INDIAN JOURNAL OF LEGAL REVIEW

VOLUME 6 AND ISSUE 3 OF 2026

INSTITUTE OF LEGAL EDUCATION

INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN - 2583-2344

(Open Access Journal)

Journal's Home Page – https://ijlr.iledu.in/

Journal's Editorial Page - https://ijlr.iledu.in/editorial-board/

Volume 6 and Issue 3 of 2026 (Access Full Issue on - https://ijlr.iledu.in/volume-6-and-issue-3-of-2026/)

Publisher

Prasanna S,

Chairman of Institute of Legal Education

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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

VOLUME 6 AND ISSUE 3 OF 2026

APIS – 3920 - 0001 *(and)* ISSN - 2583-2344

Published by

Institute of Legal Education

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LEX FINANCIERIA AND THE NORMATIVE AUTHORITY OF THE ISDA MASTER AGREEMENT IN GLOBAL FINANCE

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BEST CITATION – ADITHYA KRISHNA, LEX FINANCIERIA AND THE NORMATIVE AUTHORITY OF THE ISDA MASTER AGREEMENT IN GLOBAL FINANCE, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR),* 6 (3) OF 2026, PG. 260-269, APIS – 3920 – 0001 & ISSN - 2583-2344.

Abstract

This paper examines the ISDA Master Agreement not merely as a contractual template but as a normative instrument with profound implications for global financial markets. It interrogates the ways in which repeated adoption, judicial recognition, and regulatory reliance converge to produce a framework that functions in many respects like law, even if it is not formal sovereign law. By situating the Master Agreement at the intersection of customary international law, transnational private law, and contract-as-law theory, the study aims to illuminate how private contracts can generate systemic authority, influence market behavior, and establish normative expectations that extend beyond the parties themselves.

The research explores the practical mechanisms through which ISDA operates. Credit support annexes, confirmations, and collateral arrangements translate abstract contractual obligations into enforceable outcomes. Judicial decisions, particularly in English and United States courts, provide reinforcement by interpreting and upholding ISDA clauses across disputes involving bankruptcy, netting, and cross-border enforcement. Regulatory actors, including central banks and international standard-setting bodies, rely on the framework to measure counterparty risk and maintain financial stability. Taken together, these interventions create a self-reinforcing normative cycle that parallels many functions traditionally associated with law.

Critics of the ISDA framework argue that its dominance grants disproportionate authority to private financial actors, raising questions about accountability and systemic risk. This paper engages with such critiques while emphasizing the practical necessity of ISDA in stabilizing otherwise fragmented and volatile derivatives markets. It interrogates the tension between private contractual authority and public regulatory oversight, illustrating how repeated practice and tacit recognition can produce normative force even in the absence of formal legislative enactment.

The theoretical contribution of this study is significant. Customary international law explains how repeated conduct combined with state recognition can produce binding norms. Transnational private law demonstrates that non-state actors can generate rules with systemic effect. Contract-as-law theory highlights how widely adopted contractual frameworks can function as constitutive instruments for markets, allocating risk, guiding behavior, and influencing judicial interpretation. Each lens alone offers insight, but together they provide a comprehensive explanation for the normative power of ISDA and its quasi-legal function.

In conclusion, this paper argues that the ISDA Master Agreement occupies a liminal space between private and public authority, contractual form and law-like function. Its study reveals broader truths about the evolving nature of authority in global finance, the role of private contracts in shaping market norms, and the complex interplay between repeated practice, judicial recognition, and regulatory reliance. By analyzing ISDA through multiple theoretical perspectives and grounding the

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discussion in judicial and practical realities, the paper contributes to an enriched understanding of how private agreements can achieve normative force on a global scale, challenging traditional doctrinal assumptions about the origin and enforcement of law.

