimited overdraft, subject to payment of interest in the event of a debit position. Accordingly, due to its membership of the franc zone, the legal tender currency in Ivory Coast is the CFA franc, subject to the control of the CBWAS.

The Economic Community of West African States ("ECOWAS"/ "*Communauté économique des Etats de l'Afrique de l'Ouest*, "*CEDEAO*"), a regional international organisation established on May 28, 1975 with the mandate of promoting economic integration amongst its 15-members [5] , including all WAEMU's members states, is currently working on a road map to switch the CFA franc for a new currency with an aim to launch it next year. The Conference of the Heads of States and Governments of the ECOWAS held on June, 29 2019 decided on the name of the new currency, the "ECO", and adopted the principle of a flexible exchange rate regime with a monetary policy framework focused on inflation targeting.

1.2 Impact of foreign exchange regulations

Regulation n° 09/2010/CM/UEMOA of October 1, 2010 on the external financial relations of WAEMU member states, is the reference regulatory framework governing foreign exchange transactions (together with the implementing instructions dated July 13, 2011). It applies to the entire WAEMU area and to all residents, whether natural person or corporate entities, (including banking institutions) (the "**Forex Regulation**") and does not contain provisions that exempt banking institutions from compliance with the Forex Regulation.

Financial payments and capital flows between the WAEMU member states and foreign countries can only be carried out through the CBWAS, the Post Office or an authorized intermediary bank.

This presupposes that the opening of accounts and flows of funds in foreign currency, in particular the Euro, can only be done through a local authorized intermediary bank.

For non-residents, accounts opened in foreign currencies (including the Euro) or in CFA francs constitute "foreign accounts" which, with respect to accounts in foreign currencies other than the Euro, require the prior authorization of the BCEAO.

In accordance with the Forex Regulation and Instruction 01, the holder of foreign currencies, whether a resident or non-resident of a WAEMU member states, must:

- deposit these foreign currencies in an account opened in the books of an authorized intermediary of the relevant WAEMU member state; or
- convert them into CFA francs through an authorized intermediary and deposit the CFA francs amount in an account opened in the books of an authorized intermediary bank of the relevant WAEMU member state.

No specific authorization is required for the import of foreign currencies for direct investment purposes nor for foreign exchange transactions but the operation must be (a) carried out by an authorized intermediary bank at the request of the transferor and (b) reported by the relevant authorized intermediary(ies) to the "*Direction chargée des Finances Extérieures*" (Ministry of Finance) and to the CBWAS.

[5] Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo.

With respect to derivatives, transactions on foreign exchange or basic commodities are expressly subject to foreign exchange control regulations. The rules described above are therefore applicable, including the flows of funds through accounts opened with authorized intermediary banks.

Derivatives transactions must be backed by trade or financial transactions. This is a fundamental requirement according to which, under the perspective of a local counterparty, these operations ought to be solely concluded for hedging and not speculative purpose. Further, the authorized intermediaries must ensure that the foreign exchange risk they bear when dealing with their client is covered. It implies that, as specified by the final draft instruction n° 11 of the BCEAO relating to the "accounting of derivatives instruments" for banking institutions, the local authorized financial intermediaries must specify whether the relevant derivative transaction is entered into for a specific hedging transaction or for the purpose of the global hedging monitoring of its interest rate positions.

The Forex Schedule II provides that the local domiciliary bank must ensure, under its own responsibility, that the payment, in terms of both its amount and the currency of the transaction, complies with the hedging contract (including the commercial or financial contract which constitutes the underlying agreement).

Any payment (initial payment under a derivative contract, interest amount, initial margin, margin call, etc.) made by a resident to a non-resident entity (on its foreign account) will be considered as a foreign exchange transaction made by the relevant local counterparty. Consequently, said local counterparty will have to provide the authorized intermediary with the appropriate documentation supporting the transaction in order to justify, *inter alia*, the relevance of the cash amount which is transferred and the hedging purpose of the derivative transaction.

1.3 Legislative and institutional environment

1.3.1 Harmonisation of business law

The Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) (the "**OHADA**") was created by the adoption of the Treaty on the Harmonisation of Business Law in Africa signed in Port-Louis, Mauritius, on October 17, 1993 (the "**OHADA Treaty**"), which was subsequently revised in Quebec, Canada, on October 17, 2008.

The purpose of this legal and judicial integration tool is to harmonize business law through the development and adoption of simple, modern common rules and the implementation of appropriate judicial procedures, including by encouraging the use of arbitration for the settlement of contractual disputes. This legislation covers a geographical area which includes the CAEMC and WAEMU[6].

The OHADA legal framework is composed of the OHADA Treaty, certain regulations (implementing the OHADA Treaty) and certain uniform acts (directly applicable in each member state national law).

Under article 3 and 14 of the OHADA Treaty, OHADA shall include in its remit the Common Court of Justice and Arbitration (the "**CCJA**"), based in Abidjan, Ivory Coast, which ensures the uniform

[6] To date, seventeen (17) states are members of the Organization for the Harmonisation of Business Law in Africa: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Comoros, the Democratic Republic of the Congo (DRC), Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, and Togo.

interpretation and application of the OHADA Treaty and its rules of enforcement as well as of the uniform acts and decisions.

To this end, in order to promote the legal and judicial security of the business environment, various uniform acts have been adopted within the OHADA framework by its deliberative body, *i.e.* the Council of Ministers (as further defined in the OHADA Treaty) of the member states composed in particular of Ministers in charge of Justice and Finance[7]. The uniform acts adopted by the Council of Ministers become directly effective and enforceable in the legal order of each member state and repeal any national provision to the contrary[8]. It is not permitted to contractually waive to their application and agree that national provisions prevail [9]. It is up to the CCJA to ensure consistency in the application and interpretation of the uniform acts. In addition to the advisory opinions it may produce at the request of member states, the Council of Ministers or national courts, the CCJA is tasked with the judicial review of decisions handed down by the courts of appeal of the member states in all matters relating to the application of uniform acts and regulations provided for in this OHADA Treaty, with the exception of decisions applying criminal sanctions.

1.3.2 Harmonisation of banking and financial law

In order to further harmonize business law, banking and financial rules, regulations have also been harmonized at a regional level[10].

As previously mentioned, there are two independent economic monetary unions among the OHADA member states, the WAEMU and the CAEMC. Each has established its own laws, central bank, as well as its own banking and financial rules.

For the WAEMU zone, the architecture of banking and financial activities is based on the system of regional law adopted by the bodies of WAEMU, whose Council of Ministers exercises a legislative function. The WAEMU legislation is composed of the WAEMU Treaty, the directives (which should be transposed into national law) and the regulations (which are directly applicable).

Once adopted, the directives must be transposed into the legislation of the member states[11] under the supervision of the banking commission, a body of the CBWAS (the "**Banking Commission**"). Recently a number of legislative initiatives have focused not only on harmonization but on the modernization of financial regulation in the region. For example, the WAEMU banking sector has proven willing to adapt to the new prudential regulations international efforts with the

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[7] To date, there are uniform acts relating to general commercial rights, commercial companies and economic interest groupings, the organization of security rights, collective procedures for the settlement of liabilities, the organization and harmonization of business accounts, contracts for the carriage of goods by road, arbitration, accounting law and financial information.

[8] Article 10 of the OHADA Treaty "contains a rule of supranationality because it provides for the direct and mandatory application in the member states which are parties to the Uniform Acts and establishes, moreover, their supremacy over prior or subsequent provisions of domestic law", CCJA, avis n° 1/2001/EP dated April 30, 2001, Recueil de jurisprudence CCJA, January 2003, p. 74).

[9] CCJA, Arr. n° 018/2003, October,19 2003, Aff. Société AFRCM C/ Caisse de stabililisation et de soutien des prix des productions agricole).

[10] There are several other fields of business law in which OHADA uniform acts apply (securities, insolvency proceedings, enforcement and recognition of judgement, *etc*.).

[11] Without claiming to be exhaustive, these include the framework law (*loi cadre*) on banking regulation, the uniform law on the punishment of offences in the area of cheques, bank cards and other payment instruments and electronic processes; the Regulation on the external financial relations of member states, the Directives on the fight against money laundering and the financing of terrorism, *etc*.

adoption of the Prudential Decision, which implements the Basel II and Basel III rules into domestic law[12].

These include higher minimum capital adequacy requirements and stricter loan concentration requirements. Stringent application of prudential rules for the few remaining non-compliant banks would further improve the soundness of the banking system.

The adoption of modern financial regulations has permitted the opening of regional financial markets in the WAEMU banking sector. For example, in 1996 the first regional financial market, the Regional Securities Exchange (the "**BRVM**"), was created to provide for the listing of public limited companies and give them access to capital markets. The BRVM[13] is placed under the regulatory supervision of the Financial Markets Authority of the WAMU[14].

