European Financial Markets Lawyers Group

SYMPOSIUM ON STANDARD MARKET DOCUMENTATION:

LESSONS LEARNED FROM THE CURRENT FINANCIAL CRISIS

SUMMARY REPORT

12 April 2010

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1 Introduction

1.1 Challenges Past and Ahead

In the course of the current financial crisis, which many economists call the worst crisis since the Great Depression of the 1930s, the financial industry's credit risk management practices, especially the procedures and the documentation governing the termination and close-out of financial transactions (i.e. derivatives, securities lending and repurchase transactions). were severely tested. Although the overall perception is that the close-out of financial transactions worked reasonably well, there is also consensus on the fact that the existing fragmentation of and deviations in the supporting standard market documentation and the co-existence of different, sometimes outdated, versions caused unforeseen issues which need to be addressed.

Other challenges lie ahead. The current financial crisis resulted in a broad range of regulatory responses on both the national and the international level. New legal frameworks for the rescue or winding-up of financial institutions have been discussed. The pending consultations provide for the regulator's right to transfer sound business units to a surviving "good bank" and, as such transfer may include financial transactions, also for a stay of termination and close-out rights. Striking the balance between a failing bank's interest in continuing necessary hedge transactions and the interest of other institutions, which depend on termination and close-out netting when managing their exposure to that failing bank, will be a major task for both legislators and those market and banking associations that develop market standard documentation.

Being concerned about the opaqueness and complexity of OTC derivatives and their contribution to the current financial crisis, regulators have discussed various initiatives with the aim of mitigating potential systemic risks stemming from the derivatives market. The proposals include, amongst other suggestions[1], the clearing of OTC derivatives through central counterparties (CCP). The stability and soundness of CCPs substantially depend on their credit risk management tools and their ability to adequately respond to a clearing member's failure, e.g., by porting their positions or closing them out. When doing so, CCP rely either on standard market documentation or on rules and regulations which substantially mirror the termination and close-out language of master agreements prevailing in the relevant market.

On 15 September 2009, one year after the Lehman Brothers' insolvency, the EFMLG organised a high-level legal symposium hosted by Calyon in London, in which representatives of various market and banking associations (such as the International Swaps and Derivatives Association, Inc. (**"ISDA"**), the Securities Industry and Financial Markets Association (**"SIFMA"**), the International Capital Markets Association (**"ICMA"**), the International Securities Lending Association (**"ISLA"**), the European Banking Federation (**"EBF"**) and the European Savings Banks Group (**"ESBG"**) and major financial institutions, companies, legal associations and international law firms participated. The main purpose of the symposium was to discuss the lessons learned from the current financial crisis specifically with a view to identifying potential divergences between various master agreements and discussing the need for harmonisation, if any.

[1] Other suggestions include the standardisation of OTC derivatives, the use of collateral support and margining agreements and a more stringent (and partially punitive) framework for the calculation of regulatory capital requirements for exposure related to financial transactions.

The EFMLG symposium was not the first initiative of this kind. The 1998 market disruption, the so-called Asian crisis, had already revealed weaknesses in standard market documentation which were later addressed in the 1999 report of the Counterparty Risk Management Policy Group (**“CRMPG”**) on “Improving Counterparty Risk Management Practices” and which led to the institution of the Global Documentation Steering Committee (**“GDSC”**). The GDSC recommended further harmonisation of standard market documentation, e.g. an unified approach to cross-default and force majeure provisions, and a grace period for involuntary insolvency petitions, which made their way into the master agreements along with some other proposals.

The EFMLG symposium was held as a starting point, raising the necessity of further harmonisation of standard market documentation and identifying the topics that should be in the limelight of such harmonisation. The ambitious target of finalising such work will require a broader and more sustainable discourse amongst the associations sponsoring the relevant master agreements, as well as their members.

1.2 Scope and Approach of this Report

This report summarises the discussions held at the EFMLG symposium. Its first conclusions and recommendations provide an overview of the current state of the standard master agreements widely used to document financial transactions, address the challenges the market participants are likely to face in the near future, and give practical recommendations as to the steps to be taken to improve and harmonise the standard market documentation.

The analysis is based on the following master agreements used to document transactions with respect to OTC derivatives, securities lending and repo transactions:

- 1992 (Multicurrency – Cross Border) ISDA Master Agreement (the **“ISDA 1992”**)
- 2002 ISDA Master Agreement (the **“ISDA 2002”**)
- Master Agreement for Financial Transactions – General Provisions – Edition 2004 from the Banking Federation of the European Union (the **“EMA 2004”**)
- PSA/ISMA Global Master Repurchase Agreement – November 1995 Version (the **“GMRA 1995”**)
- TBMA/ISMA Global Master Repurchase Agreement – 2000 Version (the **“GMRA 2000”**)
- Global Master Securities Lending Agreement (Version: May 2000) (the **“GMSLA 2000”**)
- Global Master Securities Lending Agreement (Version: January 2010) (the **“GMSLA 2010”**)

The ISDA 1992, the ISDA 2002, the EMA 2004, the GMRA 1995, the GMRA 2000, the GMSLA 2000 and the GMSLA 2010 are referred to collectively as the **“Master Agreements”** and individually as a **“Master Agreement”**. In the following chapters of the report, capitalised terms not defined in the report shall have the meaning given to them in the relevant Master Agreement.

This report is focused on the major issues that either gave rise to disputes between market participants in the course of the current financial crisis or could potentially cause problems in distressed market conditions, or may lead to ambiguity and controversial interpretations. The most important of such issues that shall be clarified and brought in line across the market as a matter of first priority are the following:

- definition of insolvency-related events of default;
- procedures for terminating Master Agreements by notice and the manner of serving such notices;
- mechanism of automatic early termination of transactions under the Master Agreements;
- calculation of close-out amounts; and
- dispute resolution procedures.

Synopsises showing the main discrepancies between the Master Agreements in a comparative table form, and lists of the members of the EFMLG and EFMLG Task Force on Standard Market Documentation are attached to this report as Annexes.

2 Executive Summary

The standard agreements for OTC derivatives, securities lending and repo transactions have generally mastered the challenges brought on by the financial crisis. By providing for a wide-ranging close-out netting of transactions, the Master Agreements played a crucial role in managing counterparty risks and mitigating the impact of the financial crisis. At the same time, a number of deficiencies and the need for an increased harmonisation among the Master Agreements were revealed. The aim of this report is to analyse certain key issues and make suggestions on how best to implement the lessons learned. The main points can be summarised as follows:

2.1 The main points can be summarised as follows:

2.1.1 Events of Default: Insolvency-related Events of Default should be reconsidered in light of the following findings: (i) The definitions relating to bankruptcy, insolvency and restructuring as used in the Master Agreements show a clear need for harmonisation. Differences can have a significant impact on market participants who have entered into more than one Master Agreement with the same counterparty and who may therefore experience problems due to mismatches in the timing and scope of terminations of Master Agreements following the occurrence of the same events. (ii) The crisis has shown the importance of special regulatory pre-insolvency regimes to prevent struggling financial institutions considered to be system-critical from going into insolvency (such as a moratorium or stay imposed by a supervisory authority). It is not clear in all Master Agreements whether and when such measures are to be interpreted as Events of Default. (iii) The same is basically true for measures based on recent legislation on financial market stability. Such measures (for example the appointment of a state representative or deferment of payment obligations) may also fall under the relatively broad insolvency definitions. In both cases, the considerations of clearer and appropriately harmonised contractual terms should be preceded by a discussion of whether such pre-insolvency or stabilisation measures should, and if so, may validly be construed as Events of Default, taking into account the applicable regulatory framework and the systemic purpose of such measures.

2.1.2 Termination Notices: Compliance with the formal procedure of serving a termination notice plays a crucial role in determining whether or not an early termination of transactions under the relevant Master Agreement has been triggered following an Event of Default or Termination Event. Currently, the notice provisions of the Master Agreements seem to be quite similar, but remaining differences can easily be overlooked. Such differences mainly relate to the use of different means of communication such as “old fashioned” telex, on the one hand, and “modern” electronic messaging systems and e-mails, on the other. Another issue that needs to be dealt with by the Master Agreements is inability of the non-defaulting party to deliver a notice when the defaulting party refuses to accept it, turns off a facsimile machine, etc. To fill this gap, new ways of serving notices, such as delivery via an intermediary appointed by the parties in advance or using website notification, should be considered by market participants and introduced to the Master Agreements.

2.1.3 Automatic Early Termination: The main purpose of automatic early termination clauses is to avoid potential conflicts with an otherwise applicable statutory insolvency regime that imposes termination restrictions or limitations in set-off. The approaches taken by Master Agreements differ significantly and require harmonisation. Considering the potential drawbacks, automatic early termination should not be considered as fallback. Another large field for harmonisation is bringing the definitions of “bankruptcy”, “insolvency”, “winding-up” and similar terms that “trigger” automatic early termination in line across Master Agreements.

2.1.4 Calculation of Close-out Amounts: Although Master Agreements take similar approaches and typically base the calculation of close-out amounts on actual losses or on pricing information derived from replacement transactions, market prices or dealer quotes, they differ significantly in terms of timing and scope of valuations. The crisis has shown that it is advisable to extend the discretion of the non-defaulting party and introduce a more flexible approach, especially in distressed and less liquid markets. However, the interests of the parties must be balanced, and certain limitations should be either imposed on or voluntarily considered by the non-defaulting party. Clearer and harmonised rules taking into account the above can help to achieve appropriate results and reduce the risk that valuations can be successfully challenged by the counterparty or the counterparty’s insolvency administrator.

2.1.5 Collateral and Margin Dispute Resolution: Most Master Agreements do not provide for collateral or margin dispute resolution procedures. In the course of the current financial crisis the number of collateral and margin disputes rose dramatically both in size and frequency, demonstrating the significance and strong need for standardised dispute resolution procedures. Such procedures, on the one hand, should be time-efficient to prevent defaulting parties from initiating a dispute in an attempt to “buy time”. On the other hand, in the case of a valid business dispute, the procedures should lead to objective results acceptable to the parties and market regulators.

2.2 It is clearly in the interest of the financial markets to further harmonise the existing Master Agreements in order to reflect the lessons learned from the financial crisis as soon as possible. It is important to note that all market organisations involved are closely monitoring the developments and are constantly and actively considering steps for improving the terms of the relevant Master Agreements. EFMLG welcomes these ongoing initiatives and regular consultations with market participants. The resulting changes to GMSLA 2000 by the publication of GMSLA 2009/GMSLA 2010 and the ISDA 2009 Collateral Dispute Resolution Procedure are a few examples of highly useful initiatives. However, further action and cooperation between market and banking organisations is needed. EFMLG will invite all interested associations concerned with the development of standard market documentation to participate in this task.

3 Topic 1: Events of Default

3.1 Overview

Each Master Agreement contains a number of events, actions and failures that constitute events of default (each an **"Event of Default"**). The following analysis primarily relates to Events of Default which are triggered by insolvency and restructuring events. Although each Master Agreement specifies such Events of Default in a detailed manner, the collapse of financial institutions during the recent credit crisis has shown that the scope of the relevant triggers is not always clear and differs from one Master Agreement to another. Moreover, due to the fact that all Master Agreements are used in a large number of different jurisdictions, the definitions of insolvency, restructuring and other relevant triggers incorporated in the Master Agreements typically require interpretation of such terms in the context of the applicable law in order to establish whether or not the insolvency/restructuring procedures initiated in relation to a counterparty constitute an Event of Default under the relevant Master Agreement.

Relevant trigger events typically include all or some of the following events: (i) a dissolution of the counterparty; (ii) non-payments (in the sense of an inability to pay debts); (iii) petitions for bankruptcy, winding-up or insolvency; (iv) petitions for restructuring; (v) appointment of a trustee, administrator, receiver, liquidator, conservator, custodian or other similar official or analogous officer; (vi) restructurings; (vii) enforcement by a secured party of substantially all assets; (viii) furtherance of any of the foregoing actions; and (ix) events which have an effect analogous to any of the events specified above.

