

DRAFT

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SYMPOSIUM ON STANDARD MARKET DOCUMENTATION:
LESSONS ~~TO BE DRAWN~~ LEARNED FROM THE CURRENT FINANCIAL
~~TURMOIL~~ CRISIS
SUMMARY REPORT

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1 Introduction

1.1 ~~Legal Symposium of 15 September 2009~~ Challenges Past and Ahead

In the ~~context of the financial crisis;~~ course of the current financial crisis, which many economists call it the worst since the Great Depression of the 1930s, the financial industry's credit risk management practices, especially the procedures and the documentation that govern the termination and close-out ~~procedures in relation to OTC~~ of financial transactions (i.e. derivatives, securities lending and repurchase (repo) transactions as well as the master agreements supporting them 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 ~~and diversity of~~ of and deviations in the supporting standard market documentation and the co-existence of different, sometimes outdated, versions caused unforeseen issues which need to be addressed. ~~Against this background, the EFMLG initiated a dialogue with the leading industry organisations sponsoring standard market documentation and an ad hoc EFMLG Task Force was set up.~~

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 institution have been discussed. The pending consultations provide for the regulators rights 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. Being concerned about the opaqueness and complexity of OTC derivatives and their contribution to the current financial crisis, regulators discuss various initiatives that aim at the mitigation of potential systemic risks stemming from derivatives market. The proposals include the standardisation of derivatives, the use of central counterparty clearing or 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.

On 15 September 2009, one year after the Lehman Brothers' insolvency, the EFMLG organised a ~~High Level Legal Symposium~~ high-level legal symposium hosted by Calyon in London, in which ~~various~~ representatives from ~~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 ~~from various~~ major financial institutions, companies, legal ~~groupings~~ associations and international law firms participated. The main purpose of the ~~Symposium~~ symposium was to discuss the lessons ~~to be~~ learned from the financial crisis ~~regarding specific provisions commonly used in financial transactions documentation, also specifically~~ with a view to ~~identifying~~ identify potential divergences between various master agreements and discussing the need for ~~harmonization~~ harmonisation, if any.

~~The aim of the present report is to provide a summary of the discussion and identify areas in which, in the view of EFMLG, there is a need for action.~~

~~It focuses on five aspects that all standard master agreements have in common: (i) definition of bankruptcy related events of default (see Topic 1 in section 3 below); (ii) procedures for terminating master agreements by notice (see Topic 2 in section 4 below); (iii) operation of automatic early termination clauses (see Topic 3 in section 5 below); (iv) calculation of close-out amounts, including valuation of securities and currency conversion (see Topic 4 in section 6 below); and (v) resolution of collateral and margin disputes (see Topic 5 in section 7 below).~~

The EFMLG symposium was not the first initiative of this kind. Already the 1998 market disruption, the so-called Asian crisis, 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. a unified approach to cross-default and force majeure provisions, grace period for involuntary insolvency petitions, which as well as some other proposals made their way into the master agreements.

The EFMLG symposium was held as a starting point raising the problem of 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 Standard Market Documentation Scope and Approach of this Report

This report ~~is a summary of~~summarises the discussions held at the ~~symposium in London. The report focuses on the following standard market documentation for~~EFMLG symposium. Its first conclusions and recommendations provide an overview of the current state of the standard market agreements widely used to document financial transactions, addresses the challenges the market participants are likely to face in the near future and gives practical recommendations as to the steps to be taken to improve and harmonize 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**”)
- ~~Overseas Securities Lender’s Agreement, December 1995 (the “**OSLA 1995**”)~~
- ~~Global Master Securities Lending Agreement (Version: May 2000) (the “**GMSLA 2000**”)~~
- ~~Global Master Securities Lending Agreement (Version: July 2009) (the “**GMSLA 2009**”)~~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**”)
- ~~Master Agreement for Financial Transactions – General Provisions – Edition 2001 from the Banking Federation of the European Union (the “**EMA 2001**”)~~Global Master Securities Lending Agreement (Version: May 2000) (the “**GMSLA 2000**”)
- ~~Master Agreement for Financial Transactions – General Provisions – Edition 2004 from the Banking Federation of the European Union (the “**EMA 2004**”)~~Global Master Securities Lending Agreement (Version: January 2010) (the “**GMSLA 2010**”)

The ISDA 1992, the ISDA 2002, the ~~OSLA 1995, the GMSLA 2000, the GMSLA 2009,~~EMA 2004, the GMRA 1995, the GMRA 2000, the ~~EMA 2001~~GMSLA 2000 and the ~~EMA 2004~~GMSLA 2010 are together referred to as the “**Master Agreements**” and each a “**Master Agreement**”.