1.3.3 Influence of French Law

As a nation historically influenced by French law, the Ivory Coast has thus far recognized international private law rules to the same extent they have been adopted by the French Civil Code, the French Commercial Code and the decisions of the French Courts.

For example, the Ivorian Civil Code bears resemblance to the French Civil Code both in its structure, content and spirit. Similarly, the corporate business law, notably the insolvency proceedings regime, of the OHADA has been inspired by the French insolvency regime that existed until 1985. Since then, France adopted in 1996 legislation to guarantee the enforceability of close-out netting of derivatives contracts under a master agreement in case of insolvency, as discussed in greater detail in Section 2.3.

2 LEGAL ANALYSIS OF DERIVATIVE CONTRACTS NETTING IN THE IVORY COAST

As discussed above, the CBWAS has established the regional framework for the banking and financial regulations applicable to all member states of the WAEMU. This standard-setting function is exercised through directives, regulations, instructions or circulars issued by the bodies of the WAEMU.

The standards of the CBWAS cover provisions relating to the organization of the profession and the marketing of banking services, exchange controls and the supervision of financial relations with non-WAEMU countries.

With this in mind, the CBWAS has also developed relevant regulations that allow local economic operators to enter into OTC derivative contracts to hedge against financial risks incurred in their international commercial or financial transactions.

Although such contracts are specific to the financial needs and motivations of local market participants, in order for such participants to engage in transactions in an international market, it is important to examine the conformity of the local legal framework as compared to the international standards that govern the contractual architecture of derivative transactions.

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[12] Decision n° 013/24/06/2016/CM/UMOA laying down a prudential framework for the credit institutions and financial companies of the WAMU and its annex, in force since January 1, 2018; Decision n° 014/24/06/2016/CM/UMOA on the supervision on a consolidated basis of parent credit institutions and financial companies in the WAMU, which entered into force upon its adoption.

[13] http://www.brvm.org/fr.

[14] http://www.crepmf.org°; the Regional Council for Public Savings and Financial Markets is now called the Financial Markets Authority of the WAMU (*Autorité des Marchés Financiers de l'Union Monétaire Ouest Africaine*).

Indeed, financial communities have developed national (*e.g.* French, German and Spanish) or international (the International Swaps and Derivatives Association ("**ISDA**")) master agreements that enable the parties to set uniform terms and conditions of their derivative transactions, in particular with regard to termination and netting. It should be noted that several versions of the ISDA Master Agreement have been published, and unless otherwise stated, references herein to the ISDA master agreement will refer to the latest English law ISDA Master Agreement published in 2002 (the "**ISDA MA**")[15].

As a general matter, the ISDA MA allows for the termination and netting of derivative transactions and, subject to its enforceability in the jurisdiction in which it is invoked, derogates from the legislation on insolvency proceedings. Accordingly, a party may proceed, in accordance with the ISDA MA, with the early termination and the close-out netting of the transactions concluded under the ISDA MA.

Within the framework of the WAMU financial community, financial regulations specific or relevant to derivatives have been adopted:

- Annex to the Convention Governing the Banking Commission of WAMU as amended by Decision n° 010 OF 29/09/2017/CM/UMOA (the "**Convention Annex**");
- Uniform Act relating to the accounting rules and financial information adopted on January 26, 2016 which entered in force on January 1, 2018 with respect to social accounts of companies and on January 1, 2019 with respect to consolidated accounts, combined account and financial statements under IFRS;
- final draft Instruction 04 n°11 of the CBWAS relating to the accounting of derivatives instruments for banking institutions;
- instruction n° 025-11-2016 relating to the accounting of transactions in foreign currencies and assimilated transactions;
- Regulation n° 09/2010/CM/UEMOA dated October 1, 2010 on the external financial relations of WAEMU member states including its annexes (the "**Forex Regulation**");
- BCEAO Instruction n° 04/07/2011/RFE dated July 13, 2011 relating to the hedging of exchange risk and price risk by residents with respect to their commercial and financial transactions with non-residents ("**Annexe 04**");
- Decision of the Council of Ministers of the West African Monetary Union n° 013/24/06/CM/UMOA dated June 24, 2016 regarding the prudential framework applicable to credit institutions and financial companies of the WAMU (*Dispositif prudentiel applicable aux établissements de credit et aux companies financières de l'Union Monétaire Ouest Africaine*) enforceable as from January 1, 2018 (the "**Prudential Decision**").

While the CBWAS adopted the Forex Regulation to govern, inter alia, derivatives transactions concluded by residents with foreign counterparties, it did not specify the contractual framework within which these transactions shall take place. No other piece of legislation of Ivory Coast, WAEMU or OHADA specifically provide for such contractual framework. Accordingly, in the absence of a binding contractual framework, and based on the principle of contractual freedom which is recognized under Ivorian law, the parties would normally be free to submit their transactions to an international master agreement such as the ISDA MA.

[15] Please note that ISDA published in 2018 a version of its 2002 ISDA submitted to either Irish or French Law.

Concerning the enforceability of the ISDA MA contractual terms under Ivorian law, without addressing the enforceability of any specific provision but as a general matter, Article 1134 of the Ivorian Civil Code (the "**ICC**") provides:

"*Agreements lawfully entered into take the place of the law for those who have made them*".

It is on this basis that we shall analyze the validity and enforceability of contractual provisions provided for in the ISDA MA, which authorizes the early termination and netting of derivatives transactions, including in the event of insolvency proceedings or an equivalent measure commenced against a counterparty established in a WAEMU member state. Therefore, it is necessary to examine the legal and regulatory regime for the conclusion and settlement of derivatives transactions[16].

2.1 Prior consideration regarding applicable law and determination of the competent jurisdiction

Although derivatives transactions are regulated at a regional level, currently there is no regional regulation that enables us to determine the applicable law and jurisdiction (as is the case in Europe, for example[17]). Conflicts of laws and jurisdiction are determined according to each country's own civil procedure code and, where relevant, the application of international private law by each country.

French Courts acknowledged the freedom of choice of law at the beginning of the 19th century[18]. This principle allows counterparties to select the applicable law and jurisdiction for the purpose of litigating contractual disputes, so long as the choice of foreign law is free from fraud, has some connection to the parties or matter at hand, and would not otherwise be contrary to public policy.

Courts in the Ivory Coast have followed this example, with some exceptions which do not apply to issues related to the derivatives domain. By way of illustration, Ivorian law dealing with electronic transactions accords the freedom to select foreign law as applicable; however, this choice should not result in "a *derogation from the obligations of the regulations governing the external financial relations of the Ivory Coast, in particular with regard to the domiciliation of exports and the repatriation of revenue*"[19].

Thus, the parties are free to choose a foreign law as governing law, unless such law conflicts with mandatory regional or local laws.

Concerning the choice of jurisdiction in respect of contractual litigation, Article 18 of the Ivorian Civil, Commercial and Administrative Procedure Code (the "**Civil Procedure Code**") indicates that the parties may derogate from the rules of territorial jurisdiction by express or tacit agreement;

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[16] The legal regime or arrangements relating to any collateral which may be put in place with respect to derivatives transactions with Ivorian counterparties are briefly considered in paragraph 2.5.2 of this guide.

[17] Regulation n° 593/2008/EC of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations ("**Rome I**"), and Regulation n° 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Bruxelles I *bis***").

[18] 5 déc. 1910 (Rev. Dr. Int., 1911. 395, Clunet, 1912. 1156, S. 1911. 1. 129). This principle has been integrated in French law by the Rome Convention on the law applicable to contractual obligation dated June 19, 1980 (replaced by the Rome I Regulation dated June 17, 2008).

[19] Alfred Kouassi, *Les transactions électroniques en droit international privé ivoirien : étude à partir des Articles 8 et 9 de la loi ivoirienne n° 2013-546 du 30 juillet 2013 relative aux transactions électroniques*, *Actualité juridiques*, n° 84/2015, International Centre for the Development of Law.

exceptions arise in the case of public policy considerations of administrative matters or when a matter is assigned by law exclusively to a particular jurisdiction[20].

Consequently, an Ivorian counterparty, being party to an ISDA MA, may validly waive its jurisdictional privilege and give jurisdiction to a foreign court.

Nonetheless, in order to avoid any dispute, the parties to the ISDA MA should stipulate that the foreign courts have exclusive jurisdiction so that the waiver, permitted by article 18, of the jurisdictional privilege of Articles 14 and 15 of the Civil Procedure Code, is valid.

The enforceability of foreign judgments is addressed in Articles 345-350 of the Civil Procedure Code, and (as is the case in France) Article 345 requires an *exequatur*, *e.g.* the recognition of such foreign judgment by a local court of competent jurisdiction (if not otherwise of direct effect through international treaties or conventions).