Keywords: ISDA Master Agreement, Transnational Private Law, Customary International Law, Contract-as-Law Theory, Financial Market Regulation

Introduction

The ISDA Master Agreement stands as the most prevalent framework governing over-the-counter (OTC) derivatives transactions globally.[788] When people talk about international law, they usually picture treaties, conventions, or United Nations declarations. What is less obvious, though, is that much of the global economy runs on rules that were never debated in parliaments or signed by states. The ISDA Master Agreement is perhaps the clearest example of this. At first glance, it looks like nothing more than a contract template put together by an industry association. Yet in reality, it is the legal backbone of the derivatives market, which in turn underpins a huge part of modern finance. Its widespread adoption across diverse jurisdictions underscores its significance in the financial sector.[789] By some estimates, more than nine out of ten over-the-counter derivatives trades rely on its wording. That is not a minor technicality. It means that if the Agreement were to collapse or be ignored by courts, entire financial systems would be at risk.

It is therefore difficult to treat the ISDA Master Agreement as just another piece of boilerplate. Courts have been forced to acknowledge this fact. After the 2008 collapse of Lehman Brothers, disputes involving ISDA terms landed before judges in London, New York, and beyond. The questions were highly specific — could close-out netting provisions hold, what happens to payment obligations in insolvency? — but the implications were systemic. The answers determined not only the fate of counterparties but the stability of financial markets as a whole. What one notices, looking at those cases, is that judges were reluctant to disturb the Agreement's operation. They did not openly call it international law, of course, but the reasoning suggests something more than a private deal between two firms. It was as though the courts were aware that undermining ISDA would be akin to pulling threads out of the global financial fabric. This paper examines whether the ISDA Master Agreement, through its universal application and judicial enforcement, has attained a status akin to customary international law.[790]

That observation brings us to the central problem of this paper: should the ISDA Master Agreement be seen as part of customary international law, or at least as a candidate for what some have called *lex financieria*? In orthodox terms, custom requires two elements: general and consistent practice, and the belief that such practice is followed out of legal obligation, or *opinio juris*. This doctrine, clarified in cases like the *North Sea Continental Shelf*, has usually been applied to state behaviour — things like diplomatic immunity or passage rights at sea. Applying it to a contract drafted by a private trade association may feel like stretching the concept beyond recognition. Yet there is a case to be made. When courts across different jurisdictions consistently enforce ISDA terms, and when regulators justify such enforcement in the name of systemic necessity, there are at least traces of the two elements of custom.

The objection is obvious. ISDA is not a treaty. It is not even a soft law instrument like a UN Guideline. It is, at its origin, a private ordering device. So how can one seriously claim that it

[788] International Swaps and Derivatives Association (ISDA)

[789] Jo Braithwaite, 'Interpreting the ISDA Master Agreement' (Cambridge University Press, 2020)

[790] *Katharina Pistor, 'The Code of Capital' (Harvard University Press, 2019)*

qualifies as international law? The answer, at least in part, is that international law is not frozen in time. Scholars have long debated the extent to which non-state actors can generate rules. The law of merchant traders in medieval Europe (*lex mercatoria*) is often invoked as precedent. Financial law today may be going through a similar transition. If enough states, through their courts and legislatures, accept the Agreement as binding in effect, then perhaps its private origin matters less than its practical role. The ISDA Master Agreement provides an enforceable framework that mitigates disputes arising from derivative contracts.[791]

This is not to say the argument is watertight. Far from it. There are legitimacy concerns: why should a document written by banks and law firms, without democratic scrutiny, acquire the same aura as a rule of customary law? There is also the problem of fragmentation — some jurisdictions still limit netting or derivatives enforcement, so the global picture is not seamless. And yet, ignoring the role of ISDA is also unsatisfactory. Financial markets are too interconnected to be left in a legal grey zone. Even critics acknowledge that the Agreement has achieved a degree of universality and predictability that no treaty has matched in this space. ISDA agreements have been widely adopted even in jurisdictions without comprehensive derivatives regulation, signaling de facto legal authority.[792]