~~Even though all Master Agreements have been updated in the last couple of years, some of the out-dated versions of the Master Agreements are still in use. Consequently, the report will also look at the various versions of Master Agreements to the extent differences exist.~~ 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 EFMLG symposium, and consequently this report, are focused on the major issues that gave rise to disputes between market participants in the course of the current financial crisis or potentially can cause problems in the distressed market conditions or are, in their current versions, ambiguous and therefore allow 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 for collateral and margin calls.

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

2 Executive Summary

~~[To be completed upon review sign-off of the report by rapporteurs.]~~

3 Topic 1: Events of Default

~~3.1 Questions~~

~~Should the definitions of “Bankruptcy” and “Act of Insolvency” or related definitions in market standard documentation be harmonized or aligned? Is there a need to account for recent legislation on financial market stability and recovery (e.g. new bankruptcy procedures for banks)?~~

~~3.1~~ **3.2 Overview**

~~All Master Agreements contain early termination triggers linked to~~ Each Master Agreement contains a number of events, actions and failures that constitute Events of Default. While some of such triggers reflect specifics of particular types of transactions, others are intended to deal with a broader range of legal issues that affect transactions of all kinds irrespective of their legal nature. The following analysis primarily relates to Events of Default which are triggered by insolvency and restructuring events. ~~Due to the fact that the Master Agreements have been drafted for use~~ 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 these insolvency, restructuring and other relevant triggers incorporated in the Master Agreements typically require an interpretation of the relevant 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 trigger an event of default. In particular, the collapse of financial institutions during the credit crisis has shown that the scope of these triggers is not always clear and differs between the various Master Agreements. constitute an Event of Default under the relevant Master Agreement.

~~A synopsis is attached as Annex 1 hereto. It shows the main criteria for defining Act of Insolvency/Bankruptcy/Insolvency Events.~~ 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) possession takings, enforcements by a secured party of substantially all assets, (viii) furtherance of any of the foregoing actions, (ix) events which have an analogous effect on any of the events specified above.

~~3.3 Summary of Certain Key Criteria for defining Acts of Insolvency/Bankruptcy/Insolvency Events~~

~~3.3.1 Dissolution of Party or other Relevant Entity~~

~~All Master Agreements contain dissolution wording without differing substantially from each other. ISDA 1992/2002 and EMA 2001/2004 contain a carve out for consolidations, amalgamations and mergers respectively corporate restructurings resulting in a solvent successor entity. Given that dissolutions in relation to solvent entities are not meant to be events of default, such carve outs are certainly helpful although they arguably only have clarifying effects.~~

~~3.3.2 Non Payment (Inability to Pay Debts)~~

3.2 Key Features

The Master Agreements ~~contain certain differences with regard to trigger events based on an inability to pay debts as they become due.~~ 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 overindebtedness (see paragraph 3.3.2 below). Another group uses a merely formalistic approach and defines Events of Default as 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 formalistic approach is generally open to criticism, but given that the formal procedures are more visible and easier to establish compared to objective tests, they are broadly used in the Master Agreements and are typically used as triggers for automatic early terminations of Master Agreements.

~~The broadest approach is taken by 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 EMA 2001/2004, OSLA 1995, GMSLA 2000/2009 and GMRA 1995/2000 have a narrower scope. The trigger under EMA 2001/2004 merely requires the general inability to pay debts as they fall due. Other triggers used in the ISDA Master Agreement are not reflected. The OSLA 1995, GMSLA 2000/2009 and the GMRA 1995/2000 limit the scope to a written admission of the inability to pay debts as they become due.~~

~~Whilst a written admission of the inability to pay debts as they become due certainly helps to have clarity on the occurrence and the timing of the event, it narrows down the scope of such trigger significantly given that in many cases no such written admission is made.~~

~~3.3.3 Petition for Bankruptcy, Winding up or Insolvency~~

~~The non payment trigger described in 3.3.2 above is based, in principle, on certain objective insolvency tests typically used in national insolvency law regimes as precondition for justified insolvency petitions. In contrast, the triggers linked to the insolvency petition as such merely use the formal petition for the institution of insolvency or bankruptcy proceedings. Such petitions are required in probably all jurisdictions in order to institute relevant insolvency proceedings and may or may not be justified. It is one of the challenges to be addressed by the Master Agreements to avoid that unjustified petitions allow to trigger 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.~~