Finally, the recognition and enforcement of arbitral awards in the Ivory Coast is based, in particular, on Articles 2 and 3 of the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Sentences, which was ratified by the Ivory Coast in 1991, and on Article 34 of the Uniform Act of the OHADA, relating to arbitration law[21].

It is therefore reasonable to conclude that the choice of foreign law as well as jurisdiction or an arbitration clause, where such a clause is included in the ISDA MA, would be valid and enforceable in the Ivory Coast.

2.2 Regime for the conclusion of derivative transactions

We will discuss the relevant legal and regulatory regimes for the conclusion of derivatives transactions, namely the OHADA (as a broader treaty applying to both the WAEMU and CAEMC zones) and WAEMU regulations.

2.2.1 OHADA

Article 744 of the 2014 Uniform Act concerning commercial company law (*Acte Uniforme révisé relatif au droit des sociétés commerciales et du groupement d'intérêt économique*) ("**2014 Uniform Act**") provides that public limited companies ("*sociétés anonymes*") may enter into "financial agreements ("*contrats financiers*") otherwise called "financial futures" ("*instruments financiers à terme*")", without further specification as to a particular type of contract.

The OHADA commercial company regulations do not contain other provisions pertaining to derivatives transactions.

Therefore, one can infer that derivatives contracts are permitted financial instruments subject to the applicable law and regulations in Ivory Coast.

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[20] Commercial Court of Abidjan, Case n° 649/2015, April 30, 2015, *International Aircraft Services Limited v/CNR International*. (http://docplayer.fr/14439762-Audience-publique-du-30-avril-2015.html).

[21] This text provides that: "*Arbitral awards rendered on the basis of rules other than those of the present Uniform Act shall be recognized in the States Parties in accordance with any international conventions*".

2.2.2 WAEMU

As previously discussed, WAEMU regulations are directly applicable in each member state and form part of that member state's national laws. Thus, with regard to the regulation of derivatives transactions, each member state shall abide by the WAEMU regulations.

The legal framework of international transactions on derivatives (*e.g.* transactions concluded with counterparties located outside the WAEMU) is set forth in the Forex Regulation supplemented by schedules, in particular Schedule II (the "**Forex Schedule II**"), and by Instruction 04 n° 04/07/2011/RFE of July 13, 2011 on the hedging of foreign exchange risk and price risk by residents on external trade and financial transactions, (the "**Instruction 04**")[22].

Article 12 of the Forex Regulation states:

"*Residents are authorized to conduct transactions on foreign exchange derivative markets through licensed intermediaries or foreign banks.*

Authorized transactions must be backed by trade or financial transactions, subject to compliance with all other regulatory provisions applying to the aforementioned transactions.

The nature of the authorized transactions is specified in a CBWAS Instruction" (i.e. Instruction 04).

The Forex Regulation, the Forex Schedule II and the Instruction 04 provide the legal framework for determining (1) authorized transactions, (2) eligible entities, (3) eligible counterparties, (4) hedging obligations applicable to certain counterparties, and (5) the currency of the transaction. The risk of requalification as a gaming or betting contract is also ruled out (6).

2.2.2.1 Authorized transactions

Pursuant to the Forex Regulation, Forex Schedule II and Instruction 04 and under certain conditions described hereafter, counterparties can conclude certain types of foreign exchange and commodity[23] derivatives.

2.2.2.1.1 Foreign exchange derivatives

Further to Article 12 of the Forex Regulation, Article 18 of Forex Schedule II states that:

Residents may use foreign exchange derivatives to hedge foreign-exchange risks, for the following commercial or financial transactions:

- *imports and exports of goods and services by residents;*
- *foreign loan transactions by residents (draw-downs and payments); and*
- *direct foreign investments in a resident enterprise under negotiation.*

Residents may use derivatives to hedge price risks. They must be backed by commodity imports or exports carried out by the residents.

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[22] The Forex Regulation and Instruction 04 are supplemented by specific instructions including: Instruction 04 n° 01/07/2011/RFE of July 13, 2011 on the execution of payments internationally or with non-residents, Instruction 04 n° 02/07/2011/RFE of July 13, 2011 on the domiciliation and payment of imports and Instruction 04 n° 03/07/2011/RFE of July 13, 2011 on the constitution of export domiciliation applications and their clearance.

[23] Article 7 of the Instruction 04 specifies that commodities covered include food and live animals (meat, fish, cereals, vegetables and fruit, coffee, cocoa), non-edible raw materials (leathers and hides, oil seeds and oleaginous fruits, rubber, wood), mineral fuels (petroleum, natural gas), chemicals, metals and minerals.

The list of permitted derivative instruments that residents may use to hedge against foreign exchange risk can be found in Article 2 of Instruction 04, and are as follows:

- outright forward foreign exchange contracts;
- currency options; and
- foreign exchange and currency swaps.

With respect to currency options, Article 2 of Instruction 04 authorizes two types of transactions:

- the purchase of currency calls by a resident from a local or foreign bank; or
- the purchase of currency puts by a resident from a local or foreign bank.

2.2.2.1.2 Commodity derivatives

Article 13 of the Forex Regulation states:

"*Residents are authorized to carry out commodity derivative transactions on commodity futures markets.*

These transactions must be backed by commodity imports or exports carried out by the residents.

The nature of the transactions authorized is specified in a CBWAS instruction" (i.e. Instruction 04).

However, this authorization is subject to the limitation set out in Article 18 of the Forex Schedule II:

"*Residents are not authorized to purchase commodities on foreign markets for the purposes of meeting its delivery obligation in commodity derivative transactions*".

Article 6 of Instruction 04 indicates the list of derivative instruments that may be used to hedge against the price fluctuation risk on commodities.

Residents are allowed to trade, on futures or over-the-counter markets, the following commodity derivatives:

- the purchase and sale of futures or forward commodity derivatives;
- the purchase of a put option on futures or forward commodity derivatives; and
- the purchase of a call option on futures or forward commodity derivatives.

Article 7 of Instruction 04 further states that:

- the purchase of forward or future commodity derivatives and call options on forward or future commodity derivatives must relate to imported commodities;
- the sale of forward or future commodity derivatives and call options on forward or future commodity derivatives must relate to exported commodities.[24]

2.2.2.1.3 Interest rate derivatives

Interest rate derivatives are not specifically mentioned in any of the Forex Regulation, Forex Schedule II or Instruction 04 which only authorizes specific derivative transactions, *i.e.* foreign exchange and commodities derivatives. However, final draft instruction n° 11 of the BCEAO relating to the "accounting of derivatives instruments" for banking institutions refers, in Article 2, to (a) the derivatives permitted by the Forex Regulation and (b) transactions hedging interest rate risks. Article 3 provides that the following transactions are expressly permitted "*for the hedging of the risks held by residents:*

[24] These commodities include agriculture products, livestock, their by-products and minerals/metals

- *with respect to foreign exchange derivatives: outright forward foreign exchange contracts, currency options, and foreign exchange and currency swaps; […]; and*
- *with respect to interest rate derivatives: notably, interest rate swaps*".

Article 11 further indicates that the (local) authorized financial intermediaries must specify whether the relevant currency swap and/or interest rate swap are entered into for a specific hedging transaction or for the purpose of the global hedging monitoring of its interest rate positions. The ability to hedge in relation to a global interest rate risks position is limited to institutions which (a) have the appropriate means to monitor the risk, (b) are able to justify that the global approach allows for the effective reduction of their interest rate risks position and (c) have put in place an authorization process by the management including with respect to appropriate limits and ceilings.

Finally, the working draft regulations implementing the new Bank Accounting Plan *(Plan Comptable Bancaire),* include specific provisions for the accounting of derivative transactions ("*instruments financiers à terme*"), notably interest rate instruments / contracts dealt with on organized markets or on an OTC basis. The accounting classifications 941-942 of the new Bank Accounting Plan relate to transactions hedging interest rate risks as referred to in the instruction relating to the accounting treatment of derivative transactions.

This leads to consider that interest rate derivatives may be permitted, at least for financial intermediaries, but is not yet dispositive on the subject.

2.2.2.1.4 Credit derivatives

Finally, paragraph 285 *et seq*. of the Prudential Decision, which is highly inspired by European regulations, sets forth the risk weighting regime (for the purposes of risk capital requirements) for banking counterparties buying protections under credit derivatives transactions (*i.e.* credit default swaps and total return swaps). However, as with interest rate derivatives, there is no explicit authorization for the use of credit derivatives in the Forex Regulation, Forex Schedule II or Instruction 04.