3.2 Key Features

The Master Agreements take different approaches in determining the events, actions or failures qualified as Events of Default. The first group of triggers is based on determinations to be made using objective tests such as inability to pay debts when they become due or over indebtedness (see paragraph 3.3.2 below). Another group uses a merely formalistic approach and defines Events of Default as the occurrence of certain events or certain actions taken by the specified parties without analysing the economics behind such events and/or actions and their legitimacy under the laws of the relevant jurisdiction. An example of such triggers is filing a petition for bankruptcy, winding-up or insolvency described in paragraph 3.3.3 below. Such a formalistic approach is generally open to criticism, but given that the formal procedures are more visible and easier to establish compared with objective tests, they are broadly used in the Master Agreements and are typically used as triggers for automatic early terminations of Master Agreements.

One of the challenges to be addressed by the Master Agreements is preventing unjustified petitions from triggering a close-out of the relevant Master Agreement. This can be done, for example, by providing for grace periods if the petition is filed by third parties, assuming that applications by the affected party and applications by regulators are justified.

Another feature worth mentioning derives from the need to cover a broad range of definitions and different mechanics in the context of insolvency proceedings, which can substantially differ from one jurisdiction to another. To capture every possible scenario, certain "catch-all" wording is included in all Master Agreements in order to avoid insolvency/bankruptcy-related events being interpreted too narrowly and thus leading to different consequences in different jurisdictions. Although the exact wording of such catch-all clauses differs, the purpose of additions like "an event […] which […] has an analogous effect …" or "… any analogous proceeding" is to address all closely comparable events or proceedings irrespective of the applicable national insolvency law.

3.3 Differences/Observations

The events, actions and failures specified in the Master Agreements as Events of Defaults are listed below, identifying the common features and highlighting certain differences. For more details please refer to **Annex 1** hereto.

3.3.1 Dissolution of Party or other Relevant Entity

All Master Agreements contain dissolution wording without differing substantially from each other. Despite the fact that dissolutions in relation to solvent entities are not intended to constitute Events of Default, only the ISDA 1992/2002 and the EMA 2004 precisely address this issue by providing for a carve-out for consolidations, amalgamations, mergers and corporate restructurings resulting in a solvent successor entity, while the other Master Agreements leave it to interpretation.

3.3.2 Non-Payment (Inability to Pay Debts)

The Master Agreements contain certain differences with regard to trigger events based on an inability to pay debts as they become due. The broadest approach is taken by the ISDA 1992/2002: it covers (i) an inability to pay debts as they become due, (ii) a general failure to pay and (iii) a written admission of the inability to pay debts as they become due. The trigger under the EMA 2004 merely requires a general inability to pay debts as they fall due. The GMRA 1995/2000 and GMSLA 2000/2010 limit the scope to a written admission of the inability to pay debts as they become due.

Although a written admission of the inability to pay debts is specified in the majority of the Master Agreements as an Event of Default (and under the EMA 2004 constitutes the only option with respect to such Event of Default), it does not bear substantial practical meaning, given that a defaulting party will typically not admit such inability.

3.3.3 Petition for Bankruptcy, Winding-up or Insolvency

The definitions of the relevant Events of Default are complex and can be broken down into the following key elements:

(i) Person Initiating Insolvency Petition

The Master Agreements differ to some extent as regards the questions of (i) by whom and (ii) against whom proceedings need to be initiated in order to constitute an Event of Default.

Under the ISDA 1992, the party, the relevant person or entity against whom proceedings need to be initiated is each party, any Credit Support Provider of a party or any applicable Specified Entity of a party. The applicant can either be these entities (own applications) or any other third party (third party applications). Regulators are not specifically mentioned in the ISDA 1992.

Under the ISDA 2002, the same concept applies. Applications by regulators, supervisors or similar officials are however added to the list of relevant applicants. Applications by such authorities are treated like own applications, assuming that these applications are always justified (i.e. the requirements are already met upon filing of the petition and no grace period applies in these cases, see (iii) below). The grace period for third party applications under the ISDA 2002 is only 15 days, compared with 30 days under ISDA 1992.

The EMA 2004 takes an approach similar to the ISDA 2002 and includes insolvency proceedings initiated by the party itself, a governmental or judicial authority or self-regulatory organisation having jurisdiction over the party, and any person other than a competent authority. The entity against which such proceedings need to be instituted to constitute an Event of Default is, however, limited to the party as such and its guarantor. The EMA 2004 also provides that proceedings instituted by third parties are relevant only if filed in a Specified Jurisdiction. "Specified Jurisdiction" means the jurisdiction of the defaulting party's organisation, incorporation, principal office or residence; parties may, however, agree to broaden the definition by adding additional jurisdictions.

The approach taken by the GMRA 1995/2000 and GMSLA 2000/2010 is far less detailed. The definition of "Act of Insolvency" covers petitions initiated by anyone (other than the counterparty to the relevant Master Agreement) and only refers to Acts of Insolvency occurring with respect to the party as such (i.e. excluding credit support providers or any other applicable specified entities).

In this context, it is worth noting the different approaches in various jurisdictions regarding applications by regulators during the credit crisis. In many jurisdictions only the competent regulator can file a petition for opening of insolvency proceedings in respect of financial institutions. Apart from such a filing, the competent authority may pursue preliminary steps (such as automatic stays or moratoriums) which may play a role when considering whether and when an Event of Default has occurred. In terms of timing, it can make a significant difference whether such preliminary steps taken by regulators already give a direct termination right (respectively trigger automatic early termination, if applicable) or merely start a grace period.

(ii) Procedure

Despite certain differences between the ISDA 1992 and ISDA 2002, the general approach is that third party applications require additional tests to avoid unjustified insolvency petitions triggering a close-out of transactions under the relevant Master Agreement. The additional requirements to be met under the ISDA 1992 and ISDA 2002 are either the commencement of the actual insolvency proceedings or the lapse of a grace period (see (iii) below).

The approach under the EMA 2004 is comparable to the ISDA 1992/2002 approach, drawing a distinction between own applications and third party applications. Third party applications require such application to result in a Judgment of Insolvency or such application not being dismissed or stayed for a certain period of time.

In contrast, the relevant definition of "Acts of Insolvency" used in the GMRA 1995/2000 and GMSLA 2000/2010 does not require the opening of proceedings and does not distinguish between own and third party applications. The presentation or filing of a petition in respect of a party (other than by the counterparty to the relevant Master Agreement) is sufficient and a general grace period of 30 days applies in respect of the relevant petition. It is worth noting that winding-up or analogous proceedings play a special role in that no termination notice is required in such cases and no grace periods (otherwise typically 30 days) apply. The recently published GMSLA 2010 merely requires that automatic early termination is elected to cause a termination without notice following winding-up or analogous proceedings. In that respect, see paragraph 5 of this report below.

(iii) Grace Periods

The Master Agreements take, to a large extent, the same approach as regards grace periods following the filing of a petition for the opening of insolvency proceedings. The typical time period is 30 days; only the ISDA 2002 shortens the grace period to 15 days.

Whilst the ISDA 1992/2002 and EMA 2004 use the grace period only in cases of third party applications, the GMRA 1995/2000 and GMSLA 2000/2010 use this as a general requirement (other than in the case of winding-up or similar proceedings; see (ii) above).

3.3.4 Petition for Restructuring

A petition for restructuring is, in principle, a trigger or can be interpreted to be a trigger under all Master Agreements. At the same time, it raises the question of whether a petition for restructuring should constitute an Event of Default at all, for example, when such petition relates to a solvent party.

3.3.5 Appointment of Certain Officials

All Master Agreements have included the appointment of certain officials as a trigger event and attempt to list various terms for such officials and officers which are in charge of carrying out insolvency, bankruptcy or winding-up proceedings. The challenge is again to find appropriate wording which covers concepts in a large number of different jurisdictions. This creates the risk that in certain cases an Event of Default might be triggered despite the fact that the relevant official has been appointed to avert insolvency. A typical example is the appointment of a state representative in the context of public stabilisation measures for financial institutions.

The appointment of officials typically covers persons such as trustees, administrators, receivers, liquidators, conservators, custodians and other “similar officials” or “analogous officers”. The exact scope and wording differ however. Just as an example: whilst the ISDA 1992/2002 mention conservators and custodians, the EMA 2004, GMRA 1995/2000 and GMSLA 2000/2010 do not explicitly mention these types of officials and would have to rely on an interpretation of the “catch-all” wording referring to “similar officials”.

3.3.6 Restructuring

Restructuring in the sense of general assignments, arrangements, compositions, amicable settlements and reorganisations is covered in all Master Agreements. Again, there are slight differences as to the scope of the terms used which may lead to a different treatment of Master Agreements following the same event, for example: the GMRA 1995/2000 and GMSLA 2000/2010 mention explicitly that “arrangements” include voluntary arrangements, and the EMA 2004 specifies that the term “reorganisation” does not include reorganisations of solvent corporate entities.

3.3.7 Possession Taking/Enforcement by a Secured Party

It constitutes an Event of Default under the ISDA 1992/2002 if a secured party takes possession or carries out other enforcement measures in relation to all or substantially all assets of a party, its Credit Support Provider or any applicable Specified Entity, provided that the relevant process is not dismissed, discharged, stayed or restrained within a certain time period (ISDA 1992: 30 days; ISDA 2002: 15 days). The events of default in the other Master Agreements do not cover such event.

3.3.8 Furtherance of Foregoing Acts

Again, the ISDA 1992/2002 contain the broadest approach as regards action or behaviour by a party (or any Credit Support Provider/Specified Entities) in furtherance of or indicating its consent to, approval of, or acquiescence in, any of the relevant acts set out in the “Bankruptcy” definition under the ISDA 1992/2002. The extension of the “Bankruptcy” definition to include such events may trigger an Event of Default at an early stage given that contributions to, or steps in preparation of, insolvency petitions or other relevant measures could arguably be interpreted to fall within the scope of such trigger event.

3.4 Recommendations

3.4.1 Harmonisation

The definitions relating to bankruptcy, insolvency and restructuring used in the Master Agreements show a clear need for harmonisation. There are a number of differences in terms of the scope of insolvency related trigger events, the timing of such triggers (grace periods) and the question as to whether and when measures by financial regulators cause a termination of the Master Agreement. The Master Agreements also take a different approach as regards the question of who needs to file a petition or against whom a petition needs to be filed (personal scope of triggers).

Such differences can have a significant impact on market participants, as many of them have entered into various Master Agreements with the same counterparties and, upon occurrence of an insolvency-related event with respect to the relevant counterparty, one has to analyse said event from the perspective of each Master Agreement separately. They can also face a situation where an event of default has occurred under some Master Agreements but not under all Master Agreements and (assuming a notice has been given or automatic early termination applies) only the transactions under the terminated Master Agreements can be closed out. This may make it difficult to take a coordinated approach to sending termination notices and entering into replacement transactions and may thereby create difficulties with related back-to-back transactions.

3.4.2 Pre-insolvency Regimes

Another topic is that regulators and legislators are likely to implement or make use of existing special pre-insolvency regimes to prevent struggling financial institutions considered to be system-critical from insolvency (such as, for example, a moratorium over assets and the performance of contracts). Such regimes and measures could have a significant impact on Master Agreements, and it has to be assessed on a case by case basis whether relevant measures count as events of default under the Master Agreements. Given that regulatory measures typically aim either to avert insolvency or to gain time to assess the situation any close-out triggered by such measures (and potentially resulting in further terminations of other agreements based on cross default clauses) would be counter productive and will raise the question of whether related terminations are at all valid under the applicable law.

3.4.3 Recent Development of Legislation

Recent legislation on financial market stability has to be taken into account. These rules typically provide for proceedings and measures under which financial institutions are set to be stabilised, such as for example the taking of security over of shares in return for providing funding, the appointment of a government representative, and in certain cases also the statutory order that contractual termination clauses (netting clauses) based on such measures shall be void. It has to be checked on a case by case basis whether relevant measures can be interpreted as Events of Default and, if so, whether rules prohibiting terminations apply and are valid and enforceable under the law governing the Agreement.

4 Topic 2: Termination Notices

4.1 Overview

The notice provisions are often overlooked as “boilerplates”, although their importance should not be underestimated. Many rights and obligations under the Master Agreements are only established upon serving a notice to the other party. In particular, early termination of transactions under the relevant Master Agreement upon the occurrence of an Event of Default or Termination Event requires the delivery of a notice, except in those relatively rare cases in which automatic early termination applies (see paragraph 5 of this report below).

Practical experience following the Lehman Brothers default has shown that the notice provisions have worked reasonably well. However, some general issues emerged which may be addressed in any reform relating to the Master Agreements.

4.1.1 Address

In order for a notice to be valid, it must be sent to the address specified in the relevant Master Agreement. This requires up-to-date and immediately accessible records of any changes of address related to the counterparty.