~~Given that such formal procedures are more visible and easier to establish compared to objective insolvency tests linked for example to an inability to pay or overindebtedness, insolvency petitions play an important role as termination triggers and are also a suitable trigger for automatic early terminations of Master Agreements (provided the relevant Master Agreement allows to elect automatic early termination, such as for example ISDA 1992/2002—see section 5 of this report below).~~

Another feature to mention derives from the necessity 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 any possible scenario certain “catch-all”-wording is included in all Master Agreements in order to avoid that the insolvency/bankruptcy related events are interpreted in a too narrow sense and thus lead 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” aim 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 the 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 Event of Default related to inability to pay debts (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 almost never admit such inability.

3.3.3 Petition for Bankruptcy, Winding-up or Insolvency

The ~~wording of these triggers is~~ definitions of the relevant Events of Default are complex. It 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 (i) by whom and (ii) against whom proceedings need to be initiated in order to ~~meet the requirements of the relevant trigger event~~ 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 to 30 days under ISDA 1992~~). 1992.

The EMA ~~2001/2004~~ 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 ~~count as an event of default under EMA 2001/2004~~constitute an Event of Default is however ~~only limited to~~ the party as such.

The approach taken by the GMRA 1995/~~2000, OSLA 1995~~2000 and GMSLA 2000/~~2009~~2010 is far less detailed. The definition of “Act of Insolvency” covers petitions initiated by anyone (other than ~~by~~ the counterparty to the relevant Master Agreement) and only ~~covers~~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 ~~may~~can file ~~the~~a petition for opening of insolvency proceedings in respect of financial institutions. Apart from such 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~~Event of ~~default~~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 ~~that~~ unjustified insolvency petitions ~~trigger~~triggering a close-out of transactions under the relevant Master Agreement. The additional ~~tests~~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 ~~2001/2004~~ 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” as used in the GMRA 1995/~~2000, OSLA 1995~~2000 and GMSLA 2000/~~2009~~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. Merely the recently published GMSLA 2009 requires that automatic early termination is elected to cause a termination without notice following winding-up

or analogous proceedings. In that respect, see ~~section~~[paragraph 5](#) of this report below).

(iii) Grace Periods

The Master Agreements ~~largely~~ 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. ~~Merely, only~~ the ISDA 2002 ~~uses~~ [shortens such](#) grace period ~~to~~ 15 days.

Whilst [the](#) ISDA 1992/2002 and EMA ~~2001/2004~~ use the grace period only in cases of third party applications, ~~OSLA 1995, GMSLA 2000/2009 and~~ [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).

~~For more details see Annex I.~~

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. ~~An open issue will be in many cases~~ [At the same time, it raises the question](#), whether a petition for restructuring should ~~be a relevant event of default at all. For example, it could be ensured that petitions by solvent entities are disregarded. Narrowing down the scope in this sense may be appropriate if the assumption is correct that it was the parties' intention not to cause a full close out of the Master Agreement if the petition for restructuring was meant to merely reorganise a solvent counterparty.~~ [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~~[Event](#) of ~~default~~[Default](#) might be triggered despite the fact that the relevant official has been appointed to avert ~~an~~ 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 ~~includes~~[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~~[whilst the](#) ISDA 1992/2002 ~~mentions~~[mention](#) conservators and custodians, ~~the~~ EMA ~~2001/2004~~, ~~OSLA 1995, GMSLA 2000/2009 and~~ 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”. ~~Again, this may lead to a different treatment of some Master Agreements following the same event.~~

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: ~~GMSLA 2000/2009 and~~ [the](#) GMRA 1995/2000 ~~and GMSLA 2000/2010~~ mention explicitly that “arrangements” include

voluntary arrangements and [the](#) EMA 2001/2004 ~~contains the statement~~ [specifies](#) that the term “reorganisation” does not include [reorganisations of solvent corporate reorganisations 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 ~~eontains~~ [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.

~~3.3.9 Events with Analogous Effects~~

~~Certain “catch-all” wording is added in all Master Agreements in order to avoid that the insolvency/bankruptcy related events are interpreted in a too narrow sense (for example national insolvency laws may choose a different mechanism or terminology compared to the events and officials described in the Master Agreements). 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” aim to capture crisis related proceedings which are closely comparable to the proceedings or events specified in the relevant Master Agreement.~~

3.4 ~~Observations and Recommendations~~

3.4.1 [Harmonisation](#)

The definitions relating to bankruptcy, insolvency and restructuring as used in the Master Agreements show a clear need for ~~harmonization~~ [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).