2.2.2.2 Eligible entities

As noted above, Article 744 of the 2014 Uniform Act permits local public limited companies ("*sociétés anonymes*") to enter into derivatives transactions, subject to local law or regulation. The Commercial Company Law does not mention this possibility for any other form of commercial entity. To the extent that the derivative transactions do not fall outside the corporate purpose ("*objet social*") of the relevant local corporate counterparty which is constituted as a public limited company, we are not aware of any Ivorian commercial company law which prohibits such transactions.

From a foreign exchange standpoint, according to Article 12 of the Forex Regulation and Article 2 of Instruction 04/07/2011/RFE, all residents are authorized to enter into foreign exchange derivative transactions to the extent they are performed through a WAEMU authorized banking institution or with a credit institution and performed for hedging and not speculative purposes.

Resident is broadly defined to include the corporate entities entitled to do so (see above) and natural persons having their area of interest in a WAEMU member state, WAEMU member state subsidiaries of national or foreign legal entities, and with certain exceptions, residents of other franc zone member countries.

As a matter of interest, although securitization vehicles do not appear as an eligible counterparty in the Forex Regulation, a separate Regulation n° 02/2010/CM/UEMOA on securitization receivables authorizes special purpose vehicles to enter into derivative contracts. According to Article 16 of the aforementioned regulation, the purpose of these transactions must be to protect

them in whole or in part against the currency or interest rate risks which may affect their assets or their payment obligations. In all cases, these transactions must be carried out in accordance with the regulations on foreign exchange control, in particular with respect to declaration, domiciliation and repatriation obligations, *etc*.

2.2.2.3 Eligible counterparties

Article 2 of Instruction 04 imposes foreign exchange derivatives[25] to be concluded through[26] a licensed banking intermediary of the WAMU or with a foreign credit institution[27]. In practice, it means that when the resident corporate entity enters into a transaction with a foreign bank, the transaction is required to be conducted in compliance with the Forex Regulation and the funds must go through an account opened by the foreign bank with a local licensed banking institution.

Article 6 of Instruction 04 also imposes commodities derivatives to be concluded through a licensed banking intermediary of the WAMU or "with a non-resident, notably a foreign credit institution". In this respect, if a resident covering its financial exposure on commodities derivatives enters into a hedging arrangement with a local bank, the latter is required to simultaneously cover its own exposure by entering into a hedging contract with a foreign financial institution. Transfers of funds must equally go through an account opened by the foreign counterparty with a local licensed banking institution.

2.2.2.4 Hedging obligations

Other than the mandatory obligation to go through a WAEMU licensed banking institution or a foreign bank, Instruction 04 imposes an additional hedging obligation on local counterparties (whether corporate or banks).

Actually, derivative transactions must be backed by trade or financial transactions. There is a fundamental requirement that, under the perspective of a local counterparty, these operations ought to be solely concluded for hedging and not speculative purposes. The hedging obligation is imposed on the resident (which would have an unhedged position as a consequence of the underlying commercial or financial transaction).

Consequently, the contemplated transactions are authorized (a) for local corporate entities to the extent that they are entered into in the context of a commercial or financing transaction and (b) for local licensed banking institution to the extent they constitute a hedging transaction for such banking counterparty (either of their own position or in order to cover against any of their client transactions)[28].

In this respect, article 11 of final draft instruction n° 11 of the BCEAO relating to the "accounting of derivatives instruments" for banking institutions indicates that the (local) licensed financial intermediaries must specify whether the relevant currency swaps and/or interest rate swaps are entered into for a specific hedging transaction or for the purpose of the global hedging

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[25] The obligation would apply to interest rate derivatives as well.

[26] Please note that the French version of both the Regulation and Instruction 04 state "*avec*" licensed banking institutions and foreign banks which means "with" and not "through".

[27] The Forex Regulation defines "credit institutions" as banks and financial institutions being equivalent to banking institutions ("*à caractère bancaire*").

[28] Article 4 of instruction n° 025-11-2016 relating to the accounting of transactions in foreign currencies and assimilated transactions states that " are considered as entered into for hedging purposes the transactions which aim at offsetting or reducing the risk of exchange rate fluctuations affecting a uniform set of assets, liabilities or off-balance sheet items".

monitoring of their interest rate positions. The ability to hedge in relation to a global interest rate risks position is limited to institutions which (a) have the appropriate means to monitor the risk, (b) are able to justify that the global approach allows for the effective reduction of their interest rate risks position and (c) have put in place an authorization process by the management including with respect to appropriate limits and ceilings.

2.2.2.5 Currency of the transaction

Article 4 of Instruction 04 restricts the eligible currencies of authorized foreign exchange hedging transactions, which must be either:

- two foreign currencies;
- the local currency (the CFA franc) and a foreign currency with the exception of (a) the Euro or (b) a currency for which the issuing institution has an operating account with the French Treasury.

However, if a foreign exchange hedging transaction is entered into in respect of a transaction other than an import of goods and services, the CFA franc is necessarily the currency of the hedging transaction, which may be an outright forward foreign exchange contract, a foreign exchange option or a currency swap. Further, under Chapter III, Article 19 of Forex Schedule II, the foreign exchange transaction must be denominated in the same currency as the financial operation such transaction is intended to cover, which effectively prohibits foreign exchange transactions intended to speculate on the value on the CFA franc.

Moreover, a resident who receives currencies on the maturity of an outright forward foreign exchange contract, a foreign exchange option, a foreign exchange or a currency swap is required to proceed with the repatriation of such payment in accordance with the provisions of the Forex Regulation.

2.2.2.6 Absence of requalification as a gaming or betting contract

Gaming or betting contracts are specific contracts that fall under specific laws different from derivatives contracts.

The Forex Regulation expressly authorizes derivative contracts entered into for the purpose of protecting against the occurrence of some financial risks, as explained above. Accordingly, if the transaction is part of a hedging strategy, the risk of such contract being requalified as a gaming or betting contract remains hypothetical.

2.3 Settlement of derivative transactions

The settlement of derivatives transactions may differ (1) in the absence of insolvency proceedings, and (2) in cases where insolvency proceedings have been commenced[29]. As previously noted, with the exception of Article 744 of the 2014 Uniform Act, which authorizes public limited companies to enter into derivatives transactions ("*instruments financiers à terme*"), OHADA does not otherwise provide for the regulation of such transactions. We will therefore rely on the WAEMU regulations to understand how derivatives transactions may be settled in the Ivory Coast.

[29] With respect to insolvency situations, the applicable regime is dealt with by the Uniform Act Organizing Collective Proceedings for Wiping Off Debts (*Acte Uniforme portant organisation des Procédures Collectives d'Apurement du Passif*) dated September 10, 2015 and adopted by the OHADA and, as the case may be, the Loi-Cadre portant réglementation bancaire of the WAMU, as implemented in Ivory Coast by the Bill (ordonnance) n°2009-385 dated December 1, 2009 and its subsequent amendments (the "WAEMU Banking Law").

2.3.1 Settlement of derivative contracts in the absence of insolvency proceedings

2.3.1.1 Maturity of the transaction

Chapter III, Article 20 of Forex Schedule II provides:

"*Transactions on foreign exchange and price derivative instruments may not exceed the due date for payment of the import or export or the receipt of proceeds from borrowings and foreign direct investments*".

Article 20 appears under the heading of Chapter III, which sets forth the foreign exchange and commodities transactions permitted to hedge against price and currency risks. As a result, we can conclude that, according to Article 20, any such hedging transaction must have a maturity less than or equal to that of the underlying contracts.

2.3.1.2 Early termination

Early termination is a mechanism that allows the parties to terminate a contract prior to its maturity.

Section 6 of the ISDA MA governs the early termination mechanism in respect of derivatives transactions. As a contractual mechanism, its efficiency will depend on whether it is recognized under local law and whether local law might prohibit its enforceability.

Pursuant to Article 1184 of the ICC:

"*A condition subsequent is always implied in bilateral contracts, in the event one of the two parties does not satisfy the contractual obligations.*

In such event, the contract is not terminated as of right. The party towards whom the undertaking has not been fulfilled has the choice to either compel the other party to perform in accordance with the agreement where possible, or to request its termination with damages.

Termination must be applied for in court, and the defendant may be granted a time extension depending upon the circumstances".

Therefore, the ICC allows for parties to include a condition subsequent in their contract that anticipates a breach of contract by the defaulting party. Nonetheless, any settlement in respect of a contractual breach is not resolved *ipso jure* and the non-defaulting party shall have the choice to either demand the party's performance or to request the termination of the contract and collect damages. In principle, this remedy must be sought in court, but Ivorian case law has recognized that the parties may enforce termination rights without prior court authorization[30].

Consequently, the early termination provisions of the ISDA MA, which allow the parties to proceed with the early termination of the contract, are valid and enforceable under Ivorian law.