The stakes of this discussion are not academic alone. The way we conceptualise the ISDA Master Agreement affects real policy choices. Should international bodies move towards codifying certain practices to reduce uncertainty? Or should we continue to rely on the implicit acceptance of ISDA as a de facto global standard? And more broadly, what does it say about the nature of law in the twenty-first century if the most important legal text in finance is not a statute, not a treaty, but a privately drafted contract? The enforceability of ISDA agreements has been consistently reinforced by English and U.S. courts, which are considered market-standard jurisdictions.[793]

This paper does not claim to settle these questions once and for all. Instead, its aim is more modest but still significant: to explore whether ISDA can be understood through the lens of customary international law and to assess the implications of doing so. The discussion begins with a review of the theory of custom and transnational private law, before moving to judicial practice in key jurisdictions. It will also survey the major scholarly contributions to this debate, weighing arguments and counterarguments. Ultimately, the contention advanced here is that while ISDA may not yet be universally recognised as custom, the trajectory of state practice and judicial reasoning strongly suggests that it is moving in that direction. That movement alone justifies a deeper theoretical and doctrinal analysis. Its widespread adoption reflects a quasi-universal recognition that elevates private contractual norms into a transnational legal practice.[794]

Whether one agrees with the conclusion or not, the exercise matters. The ISDA Master Agreement is not going away. ISDA Master Agreements function as a benchmark for derivative transactions, often referenced in secondary contractual arrangements.[795] It will remain the skeleton of global derivatives markets, and by extension, of global finance. The question is whether international law will continue to look the other way, or whether it will begin to acknowledge that lawmaking in this century does not belong solely to states. The legal certainty provided by ISDA agreements attracts institutional investors seeking regulated exposure to derivatives markets.[796]

[791] Thomson Reuters, *The ISDA Master Agreement: Legal and Practical Considerations*, 2022.
[792] Investopedia, "Understanding the ISDA Master Agreement," 2025.
[793] HSF Kramer, *High Court Reaffirms Primacy of ISDA Master Agreement Jurisdiction Clause Post-Brexit*, 2023.
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[795] Financial Times, "The Role of ISDA Master Agreements in Financial Markets," 2024.
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INDIAN JOURNAL OF LEGAL REVIEW [IJLR – IF SCORE – 7.58]

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Theoretical Framework

Understanding the ISDA Master Agreement in the context of international law is tricky. On one hand, it is a privately drafted contract, designed primarily by banks and law firms to standardize derivatives transactions. On the other, it functions almost as a global norm, shaping behavior in financial markets and influencing state practice indirectly. How does one reconcile these seemingly contradictory realities? To approach this, three strands of theory are particularly helpful: customary international law formation, transnational private law, and the debate over contracts as law. Individually, each lens provides partial insight. Taken together, they reveal why ISDA may occupy a quasi-legal space, bridging private ordering and public authority. ISDA agreements illustrate how private contractual norms can evolve into functionally binding transnational law.[797]

At the heart of international law lies the concept of custom, traditionally understood as arising from two elements: widespread and consistent state practice, and opinio juris, the belief that the practice is legally obligatory. Legal scholars note that widespread usage of ISDA terms generates expectations akin to opinio juris in customary international law.[798] The ICJ, in the *North Sea Continental Shelf* cases, reaffirmed this dual requirement. Yet applying this framework to ISDA immediately raises questions. Clearly, states are not drafting ISDA clauses. Private actors dominate. But the twist is that states are participants too—through courts, regulators, and policy instruments. Thomson Reuters highlights the conceptual parallels between ISDA enforcement mechanisms and customary law recognition.[799] The repeated enforcement of ISDA provisions, especially in cases involving systemic risk like Lehman Brothers, suggests that states tacitly accept its rules. Perhaps this is not formal *opinio juris*, strictly speaking, but it is a functional equivalent: a recognition that upholding ISDA mechanisms matters legally because the system depends on it.