~~These~~ [Such](#) differences can have a significant impact. ~~Market on market~~ [participants which, as many of them have entered into various Master Agreements in place with the same counterparty may have to look at with the same counterparties and, upon occurrence of an insolvency-related event with respect to the relevant counterparty, one has to analyse such event from the perspective of](#) each Master Agreement separately. They ~~may~~ [can also](#) face a situation where an event of default has occurred under ~~ertain~~ [some](#) Master Agreements but not under all Master Agreements and (assuming a notice has been given or automatic early

termination applies) only the transactions ~~of~~under the terminated Master Agreements can be closed- out. This may make it difficult to take a coordinated approach in relation to sending termination notices, entering into replacement transactions and may thereby create difficulties with related back-to-back transactions.

~~These differences could be an argument for a wider use and ideally a harmonized approach in relation to cross product master agreements. Under a cross product master agreement, all relevant product-specific master agreement types could be combined and a cross-trigger could be implemented, ensuring that an early termination under one of the Master Agreements also triggers the early termination of the other Master Agreements.~~

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 to either 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 whether related terminations are at all valid under the applicable law.

3.4.3 Recent Development of Legislation

~~Finally, recent~~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 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~~Events of ~~default~~Default and, if so, whether rules prohibiting terminations apply and are valid and enforceable under the law governing the Agreement. [For more details please refer to paragraph 8 below]

3.4.4 Unjustified Petitions

One last challenges worth noting and to be addressed by the Master Agreements is to avoid situations when unjustified petitions allow triggering of a close-out of transactions under the relevant Master Agreement. This can be done, for example, by providing for grace periods if the petition is filed by a third party, assuming that applications by the affected party itself and applications by regulators are justified.

4 Topic 2: Termination Notices

~~All Master Agreements contain provisions which set out procedures relating to notification and communication between the parties.~~

4.1 QuestionsOverview

~~Should the provisions for rendering termination notices be harmonized? What are the means of notifications that are acceptable (e mail, faesimile, letter)? Should there be rules on the point in time a notification must be received for being effective? How to deal with notices that the addressee refuses to accept?~~

4.2 ~~Importance of Notices for Early Termination~~

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, ~~the~~ early termination of transactions under the relevant Master Agreement upon the occurrence of an ~~event of default or termination event~~ usually Event of Default or Termination Event requires the delivery of a notice, except in specific circumstances where those relatively rare cases in which automatic early termination applies (see section-paragraph 5 of this report below).

~~Although the early termination provisions of the Master Agreements differ to a certain extent, the following common features can be identified in respect of notices upon the occurrence of an event of default or termination event:~~

4.2.1 ~~a number of events require a notice requesting the remedy of the relevant failure, i.e. the commencement of certain grace periods depends on serving a related notice. Only upon lapse of the relevant grace period the party may terminate the relevant Master Agreement (see section 5(a)(i), (ii)(1) of the ISDA 2002; section 5(a)(i), (ii) of the ISDA 1992; paragraph 10.1(b), (i) of the GMSLA 2009; paragraph 14.1(x) of the GMSLA 2000; paragraph 10(a)(x) of the GMRA 2000; section 6(1)(a)(i), (iii), (b) of the EMA 2004);~~

4.2.2 ~~the termination notice shall either specify the early termination date (see section 6(a), (b)(iv) of the ISDA 1992/2002; section 6(1)(b), (2)(b) of the EMA 2004; paragraph 11(e) of the GMRA 2000 in respect of a tax event) or the effective date of the notice will trigger the applicable termination date/repurchase date (see paragraph 11.2 of the GMSLA 2009; paragraph 10.2 of the GMSLA 2000; paragraph 10(b) of the GMRA 2000);~~

4.2.3 ~~the termination notice has to be sent to the address or addresses specified in the relevant Master Agreement (see section 12(a) of the ISDA 1992/ 2002; paragraph 20.1 of the GMSLA 2009; paragraph 21.1 of the GMSLA 2000; paragraph 14(a)(iii) of the GMRA 2000; section 8(1) of the EMA 2004);~~

4.2.4 ~~the termination notice may need to be submitted 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]”);~~

4.2.5 ~~the termination notice may need to be given in a certain manner (see for example section 12(a) of the ISDA 1992/2002; definition of “Default Notice” in paragraph 2(1) of the GMRA 2000); and~~

4.2.6 ~~the termination notice may need to provide information about the relevant termination event (see for example section 6(a), (b)(i) of the ISDA 1992/2002).~~