[30] CCJA 1ère Chambre, Arrêt 002 dated February, 28 2008, Juris-ohada n°3 July-September 2008, p.2 The situation was similar in France (Arrêt Tocqueville, Cass.Civ.1ère, October, 13 1998, n°96-21.485, *RTD Civ*. 1999, p. 506) until 1996 when case law on contractual early termination provisions (*"résiliation contractuelle"*) was enshrined in common civil law (Ordinance n°2016-131 dated February, 10 2016).

2.3.1.3 Netting

Sections 2 and 6 of the ISDA MA provide for the netting/set-off of claims. The ISDA MA covers three specific mechanisms: netting of payments, close-out netting, and set-off.

It is important to distinguish between set-off and netting, as these terms are not used interchangeably in the ISDA MA.

Under Section 2(c) of the ISDA MA, the netting of payments allows for the calculation of a single net amount owed in respect of reciprocal claims payable on the same day and in the same currency for the same or different Transactions (as defined in the ISDA MA). Netting effectively extinguishes payment obligations to the extent an amount owed to one party is also due and payable by that party. In addition, the parties may elect to net in respect of a set of Transactions or across all Transactions. Netting of payments is done in the ordinary course of business would apply (either to each set of Transactions or all Transactions, at the option of the parties) in the event of an early termination of the agreement.

Close-out netting is composed of two mechanisms: the early termination of the Transactions and the subsequent contractual netting of reciprocal claims and debts. Close-out is triggered, for example, by the occurrence of an event of default (such event of default being or not due to insolvency proceedings).

Finally, the concept of set-off appears in Section 6(f), and is defined as a mechanism that intervenes after the close-out netting to set-off, or effectively reduce, the close-out amount against any or all outstanding claims between the parties, regardless of whether these claims arise under the ISDA MA. Set-off operates at the option of the parties, and effectively nets the close-out amount (which is calculated by the close-out netting of the Transactions) against any other amounts that the party responsible for payment of the early termination amount may be owed by the other party (which may consist in collateral put in place in relation to the Transactions), in order to arrive at a final net amount owed in respect of any and all claims between the parties.

As previously discussed, the ICC allows for the early termination of contracts in the absence of insolvency proceedings. Contractual netting is also permissible as a mode of extinguishing contractual obligations under Ivorian law. Indeed, the extinction of an obligation by way of payment netting (*compensation*) is recognized by Article 1289 of the ICC, and by operation of law extinguishes reciprocal debts (Article 1290).

Article 1291 of the ICC further provides that netting is possible between two debts of sums of money or between two payment obligations that are fungible, liquid and payable.

On the basis that netting, close-out netting or set-off under the ISDA MA is done in respect of payment obligations as described in Article 1291 of the ICC. We are of the opinion that, with a few exceptions[31], all netting/set-off provisions (including close-out netting) of the ISDA MA are enforceable in the absence of insolvency proceedings.

[31] Pursuant to Article 30 of the Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures (*Acte Uniforme portant Organisation des Procédures Simplifiées de Recouvrement et des Voies d'Exécution*), the close-out netting of claims with a public entity which can benefit from immunity from execution might be challenged, unless the claim is liquid, payable and "certain" i.e. that either (i) such public entity has acknowledged its payment obligation, or (ii) a court having jurisdiction over such public entity has issued an enforcement judgment.

2.3.2 Settlement of derivative contracts in case of insolvency proceedings[32]

The commencement of insolvency proceedings raises several questions relating to the enforceability of early termination and contractual netting and/or set-off of payments pursuant to the ISDA MA. These questions do not appear to be addressed at the local level (either in the ICC or by any other local Ivorian law, act or regulation). Instead, the legal framework for insolvency derives from regional regulations set forth by the OHADA or the WAEMU.

The insolvency proceedings law adopted under the OHADA legislation is largely inspired by French insolvency proceedings law, as it existed prior to its modification[33] by the French legislator to allow for close-out netting during insolvency proceedings[34].

Therefore, the enforceability of netting agreements in the Ivory Coast may admittedly be examined in light of the issues previously encountered by French legislation, as they also arise under OHADA legislation.

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[32] Article 2 of AUPCAP distinguishes four types of proceedings: "1) Conciliation is a preventive, consensual and confidential procedure, designed to avoid the cessation of payments by the debtor undertaking to carry out, in whole or in part, its financial or operational restructuring in order to safeguard it. This restructuring is carried out through private negotiations and the conclusion of a conciliation agreement negotiated between the debtor and its creditors, or at least its main creditors, through the support of a neutral, impartial and independent third party called a conciliator. 2) Preventive settlement is a preventive insolvency proceeding designed to prevent the cessation of payments by the debtor undertaking and to make it possible to wipe off its debts through a preventive composition agreement ("concordat préventif"). 3) Judicial reorganization is an insolvency proceeding intended to safeguard the debtor undertaking in cessation of payments but whose situation is not irremediably compromised, and to wipe off its debts through a composition agreement. 4) The liquidation of assets is an insolvency proceeding designed to realize the assets of the debtor undertaking in cessation of payments whose situation is irremediably compromised and to wipe off its liabilities".

[33] Law of December 31, 1993; Law of June 10, 1994; Law of July 2, 1996.

[34] The problem that arose at that time under French law was the impossibility of invoking the termination or cancellation of the contract solely due to the commencement of insolvency proceedings. French law precluded the exercise of termination rights by the parties in the event of insolvency, giving this power to the court, which may decide to terminate certain contracts and to enforce others. This gave rise to the possibility of "cherry picking" whereby the receiver opts to terminate certain transactions (generally unfavourable to the debtor subject to the insolvency proceedings), on the one hand, and to enforce those that are favourable to the debtor.

These aforementioned legal issues were considered impediments to the ISDA MA's early termination mechanism.

Subsequently, French law has been modified to allow early termination by the parties in the event of insolvency and thus prevent cherry picking.

Another issue stemmed directly from the articles of the French Commercial Code, which provided that any payment made during the "suspect period" for unmatured debt, whatever the method, is invalid. Combined with a public policy principle which states that the judgment opening the insolvency proceedings does not render claims due payable on the date of its pronouncement, it was clear that the contractual netting mechanism was not assured by law.

However, particular case law developed in France in the early 1990s which recognized the close-out netting of related claims, even in the case of insolvency proceedings. The French case law qualified interrelated claims as those having a close link and the same contractual relationship ("*connexité*"). On the mere basis of interrelated claims (rather than on the basis of the traditional principle of statutory netting that required the claims to be payable, certain and fungible), French case law thus permitted the contractual netting between claims of the bankrupt party and claims of the other non-defaulting party which were not yet due and payable before the early termination date, or the amount of which had not yet been settled. This case law was subsequently enshrined in Article L.621-24 of the French Commercial Code, which prohibits the payment of any claim arising prior to the judgment opening the insolvency proceeding, but authorizes the payment by netting of related claims ("*créances connexes*").

Since the ISDA MA creates a contractual common mechanism for termination and contractual netting for all outstanding transactions, French case law accordingly recognized that claims under the ISDA MA were related claims and that close-out netting can be carried out even in the case of insolvency proceedings. Therefore, there were no legal impediments in France to the enforceability of the close-out netting mechanism in the ISDA MA.

2.3.2.1 OHADA

2.3.2.1.1 Early termination and contractual netting in case of insolvency proceedings

Pursuant to Article 107 of the Uniform Act Organizing Collective Proceedings for Wiping Off Debts (also referred to as the 2015 Uniform Act On Bankruptcy Proceedings) (the "**AUPCAP**"), insolvency proceedings may call into question the enforceability of early termination and contractual netting.

2.3.2.1.1.1 Early termination

Article 107 of the AUPCAP provides that:

"*notwithstanding any legal provision or any contractual clause or indivisibility, no termination or cancellation of an outstanding contract can result from the sole fact of the commencement of the receivership or liquidation of the assets*" of the defaulting party.

Additionally, pursuant to Article 108 of the AUPCAP, only the court-appointed trustee ("*syndic*") in the insolvency proceeding can choose to pursue the outstanding contracts. As a consequence, the trustee's decision would override any contractual provision pertaining to termination rights upon the commencement of insolvency proceedings. Moreover, the insolvent party's failure to fulfil its contractual obligations prior to the opening of bankruptcy proceedings does not affect the right of the trustee to decide to enforce outstanding contracts provided it performs its own contractual obligations towards its counterparty

2.3.2.1.1.2 Contractual netting

Under Article 68 (4°) of the AUPCAP, a payment made during the "suspect period" (*i.e.* a claw back period) might be unenforceable except, *inter alia* with respect to interconnected due debts:

"*The following acts shall be unenforceable against the body of creditors where they are carried out during the suspect period:*

(3°) any payment of unmatured debt, regardless of the means except with a bill of exchange or promissory note*;*

(4°) any payment of matured debts, other than in cash, bill of exchange or promissory note, transfer, direct debit, credit card or legal, judicial or contractual offset of debts that are interconnected or any other mode of payment that is normal or commonly accepted *in business relations in the debtor's sector of activity*"[35].