If a notice must be sent to more than one address or addressee, it may be unclear (i) whether the notice will become effective if delivered to only one address or addressee, as the case may be, and (ii) when such notice will become effective if delivered to different addresses or addressees, as the case may be, on different dates.

Further problems may occur if the notice must be marked for the attention of a specific person who is no longer with the relevant party. Although it may be argued that the requirement is not mandatory, practical issues as to timing may arise.

Another problem may arise where the address has changed, but the non-defaulting party has not been so informed in accordance with the provisions of the relevant Master Agreement. As the non-defaulting party may be unable to identify the new address, it may not be clear whether a notice only delivered to the old address is valid.

If the defaulting party is insolvent, applicable insolvency law may require the notice to be given to the insolvency administrator. In this case, the question arises of whether an additional notice must still be given to the address set out in the relevant Master Agreement.

4.1.2 Refusal of Acceptance

Apart from a party changing addresses, the receiving party may simply ignore or refuse the acceptance of the relevant notice, or render its delivery impossible (lock the doors, turn off the fax machine, etc.). The notifying party may then need to rely on a “flexible” approach taken by a court in order to overcome failure of the formalities set out in the notice provisions. The notifying party may be required to show that it has taken all reasonable steps to deliver a notice to the other party. This may require multiple notices delivered in different manners as set out in the relevant notice provisions. Multiple notices create their own issues: how do you know which one, if any, is effective?

Except for the GMRA 2000, the other Master Agreements do not provide for an alternative notice delivery mechanism in order to protect the non-defaulting party.

4.1.3 Delivery Process

Certain notice delivery methods create uncertainties beyond the control of the notifying party.

For example, a certified or registered letter with return receipt may provide clarity on the effective date of the notice, but the notifying party may only receive the return receipt after a period of 3-5 days. In the case of a termination, the non-defaulting party will need to designate an early termination date sufficiently far in the future that it will not fall before the time at which the non-defaulting party can confirm effectiveness of the notice. This may substantially delay the close-out process. Even then, the notifying party may need to prove that the signature on the return receipt is that of an employee of the defaulting party. Most financial institutions do not use this method in practice.

Another example is notification by telefax. The burden of proof of receipt of the fax remains with the notifying party. The transmission report by the notifying party is not sufficient in that respect[2]. In most cases, the notifying party is also not able to provide evidence that the notice submitted by fax is legible and that it has been received by a responsible employee of the recipient.

Electronic messaging and e-mail may also be an unsafe method of giving formal notice as issues of interception and diversion may occur. Again, the burden of proof of receipt/delivery may be difficult for the notifying party to satisfy. Another issue relates to the difference between the delivery and receipt of an e-mail. Under English case law in relation to the Arbitration Act 1996, an e-mail is effective when it is delivered to the correct e-mail address, even if the e-mail is not accessed by the relevant recipient. This is reflected, albeit more broadly and less precisely, in the ISDA 2002, which provides for the effectiveness of an e-mail notice when delivered. However, a different approach is taken in all Master Agreements in relation to electronic messaging, where receipt of the electronic message is required. It seems to be unclear why the provisions differentiate between e-mail and electronic messaging and how a receipt of an electronic message may be achieved.

4.1.4 Impact of Non-Compliance with notice provisions

Under English law, compliance with the notice provisions set out in the Master Agreements will generally be strictly construed, and non-compliance may lead to invalidity of the notice. This extends to the content of the notice as well as to requirements incident to its delivery. Two cases set out the English law position. The House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd, House of Lords [1997] A.C. 749* held that a notice with a noncompliant error was nonetheless valid if a reasonable recipient would have understood what the notice was intended to say and do. Exercise of an option in a lease exercisable on its third anniversary (only) by three months notice was not invalid because the notice referred to the day preceding the anniversary. In *Peaceform Ltd v Cussens, Chancery Division [2006] EWHC 2657 (Ch)* it was held that a notice had to be sufficiently clear and unambiguous, so that a reasonable recipient, with the requisite knowledge, was, as in *Mannai*, in no doubt as to its terms. Exercise of an option on any date before a given date by three months notice was invalid because the notice specified a date within three months and a reasonable recipient familiar with the lease could not have inferred the correct date.

Invalidity of the termination notice could have a significant impact on early termination and close-out netting. This could pose particularly critical issues for the non-defaulting party that had closed out, or was attempting simultaneously to close out, related hedging transactions on the assumption that the relevant notice had been valid. Even worse, it might not be able to designate another early termination

[2] See section 12(a)(iii) of the ISDA 1992/2002, paragraph 14(b)(iii) of the GMRA 2000, paragraph 21.1(iii) of the GMSLA 2000 and paragraph 20.1(b) of the GMSLA 2010.

date. If the notice is invalid and the default has been cured before a new, valid notice can be served, the non-defaulting party will be unable to terminate the transactions under the relevant Master Agreement. In either case, the non-defaulting party will be exposed to an open market position (e.g. foreign exchange and/or interest rate risk).

The non-defaulting party may in turn itself breach the agreement, as it will assume that the relevant Master Agreement has been validly terminated and cease performing obligations under the relevant Master Agreement.

In *Nuova Safim SpA v Sakura Bank Ltd, Court of Appeal (Civil Division) [1999] 2 All E.R. (Comm) 526,* the court held that a party that did not comply with the timing requirements of the notice procedures could not give a later notice and claim an event as an illegality. The counterparty had already terminated the agreement by reason of an event of default and the defaulting party could not claim the advantages of treating the event as an illegality.

4.1.5 Effective Date of Notice

The issues discussed above may result in an uncertainty as to the effective date of the relevant notice, although the notice provisions of the relevant Master Agreements provide some guidance as to the effectiveness of notices.

Any ambiguity as to the effective date of a notice may result in uncertainty as to the starting point of any grace period or the occurrence of the event of default/termination event.

In addition, the non-defaulting party is required to determine the relevant close-out amount as of the relevant early termination date or a specific date related to the occurrence of the event of default[3]. If the effective date is not clear, the determination may be materially affected. For example, if a non-defaulting party designates the early termination date as the date of the notice but the notice is determined to have been served after business hours, the notice will not become effective until the next business day and a new notice specifying the new close-out amount as of said date will be required.

Interest accrues on the close-out amount, whether owed by the non-defaulting party or the defaulting party, from the date following the effective date of the notice providing particulars of the amount owing[4]. Again, the determination may be difficult if the effective date of the notice is in doubt.

4.2 Key Features

Although the early termination provisions of the Master Agreements differ to a certain extent, the following key features are common:

- a number of events require a notice requesting the remedy of the relevant failure; effectiveness of the notice establishes the commencement of a grace period. Only

[3] See the definition of “Close-out Amount” in section 6(e) of the ISDA 1992, section 14 of the ISDA 2002; the definition of “Final Settlement Amount” in section 7(1)(a) of the EMA 2004; paragraph 10(e)(ii) of the GMRA 2000; paragraph 10.4 of the GMSLA 2000 and paragraph 11.2(a), 11.4 of the GMSLA 2001.

[4] See section 6(d)(ii) of the ISDA 1992; section 9(h)(ii) of the ISDA 2002; section 7(3)(b) of the EMA 2004; paragraph 10(f) of the GMRA 2000, paragraph 10.7 of the GMSLA 2000 and paragraph 11.7 of the GMSLA 2010.

upon lapse of the relevant grace period may the party terminate transactions under the relevant Master Agreement[5];

- the termination notice, assuming its effectiveness, establishes the early termination date[6], or the effective date of the notice triggers the occurrence of the termination date/repurchase date[7];
- the termination notice must be sent to the address or addresses specified in the relevant Master Agreement[8];
- certain notices related to termination must be effectively sent within a specific period of time (see for example section 6(b)(i) of the ISDA 1992/2002 – "*promptly upon becoming aware of it [the event]*");
- notices may need to be given in a certain manner[9]; and
- the termination notice may need to provide information about the relevant termination event[10].

Apart from the specific termination notices, the relevant Master Agreements require notifications for change of accounts, change of address, withholding tax, failure of payee representation, inability to transfer after certain termination events, service of process, various notices in respect of collateral, margin calls, corporate action, indemnity and valuations, in addition to notices of a similar nature under related credit support agreements incorporated into the relevant Master Agreement.

4.3 Differences/Observations

The notice provisions describe the manner in which notices may or may not be given, the effectiveness of such notices and the way by which a party may change the relevant address. While the provisions relating to notices are already broadly similar, some minor differences do exist among the various Master Agreements. For more details on termination notices please refer to **Annex 2** hereto.

4.3.1 ISDA 1992/2002

Section 12(a)(vi) of the ISDA 2002 (but not the ISDA 1992) expressly refers to e-mail as a permissible mean of communication. Many parties nonetheless use e-mails for important notices (e.g. delivery or return of Credit Support) under credit support agreements documented under the ISDA 1992, which should be amended accordingly.

4.3.2 EMA 2004

The effectiveness in respect of notices made by telefax only refers to the "receipt by the addressee"[11], while the other Master Agreements refer to the receipt by a responsible employee of the recipient in legible form and clarify that the burden of

5 See section 5(a)(i), (ii) of the ISDA 1992, section 5(a)(i), (ii)(1) of the ISDA 2002; section 6(1)(a)(i), (iii), (b) of the EMA 2004; paragraph 10(a)(x) of the GMRA 2000, paragraph 14.1(x) of the GMSLA 2000 and paragraph 10.1(b)(i) of the GMSLA 2010.

6 See section 6(a), (b)(iv) of the ISDA 1992/2002; section 6(1)(b), (2)(b) of the EMA 2004; paragraph 11(c) of the GMRA 2000 in respect of a tax event.

7 See paragraph 10(b) of the GMRA 2000, paragraph 10.2 of the GMSLA 2000 and paragraph 11.2 of the GMSLA 2010.

8 See section 12(a) of the ISDA 1992/ 2002; section 8(1) of the EMA 2004, paragraph 14(a)(iii) of the GMRA 2000, paragraph 21.1 of the GMSLA 2000 and paragraph 20.1 of the GMSLA 2010.

9 See section 12(a) of the ISDA 1992/2002, definition of "Default Notice" in paragraph 2(l) of the GMRA 2000.

10 See section 6(a) and (b)(i) of the ISDA 1992/2002.

11 Section 8(2)(a) of the EMA 2004.

proving receipt is on the sender, and such proof is not met by the transmission report generated by the sender's facsimile machine.

4.3.3 GMRA 2000

Paragraph 14(a)(i) of the GMRA 2000 requires notices to be in the English language and in writing, except where the GMRA 2000 expressly states otherwise. For example, margin calls may be given orally pursuant to paragraph 4(a), (b) of the GMRA 2000. Paragraph 2 (xx) of the GMRA 2000 extends the meaning of "written" communications and communications "in writing" to include communications made through any electronic system agreed between the parties which is capable of reproducing such communication in hard copy form (except in paragraph 14(b)(i) and 18 of the GMRA 2000).

Paragraph 14(c) of the GMRA 2000 provides an alternative method of delivery (so-called "Special Default Notice") where the non-defaulting party is not able to serve a default notice to the defaulting party. This seeks to avoid situations where the defaulting party takes steps, purposively or not, that make service of notice impossible or difficult.

4.3.4 GMSLA 2000/2010

According to paragraph 20 of the GMSLA 2010, telex is no longer an appropriate manner of communication.

Whereas the other Master Agreements do not define "Close of Business", the term is defined in the GMSLA 2000/2010 with reference to the closure of the relevant banks, securities settlement systems or depositaries in the business centre in which payment is to be made or securities/collateral is to be delivered.

4.4 Recommendations

4.4.1 Alternative Delivery Procedures

Due to the importance of notices, it is recommended that provision be made for procedures which are secure and clear to all parties. In particular, the procedure should clearly identify the effective date and ensure that the notice is validly received. As notices by e-mail are predominant in practice, the focus should be on clarification of effectiveness of notices by e-mail.

A starting point may be Art. 10 of the UNCITRAL model law on the use of electronic communications in international contracts suggesting that an electronic communication is received when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

However, the UNCITRAL model law may not overcome the uncertainty as to the question whether the e-mail has entered the system of the recipient or not. In order for the sender to prove this, it would need to rely on the electronic protocol of the recipient's system.