~~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, valuations etc.~~

~~4.3 — General Notice Provisions — Minor Differences~~

~~Annex 2 sets out the relevant general notice provisions of each Master Agreement. The provisions relating to notices are already broadly similar. 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.~~

~~However, some minor differences exist between the various Master Agreements.~~

~~4.3.1 — 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(e) 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.~~

~~4.3.2 — ISDA 2002: Section 12(a)(vi) of the ISDA 2002 expressly refers to e-mail as a possible way of communication.~~

~~4.3.3 — EMA 2004: The effectiveness in respect of notices made by telefax only refers to the “receipt by the addressee” (see section 8(2)(a) of the EMA 2004). The other Master Agreements refer to the receipt by a responsible employee of the recipient in legible form and clarify that the burden of proving receipt is on the sender and such proof is not met by the transmission report generated by the sender’s facsimile machine.~~

~~4.3.4 — GMSLA 2009: According to paragraph 20 of the GMSLA 2009, telex is not an appropriate manner of communication anymore.~~

~~Whereas the other Master Agreements do not define “Close of Business” the term is defined in the GMSLA 2000/2009 with reference to the closure of the relevant banks, securities settlement systems or depositories in the business centre in which payment is to be made or securities/collateral is to be delivered.~~

~~4.4 — General Issues regarding Notices~~

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

~~4.1.1 4.4.1 Address~~

~~In order for a notice to deliver abc valid notice, it needs to must be sent to the address specified in the relevant Master Agreement. This requires a constant book-keeping up to~~

date and immediately accessible records of any changes of address related to the counterparty.

If ~~notices are~~ a notice is required to be sent to more than one address or addressee, it may be unclear ~~when the~~ (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 ~~as it may be~~ if delivered at to different addresses or addressees, as the case may be, on different dates.

~~Some further~~ Further problems may occur if the notice ~~shall~~ must be marked for the attention of a specific person who is no longer with the relevant party. Although it may be ~~clear~~ argued that the requirement ~~cannot be~~ is not mandatory, ~~it may lead to~~ practical issues; ~~in particular where the~~ as to timing ~~of the notice is crucial~~ may arise.

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

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

4.1.2 ~~4.4.2~~ 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 ~~4.4.3~~ Delivery Process

Certain methods of delivery of notices ~~can hardly be controlled by~~ create uncertainties beyond the control of the notifying party.

For example, a certified or registered mail 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 ~~this, 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 ~~as the non-defaulting party would have to wait for the return receipt before it could start closing out related hedging positions for example. In addition. Even then,~~ the notifying party may need to ~~proof~~ prove that the signature on the return receipt ~~derives from~~ is that of an employee ~~with~~ of the ~~relevant~~ defaulting party.

~~Therefore~~ Most financial institutions ~~have refrained from applying~~ do not use this method in practice.

Another example is ~~any~~ notification by ~~fax~~ telefax. The burden of proof ~~in respect~~ of receipt of the fax remains with the notifying party. The transmission report by the notifying party is not sufficient in that respect ~~as set out in paragraph 21.1(iii) of the GMSLA 2000, paragraph 20.1(b) of the GMSLA 2009, paragraph 14(b)(iii) of the GMRA 2000 and section 12(a)(iii) of the ISDA 1992/2002.~~¹ 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 ~~(as it is requested by most of the notice provisions as set out in Annex 2 to this report).~~

Electronic messaging and email may also be an unsafe ~~mean~~ method of giving formal notice as issues of interception and diversion may occur. Again, the burden of proof of receipt/delivery may be difficult ~~to comply with by~~ 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 though the e-mail is not accessed by the relevant recipient. This is reflected in the ISDA ~~2002 accordingly~~ 2002, albeit more broadly and less precisely, which provides for effectiveness of an email 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 ~~4.4.4~~ Impact of Non-Compliance with notice provisions

Under English law ~~the impact of any non~~ compliance with the notice provisions set out in the Master Agreements ~~may~~ will generally be strictly construed and non-compliance may lead to an 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. However, the ruling in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd, House of Lords [1997] A.C. 749 needs to be considered which (under certain circumstances) may result in a valid notice although the expressed terms seem to indicate the contrary. 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.