Article 69 specifies however that voluntary payments of due debts may also be declared unenforceable, with some exceptions, if they were made with knowledge of the debtor's insolvency.

The Supreme Court of Ivory Coast ruled out that "*in case of insolvency proceedings, no legal, contractual or judicial compensation may be made as from the judgment opening the proceedings for judicial settlement or liquidation of assets*"[36].

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[35] Article 69 of the AUPCAP specifies however that voluntary payments of due debts may be declared unenforceable, with some exceptions, if they were made with full knowledge of the debtor's insolvency.

[36] Ivory Coast Supreme Court (*Cour Suprême de Côte d'Ivoire, Chambre Judiciaire*) – Case n° 402/09 dated June 12, 2009, Toure Alzouma Maimouna c/ Seka Anon(Me Tano Kouadio Emmanuel), Actualités Juridiques n° 68-69 / 2010, p. 40.

However, Ivorian case law has clarified that the netting of claims, whether done post-insolvency or during the suspect period, could be valid if the reciprocal claims and debts invoked are liquid, payable and interrelated ("*connexes*"):

"The prohibition of payment after the judgment of the commencement of insolvency proceedings, which does not preclude payment by netting against interrelated claims ("connexes"), is valid, the bank's netting between its claim and the related claim of the company in liquidation, being operated as of right by the sole force of the law, even without the debtor's knowledge[37]."

Since the adoption by the OHADA of the revised AUPCAP in 2015, the Court of Justice and Arbitration of the OHADA ("**CCJA**"), which is competent for such matters[38] has not had, to our best knowledge, the opportunity to rule on this matter.

However, legal commentators have expressed a view that "the intent of the authors of the AUPCAP, when reading and combining notably its articles 68, 102 and 109, was that the netting of claims after the opening of the bankruptcy proceedings is amply admitted by the AUPCAP when claims are "*connexes*".[39]

Hence, as was the case under French case law, Ivorian case law has recognized netting as enforceable for interrelated, liquid and payable claims even in the case of insolvency proceedings. French law went a step further providing that netting was possible for related claims regardless of whether they were payable. To the best of our knowledge, Ivorian law or the CCJA has not yet established such a principle. As noted above, French law was amended to allow close-out netting in case of insolvency proceedings. The OHADA has not yet adopted any such amendments.

2.3.2.1.2 Indivisibility of the ISDA MA and cherry-picking during insolvency proceedings

2.3.2.1.2.1 Indivisibility of the ISDA MA

The ISDA MA provides a contractual framework for different types of derivatives transactions. This raises the question of whether transactions concluded under the master agreement should be considered as one indivisible set of transactions or whether each transaction should be considered as a separate and distinct contract.

The ISDA MA provides that derivatives contracts concluded under the ISDA MA must be seen as a set of transactions that may not be disaggregated – while individual transactions may vary according to their terms, as further specified in such transaction's confirmation, they all remain subject to the same legal framework.

Even if that is the case under English law (*i.e.* the governing law of the ISDA MA), the contractual indivisibility should be assessed with regard to the law and case law of Ivory Coast that could set different criteria to qualify the indivisibility of the contract.

We are not aware of this concept of contractual indivisibility being tested under Ivorian law, and Ivorian case law could yet determine different criteria to qualify the indivisibility of the ISDA MA.

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[37] Ivory Coast Supreme Court (*Cour Suprême de Côte d'Ivoire, Chambre Judiciaire, Formation civile*) – Case n° 383 dated July 6, 2006, Juris-Ohada n° 3 – July-August-September 2008.

[38] As stated by case law on the basis of article 15 of the OHADA Treaty (Ivory Coast Supreme Court (*Cour Suprême de Côte d'Ivoire, Chambre Judiciaire)* Case n° 396/09 dated June 4, 2009, Bicicil (SCPA Dogue-Abbe Yao et Associés) c/ Sicus (Me NDoua Adou Pascal). Actualités Juridiques n° 68-69, 2010, p. 59).

[39] OHADA Law Encyclopaedia, Consequences of the opening of bankruptcy proceedings vis-à-vis creditors, p.764.

It may be noted however that under consistently applied French case law, the ISDA MA constitutes a single legal framework for derivative contracts.

Taking into consideration the fairly close connections between the civil and bankruptcy law regimes of France and those of the Ivory Coast (in terms of actual laws and regulations, case law and comments by legal authors), one may reasonably anticipate that Ivorian judges will follow the French law interpretation, which confirms that all derivatives contracts concluded pursuant to the ISDA MA should be treated as a single set and not separately.

2.3.2.1.2.2 Possibility of cherry picking during insolvency proceedings

Upon the commencement of insolvency proceedings, Article 108 of the AUPCAP gives full discretion to the court-appointed trustee to require the execution of outstanding contracts.

As a procedural matter, in the absence of a decision to continue the contract or if the trustee is late in reaching his decision, the non-defaulting party is entitled to send formal notice to the trustee as to the lack of decision on the option. The trustee must then take a decision within thirty days. If no decision is taken within this period of time, the non-defaulting party may refer the matter to the bankruptcy judge ("*juge-commissaire*"), who will terminate the contract as of right if the conditions are fulfilled. The trustee can also petition the bankruptcy judge for the early termination of the contract if, in particular, he concludes that the continuation of the contract is no longer justified or the defaulting party does not have the necessary liquidity to meet payments due under the contract.

By implication, the broad discretionary powers afforded to the trustee could result in the decision to ask for the termination of certain derivatives contracts while requiring the continued performance of other derivatives contracts under the ISDA MA (such ability to pick and choose being referred to hereinafter as cherry picking). However, in furtherance of, and on the same grounds as with respect to our previous conclusion under paragraph 2.3.2.1.2.1 above, one may reasonably anticipate that the Ivorian courts should, as French courts do, recognize the indivisibility of the ISDA MA and therefore would treat all derivatives contracts under an ISDA MA as a single set of transactions that cannot be disaggregated.

Therefore, the only option given to the trustee in respect of the ISDA MA should be to either ask for the termination of all outstanding derivatives contracts or to require the continued performance of such contracts.

2.3.2.2 WAEMU

The regulatory framework for insolvency proceedings in the Ivory Coast is promulgated by the OHADA. While the WAEMU does not otherwise provide for the regulation of insolvency proceedings, it has set forth a new legal framework for banking regulation, as adopted pursuant to the Ivorian Banking law. With respect to insolvency, Article 84 of the Ivorian Banking law states:

"*The provisions of the general law relating to the preventive settlement, the judicial reorganization and the liquidation of property are applicable to credit institutions so long as they do not conflict with the provisions of this law*" (i.e. the Ivorian Banking Law and pertaining texts).

This text echoes the provisions of Article 1.1 of the revised AUPCAP:

"*Conciliation, preventive settlement, reorganization and assets liquidation proceedings shall govern legal entities governed by private law engaged in an activity regulated by a special regime when it is not otherwise regulated by specific rules governing such activity. Activities under special regulations within the meaning of this Uniform act and texts governing them are, inter alia, those carried out by banking institutions within the meaning of the banking law, […] as well as activities of insurance and reinsurance companies of the States party to the OHADA Treaty.*"

It would include the recent Prudential Decision, as implemented under Article 56 of the WAMU Banking Law. However the Prudential Decision addresses only matters relating to the regulatory framework of financial institutions and does not cover the contractual relationship with third parties (i.e. among financial institutions or with non-financial institutions) in case of insolvency. In this respect, the OHADA legislation concerning insolvency proceedings then serves as the framework for the settlement of derivatives contracts post-insolvency since the Ivorian Banking Law (and pertaining texts) does not include specific provisions on the matter (other than with respect to the banking resolution regime). However, the need for a full implementation of the Prudential Decision may put pressure on the relevant authorities to conform the applicable legislation to the current French law concerning the netting of contracts in the event of a bankruptcy, at least insofar as it applies to banking counterparties.

As previously noted, the Prudential Decision adopts the framework of the Basel regulation in the WAEMU. The new prudential regulatory framework applies risk capital requirements to banking, credit and other financial institutions as well as financial holding companies in order to ensure these establishments are in a position to meet their outstanding obligations. These risk capital requirements are calculated based on counterparty credit exposure. However, the framework provides for reduced risk capital requirements where these establishments can sufficiently demonstrate that certain risk mitigation techniques are applicable and enforceable, in a variety of circumstances, to their transactions with counterparties.