A solution may lie in agreed principles relating to the use of trusted third parties. Both parties may appoint a trusted third party whose systems are set up to provide receipt confirmations to both sender and recipient. Electronic notices are sent to the intended recipient as well as the trusted third party. On receipt by the trusted third party, it will automatically issue confirmations of the time and the date of delivery to the sender and the recipient. This shall constitute sufficient proof of service of the relevant notice, provided that the other requirements are fulfilled.

For situations in which any delivery of a notice fails (e.g. the recipient refuses acceptance), the approach taken in paragraph 14(c) of the GMRA 2000 may be followed by the other Master Agreements.

4.4.2 Website Notice

Another possible method of notification would be the publication of the relevant notice on the non-defaulting party's website. However, privacy and confidentiality issues would need to be considered. As the parties would need to monitor the relevant website, this may not work in practice.

4.4.3 Multiple Delivery Methods

As a practical matter it is recommended to give notice by several methods in order to ensure effectiveness. However, this may only work if the early termination date is set at the same date in all notices and at a date after the latest possible effective date of the relevant notice. Further, even if the termination dates and notice thereof are aligned, payment dates may still differ.

4.4.4 Multiple Addresses/Addressees

Following the judgment of the Court of Appeal in the case of *Von Essen Hotels 5 Limited* v *Roy and Daphne Vaughan and another*, Court of Appeal (Civil Division) [2007] EWCA Civ 1349, in which the court ruled that, when a contractual provision states that a notice shall be sent to a party with a copy to a second addressee (in that case—the party's solicitors), (i) such notice must be sent to both the actual party to the relevant agreement and the other addressee named therein; (ii) the posting of a copy of the notice to the second addressee is a prescriptive (mandatory) step; and (iii) such copy shall be served to the second addressee in the same manner as the original notice to the relevant party. Therefore, the number of multiple addresses or addressees, as the case may be, proportionally increases the risk of non-compliance with the contractual notification procedure on the side of the non-defaulting party, and it is recommended that this option be excluded from any Master Agreement.

4.4.5 Close of Business definition

In order to ensure a precise effective date of the relevant notice it is recommended to define the term "close of business". The definition in the GMSLA 2000/2010 may be assumed by the other Master Agreements. However, the reference to relevant bank and settlement systems may not be relevant when determining the date of receipt of a notice. Ideally, a time should be specified.

4.4.6 Conclusion

It is recommended that the notice provisions of the different product master agreements be harmonised in order to ensure that the general requirements for notices are the same. “Business Days” and “Business Hours”, the methods of notification and the effectiveness of notices should be consistent across the Master Agreements.

In order to benefit from a further harmonisation of the notice forms related to the early termination of the relevant Master Agreements, the events of default, the termination events and the termination procedures would need to be standardised. Only then would full harmonisation be practical.

5 Topic 3: Automatic Early Termination

5.1 Overview

The Master Agreements contain provisions according to which certain insolvency events automatically trigger an early termination of the transactions under the relevant Master Agreement without requiring notice to be given by either party (the “**Automatic Early Termination**”). The purpose of the Automatic Early Termination provisions is to terminate all transactions under the relevant Master Agreement immediately prior to the point in time when the statutory insolvency regime becomes applicable to the relevant party in the relevant jurisdiction in order to allow the contractual netting (rather than the statutory netting) to apply. Another ground for the Automatic Early Termination provisions is to avoid termination restrictions applicable in certain jurisdictions upon the commencement of the statutory insolvency regime.

Legal opinions in relation to certain jurisdictions recommend applying the Automatic Early Termination provisions in respect of the Master Agreements. The implementation of such provisions bears however certain risks. For example, the non-defaulting party may not know on time that the transactions under the relevant Master Agreement have already been terminated and, consequently, would not be able to terminate the related hedging transactions at the prices prevailing on the date of the relevant Automatic Early Termination. In that respect, it is in the interest of the non-defaulting party not to apply the Automatic Early Termination provisions (where this is possible under the applicable insolvency regime without endangering the general validity of the netting provisions), as it gives the non-defaulting party the flexibility to elect the relevant early termination date at its discretion.

5.2 Key Features

The main issues raised with respect to an Automatic Early Termination of the transactions under the relevant Master Agreement relate to the determination of the triggers giving rise to an Automatic Early Termination and the mechanics of the implementation of the Automatic Early Termination procedure.

Due to the fact that the Master Agreements lack a harmonized definition of “insolvency”, “bankruptcy”, “winding-up” or similar terms (see paragraph 3 of this report above), the applicable triggers for an Automatic Early Termination differ to a large extent depending on the applicable national insolvency law. It also may be uncertain whether a specific insolvency-related event will trigger an Automatic Early Termination of transactions under all Master Agreements or only some of them, and whether the Automatic Early Termination of transactions under different Master Agreements will occur at the same time. Different early termination dates in respect of transactions under different Master Agreements entered into between the same parties may cause difficulties in the related close-out process and the winding up of the related hedge transactions.

The Master Agreements approach the application of Automatic Early Termination in different manners. For example, the EMA 2004 (in relation to the main Insolvency Events), the GMRA 2000 (in relation to winding-up/liquidators) and the GMSLA 2000 (in relation to winding-up/liquidators) apply Automatic Early Termination as a default mechanism, whereas the ISDA 1992/2002 and the new GMSLA 2010 expressly require the parties to specify its application in the relevant schedule. Such specification should in any case take the recommendations of the applicable netting opinion into account.

5.3 Differences/Observations

At first glance the Automatic Early Termination provisions of different Master Agreements seem to be fairly similar, but certain fundamental differences should be highlighted. For more details on Automatic Early Termination provisions please refer to **Annex 3** hereto.

5.3.1 ISDA 1992/2002

As a general rule an early termination notice is required to be given following the occurrence of an Event of Default or a Termination Event, as the case may be. According to section 6(a) of the ISDA 1992/2002, if the parties elect Automatic Early Termination in the relevant schedule as applying to a party, then the early termination date will occur (i) in the case of section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous, (8) of the ISDA 1992/2002, immediately upon the occurrence of any of theses events and (ii) in the case of section 5(a)(vii)(4) or, to the extent analogous, (8) of the ISDA 1992/2002, as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition. Section 5(a)(vii) of the ISDA 1992/2002 defines the various bankruptcy events.

5.3.2 EMA 2004

In general, section 6(1)(b) of the EMA 2004 requires an early termination notice by the non-defaulting party following the occurrence of an Event of Default. An exception applies for certain insolvency events set out in paragraph 6(1)(a)(viii)(1), (2), (3), (5)(A) or, to the extent analogous, (9) of the EMA 2004. In said cases the termination shall occur automatically and as of the time immediately preceding the relevant event or action. Paragraph 6(1)(a)(viii) specifies the various insolvency events. The parties may agree in the special provisions related to the EMA 2004 not to apply Automatic Early Termination.

5.3.3 GMRA 2000

Paragraph 10(a)(vi) of the GMRA 2000 does not require an early termination notice (so-called Default Notice) in the event that an act of insolvency takes the form of the presentation of a petition for winding-up or any analogous proceeding, or the appointment of a liquidator or analogous officer of the defaulting party. The related concepts of Automatic Early Termination and Early Termination Date are not defined in the GMRA 2000. Furthermore, there is no explicit clarification that an Early Termination Date will occur immediately in respect of all outstanding transactions, as of the time immediately preceding the event cited in Paragraph 10(a)(vi) above. In order to disapply Automatic Early Termination in such a case, the parties have to expressly specify such non-application in the relevant annex to the GMRA 2000. In the case of all other Events of Default (or the occurrence of a tax event), a notice is required by the non-defaulting party (in the case of a tax event, the affected party) in order to terminate the transactions documented under the GMRA 2000. This notice requirement also applies to insolvency events which are not “winding-up” or “liquidator” related and includes the presentation or filing of a petition for the bankruptcy or insolvency of a party (or any analogous proceedings).

5.3.4 GMSLA 2000/2010

According to paragraph 14.1(v) of the GMSLA 2000, no written notice is required by the non-defaulting party if an Act of Insolvency occurs which takes the form of the presentation of a petition for winding-up or any analogous proceeding, or the appointment of a liquidator or analogous officer of the defaulting party. Similar to the GMRA 2000, the presentation or filing of a petition for the bankruptcy or insolvency of a party (or any analogous proceedings) will not lead to an Automatic Early Termination.

Paragraph 10.1(d) of the GMSLA 2010 mainly replicates paragraph 14.1(v) of the GMSLA 2000. In contrast to the previous wording in the GMSLA 2000, the new GMSLA 2010 requires the parties to specify in paragraph 5 of the relevant schedule that in relation to a petition for winding-up (or analogous proceedings) or the appointment of a liquidator (or analogous officer) Automatic Early Termination shall apply.

5.4 Recommendations

5.4.1 Harmonisation of Insolvency Events

It is recommended to harmonise the definition of insolvency events. Further, the situations in which Automatic Early Termination should apply in certain jurisdictions should be standardised in order to close-out the relevant transactions prior to the opening of the relevant statutory insolvency regime. The wording and terminology should be the same in all Master Agreements.

5.4.2 Obtaining Legal Opinions

It is recommended to clearly identify the various situations in which the legal opinions received by the market associations advise applying the Automatic Early Termination provisions. As the analysis may be difficult in various situations and jurisdictions, it is recommended to introduce a formalised procedure, including a short assessment period during which the market participants can gather information and form a clear opinion of whether the relevant Master Agreements are automatically terminated or not.

5.4.3 Harmonisation of Automatic Early Termination Provisions

It is recommended to harmonise the provisions on Automatic Early Termination in order to follow a standardised approach in respect of the relevant jurisdictions in which it is advisable to apply Automatic Early Termination. Automatic Early Termination should either apply (i) as a standard default mechanism or (ii) upon expressed election by the relevant parties, but the approach should be standardised across the Master Agreements.

5.4.4 Diversified Approach based on Local Insolvency Laws

It is recommended that the relevant market associations issue guidelines/specific standardised clauses dedicated to specific jurisdictions in which it is advised to apply Automatic Early Termination provisions. This would further reduce the potential discrepancy between local insolvency laws and the Automatic Early Termination provisions contained in the Master Agreements.

6 Topic 4: Calculation of Close-out Amounts

6.1 Overview

All Master Agreements contain detailed rules regarding the determination and c of close-out amounts payable by one of the parties following a close-out of the relevant Master Agreement. Close-out in this context means that all transactions under the relevant Master Agreement are terminated, evaluated and aggregated, typically taking into account the value of collateral (if any) and converting the value assigned to transactions and collateral into one termination currency.

The scope of the review can be broken down into (i) questions on the discretion granted to the non-defaulting party in the context of value determination and the timing of replacement transactions and quotations; (ii) fall-back provisions for determining the market value of securities; (iii) issues in relation to determining fair values and (ii) provisions regarding the termination currency.

6.2 Key Features

The key issues in light of calculating of close-out amounts is the flexibility (or inflexibility) of the approach taken by the relevant Master Agreement and the discretion given to the non-defaulting party thereunder. The lessons learned from the recent crisis were that an over-restrictive approach as to the permitted timing for entering into replacement transactions or obtaining quotations taken by a Master Agreement may cause problems for solvent parties and lead to quotations, sales or purchases of assets at inappropriate prices. On the other hand, if the discretion given to the non-defaulting party is too broad, it can lead to an imbalance of the parties' interests in the determination of close-out amounts and may also increase the risk of being challenged under the applicable insolvency regime. The pros and cons for a broader discretion on the side of the non-defaulting party can be summarised as follows:

Pros:

- Calculations based on third party quotations and market data may be included but could be inappropriate if exclusive;
- More flexibility may be helpful to avoid inappropriate prices or the lack of a market for replacement transactions in situations of market stress;
- May avoid shortfalls produced if only market data or quotations are used;
- No need for a large number of predefined fallbacks;
- Always subject to "good faith", whether contractually or by law (i.e. *Socimer International Bank Ltd v Standard Bank London Ltd* and *Savings Bank of the Russian Federation v Refco Securities LLC*);
- Could be useful when making valuations of large portfolios.

Cons:

- Reputation risk if valuation process is attacked or if discretion is exercised differently either by different departments of an institution or in relation to different client close-outs;
- No clear path visible for end-users;
- Can lead to arbitrage opportunities to the detriment of the defaulting party;
- If valuation is disadvantageous for the defaulting party, there is a risk that valuations are challenged by the defaulting party's administrators or third-party creditors;
- There may be requests to demonstrate the basis used when performing discretion;
- Adverse litigation risk if discretion exercised incorrectly (claims for damages, creation of benchmarks);
- In some jurisdictions, clauses giving the non-defaulting party too much discretion might be unenforceable or even void.