~~Any invalidity~~ Invalidity of ~~a~~ the termination notice ~~is likely to~~ could have a ~~huge~~ significant impact on ~~the economics related to the~~ early termination and close-out netting. This ~~is~~ could pose particularly ~~true~~ critical issues for the non-defaulting party ~~having already that had~~

¹ 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.

closed out ~~any, or was attempting simultaneously to close out,~~ related hedging transactions ~~assuming on~~ the ~~validity of the relevant notice. The non-defaulting party may be exposed to an open position (e.g. foreign exchange risk). If, for example,~~ assumption that the relevant notice had been valid. Even worse, it might not be able to designate another early termination date. If the notice is invalid and the default has been cured ~~until~~ before a new, valid notice ~~is~~ 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 ~~has stopped to perform any~~ have ceased 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 ~~non-compliance~~ a party that did not comply with the timing requirements of the notice procedures ~~prevented one party from terminating the relevant Master Agreement for~~ could not give a later notice and claim an event as an illegality. The counterparty had already terminated the agreement ~~for default and there was no room for overturning such termination with a subsequent notice which did not comply with the notice procedures~~ 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 ~~4.4.5~~ 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 ~~(see the definition of “Close-out Amount” in section 14 of the ISDA 2002; section 6(e) of the ISDA 1992; 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; paragraph 11.2(a), 11.4 of the GMSLA 2009)².~~ 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 such date will be required.

~~If the relevant~~ Interest accrues on the close-out amount ~~is, whether~~ owed by the non-defaulting party ~~or defaulting party,~~ interest will accrue on such amount from the date following the effective date of the notice ~~(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 11.7 of the GMSLA 2009; paragraph 10.7 of the GMSLA 2000; paragraph 10(f) of the GMRA 2000)~~ providing

² 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.

[particulars of the amount owing](#)³. 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 upon lapse of the relevant grace period may the party terminate transactions under the relevant Master Agreement](#)⁴;
- [the termination notice, assuming its effectiveness, establishes the early termination date](#)⁵ [or the effective date of the notice triggers the occurrence of the termination date/repurchase date](#)⁶;
- [the termination notice must be sent to the address or addresses specified in the relevant Master Agreement](#)⁷;
- [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](#)⁸; and
- [the termination notice may need to provide information about the relevant termination event](#)⁹.

[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.](#)

³ [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.](#)

⁴ [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.](#)

⁵ [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.](#)

⁶ [See paragraph 10\(b\) of the GMRA 2000, paragraph 10.2 of the GMSLA 2000 and paragraph 11.2 of the GMSLA 2010.](#)

⁷ [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.](#)

⁸ [See section 12\(a\) of the ISDA 1992/2002, definition of “Default Notice” in paragraph 2\(l\) of the GMRA 2000.](#)

⁹ [See section 6\(a\) and \(b\)\(i\) of the ISDA 1992/2002.](#)

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 emails 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”¹⁰, 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 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 depositories in the business centre in which payment is to be made or securities/collateral is to be delivered.

4.4 ~~4.5~~ Recommendations

4.4.1 ~~4.5.1~~ Alternative Delivery Procedures

Due to the importance of notices it is recommended ~~to provide~~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

¹⁰ Section 8(2)(a) of the EMA 2004.

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 (~~see Annex 2 in that respect~~).

4.4.2 ~~4.5.2~~ 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. ~~The~~As the parties would need to monitor the relevant website ~~which, this~~ may not work in practice.

4.4.3 ~~4.5.3~~ Multiple ~~Notice Solution~~ 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, event 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 such option is recommended to be excluded from any Master Agreement.

4.4.5 ~~4.5.4~~ 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/~~2009~~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.

~~4.5.5~~ Further Harmonization

4.4.6 Conclusion

It is recommended ~~to harmonize~~that the ~~general~~ notice provisions of the different product master agreements be harmonized in order to ensure that the general requirements ~~regarding~~for notices are the same. “Business Days” and “Business Hours” ~~may be defined in all Master Agreements alike. The, the~~ methods of notification ~~should be harmonized. The~~and the effectiveness of notices should be consistent across the Master Agreements.