Pursuant to paragraphs 269 *et seq*. of the Prudential Decision, in order for a bank to claim the reduced risk capital requirements in respect of bilateral agreements that qualify as netting agreements, the bank must prove that the netting mechanism is valid, binding and enforceable in all relevant countries even in the event of a counterparty's insolvency or bankruptcy.

As previously discussed, netting certainty in the event of insolvency is not enshrined in Ivorian law, according to Articles 68 and 69 of the AUPCAP, but has been upheld by Ivorian case law where applied to interrelated, liquid and payable claims. In order to avail themselves of the reduced risk capital requirements, Ivorian banks and financial institutions will undoubtedly seek certainty on this point, and (similar to the evolution in French law) it would not be surprising to see a codification of this case law at some point in the future.

WAMU Banking Counterparties are also subject to a specific resolution regime[40], as detailed in paragraph 2.3.3.2 below. At this stage, it is premature to assess the extent to which the implementation of the provisions on systemic WAMU banks may depart from the European regime[41] (although we understand that it is not the intent) and might challenge the enforceability of contractual netting, since a number of implementing regulations have not been issued yet.

2.3.3 Specific insolvency proceedings applicable to credit institutions

Three specific texts deal with the distressed banks regime in the WAEMU:

- Annex to the Convention Governing the Banking Commission of WAMU as amended by Decision n° 010 dated 29/09/2017/CM/UMOA (the "**Convention Annex**");

[40]Annex to the Convention regulating the UMOA Banking Commission dated April 6, 2007 as amended by a Decision n° 010 dated September 29, 2017.

[41]Recovery and resolution directive 2014/59/EU of May 15, 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and Single Resolution Mechanism Regulation: Regulation (EU) N°806/2014 of the European Parliament and the Council of July 15, 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund..

- circular n° 006-2011/CB/C relating to the interim administration of credit institutions and decentralized financial systems of the WAMU; and
- circular n° 007-2011/CB/C relating to the judicial liquidation of WAMU credit institutions and decentralized financial systems, (together, the "**WAMU Rules**").

As mentioned above, these texts coexist and take precedence over the rules laid down by the AUPCAP. Whenever a rule established by the AUPCAP is contrary to the WAMU Rules, the AUPCAP shall not apply.

Where the WAMU Rules provide for general rules applicable to credit institutions (as described below), specific rules are applicable to systemic credit institutions (see paragraph 2.3.3.2 below).

2.3.3.1 General rules applicable to financial institutions

2.3.3.1.1 The interim administration regime

Article 60 of the Ivorian Banking law gives the Banking Commission power to put credit institutions subject to its supervision[42] into forced liquidation for illicit activity, or into forced receivership, under certain circumstances. The regulatory framework for the Banking Commission's supervision of credit institutions is elaborated in the Convention Annex and, according to Article 34, it may decide to take such measures:

- at the request of the distressed bank directors, if they believe that they are no longer able to perform their duties in an orderly manner;
- upon its determination that management decisions can no longer be taken under normal conditions;
- upon its decision for the suspension or resignation of the directors responsible for a violation of banking regulations; or
- if the management of the institution jeopardizes customer deposits or make the claims of the BCEAO illiquid (in accordance with Article 60 of the Banking Law).

The decision is notified to the Minister of Finance of the relevant country (Ivory Coast in this particular case), who then appoints an interim administrator.

2.3.3.1.2 The powers of the interim administrator

The Minister of Finance confers to the interim administrator the powers necessary for the administration and management of the institution and specifies the scope of his duties.

The interim administrator may be supervised by a "monitoring committee" ("*comité de suivi*") issuing opinions on the conduct of operations, the prospects for recovery and the implementation of the decision of the Banking Commission.

It should be noted that the WAMU Rules do not allow for, nor prohibit, any specific action by the interim administrator, notably with respect to his ability to terminate a contract before its initial maturity date, nor to choose to carry on only some of the outstanding agreements (cherry-picking).

[42] Such institutions do not include mutual or cooperative credit institutions, insurance companies, pension funds, asset managers, international financial institutions or those institutions whose activities in the territory are authorized by international treaty.

2.3.3.1.3 Regulatory supervisory powers

The opening of a preventive settlement procedure (the framework for which is provided by the AUPCAP) in respect of a credit institution is subject to the approval of the Banking Commission, according to Article 87 of the Ivorian Banking Law. Once approved, the credit institution would then be subject to the unwinding and settlement procedures prescribed by the AUPCAP, with the caveat that, pursuant to Article 29 of the Convention Annex, the Banking Commission would also be given broad authority to take whatever measures it deems necessary to secure the banking system.

2.3.3.1.4 Settlement of liabilities

Pursuant to Article 95 of the Ivorian Banking law, in the event of the settlement of liabilities ("*apurement du passif*") of a credit institution, account holders shall be refunded immediately after the creditors of legal proceedings fees and employees, up to an amount fixed by the competent authority, on the basis of available resources, less the indebtedness due by such account holder to the credit institution.

This order of priority does not apply to the deposits of credit institutions and other financial institutions.

2.3.3.1.5 Recourse

Article 43 of the Convention Annex states that there is no possible recourse against decisions of interim administration or liquidation following the appointment of the interim administrator or the liquidator by the Minister of Finance of the relevant country in which such decisions are enforceable.

2.3.3.2 Specific rules applicable to Systemically important financial institutions

In addition to providing for the Banking Commission's supervision of credit institutions, the Convention Annex establishes resolution procedures for banking entities, decentralized financial systems, market infrastructures or any entity subject to the supervision of the Banking Commission whose failure may have a significant impact on the financial stability or the economy of one or more member states of the WAEMU.

2.3.3.2.1 The resolution procedure

The Convention Annex establishes both a supervisory board, whose remit includes the ongoing, continuous supervision and control of credit institutions, and a resolution board, whose mission is to preserve financial stability and limit collateral damage in the event of a banking crisis. The resolution board is a technical body that oversees the development and implementation of crisis prevention and resolution measures. At the request of the supervisory board , the resolution board may determine the measures necessary to carry out the resolution of the credit institution, without having to obtain the authorization or approval of any administrative or judicial authority (Article 48 and 52 of the Convention Annex).

2.3.3.2.2 Resolution Board measures

Under Article 53 of the Convention Annex, the resolution board may take certain measures in the performance of its mission, the most significant of which are:

- notwithstanding any provision or stipulation to the contrary, prohibit the payment of a credit institution's debts arising prior to the date of entry into resolution;

- limit or temporarily prohibit the carrying on of certain operations;
- terminate agreements concerning financial obligations of the credit establishment or the netting of debts and claims related to such agreements; and
- suspend the exercise of the right to invoke the early termination of an agreement and the rights of cancellation and compensation of all or part of a contract concluded with the credit institution.

Consequently, the resolution board could apply such measures in respect of those provisions of the ISDA MA providing for early termination and netting, in which case such provisions would be unenforceable against any credit institution that is subject to a resolution procedure.

The Banking Commission is due to prepare and issue a circular ("**circulaire**") dealing with implementing regulations of the Convention Annex which is expected, *inter alia*, to aim at minimizing the harshness of such consequences. Considering that the current regulation is aligned with international standards, one may reasonably anticipate that the contemplated circular would be close to the European Directive "establishing a framework for the recovery and resolution of credit institutions and investment firms" ("**BRRD**").

2.3.3.2.3 Recognition of decisions

Any enforcement action taken under the ISDA MA against an Ivorian counterparty in a foreign court is effectively worthless unless the foreign court's decision is recognized by a court in the Ivory Coast. The ICC stipulates that the execution of foreign judgments must be done by *exequatur*.

Exequatur is a judgment issued by an Ivorian court that recognizes a foreign decision and allows for its enforcement in Ivory Coast. An *exequatur* will only recognize a foreign judgment if it finds that, *inter alia*, the decision does not contain a provision contrary to Ivorian public policy and is not otherwise precluded by a prior judicial decision having the authority of *res judicata*[43].

With regard to the regional legal framework, Article 33 of the AUVE lays down the list of enforceable instruments which may give rise to enforcement measures in a member state:

"*foreign acts and court decisions (...) declared enforceable by a court decision (...) of the State in which such instrument is invoked*".

Regionally, the AUVE has unified enforcement procedures without calling into question the national rules relating to the recognition and enforcement of foreign decisions. For example, its rules make it possible to ensure that a decision rendered in Togo is executed in Togo according to the same procedures and under the same conditions as those followed in the Ivory Coast for a decision rendered by an Ivorian court. It does not facilitate the recognition and enforcement in Togo of the Ivorian decision, which must receive a prior *exequatur* according to the conditions laid down by the Togolese legal order.