Problems can also be caused by rules that do not allow sufficient flexibility for the scope and timing of replacement transactions or the application of quotes, and by forcing the parties to take certain actions in a strictly regulated manner without considering their best interest in a particular situation. On the other hand, flexibility in this context should not result in a lack of guidance, which may cause problems of a different kind. For example, most of the Master Agreements do not provide significant detail on the timing of currency conversions. As a consequence, such conversions may occur as of different dates and at different times and may therefore lead to different results. Another problem may arise in a situation when a calculation of the Termination Currency Equivalent is not possible for some reason, as the Master Agreement does not provide for any fallback scenario and it is not clear whether the last available, values should be used, the determination should be postponed until the Spot Rate is available or another mechanism should be applied by the relevant parties.

6.3 Differences/Observations

For more details on calculations of close-out amounts please refer to **Annex 4** hereto.

6.3.1 Determination of Close-out Values

A. ISDA 1992

Under the ISDA 1992, parties may elect either Market Quotation or Loss as the basis for the determination of the value of transactions. If no election is made, Market Quotation applies.

The ISDA 1992 allows parties, in addition, to elect that the Non-defaulting Party never has to pay a close-out amount to the defaulting party ("**First Method**") or that such payment may work both ways ("**Second Method**"). It is worth noting that the First Method is hardly ever agreed between the parties. This is due to the fact that such a "walk-away" by the solvent party means that an acceptance of close-out netting for own-funds purposes is typically rejected by regulators due to a less robust insolvency law analysis in many jurisdictions.

If Market Quotation is elected, the party making the determination will request dealer quotations from Reference Market-makers. Such quotations are requested to the extent reasonably practicable as of the same day and time on the Early Termination Date or as soon as reasonably practicable thereafter.

If Loss applies, the determination must be made as of the relevant Early Termination Date. If this is not reasonably practicable, a party will determine its Loss as of the earliest date thereafter. A party may (but is not obliged to) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets. Loss is the amount that a party reasonably determines in good faith to be its total losses, costs or gains.

B. ISDA 2002

The ISDA 2002 replaced the concepts of Market Quotation and Loss by the concept of a Close-out Amount. The equivalent of the “Second Method” under the ISDA 1992 is the only possible close-out payment method.

Any Close-out Amount will be determined by the Determining Party, which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result. Each Close-out Amount is to be determined as of the Early Termination Date or thereafter (to the extent commercially reasonable).

The Close-out Amount is the amount of the losses or costs (or gains) that are or would be incurred (or realised) under the prevailing circumstances in replacing or providing, for the Determining Party, the economic equivalent of the material terms and option rights of the parties in respect of terminated transaction. Unpaid Amounts are to be excluded in all determinations of Close-out Amounts.

The Determining Party will consider (i) quotations from third parties, (ii) information consisting of relevant market data supplied by third parties, (iii) the above information from internal sources of the same type used by the Determining Party in the regular course of its business.

Without duplication of other amounts, the Determining Party may consider any losses or costs incurred in connection with its terminating, liquidating or re-establishing any hedges related to the terminated transactions (or any gain resulting from any of them).

C. EMA 2004

The Final Settlement Amount is determined by the Calculation Party as of the Early Termination Date and shall be equal to (i) the sum of all Transaction Values which are positive for the Calculation Party, the Amounts Due owed to the Calculation Party and its Margin Claims, less (ii) the sum of the absolute amounts of all Transaction Values which are negative for the Calculation Party, the Amounts Due owed by the Calculation Party and the Margin Claims of the other party.

If both parties act as Calculation Party and their respective calculations of the Final Settlement Amount are not identical, the Final Settlement Amount shall be equal to one-half of the difference between the amounts so calculated by both parties.

Transaction Value means, at the option of the Calculation Party, an amount equal to either (i) the loss incurred (expressed as a positive figure) or gains realised (expressed as a negative figure) by the Calculation Party as a result of the termination of the transaction or transactions (as the case may be), or (ii) the arithmetic mean of the quotations (expressed as the amount which the market participant would pay or receive on the Quotation Date if it were to assume, as of the Quotation Date, the rights and obligations of the other party under the relevant transactions) for replacement or hedge transactions on the Quotation Date obtained by the Calculation Party from not less than two leading market participants. If no or only one quotation can reasonably be obtained, the Transaction Value shall be determined pursuant to (i) as set out above.

Amounts Due owed by a party means the sum of any amounts due and payable under any transaction but unpaid, the Default Value (see below) as of the agreed delivery date of any asset which should have been delivered by said party under any transaction but remains outstanding, and interest on the amounts so calculated.

Margin Claims means, as of the Early Termination Date, any margin or collateral provided by one party but not returned to it plus any interest accrued in relation thereto.

Default Value means, in respect of any assets, an amount equal to (i) the net proceeds which it has or could reasonably have received when selling assets of the same kind and quantity in the market on such date if the assets are or were to be delivered by the Calculation Party, (ii) the costs which the Calculation Party has or would have reasonably incurred in buying assets of the same kind and quantity in the market on such date if the assets are or were to be delivered to the Calculation Party, and (iii) (being the fallback position), if a market price for such assets cannot be determined, an amount which the Calculation Party determines in good faith to be its total losses and costs in connection with such assets.

D. GMRA 1995

Following the occurrence of an Event of Default (including *inter alia* an Act of Insolvency) and the serving of a Default Notice, the Repurchase Date for transactions under the GMRA 1995 shall be deemed immediately to occur and all Cash Margin shall be immediately repayable, whilst Equivalent Margin Securities shall be immediately deliverable.

The non-Defaulting Party shall establish the Default Market Values of securities, the Cash Margin and the Repurchase Prices. Amounts due by each party shall be set off. Only the balance shall be payable on the next following business day.

Valuations are based on the market value of securities and margin securities. The non-Defaulting Party's calculation of this value depends on whether there has been an actual sale or purchase of the relevant securities. The time period available for such sale is relatively short. Such a sale has to take place between the Event of Default and the Default Valuation Time[12]. Default Valuation Time is defined as the dealing day or the second dealing day following the day on which the Event of Default occurred, depending on whether it occurred during normal business hours on a dealing day or not. The resulting valuation options are as follows:

[12] See paragraph 2(j) GMRA 1995; definition of "Default Market Value".

(i) Sale of Securities:

The actual price paid or received is relevant. Reasonable costs, fees and expenses incurred in connection with the sale are deducted or added, as applicable.

(ii) No sale of Securities:

(a) Securities have to be delivered to the Defaulting Party: The relevant securities are valued at the Default Valuation Time at their Market Value, that being the price obtained from a generally recognised source agreed by the parties (plus accrued but yet unpaid interest, dividends or other distributions);

(b) Securities have to be delivered to the non-Defaulting Party: The relevant securities are valued at the amount of costs to buy the relevant securities at the Default Valuation Time at the best available offer price on the most appropriate market in standard size. Other costs, fees and expenses are added. The aggregate of the positions will be calculated on the assumption that the aggregate is the least that could reasonably be expected to be paid in order to carry out the transaction.

E. GMRA 2000

The GMRA 2000 basically uses the same valuation approach as the GMRA 1995. Under the GMRA 2000, however, there is a far more flexible approach in terms of the time and the possibility for the non-Defaulting Party to enter into replacement transactions or to establish the value on the basis of quotations. The suggested mechanism for the determination of the relevant value (Default Market Value) can be summarised as follows:

(i) Default Valuation Notice by the Default Valuation Time (being the fifth dealing day after the day on which the Event of Default occurs or (in the case of automatic early termination) the fifth dealing day on which the non-Defaulting Party first became aware of the occurrence of the Event of Default):

(a) Replacement transactions as basis: The relevant value (Default Market Value) equals the net sale proceeds or aggregate purchase cost received or paid by the non-Defaulting Party, if sales or purchases were made.

(b) Quotes as basis: Arithmetic mean of bid or offer quotations received in a commercially reasonably size from two or more market makers or regular dealers in the Appropriate Market.

(c) Own determination as basis (fallback position): If the non-Defaulting Party has endeavoured but been unable to enter into replacement transactions or to obtain quotes or has determined that it would not be commercially reasonable to obtain or use any quotes, it may use the fair market value.

(ii) No Default Valuation Notice by the Default Valuation Time:

The Default Market Value shall be, in principle, an amount equal to the fair market value at the Default Valuation Time. If the non-Defaulting Party reasonably determines that it is not possible to determine a commercially reasonable fair market value, it can determine the relevant value as soon as reasonably practicable thereafter.

F. GMSLA 2000

If there is an Event of Default with respect to either party, the parties' contractual obligations (including but not limited to the parties' delivery and payment obligations) shall be accelerated. This requires the parties to perform their respective contractual obligations at the time such an Event of Default occurs (the "Termination Date").

In addition, the Non-Defaulting Party shall establish the Relevant Value of the securities which would have been required to be delivered but for the termination as of the first Business Day following the Termination Date. If the Event of Default occurs outside normal business hours of the market where the relevant securities are traded, then the Relevant Value shall be established on the second Business Day.

Based on the Relevant Values, an account shall be taken as at the Termination Date of what the parties owe to each other. The sums due from one party shall then be set off against the sums due from the other party.

The Relevant Value for any securities to be delivered *by the Defaulting Party* shall be the best available bid price (deducting the lowest reasonably expected associated costs of sale), and for any securities to be delivered *to the Defaulting Party,* the best available offer price (adding the lowest reasonably expected associated purchase costs of purchase).

If, however, prior to the close of business on the fifth Business Day following the Termination Date, the Non-Defaulting Party enters into a replacement transaction, the costs of such purchase or the proceeds of such sale shall be treated as the best available bid or offer price, but only in respect of the amount of securities so bought or sold.

G. GMSLA 2010

The general approach under the GMSLA 2010 is similar to the position under the GMSLA 2000. However, the GMSLA 2010 offers a more flexible approach for the Non-Defaulting Party to establish the Default Market Value.

As is the case under the GMSLA 2000, if there is an Event of Default with respect to either party, the parties shall be required to perform their respective contractual obligations (including but not limited to the parties' delivery and payment obligations) at the time such Event of Default occurs, i.e. at the Termination Date.

In addition, the Non-Defaulting Party shall establish the Default Market Value of (i) the securities the Borrower would have been required to return to the Lender or (ii) the collateral (including securities and cash) the Lender would have been required to return to the Borrower (as the case may be), but for the termination as at the Termination Date.

Similar to the position under the GMSLA 2000, based on the sums so established, an account shall be taken as at the Termination Date of what the parties owe to each other. The sums due from one party shall then be set off against the sums due from the other.

Between the Termination Date and the Default Valuation Time (being the fifth dealing day after the day on which the Event of Default occurs) or (in the case of automatic early termination) the fifth dealing day on which the Non-Defaulting Party first became aware of the occurrence of the Event of Default, the Non-Defaulting Party has to endeavour, acting in good faith, (a) to enter into replacement transactions or (b) to obtain bid or offer quotations from two or more market makers or regular dealers in the Appropriate Market in a commercially reasonable size (as determined by the Non-Defaulting Party).

In the case of (a) above, the Non-Defaulting Party may elect to treat as the Default Market Value the net proceeds after deducting all reasonable costs, fees and expenses incurred in connection therewith or the aggregate cost including all reasonable costs, fees and expenses incurred in connection therewith.

In the case of (b) above, the Non-Defaulting Party may elect to treat as the Default Market Value the price quoted by each of the market makers (or where the quotes differ, the arithmetic mean of the prices quoted) for the sale or purchase (as the case may be) of such securities. If the quotations do not take into account accrued but unpaid coupons, the Non-Defaulting Party may adjust such quotations in a commercially reasonable manner.

The fallback position is that if:

(i) the Non-Defaulting Party is unable to sell or purchase (as the case may be) securities as set out under (a) above; and/or

(ii) to obtain quotations as set out under (b) above; or

(iii) the Non-Defaulting Party determines that it would not be commercially reasonable to:

- sell or purchase securities at the prices bid or offered, as the case may be;
- obtain such quotations, or
- use any quotations so obtained,

then the Non-Defaulting Party may use the fair market value of the relevant securities as the Default Market Value. The fair market value is the amount which, in the reasonable opinion of the Non-Defaulting Party, represents their fair market value, having regard to such pricing sources and methods as the Non-Defaulting Party considers appropriate, taking also into account all transaction costs incurred or reasonably anticipated.