In order to benefit from a further ~~harmonization~~harmonisation of the notice ~~provisions~~forms related to the early termination of the relevant Master Agreements, ~~first~~ the event of defaults ~~and termination events would need to be standardised. Only if the event of defaults/~~ termination events and the termination procedures ~~are~~would need to be standardised, ~~a full harmonization may be beneficial. Only then would full harmonisation be practical.~~

5 Topic 3: Automatic Early Termination

5.1 Overview

~~All~~The Master Agreements contain provisions ~~regarding the automatic early termination of the relevant Master Agreement.~~

~~5.1~~ Questions

~~What should be the principle? If automatic early termination applies, what are the events of default that should trigger the automatic early termination? Is there are need for further harmonization?~~

~~5.2~~ Importance of Automatic Early Termination Provisions

~~According to the automatic early termination provisions~~according to which certain insolvency events automatically trigger an early termination of the transactions under the relevant Master Agreement ~~terminates~~ without ~~prior~~ notice required to be given by either party (see ~~Annex 3 to this report~~) (the “Automatic Early Termination”). The ~~relevant provisions link the Automatic Early Termination to certain insolvency events. These events are regarded as the starting point as of which the relevant~~purpose of the Automatic Early Termination provisions is to terminate all transactions under the relevant Master Agreement immediately prior to the point of time when the statutory insolvency regime becomes applicable ~~in~~ most jurisdictions. ~~The purpose of the provisions is to terminate the relevant Master Agreement prior to that starting point to the relevant party in the relevant jurisdiction~~ in order to allow the contractual netting (rather than ~~any potentially mandatory statutory netting to apply. Furthermore some jurisdictions even prevent a termination of an agreement after~~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 ~~which would jeopardise the netting arrangements contained in the relevant Master Agreements. Consequently,~~

Despite the fact that the legal opinions in certain jurisdictions received by ~~the relevant~~ market associations recommend to apply the Automatic Early Termination provisions in respect of the

~~relevant Master Agreements. This allows the termination of a Master Agreement prior to the point at which the relevant statutory insolvency regime kicks in. In contrast the application of any Automatic Early Termination provisions bears the risk that~~ Master Agreements and their advantages for the parties specified above, implementation of such provisions bears certain risks. For example, the non-defaulting party may not know ~~that~~ on time that the transactions under the relevant Master Agreement ~~has~~ have already been terminated. ~~In such a scenario the non-defaulting party and, consequently,~~ would not be able to terminate ~~any~~ the related ~~hedging transaction in time as it would be unable to unwind these~~ hedging transactions at the prices prevailing on the date ~~on which the relevant Master Agreement has automatically been terminated~~ of the relevant Automatic Early Termination. In that respect it is ~~an advantage for~~ in the favour of the non-defaulting party not to apply the Automatic Early Termination provisions, ~~because it may~~ as it gives the non-defaulting party the flexibility to elect the relevant early termination date in its ~~sole discretion. The calculation of the close-out amount will then take into account any costs and losses incurred as per that date.~~ discretion.

5.2 Key Features

The main issues raised with respect to an Automatic Early Termination of the transactions under the relevant Master Agreement are related 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 close-out process related 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.

5.3 Differences between the Master Agreements/Observations

~~Annex 3 sets out the relevant~~ At first glance the Automatic Early Termination provisions ~~contained in the various~~ of different Master Agreements. ~~At first glance the provisions~~ 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 ~~GMRA 2000: Paragraph 10(a)(vi) of the GMRA 2000 does not require an early termination notice (so called “Default Notice”) in the case of an act of insolvency which is 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. 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. 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~~

~~GMRA. This includes the presentation or filing of a petition for the bankruptcy or insolvency of a party (or any analogous proceedings).~~ [ISDA 1992/2002](#)

~~5.3.2 ISDA 1992/2002:~~ As a general rule an early termination notice is required [to be given](#) following the occurrence of an ~~event~~[Event](#) of ~~default~~[Default](#) or a ~~termination event~~[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 these 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](#)

~~5.3.3 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~~[Event](#) of ~~default~~[Default](#). An exemption is made for 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 which case the termination shall automatically occur 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 case of an act of insolvency which is 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. Further, 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 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](#)

~~5.3.4 GMSLA 2000:~~ 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 is 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.

~~5.3.5 GMSLA 2009~~ Paragraph 10.1(d) of the GMSLA ~~2009~~2010 mainly replicates paragraph 14.1(v) of the GMSLA 2000. In contrast to the previous wording in the GMSLA 2000, the new GMSLA ~~2009~~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~~ General Issues

~~5.4.1~~ Different Triggers

~~Due to the fact that the Master Agreements lack a harmonized definition of “insolvency”, “bankruptcy”, “winding-up” or similar terms (see section 3 of this report above) the applicable triggers for an Automatic Early Termination differ to a large extent. It may be uncertain whether a specific insolvency-related event will lead to an Automatic Early Termination of all Master Agreements at the same time. This may raise legal issues in certain jurisdictions where general insolvency law prevents an early termination of the relevant Master Agreement by notice upon the opening of insolvency proceedings (in that respect see section 5.2 of this report above). In jurisdictions where the various legal opinions advise to apply Automatic Early Termination in order for the contractual netting instead of any statutory netting to apply, a standardised approach across all Master Agreements would be desirable.~~

