

SURVEY on Legal Protection of CSD/CCP

In Case of Participants' Insolvency

ACG Legal Task Force

June 2010

NOTE:

The objective of this survey is to collect background materials for the research theme on legal protection of CSD in case of participants' insolvency. SD&C serves as the coordinator of this theme.

Considering some ACG members function as CSD only, and thus some of this questions may not be applicable, please distinguish the function of each member (solely CSD, solely CCP or both CSD and CCP), and answer the applicable questions according to your business. For some solely-CSD members, you could answer related questions you are interested in by inquiring CCP of home markets.

Organization Name:

Contact person and title:

Telephone:

Fax:

E-mail:

Function: (solely CSD, solely CCP or both CSD and CCP)

Part One: Cases on participants' insolvency

1-1. CSD/CCP's risk caused by participants' insolvency

1-1-1 Would CSD/CCP be affected by participants' insolvency in your market?

- (a) No
- (b) Yes, for CCP
- (c) Yes, for CSD
- (d) Yes, for both CCP and the CSD

If your answer is Yes, how the participants' insolvency affect CSD/CCP?

1-1-2 And what kind of effect would be led to (multiple-choice):

- (a) CSD/CCP would suffer System risk
- (b) CSD/CCP would suffer Liquidity risk
- (c) CSD/CCP would suffer Replacement cost risk
- (d) CSD/CCP would suffer Principal risk
- (e) Others_____

1-1-3 If a CSD/CCP suffers loss because of participants' insolvency,

- (a) What kinds of financial resources are available for covering CSD/CCP's loss?
- (b) If loss still existed after all available financial resources are exhausted, what further measures could be adopted?

1-1-4 Are there any cases on participant's insolvency in your market?

If there are, please briefly introduce these cases.

1-2. Legal issues and risks arise from participants' insolvency

1-2-1 Are the rules of the depository or settlement system and contracts between CSD/CCP and its participants still effective even if the participant enters into insolvency process?

1-2-2 If so, please quote the specific legal provision which grants this privilege to the rules of the depository or settlement system:

1-2-3 Are there any legal provisions which grant the privilege to the rules and procedures of the CSD/CCP that the rules applicable for the process of securities depository, clearing and settlement take precedence over law of insolvency? If so, please quote them:

1-2-4 Do the following provisions have effect despite the commencement of an insolvency proceeding of participants?

(a) Any provision precludes the revocation of any instruction given by a participant after the instruction having been entered irrevocably into the relevant clearing and settlement process;

(b) Any provision precludes the invalidation or reversal of a debit or credit of securities to a securities account after the time at which that debit, credit has been done.

1-2-5 Would the rights of investors be affected if the participant entering into insolvency process?

1-2-6 Does investors exercise recall right to their securities in the process of the participant's insolvency? Can investors ask to take all their securities or transfer their whole securities and cash to other securities firm once the participant entering into insolvency?

If so, please quote the specific legal provisions.

If not, are there any special arrangements existing, such as loss sharing rule? Please give a brief introduction.

(Note: Loss sharing refers that the relevant investors share the shortfall if the actual securities are less than the amount of the securities credited to the investors' accounts.)

Part Two: Elements related to participants' insolvency

2-1. Securities custody, clearing and settlement system

2-1-1 Does CSD/CCP bear the obligation of guarantee settlement?

2-1-2 Has the DVP principle been achieved in your market? If so, please point out which models it belong to:

- (a) Settle transfer instructions for both securities and funds on a trade-by-trade (gross) basis.
- (b) Settle securities transfer instructions on a gross basis, but settle funds transfer instructions on a netting basis.
- (c) Settle transfer instruction for both securities and funds on a netting basis.
- (d) Please give a brief description if more than one DVP methods are adopted.

2-1-3 Does netting settlement and securities title/right transfer occur simultaneously? If there would be time-gap between netting settlement and securities title/right transfer, please give a brief description.

2-1-4 Is there any potential risk to CSD/CCP regarding some financial derivatives? If so, please give a brief description.

2-1-5 The settlement participants are:

- (a) Investors
- (b) Brokers
- (c) Others_____

If the settlement participants are investors, does CSD/CCP maintain both securities account and cash account for the investor?

If CSD/CCP does not maintain cash account for the investor, who maintains it?

Does CSD/CCP bear the obligation of crediting/debiting the investor's securities account for his broker?