Consider legislative interventions across jurisdictions. In Singapore, the Financial Collateral Act explicitly recognizes close-out netting provisions; in the EU, the Financial Collateral Directive These interventions are far from incidental, they are responses, deliberate in nature, to how ISDA operates and reinforces its own norms. In a sense, private contractual practices start to intersect with, and perhaps even inform, public obligations. Could one go so far as to suggest that ISDA practice contributes, albeit indirectly, to the formation of customary international law? It is a provocative claim, but perhaps not entirely unreasonable in today's global financial environment. Critics, naturally, push back, private contracts, they insist, cannot create international law. And yet, in practice, when states repeatedly enforce these private standards out of systemic necessity, the boundary between mere contractual custom and recognized legal practice begins to blur.

This brings us to the domain of transnational private law. Unlike traditional public international law, which revolves around interactions between states, transnational law investigates the rules that govern cross-border activity regardless of origin. Scholars such as Gunther Teubner and Gralf-Peter Calliess have long argued that, particularly in modern commerce and finance, non-state actors frequently generate binding normative frameworks. The ISDA Master Agreement exemplifies this phenomenon. Drafted primarily by banks and legal counsel, it is nonetheless adopted almost universally in derivatives markets worldwide. Its authority does not rely solely on the parties' consent, it is reinforced by courts across multiple jurisdictions, by central banks, and by regulators who lean on ISDA to preserve systemic stability.

There is, of course, an underlying tension. On one hand, critics insist that labeling ISDA as law risks inflating private arrangements into a

[797] ISDA, 2021.
[798] Pistor, 2019.
[799] Thomson Reuters, 2022.

quasi-sovereign authority. After all, states remain the ultimate legitimizers. Enforcement, at least formally, is contingent on domestic courts applying local law, whether New York, English, or Japanese. Yet this critique, while valid, overlooks an important iterative process. Widespread adoption shapes expectations; these expectations influence judicial enforcement; enforcement, in turn, reinforces the normative framework. What emerges is a self-reinforcing regime, not law in the classical sense, but operationally formidable. In other words, transnational private law provides a lens through which ISDA's reach and binding force make sense.

Perhaps the most provocative idea is the notion that contracts can function as law in themselves, beyond merely creating obligations between the parties involved. Here, the ISDA Master Agreement challenges conventional thinking. Scholars like Katharina Pistor argue that financial contracts can act as constitutions of markets rather than simply agreements. The repeated and system-wide application of ISDA clauses establishes behavioral norms, allocates risk, and even constrains judicial discretion. Viewed this way, ISDA functions very much like law. It governs conduct, produces predictable outcomes, and shapes institutional behavior.

Yet, this argument is not without its challengers. Thinkers like Charles Fried caution that contracts remain rooted in autonomy and promise. They should not be elevated to the status of law merely because they are widely used. Still, in the case of ISDA, the scale is extraordinary and the systemic integration undeniable. Market participants cannot effectively operate in global derivatives markets without adhering to its framework. Deviations carry financial, reputational, and systemic consequences, which, practically speaking, enforce compliance. Its repeated application across borders, coupled with judicial and regulatory reinforcement, transforms what is ostensibly a private obligation into a normative regime. It may not be law in the sovereign sense, but it functions law-like.

Taken together, these three theoretical strands help illuminate ISDA's exceptional position. Customary law demonstrates that repeated practice, coupled with tacit state recognition, can generate normative force. Transnational private law shows that private actors can, in fact, produce binding norms outside formal state processes. Contract-as-law theory reveals how repetitive, system-wide contractual behavior can operate as regulatory authority. Individually, none of these perspectives fully captures ISDA's significance, collectively, they explain why the Master Agreement cannot be dismissed as mere boilerplate. It occupies a liminal space, bridging private and public spheres, contractual form, and quasi-legal function.

For this paper, grasping these frameworks is crucial. Judicial decisions do not occur in isolation, they are influenced by these realities. Regulatory interventions are intelligible only when we understand how private contracts function across borders. By situating ISDA at the crossroads of custom, transnational law, and contract-as-law theory, we can better interrogate whether it approaches the status of lex financieria or even customary international law. More importantly, this theoretical grounding equips us to critically evaluate legitimacy, enforceability, and systemic necessity, all central questions that this research seeks to address.