If at the Default Valuation Time the Non-Defaulting Party reasonably determines that it is not reasonably practicable for it to determine a commercially reasonable fair market value due to circumstances affecting the market in the securities or collateral in question, then such fair market value shall be determined as soon as reasonably practicable after the Default Valuation Time.

6.3.2 Termination currency

A. ISDA 1992/2002

For the purposes of section 6(e) payments, any amounts not denominated in the Termination Currency will be converted into the Termination Currency. The converted amount will be equal to an amount in the Termination Currency, determined by the party making the relevant determination, required to buy such an amount of the non-Termination Currency as at the relevant Early Termination Date with the Termination Currency at a rate equal to the spot exchange rate of the foreign exchange agent for the purchase of the non-Termination Currency with the Termination Currency at or about 11:00 am on such a date as would be customary for the determination of such a rate for the purchase of the non-Termination Currency for value on the relevant Early Termination Date.

Generally, the parties are free to specify a Termination Currency in the respective Schedules to the ISDA 1992 and ISDA 2002. If no such election is made or the currency specified is not freely available, then under the ISDA 1992 the Termination Currency will be U.S. Dollars and under the ISDA 2002 the Termination Currency will be Euro for agreements governed by English law and US Dollars for agreements governed by New York law.

B. EMA 2004

Any Amounts Due, Default Value, Margin Claims and Transaction Value not denominated in the Base Currency shall be converted into the Base Currency at the Applicable Exchange Rate.

“Applicable Exchange Rate” means the arithmetic mean of the respective rates at which the person calculating or converting an amount pursuant to the agreement is reasonably able to (i) purchase the relevant other currency with the Base Currency and (ii) sell said currency for, the Base Currency on the date as of which such an amount is calculated or converted.

As with the other Master Agreements, the Base Currency has to be agreed between the parties.

C. GMRA 1995/2000

For the purposes of calculating the set-off amount, all sums not denominated in the Base Currency shall be converted into the Base Currency on the relevant date at the Spot Rate prevailing at the relevant time.

“Spot Rate” is defined as “where an amount in one currency is to be converted into a second currency on any date, unless the parties otherwise agree, the spot rate of exchange quoted by Barclays Bank PLC in the London inter bank market for the sale by it of such second currency against a purchase by it of such first currency.”

In both, the GMRA1995 and 2000, the Base Currency is to be agreed by the parties in the respective Annex I.

D. GMSLA 2000/2010

Any prices, sums or values stated in currencies other than the Base Currency shall be converted into the Base Currency at the latest available spot rate of exchange quoted by a bank selected by the Lender (or if an Event of Default has occurred in relation to the Lender, by the Borrower) in the London interbank market for the purchase of the Base Currency, with the currency concerned on the day on which the calculation is to be made or, if that day is not a Business Day, the spot rate of exchange quoted at close of business on the immediately preceding business day on which such a quotation was available.

In addition, in the GMSLA 2010, with respect to the determination of the set-off amount, the default position is that any sum which is not denominated in the Base Currency shall be converted into the Base Currency at the Spot Rate prevailing at such date and times as determined by the Non-Defaulting Party acting reasonably.

According to the GMSLA 2000/2010, the Base Currency shall be agreed by the parties in the respective Schedules.

6.3.3 Other Ambiguities/Issues

A. GMRA 1995/2000

- How should the scenario be addressed if the Spot Rate quoted by Barclays Bank PLC (as defined in the GMRA 1995/2000) is not available?
- In a situation where a default has occurred, Market Value has to be determined for close-out purposes, but the security is suspended: Will the Spot Rate be the one quoted by Barclays Bank PLC on the Repurchase Date (anticipated), the date for making the calculation after obtaining the Market Value, or the last dealing day preceding the date of suspension?
- What exactly do “relevant date” and “relevant time” mean in paragraph 10(c)(ii) of the GMRA 1995/GMRA 2000?

B. GMSLA 2000/2010

- The close-out value calculation under the GMSLA 2010 allows a significant degree of flexibility in case of default. This raises the questions as to whether the provisions give more room for valuation decisions than needed, bearing in mind that such flexibility may give the solvent party unintended arbitrage opportunities. It should be considered whether there should be at least certain limits on time available following the occurrence of a default.
- GMSLA 2000 might benefit, on the other hand, from fallback provisions if there are no quotations on the relevant date or on the preceding business day.

6.4 Recommendations

6.4.1 Extended Discretion of Non-Defaulting Party

It is advisable to extend the discretion of the non-defaulting party and introduce a more flexible approach to the determination of close-out amounts to be incorporated into the Master Agreement. At the same time, to guarantee the balance of interests of the parties, certain limitations should be imposed on the non-defaulting party, such as the requirement to use market data and third-party quotations (if available and valid) and to act in good faith and commercially reasonably.

6.4.2 Limitation of Discretion

Another way to limit the discretion of the non-defaulting party while still giving it more fallback options is to introduce a hierarchy of obtained quotations and calculated underlying values depending on the relevant source of information or method of calculations. In the case of market disruptions or with respect to illiquid assets, such a hierarchy would, on the one hand, allow the determining party to calculate close-out amounts in the distressed market conditions and, on the other hand, to use the most objective determinations available in the particular situation.

6.4.3 Harmonisation and its Principles

It is also advisable to harmonise the relevant provisions of the different versions of the same Master Agreement, as well as provisions of different Master Agreements between each other in order to bring in line the mechanics of determinations and the timing of process. Such harmonisation should be based on the following principles:

- subjecting determination by the non-defaulting party of its costs and losses to the discretion and restrictions specified in paragraph 6.4.1 above;

- Such a determination shall be based on objective data (reference market makers, market consensus prices, etc.) if available and valid or, if such data is unavailable, on the fair value.

  Fair value for such purposes can be defined as the amount which, in the reasonable opinion of the non-defaulting party, represents the fair value of the relevant product with regard to the pricing sources and methods (including available prices for securities with similar maturity, terms and credit characteristics) it considers appropriate (taking into account reasonable transaction costs which would be incurred);

- Other values, such as realised losses (gains) or hypothetical losses (gains), shall be taken into account for determination of close-out amounts.

Initial steps to harmonise close-out provisions across the market have already been taken, with the publication of the GMSLA 2009 and the ISLA 2009 Secured Lending Protocol as well as with the ISDA Protocol 2002 and 2009.

Despite the advantages of harmonisation described above, it should be kept in mind that a unified mechanism for the determination of close-out amounts for all types of products may overcomplicate the valuation of simple products with mechanisms used for more sophisticated products, and it may be time-consuming for the industry to reach consensus on a harmonised valuation process across products.

6.4.4 Methods of Determination

As Master Agreements are used to document different products of different economic and legal natures, some are highly liquid, while others are tailor-made for a particular investor and are not intended to have any secondary market. As a result, different methods of determination are more appropriate with respect to different products: for liquid products, market/dealer quotations would provide the parties with more objective values, whereas for illiquid products, the Calculation Agent's determinations may be the only available tool.

6.4.5 Dispute Resolution Mechanism

As described above, determinations of close-out amounts often involve discretion of one of the parties and judgment calls, and they can be easily challenged by the other party. Therefore, it is highly practicable to have a time-efficient dispute resolution mechanism incorporated into the Master Agreements, which would allow the market participants to resolve disputes in respect of calculation of close-out amounts. For more details please refer to paragraph 7 below.

6.4.6 Impact of Insolvency Law

Given that insolvency administrators will review valuation approaches and might try to challenge valuations detrimental to the insolvent party's assets, valuations have to be carried out carefully and as close as reasonably possible to fair market values. Any discretion granted by the Master Agreements will have to take potential limits under applicable insolvency law into account, including but not limited to the relevant avoidance regime.

6.4.7 Timing Issues

The timing in respect of any currency conversion in respect of the relevant close-out amounts should be reviewed and, where possible, harmonised. Some of the Master Agreements suggest the usage of a "historic" spot rate for the relevant foreign exchange transaction (see e.g. the definition of "Termination Currency Equivalent" in the ISDA 1992). The determination of the applicable spot rate should reflect the market usage for foreign exchange transactions and ensure the ability of the parties to enter into appropriate hedging transactions.

7 Topic 5: Collateral and Margin Dispute Resolutions

7.1 Overview

Prior to the financial crisis of 2008/2009, most collateral and margin call disputes were not a significant issue between parties and were usually resolved informally in the ordinary course of business. The recent credit market stress has led to a dramatic increase in size and frequency of collateral and margin call disputes and shown the sharply increased significance of a standardised dispute resolution procedure for both market participants and financial regulators.

There are a number of reasons that may cause collateral and margin disputes between market participants.

On the one hand, such disputes can have valid business grounds such as, for example, the choice of sources from which the parties derive the figures, quotes and indices to be used as basis for the valuation of security and margin calls. Even in circumstances when the parties have reached an agreement as to what sources shall be used, in volatile market conditions it is not always possible to follow the provisions of the relevant underlying agreement due to severe disruptions and illiquidity of trades.

Another potential ground for disputes are valuations, calculations or determinations to be made by one party to a contract at its (sole or reasonable) discretion. In such a scenario, the counterparty cannot influence the relevant decision but is heavily affected by it and is likely to bring it into question. This is even enhanced by the fact that most market participants have their own internal standards on valuation of security and margin calls.

These differ substantially from one another depending on the size of the relevant market player and sophistication of its internal systems.

In the ordinary course of business of market participants' trade mismatches, delays and booking errors may also lead to incorrect results and raise disputes between the parties.

On the other hand, a formal dispute may be initiated by a potentially defaulting party in its attempt to "buy time" and hence jeopardise the contract position of the counterparty acting in good faith. Therefore, a structured, timely and efficient approach to resolve collateral and margin disputes, recognised across the industry and set out in the standard market documentation, gains extreme importance from the market participants' perspective, as it significantly improves their collateral protection and facilitates the improvement of risk management. It is also important from the perspective of market regulators, as it makes the process more transparent and mitigates the uncertainty and systemic risk across the industry.

7.2 Current status of market documentation

Despite the importance and frequency of collateral and margin call disputes, the Master Agreements currently do not contain provisions relating to dispute resolution.

In 1994, the International Swaps and Derivatives Association, Inc. (ISDA) published a Credit Support Annex to the Schedule to the ISDA Master Agreement subject to New York law (the "**CSA NY**"), followed by a similar document for the ISDA Master Agreement subject to English law (the "**CSA Eng**") in 1995.

Both, the CSA NY (Paragraph 5) and the CSA Eng (Paragraph 4) provide for a dispute resolution procedure applicable in cases where one party disputes (i) the Valuation Agent's calculation of a Delivery Amount or a Return Amount or (ii) the Value of any transfer of Eligible Credit Support or Posted (Equivalent) Credit Support. It should be noted that the CSA Eng requires such a dispute by a Disputing Party to be "reasonable", whilst the CSA NY takes a more formalistic approach and extends the resolution procedure to any disputes between the parties on the grounds specified above.

The following steps shall be taken by the parties in accordance with the dispute resolution procedure under the CSA NY and CSA Eng:

<u>Step 1</u> <u>Notification</u>

The Disputing Party shall notify the other party and the Valuation Agent of a dispute in a timely manner.

<u>Step 2</u> <u>Transfer of Undisputed Amount</u>

In cases where the Valuation Agent's calculation of a Delivery Amount or a Return Amount is in question, the appropriate party shall transfer the undisputed amount to the other party in a timely manner.

<u>Step 3</u> <u>Consultation and Informal Dispute Resolution</u>

The parties shall consult with each other in an attempt to resolve the dispute.

<u>Step 4</u> <u>Formal Dispute Resolution</u>

If the parties fail to resolve the dispute by the Resolution Time, the resolution of the relevant dispute shall be vested in the Valuation Agent. The Valuation Agent shall recalculate the Values and/or the Exposure in dispute by using, *inter alia*, (a) the arithmetic average of actual quotations at mid-market from Reference Market-makers, or (b) if such quotations are not available, the original calculations.

Following a recalculation by the Valuation Agent as set out above, it shall notify the parties thereof in a timely manner, and the appropriate party shall make the appropriate transfer upon demand.