And please give a brief description on the process of maintaining the securities account and cash account.

2-1-6 Has there been any participants' fraudulent breach of settlement obligation to CSD/CCP? If so, please give a brief description.

2-1-7 Is there any other intrinsic risk in CSD/CCP's operating mechanism?

- (a) Error of system
- (b) Error occurring in the process of operation
- (c) Error occurring in the process of information transferring.
- (d) Others_____

And please give a brief description.

2-2. Participants' breach of settlement obligation

2-2-1 Does CSD/CCP adopts any supervision measures to prevent participants' breach of settlement obligation? If so, please give a brief introduction.

2-2-2 Are there any self-disciplined rules accepted by participants to lower possibility of breaching settlement obligation? If so, please give a brief introduction.

2-2-3 If a participant breaches its settlement obligation, what kind of measure could be adopted by CSD/CCP?

- (a) Informing the stock exchange and applying to stop its securities transaction
- (b) Holding the corresponding securities/cash
- (c) Suspending the relative settlement
- (d) Suspending or canceling his settlement participant qualification
- (e) Imposing a fine
- (f) Others _____

2-2-4 Please quote the specific provision which grants this franchise to CSD/CCP

2-3. Legal environment

2-3-1 Is there any insufficiency in the legal system regarding to your market which might lead to CSD/CCP's risk?

2-3-2 If so, which law/rule? Please quote the specific provisions:

- (a) Securities law. Provide that _____
- (b) Guaranty Law. Provide that _____
- (c) Insolvency law. Provide that _____
- (d) Company law. Provide that _____
- (e) Other law and provision _____

2-4. Legal characteristic of CSD/CCP

2-4-1 What type of legal entity does CSD/CCP belong to:

- (a) Non-profit organization
- (b) Limited corporation
- (c) Pubic corporation
- (d) Regulatory authority
- (e) Others _____

2-4-2 What is the relationship between CSD/CCP and regulatory authority(multiple-choice):

- (a) CSD/CCP is supervised by regulatory authority
- (b) The establishment of CSD/CCP shall be subject to approval of regulatory authority
- (c) The general manager (high management) of CSD/CCP shall be appointed and removed by regulatory authority
- (e) Others _____

2-4-3 Is there any possibility that CSD/CCP becomes insolvent because of the risk from participants' insolvency

Part Three: Legal arrangements on risk mitigation of CSD/CCP's participants

3-1. Creditor and debtor's rights and duties

3-1-1 What is the legal relationship between CSD/CCP's participants and their clients:

- (a) Commission / brokerage relationship
- (b) Trust relationship
- (c) Agent relationship
- (d) Others _____

If there are specific legal provisions in this regard, please quote them.

3-1-2 Does a participant bear obligation of providing guaranty for its clients? That means, when its clients fail to fulfill his settlement obligation, should the participant provide enough securities/cash for its clients to complete settlement?

3-1-3 What is the legal relationship between CSD/CCP and its participants? If there are specific legal provisions in this regard, please explain.

3-2. CSD/CCP's special role and privilege in participants' insolvency

3-2-1 Does CSD/CCP have right of refusing to deliver securities/cash when the participants fail to fulfill his settlement obligation?

3-2-2 If so, what is legal concept of this kind of right:

- (a) Lien,
- (b) Pledge,
- (c) Others _____

Please quote the specific legal provisions which grant this right of CSD/CCP:

3-2-3 Please indicate the limits of this right as indicated below:

- (a) The right is limited to securities in the participant's proprietary account.
- (b) The right is limited to securities in the course of purchase and sale transactions, but does not extend to settled positions.
- (c) The right may extend to settled client positions.
- (d) Other _____

3-2-4 Does the laws or rules in your market grant privilege of CSD/CCP regarding participants' insolvency? If so, please quote the specific legal provisions.

3-3. Provisions of Insolvency Law

3-3-1 Please list the provisions of your insolvency law regarding the participants' insolvency.

3-3-2 Please give a brief introduction to them.

Part Four: Comments and advice

4-1. Advice on statutory law

- If you have any suggestions or advice on statutory law regarding to legal protection of CSD/CCP in case of participants' insolvency, please give your comments.

4-2. Advice on legal environment

- If you have any suggestions or advice on legal environment (such as perfecting regulations, business rules or contractual arrangement) related to legal protection of CSD/CCP in case of participants' insolvency, please give your comments.