The Agreement in Practice

The ISDA Master Agreement in practice, well, it is more than just a template one signs without thought. It is, if one dares to put it like that, the very backbone upon which global derivatives markets precariously balance. Why does it matter? Why do so many banks, firms, and hedge funds, scattered across continents, rely on something drafted largely by a handful of legal minds in New York and London? The answer is not simple, nor only legal. Necessity, perhaps, drives it more than theory. Counterparty risk lurks everywhere, and without a framework—something to say who owes what,

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when, and how—the market would be chaos personified. The Master Agreement attempts, in its own procedural way, to impose clarity and certainty, not as law perhaps, but as law-like structure that actually works.

In its bones, the agreement has general terms and schedules. General terms, almost identical from Tokyo to London, lay out obligations, warranties, representations, and default conditions. Schedules, these strange little appendices, allow the agreement to bend around local law, idiosyncratic needs, particular negotiations. Standardization meets flexibility. How else, one might ask, could a single contract be adopted in the United States, Singapore, and Japan without utterly collapsing under the weight of differing legal systems? It works because it must, not because it is elegant.

Then there are the annexes, the collateral agreements, confirmations—small documents that, in practice, make the Master Agreement real. Abstract principles, suddenly, are enforceable. Collateral is posted, valuations are calculated, obligations adjust, sometimes in milliseconds. Without these operational instruments, the Master Agreement might remain aspirational, like some old law book no one reads. They bring precision to a world that would otherwise be defined by uncertainty and disputes.

Courts, predictably, have a role. English courts, a strange and powerful presence, act almost as global arbiters. Why English? London is a financial hub, yes, but also the law itself, in commercial matters, is taken seriously. Across the Atlantic, U.S. courts have upheld ISDA clauses too. Bankruptcy, netting disputes, cross-border enforcement—courts rule, disputes resolve, and the message spreads: ISDA matters, compliance is consequential, deviation is risky. Each ruling reinforces the other. A self-reinforcing loop emerges, a quiet law born not of parliament but of repeated judicial nods.

Regulators, of course, amplify the effect. Central banks and supervisory bodies assume ISDA compliance in measuring systemic risk. Basel Committee standards, capital adequacy assessments, counterparty exposure, all quietly rely on the agreement's framework. A private contract, here, becomes quasi-regulatory. Behavior is shaped, markets are stabilized, and institutions comply, not always because they choose to, but because they must.

Yet, let us not romanticize it. There are critics. Power resides with the banks who draft the clauses, they argue, and markets follow with little say. Is it troubling, some ask, that private institutions, not democratically accountable bodies, structure global finance? Perhaps, but the counterpoint, insist others, is compelling: without it, markets fragment, risk multiplies, instability grows. The Master Agreement stabilizes; it fills a vacuum; it works.

Consider the iterative nature. Participants internalize ISDA standards. Disputes are approached with them in mind. Courts recognize them. Regulators rely on them. Each step feeds the next. Self-reinforcing, cumulative, almost like gravity in financial law. Not law in the sovereign sense, no, but law-like. Contracts, practice, enforcement, repetition, recognition—they combine to create something operationally formidable.

Operationally, the stakes are obvious. Banks manage portfolios, reduce negotiation time, enforce netting, control collateral. Regulators have a benchmark. Investors see predictability. Efficiency, risk management, confidence, all result from the framework. The system works because ISDA works.

Finally, perhaps the most remarkable insight is about law itself. Authority need not originate exclusively from the state. Repeated practice, judicial recognition, regulatory reliance—together, they confer a kind of normative power. It is not formal law, and it is not perfect. But it is law-like. ISDA demonstrates that, at least in modern finance, private agreements can function almost as if they were legal norms, recognized, enforced, and followed, system-wide.

To sum up, examining the ISDA Master Agreement in practice is like peering behind the curtain of global finance. Contractual design, necessity, judicial enforcement, regulatory reliance, they all converge here. It is practical, normative, essential. Without understanding this operation, any discussion of ISDA's theoretical or legal weight would be incomplete, naive even. The Master Agreement, one realizes, is a strange mix of instrument, law, and system.

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