7.3 ISDA Initiative: ISDA 2009 Collateral Dispute Resolution Procedure

7.3.1 Background

Following the significant increase in the occurrence of disputed margin calls during the credit market crisis of 2008 and 2009, it has been widely agreed between regulators and market participants that disputed collateral calls must be processed in a more structured and comprehensive way. In response, the ISDA Collateral Committee in consultation with the ISDA Product Steering Committees, other industry associations and financial industry regulators has developed the 2009 ISDA Collateral Dispute Resolution Procedure (the "**DR Procedure**"). The DR Procedure is accompanied by the ISDA Guidelines for Implementation of the ISDA 2009 Collateral Dispute Resolution Procedure (the "**Guidelines**"). Following a period of industry consultations and public comment, the DR Procedure was published on 30 September 2009.

According to the Guidelines, the DR Procedure aims to provide an agreed industry standard dispute resolution approach for disputed OTC derivatives collateral calls that:

(i) achieves timely identification of the root causes of disputed collateral calls;

(ii) ensures the prompt movement of as much collateral as the parties can mutually agree;

(iii) provides the parties with a flexible range of methods to narrow and/or resolve their dispute to be consistent with their risk tolerance;

(iv) creates a consistent and predictable process, timing and behaviour in case of disputes across the market; and

(v) eliminates present uncertainties and delays that increase risk for the parties.

The DR Procedure makes a number of material changes to the approach reflected in the dispute resolution procedure of the CSA NY and the CSA Eng. The two most substantial changes are that (i) if either party fails to perform as required under the DR Procedure within two business days of notice from the other party, the original valuation of the other party will apply; and (ii) the final values calculated during the Informal Dispute Resolution or the Formal Dispute Resolution shall be used for future collateral calls until the markets move or additional pricing transparency develops.

The DR Procedure is intended, upon mutual consent of the parties to the relevant Credit Support Annex, to amend and restate the relevant CSA NY or CSA Eng, as the case may be. The DR Procedure may be implemented by the relevant parties with the aim of either providing a fall-back for the existing dispute resolution language of the Credit Support Annex (non-exclusive adoption) or replacing it in its entirety (exclusive adoption).

7.3.2 Steps of the resolution procedure

The DR Procedure sets out a standard dispute resolution timeline of four days, unless otherwise agreed by the parties. Alternatively, if both parties consent, an extended timeline of ten days applies, with further extension possible by mutual consent. For more details please refer to **Annex 5** hereto.

The following steps shall be taken by the parties in accordance with the dispute resolution procedure under the DR Procedure:

Step 1 Preliminary Collateralisation

Consistent with the approach of the CSA NY and CSA Eng, this step requires the amount of collateral not in dispute to be moved to the appropriate party to ensure that said party receives the maximum protection possible pending resolution of the dispute.

Step 2 Portfolio Reconciliation

The parties shall exchange relevant transaction information such as, *inter alia*, current mark-to-market values, collateral asset, balance and interest amount, to identify the grounds of the dispute. Trades with differences greater than the ISDA-determined Tolerance level shall be ring-fenced and designated as Transactions Under Investigation. Trades with differences less than the Tolerance level may be ring-fenced and designated as Transactions Under Investigation by either party.

Step 3 Consultation and Informal Dispute Resolution

The parties shall consult with each other and internally in order to identify and resolve portfolio differences. For transactions, other than unmatched trades, not resolved through consultation, upon the parties' mutual consent, one of the following resolution methods may be elected: (a) Temporary Collateral Adjustment, (b) Common Reference Pricing or (c) Mutually Agreed Exit of Position.

The DR Procedure explicitly stipulates that the parties may also mutually agree to any other resolution method.

If the parties do not reach a mutually acceptable resolution using one of the methods specified above, they will be obliged to proceed to Step 4 and the relevant Transaction Under Investigation will be designated as a Transaction Under Formal Dispute Resolution.

Step 4 Formal Dispute Resolution

This step is mandatory and aims to provide market-based determinations for a Transaction Under Formal Dispute Resolution. The parties are required to obtain market quotations (Market Polling) in the following three stages:

(a) *Polling Process Consultation*: Each party shall affirm its role as Rebutting Party or Market-Making Party and identify to the other party the pricing sources from which it intends to solicit Quotes;

(b) *Quote Gathering*: Each party shall obtain and submit the relevant Quotes; and

(c) *Quote Evaluation*: Each party shall disclose the Quotes obtained by it; the Quotes then shall be classified and evaluated in accordance with the categories and scenarios set out in the DR Procedure.

Based on the results of the resolution procedure specified above, the relevant party or parties are obliged to recalculate the Delivery Amount or Return Amount immediately, amend their demand as necessary, and transfer collateral accordingly.

7.3.3 Implementation

As the DR Procedure is a highly complex document that affects a sensitive part of market practice, the implementation is scheduled to occur in three stages: (i) an experimental pilot programme involving only a few market participants, which took place from 15 October 2009 to 15 December 2009, followed by (ii) a trial period from 15 January 2010 until 15 June 2010, involving all major dealers and other volunteer firms, which then gives way to (iii) market adoption from 15 July 2010 onwards.

7.4 Recommendations

7.4.1 Incorporation of Dispute Resolution Provisions into Master Agreements

As mentioned above, introduction of an efficient, formal and widely recognised dispute resolution mechanism helps to decrease uncertainty for market participants, facilitates better risk management and makes transactions more transparent for regulators. It thus mitigates systematic industry risks. This relates not only to transactions executed using the ISDA Master Agreements, but also to all other types of transactions documented on the basis of the Master Agreements. Therefore it is desirable to introduce standardised dispute resolution procedures to the market participants industry-wide and incorporate the relevant provisions into all Master Agreements.

7.4.2 Common Approach

Since the majority of market participants in the course of their business enter into different types of transactions based on different Master Agreements, it would be recommended to introduce a common approach to the resolution of disputes arising from, or in connection with, any transaction based on standard market documentation, irrespective of the particular Master Agreement that has been used to document the relevant transaction.

At the current stage, the DR Procedure is the most recent and most advanced document containing a detailed procedure for dispute resolutions and for this reason seems to be the most appropriate starting point for further development of dispute resolution regulation across the market as a whole. Such a starting point may be further developed for each Master Agreement to reflect the specifics of relevant transaction types and to address certain deal-specific issues.

7.4.3 Implementation

As of 15 December 2009, the dispute resolution mechanism set out in the DR Procedure has been in a trial stage, at the end of which it may be revised to address any issues that arose over the trial period. Therefore, it seems to be reasonable to await the results of the trial run and create a new dispute resolution mechanism to be incorporated into the Master Agreements on the basis of the data collected in the trial process.

7.4.4 Two-step Adoption

In order to avoid any unforeseeable practical difficulties, implementation of the new dispute resolution mechanism may be divided into two stages: (a) in stage one, the parties may chose to adopt the dispute resolution procedure as well as use all other resolution tools available to, and agreed between, such parties; and (b) in stage two, the tried and tested provisions may be incorporated into the actual Master Agreements and become mandatory upon the parties thereto.

7.4.5 Alternative/Additional Dispute Resolution Mechanisms

An additional or alternative solution for a dispute resolution mechanism may be the establishment of a mediation or arbitration panel recognised across the market that will resolve disputes in a formal procedure. The introduction of such a panel, however, requires prior consultations with major market players and industry regulators, as the calls it makes will have the strong advantage of being objective, as well as the serious disadvantage of being very time-consuming.

8 Next Steps

As the above analysis has shown, there is a clear need for harmonisation of master agreements. In order to be able to achieve the aim of such harmonisation, a concerted co-operation of all market participants and industry associations and a clear focus on the crucial aspects of harmonisation are required. The EFMLG will be happy to support this process.

The EFMLG believes that the financial crisis should be understood as an opportunity to initiate the required harmonisation. In this context, reference again is made to the CRMPG report of 1999 which, inter alia, concluded as follows:

“Change and innovation are constant and healthy aspects of a market based competitive financial system. With that innovation will come a reminder of the need for continuous enhancements to risk management practices, such that, in time today’s emerging best practices will have to be reviewed and strengthened further. While we cannot say today when that should occur or what will be the best forum to accomplish that future review, we strongly suggest that industry leaders not wait for another market crisis to take up these questions”[13].

[13] Counterparty Risk Management Policy Group (CRMPG), Report on “Improving Counterparty Risk Management Practices” (June 1999), page 11.

Annex 1: Main Criteria for defining Act of Insolvency/Bankruptcy/Insolvency Events

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
1. Dissolution	Yes (other than pursuant to a consolidation, amalgamation, merger)	Yes or has a resolution passed for its dissolution (other than in either case, pursuant to a Corporate Restructuring resulting in a solvent Successor Entity)	Yes "seeking any dissolution"	Yes "seeking any dissolution"
	Sec. 5 (a)(vii)(1)	Sec. 6 (1)(a)(viii)(1)	Para. 2. (a) (iv)(3rd HS)	1995: Para. 1.1. (d)(3rd HS) 2000: Para. 2.1. (iv)(3rd HS) 2009: Para. 2.1. (d)(3rd HS) NB: References relate to numbering in definition of “Act of Insolvency”
2. Non-Payment				
a) unable to pay its debts as they become due	Yes	Yes	No	No
b) fails generally to pay....	Yes	No	No	No
c) admitting in writing its inability to pay its debts as they become due	Yes	No	Yes	Yes
	Sec. 5 (a)(vii)(2)	Sec. 6 (1)(a)(viii)(8)	Para. 2 (a)(ii)	1995: Para. 1.1 (b) 2000: Para. 2.1 (ii) 2009: Para. 2.1 (b)

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
3. Petition for bankruptcy, winding-up or insolvency	Yes	Yes	Yes	Yes
Initiated by	1992: The party, any Credit Support Provider of such party or any applicable Specified Entities of such party, OR proceedings instituted against any of the above entities (by third parties) 2002: In addition to the mechanism set out above in relation to ISDA 1992: by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office	(a) The party (b) A governmental or juridical authority or self-regulatory organization having jurisdiction of the Party in a Specified Jurisdiction ("Competent Authority) (c) A person, other than a Competent Authority	Anyone, apart from the counterparty to this Agreement in respect of any obligation under this Agreement	Anyone, apart from the counterparty to this Agreement in respect of any obligation under this Agreement
Procedure	1992: Institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy, and (if instituted against it) (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief	Commences an Insolvency Proceeding against itself or takes any corporate action to authorise such an Insolvency Proceeding	Presenting or filing of a petition in respect of it [the party] in any court or before any agency alleging	Presenting or filing of a petition in respect of it [the party] in any court or before any agency alleging

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
	or the making of an order for its winding-up or liquidation, or (B)…(see "Grace Period" below regarding lapse of grace period) 2002: (A) institutes or has instituted against it by a regulator a proceeding seeking a judgement of insolvency or bankruptcy, and (B) (if instituted against it by third parties) (I) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (II) … (see "Grace Period" below regarding lapse of grace period)			
Grace Period	ISDA 1992: If petition does not result in a judgement of insolvency, the petition is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof ISDA 2002: If a petition, instituted or presented by a third party as described above (see	If a <u>person</u> other than a Competent Authority commences an insolvency proceeding against the Party in a Specified Jurisdiction and such action is not dismissed or stayed within 30 days following the action or event commencing the Insolvency Proceeding, unless the commencement of such proceeding by such a person, <u>or under the given</u>	30 days (debatable as reference to petition is unclear) (30 day period shall not apply for a petition for winding-up or any analogous proceeding)	30 days (debatable as reference to petition is unclear) (30 day period shall not apply for a petition for winding-up or any analogous proceeding)

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
	"Procedure"/ISDA 2002 above/(B), does not result in a judgement of insolvency and the petition is not dismissed, discharged, stayed or restrained in each case within 15 days of the institution or presentation thereof	circumstances, is obviously inadmissible or frivolous		
	Sec. 5 (a)(vii)(4)	Sec. 6 (1) (a) (viii)(2), (3), (5)	Para. 2. (a)(iv)(1st HS)	1995: Para. 1.1 (d)(1st HS) 2000: Para. 2.1 (iv)(1st HS) 2009: Para. 2.1 (d)(1st HS)
4. Petition for restructuring	Yes	Yes	Yes	Yes
5. Appointment of	Yes	Yes	Yes	Yes
a) trustee	Yes	Not explicitly	Yes	Yes
b) administrator	Yes	Yes	Yes	Yes
c) receiver	Yes	Yes	Yes	Yes
d) liquidator	Yes, provisional liquidator	Yes	Yes	Yes
e) conservator	Yes	Not explicitly (applicability via g))	Not explicitly (applicability via g))	Not explicitly (applicability via g))
f) custodian	Yes	Not explicitly (applicability via g))	Not explicitly (applicability via g))	Not explicitly (applicability via g))
g) other similar official/analogous	Yes, for it [the party] or for all or	Yes similar official for the party or for all or any substantial	Yes, analogous officer for the party	Yes, analogous officer for the party