We are not aware whether there is any case law to guide our assessment of the enforceability of foreign judgments, thereby introducing additional uncertainly into the enforceability and validity of the ISDA MA in the Ivory Coast, especially as it concerns those provisions relating to early termination and the close-out netting of claims.

[43] Article 347 of the Ivorian Civil, Commercial and Administrative Procedure Code lays down the conditions for the enforcement of a decision issued by foreign courts.

2.4 Close-out netting of repurchase transactions: a changing legal landscape

A relatively new regulatory framework for repurchase transactions may signal an evolution in the law surrounding close-out netting.

In a repurchase transaction, one party transfers to another, temporarily but in full ownership, bills of exchange or debt securities in exchange for payment at an agreed price.

Domestic repurchase transactions are governed by Regulation n° 07/2013/CM/UEMOA of June 28, 2013, ("**Regulation 7/2013**"), as well as its Instruction 04 n° 03-09-2013, which includes a standard master agreement relating to repurchase transactions. Concurrently, Regulation n° 15/2002/CM/UEMOA on payment systems in WEAMU member states speaks of the settlement of repurchase transactions. Both regulations address the treatment of repurchase transactions in the event of insolvency, and the specificity of the texts serves as tacit acknowledgment that regulatory authorities must provide market participants with clarity going forward on the enforceability of netting post-insolvency.

As general principle regarding offsetting payables and receivables, Article 15 clearly states that:

"*The payables and receivables pertaining to repurchase transactions that may be relied on against third parties shall be offset in accordance with the terms and conditions provided for by the framework agreement.*

The provisions of this article shall apply notwithstanding any contrary provision".

Article 18 of Regulation 7/2013 addresses early termination of repurchase transactions pursuant to a master agreement in even greater specificity, stating that either party to such master agreement may suspend the performance of its obligations thereunder and terminate all outstanding repurchase transactions upon an event of default, including an insolvency default. Article 16 clearly specifies that:

"[…] *The repurchase transactions concluded under the framework agreement established between the parties may be terminated, in the event of default by one of them or new circumstances, under the conditions provided for in chapter I and II of this Title.*"

And Article 17 further defines the concept of default:

"*For the purposes of the implementation of this Regulation, default by one of the parties shall constitute one of the following:*

[…] *5. The opening of a procedure for preventive settlement, legal redresses, asset liquidation, or any other equivalent legal procedure concerning one of the parties;*"

Moreover, Article 19 notes that the non-defaulting party is entitled to retain the securities or value transferred pursuant to the transaction, and Articles 24 and 25 provide for the close-out netting and set-off of amounts due upon termination.

On its own, Regulation 7/2013 would seem to guarantee post-insolvency close-out netting of repurchase transactions under a master agreement. However, there is still the lingering matter of Articles 68 and 69 of the AUPCAP, which states that a payment made during the "suspect period" might be unenforceable. While we would expect WAEMU regulations to supersede OHADA regulations in the event of a conflict between the two, in this case Regulation 7/2013 did not address whether such payments would be enforceable even during the "suspect period". While we believe the correct interpretation of Regulation 7/2013 to be that close-out netting of repurchase transactions is enforceable as a matter of law, in the context of the AUPCAP provisions, we cannot conclude with sufficient certainty that post-insolvency netting of repurchase transactions under a master agreement is enforceable in the Ivory Coast insofar as any compensation made during the "suspect period" could be held to be unenforceable.

2.5 Specific considerations regarding the enforceability of the collateral of derivatives transactions

2.5.1 Eligible collateral under Ivorian law

The OHADA Uniform Act on security (*Organisation des sûretés*, Acte uniforme de 15 December 2010) (the "**Security Act**") provides the legal framework for the taking of security for OHADA member states.

Depending upon the nature of the collateral, the form of security may include several types of guarantees, pledges (including of bank and securities accounts) and two types of transfer of ownership. According to Article 67 of the Security Act, possession of pledged collateral gives rise to a right of retention until the underlying obligation has been extinguished.

Regarding transfer of ownership, only the following collateral mechanisms are permitted:

- cash ownership transfer through a "*fiducie*" (mechanism equivalent to a trust); and
- sale of professional receivables.

The concept of transfer of title as described in the variation margin credit support annex of the ISDA MA is not permissible under Ivorian law. Unlike in the European Union, no Ivorian law or regulation has been put in place (or even specifically addresses) to match the legal consequences of the CSA structure/benefit.

In accordance with paragraphs 215 *et seq*. of the Prudential Decision, credit institutions are authorized to use collateral agreements under certain conditions. Paragraph 229 of the Prudential Decision specifies that the financial collateral agreement must include provisions allowing the non-defaulting party and, as the case may be, through the depositary of the assets subject to the security interests, to liquidate or to acquire such assets within a reasonable period of time in case of a default by its counterparty including in case of insolvency proceedings or bankruptcy (or any other event of default defined in the relevant documentation).

In order to fulfill the requirements of the Prudential Ivorian regulations, one may choose to use the English law governed CSA collateral structure (pledge form), in which case the collateral should be held in and constituted under the laws of a foreign country which recognize the legal consequences of the CSA benefit, as is the case in France.

Otherwise, i.e. if the collateral is located in Ivory Coast, one has to turn towards the general security interest laws ("*droit commun des sûretés*") of Ivory Coast with the effective granting of the security interest (i.e. the collateralization) being documented through an Ivorian law governed document (pledge of bank and securities accounts) complying with applicable Ivorian laws.

2.5.2 Enforceability of collateral agreement under Ivorian law

2.5.2.1 Enforceability of collateral agreement in the absence of insolvency proceeding

Provided that the collateral is put in place so as to match the legal consequences of the CSA structure/benefit or that the taking of security (pledge agreement) is permitted under, and put in place in accordance with, the Security Act, such security should be enforceable in the absence of insolvency proceedings. Subject to the foregoing, a collateral agreement forming part of an ISDA MA should be enforceable under Ivorian law.

2.5.2.2 Enforceability of the collateral agreement in case of insolvency proceeding

In the event of insolvency proceedings, Article 68 of the AUPCAP provides that certain forms of security may not be enforceable if made during the "suspect period" unless:

- such security was granted to replace a pre-existing security of at least the same nature and amount; or
- such security was granted under an agreement entered into before the beginning of the suspect period.

Otherwise, our analysis as to the enforceability of any such collateral agreement would follow, to the best or our knowledge, that which we previously developed in Section 2.3.2 of this Guide.

3 CONCLUSION: PROPOSALS TO DEVELOP AND ENFORCE A NETTING LEGAL FRAMEWORK IN THE WAEMU

The development of capital markets in central and western Africa, and in the Ivory Coast in particular, is still at an embryonic stage. The construction of a local market dedicated to the trading of derivative contracts is an essential component to the dynamism of the equity and bond markets and would allow the diversification of the offer of structured financial products backed by derivatives. This market evolution would provide local economic operators with direct access to additional sources of financing, and would allow for improvement and optimization of the mechanisms available to transfer the risks of a portfolio of assets to counterparties that are better suited to absorb them. Local changes in the banking and financial environment must take into account the need to provide legal certainty to derivatives market participants and to promote a harmonized contractual framework within the WAEMU.

Moreover, in view of the regulations put in place by the CBWAS, the emergence of an organized market for the trading of derivative contracts appears to be a structural requirement that must accompany the development of the financial markets of the WEAMU region. The construction of an organized or over-the-counter market will have to be based on effective technical and legal expertise.

A significant milestone was reached with the recent development of a master agreement to govern repurchase agreements and securities lending. A new master agreement on derivative instruments could be inspired by this model to set the legal framework for the negotiation of contracts on derivative instruments in accordance with international standards. To this end, the regulatory authorities could opt for a regional master agreement for the needs of the local market, while allowing local companies to conclude an ISDA MA style international master agreement to cover the international financial risks.

Another significant milestone was reached with the adoption of Basel standards for banks through the Prudential Decision. Notwithstanding these advances, additional work is needed to provide a consistent and rigorous regulatory framework for OTC derivatives in the WAEMU zone.

This evolution will require coordination amongst regulatory and supervisory bodies, banks and financial institutions and other market participants and end users to ensure that market practice meets international prudential standards while still allowing for market growth and diversification.

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Kramer Levin is now focusing on emerging market as WAEMU to promote his EU and more particularly, its French expertise in financial markets to perform in this new economic framework with ease. Kramer Levin has already advised many Africans banks to determine the legal frame in which they can grow.

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[44] AFG: *Association Française de la Gestion Financière*.

[45] AMAFI: *Association Française des Marchés Financiers*.

[46] AFIC: *Association Française des Investisseurs pour la Croissance*.

5 EMERITUS IVORY COAST: OUR LOCAL PARTNER

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