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
officer	substantially all of its assets	parts of its assets under any bankruptcy, insolvency or similar law or any bankruptcy, insurance or similar law governing the operation of the party		
	Sec. 5 (a)(vii)(6)	Sec. 6 (1) (a) (vii), definition of "Insolvency Procedure"	Para. 2 (a)(v)	1995: Para. 1.1 (e) 2000: Para. 2.1 (v) 2009: Para. 2.1 (e)
6. Restructuring	Yes	Yes	Yes	Yes
a) general assignment	Yes	Yes	Yes	Yes
b) arrangement	Yes	No	Yes (including voluntary arrangement)	Yes (including voluntary arrangement)
c) composition	Yes	Yes	Yes	Yes
d) amicable settlement	No	Yes	Yes	Yes
e) reorganisation	No	No (…the expression [Insolvency Proceeding] does not include a solvent corporate reorganisation)	Yes	Yes
	Sec. 5 (a)(vii)(3)	Sec. 6 (1)(a)(viii)(7)	Para. 2.(a)(i)	1992: Para. 1.1. (a) 2000: Para. 2.1. (i) and (vi) 2009: Para. 2.1. (a) and (f)
7. Possession **Taking/Enforcement by a Secured Party of substantially all assets**	Yes a secured party has taken possession of all or substantially all its assets or	No	No	No

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
	has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and said secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days (ISDA 2002: 15 days) thereafter Sec. 5 (a)(vii)(7)			
8. Furtherance of any of the foregoing acts	Yes, or indicating its consent to, or approval of, or acquiescence in Sec. 5 (a)(vii)(9)	N/A	N/A	N/A
9. Event, which has an analogous effect to any of the events specified above	Yes, causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clause (1) to (7) Sec. 5 (a)(vii)(8)	Yes, causes or is subject to any event which, under the laws of Specified Jurisdiction, has an effect which is analogous to any events specified in Nos. (1) to (8) Sec. 6 (1)(a)(viii)(9)	Yes *Para. 2.(a)(iv)(2nd HS): "…or similar relief"* *Para. 2.(a)(vi):"…(or any analogous proceeding)"*	Yes *2000: Para. 2.1.(iv)(2nd HS) 2010: Para 2.1. (d)(2nd HS): "…or similar relief"* *2000: Para. 2.1.(iv)(2nd HS) 2010: Para 2.1. (d)(2nd HS) "…or any analogous proceeding)"*

Annex 2: General Notice Provisions

	ISDA 1992/2002		**EMA 2004**		**GMRA 1995/2000**		**GMSLA 2000/2010**	
Language	Not specified		Not specified		English language Para. 14(a)(i)		Not specified	
Manner	General/ Termination	Effectiveness	General/ Termination	Effectiveness	General/ Termination	Effectiveness	General/ Termination	Effectiveness
(i) in writing delivered in person or by courier	Yes	Date of delivery	Yes	Date of receipt	Yes	Date of delivery	Yes	Date of delivery
(ii) telex	Yes	Date of receipt of recipient's answerback	Yes	Date of receipt of recipient's answerback	Yes	Date of receipt of recipient's answerback	Only 2000 Version	Date of receipt of recipient's answerback
(iii) facsimile transmission	Yes	Date of receipt	Yes	Date of receipt	Yes	Date of receipt	Yes	Date of receipt
(iv) certified or registered mail or equivalent	Yes	Date of delivery or attempted delivery	Yes	Date of receipt	Yes	Date of delivery or attempted delivery	Yes	Date of delivery or attempt delivery
(v) electronic messaging system	Yes/No	Date of receipt	Yes	Date of receipt	Yes/No	Date of receipt	Yes/No	Date of receipt
(vi) e-mail	Yes/No	Date of delivery	No		No		No	
	Sec. 12(a)		Sec. 8(1), 8(2)		Para. 14(b)		Para. 21.1	
Default Manner	Not specified		Not specified		In writing Para. 14(a)(i)		Not specified	
Oral Notifications	No		No		In specified cases Para. 14(a)(i), 4(b)		No	

	ISDA 1992/2002	EMA 2004	GMRA 1995/2000	GMSLA 2000/2010
Special Requirements for Facsimile Transmissions				
(i) receipt by responsible employee	Required	No	Required	Required
(ii) burden of proof	Sender	Not specified	Sender	Sender
(iii) proof by transmission report by sender's facsimile machine	Excluded	Not specified	Excluded	Excluded
	Sec. 12(a)(iii)		Para. 14(b)(iii)	Para. 21.1(iii)

Annex 3: Termination Notice (Automatic Early Termination) Provisions

<table>
<tr><th rowspan="2"></th><th colspan="2">ISDA</th><th rowspan="2">EMA 2004</th><th colspan="2">GMRA</th><th colspan="2">GMSLA</th></tr>
<tr><th>1992</th><th>2002</th><th>1995</th><th>2000</th><th>2000</th><th>2010</th></tr>
<tr><td>Termination Notice</td><td colspan="2"></td><td></td><td colspan="2"></td><td colspan="2"></td></tr>
<tr><td>(i) generally required to be given</td><td colspan="2">Yes</td><td>Yes</td><td colspan="2">Yes</td><td colspan="2">Yes</td></tr>
<tr><td>(ii) required to be given in case of insolvency*</td><td colspan="2">Yes</td><td>No</td><td colspan="2">No</td><td>No</td><td>Yes</td></tr>
<tr><td>(iii) exceptions from (ii) above</td><td colspan="2">Automatic Early Termination is specified as applicable to the defaulting party in the Schedule</td><td>Need to serve notice specified in the Special Provisions</td><td colspan="2">No</td><td>No</td><td>Automatic Early Termination specified as applicable in the Schedule</td></tr>
<tr><td>* Insolvency for the purposes of automatic termination (the “Insolvency Event”) means</td><td colspan="2">– dissolution
– general assignment, arrangement or composition for the benefit of creditors
– proceeding seeking a judgment of insolvency or bankruptcy
– winding-up or liquidation
– appointment of an administrator, provisional liquidator, conservator, receiver, trustee or custodian
– event analogous to the above</td><td>– dissolution
– insolvency proceedings initiated by the defaulting party, competent authority or a third party
– event analogous to the above</td><td colspan="2">– petition for winding-up or any analogous proceeding
– appointment of a liquidator or analogous officer</td><td colspan="2">– petition for winding up or any analogous proceeding
– appointment of a liquidator or analogous officer</td></tr>
<tr><td></td><td colspan="2">Sec. 6(a), 5(a)(vii)</td><td>Sec. 6(1)(b)</td><td colspan="2">Para. 10(a)(iv) GMRA 1995
Para. 10(a)(vi) GMRA 2000</td><td colspan="2">Para. 14.1(v) GMSLA 2000
Para. 10.1(d) GMSLA 2010</td></tr>
</table>

	ISDA		EMA 2004	GMRA		GMSLA	
	1992	2002		1995	2000	2000	2010
Termination Date							
(i) in the case of a notice being required	Date designated by the non-defaulting party by not more than 20 day's notice		Date designated by the non-defaulting party by not more than 20 day's notice	Immediately upon the relevant notice being given		At the time the relevant notice is given	
(ii) in the case of an automatic termination due to an Insolvency Event	– in the case of a proceeding seeking a judgment of insolvency or bankruptcy, immediately prior to the institution or presentation thereof – in all other cases, immediately upon the occurrence of the relevant Insolvency Event		Immediately prior to the occurrence of the relevant Insolvency Event	Immediately upon the occurrence of the relevant Insolvency Event		At the time of the occurrence of the relevant Insolvency Event	
	Sec. 6(a)		Sec. (6)(1)(b)	Para. 10(a), (b)		Para.10.2, 14.2 GMSLA 2000 Para. 10.2, 11.2 GMSLA 2010	

Annex 4: Calculation of Close-out Amounts

	ISDA		EMA 2004	GMRA		GMSLA	
	1992	2002		1995	2000	2000	2010
Determination of Close-out Values							
(i) method of determination							
(a) default method	Market Quotation	Close-out Amount	Default Value	Default Market Value		Relevant Value	Default Market Value
(b) optional method	Loss	No	No	No		No	
(ii) "walk away" provisions for non-defaulting party	Yes (optional)	No	No	No		No	
(iii) party making determinations							
(a) one affected party	Non-affected party		Non-affected party	Non-affected party		Non-affected party	
(b) two affected parties	Both parties (arithmetic mean)		Both parties (arithmetic mean)	Not specified		Not specified	
	Sec. 6(e)		Sec. 7(1)(a), 7(2)	Para. 10(b), (c) GMRA 1995 Para. 10(b) - (e) GMRA 2000		Para. 10.2, 10.3 GMSLA 2000 Para. 11.2-11.7 GMSLA 2010	

Annex 5: Dispute Resolutions

Step	ISDA Credit Support Annex	ISDA DR Procedure	Standard timing	Extended Timing
1. Notification The party raising a dispute shall notify the other party and the valuation agent thereof	Yes	No		
(a) **Transfer of Undisputed Amounts** Undisputed amounts shall be transferred by the relevant party in a timely manner	Yes	Yes	D[14] D	D D
(b) Portfolio Reconciliation Parties shall exchange relevant information and identify transactions under investigation, taking into account the Tolerance Level	No	Yes	D D	D D+1
(c) Consultation and Informal Dispute Resolution Parties shall consult with each other in an attempt to resolve the dispute	Yes	Yes	D D+1	D+2 D+7
(d) Formal Dispute Resolution Market-based determination for a disputed transactions	Yes Quotations at mid-market obtained by the Valuation Agent. If unavailable, the original calculations.	Yes Quotations obtained by each party evaluated in accordance with the categories and scenarios set out in the DR Procedure	D+1 D+3	D+7 D+9

14 "D" means the day on which a collateral call is made.

Annex 6: EFMLG Task Force on Standard Market Documentation

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Ms Chandra Bhargavan	Commerzbank
Ms Natalia Butragueño	Banco Santander
Ms Simone Davini	IntesaSanpaolo S.p.A.
Mr Holger Hartenfels	Deutsche Bank, Chairman of the Task Force
Mr Stéphane Kerjean	European Central Bank
Mr Klaus Löber	European Central Bank
Ms Delphine Mariot-Thoreau	Calyon
Ms Helen Moran	AIB
Mr Michael Mortensen	Danske Bank
Mr Olof Myhrman	SEB
Ms Susan O’Malley	HSBC
Mr Ulrich Parche	UniCredit
Mr Frederik Winter	EFMLG/Linklaters LLP

Annex 7: EFMLG Members

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Mr Moïse Bâ	BNP Paribas
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Mr Bertrand Bréhier	Société Générale
Ms Natalia Butragueño	Banco Santander S.A.
Ms Helen Cockroft	Royal Bank of Scotland
Mr Fernando Conlledo Lantero	CECA
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Mr Pedro Ferreira Malaquias	Uría Menéndez
Mr Rein Graat	ING Group
Ms Marie-Paule Gillen-Snyers	Krediet Bank Luxembourg
Mr Mark Harding Alternate: Mr Tom Bartos	Barclays Bank PLC
Mr Holger Hartenfels	Deutsche Bank AG
Mr Otto Heinz	European Central Bank, Secretary
Ms Helene Hellners	SEB
Mr Antonio Maladorno	UniCredit Group
Ms Helen Moran	AIB Group
Mr Michael Holmgaard Mortensen	Danske Bank A/S
Ms Susan O'Malley	HSBC
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Mr Klaus Poggemann	WestLB AG
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Mr Hermann Stahl Alternate: Ms Chandraleka Bhargavan	Commerzbank AG
Mr Gregor Strehovec	SKB banka
Mr Frank Tillian	UniCredit Bank Austria AG
Mr Dimitris Tsibanoulis	Tsibanoulis & Partners
Mr Dirk Vloemans	Fortis Bank N.V./S.A.
Mr Andrew Williams	UBS Investment Bank
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