~~In addition, it may be the case that the early termination date in respect of each Master Agreement may differ due to the fact that the insolvency events triggering an Automatic Early Termination are not harmonized. This may cause difficulties in the close-out process related to the Master Agreements and the winding up of any related hedge transactions.~~

~~5.4.2~~ Different Mechanics

~~The Master Agreements approach the Automatic Early Termination in different manners. For example, the GMRA 2000 (in relation to winding-up/liquidators), the EMA 2004 (in relation to the main Insolvency Events) 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 2009 expressly require the parties to specify its application in the relevant schedule. Such differences may be overlooked when negotiating a relevant Master Agreement.~~

~~5.4.3~~ Walk-away

~~If Automatic Early Termination is not specified in the ISDA 1992/2002 or the GMSLA 2009, a situation may occur in which the non-defaulting party is not terminating the relevant Master Agreement to the detriment of the defaulting party and its creditors, respectively. Of course, this issue of a “walk-away” may not only arise in the context of an insolvency event, but also in respect of all other events of defaults or termination events. However, in the case of the GMRA 2000, the EMA 2004 and the GMSLA 2000 Automatic Early Termination would apply in specific insolvency events, leaving no room for such walk-away of the non-defaulting party.~~

5.4 ~~5.5~~ Recommendations

5.4.1 Harmonisation of Insolvency Events

~~5.5.1~~—It is recommended to harmonize 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.

~~5.5.2~~—It is recommended to harmonize the provisions on Automatic Early Termination in order to follow a standardised approach in respect of the relevant jurisdictions in which Automatic Early Termination is advisable to apply. 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.

~~5.5.3~~—In order to avoid any course of conduct which may lead to a walk away of the non-defaulting party, it could be considered to establish a standardised principle of Automatic Early Termination in all Master Agreements. The approach taken by the GMRA 2000, the EMA 2004 and the GMSLA 2000 may be the preferred mechanism in that regard. However, such principle should be limited to specific situations of insolvency. In all other circumstances the parties may freely choose whether to apply Automatic Early Termination or not.

5.4.2 Obtaining Legal Opinions

~~5.5.4~~—It is recommended to clearly identify the various situations in which the legal opinions received by the market associations advise to apply 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 whether the relevant Master Agreements are automatically terminated or not.

5.4.3 Harmonisation of Automatic Early Termination Provisions

It is recommended to harmonize the provisions on Automatic Early Termination in order to follow a standardised approach in respect of the relevant jurisdictions in which Automatic Early Termination is advisable to apply. 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

~~5.5.5~~—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~~ Questions

~~Should the provisions dealing with the determination of fair values for derivatives, securities or commodities be harmonized? Are the rules on concerting market values into the determination currency robust enough? Should there be cascades for the determination of market values or securities? How much discretion should be granted to the non-defaulting party?~~

6.1 ~~6.2~~ Overview

All Master Agreements contain detailed rules regarding the determination and calculation 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 ~~relevant~~ transactions ~~combined~~ under at 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) ~~issues in relation to determining fair values, (ii) provisions regarding the termination currency, (iii) fall-back provisions for determining the market value of securities and (iv) 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 calculations of close-out amounts is flexibility (or inflexibility) of the approach taken by the relevant Master Agreement and 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 or sales or purchases of assets at inappropriate prices. On the other hand, if 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 valuation of large portfolios.

Cons:

- Reputation risk if valuation process is attacked or if discretion exercised differently by different departments of an institution or differently 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 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 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 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 and, 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 any reason, as the Master Agreement does not provide for any fallback scenario and it is not clear whether the last available values shall be used, the determination shall be postponed until the Spot Rate is available or another mechanism shall 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 ~~6.3~~ Determination of Close-out Values

A. ~~6.3.1~~ ISDA 1992

Under the ISDA 1992, parties may either elect 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, 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 facts 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 leading 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 or as soon as reasonably practicable after the Early Termination Date.

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. [6.3.2 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 the 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 such party under any transaction but remained 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) if the assets are or were to be delivered by the Calculation Party, 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, (ii) if the assets are or were to be delivered to the Calculation Party, 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, 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. ~~6.3.3~~ 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 sale has to take place between the Event of Default and the Default Valuation Time ~~(see paragraph 2(j) GMRA 1995; definition of "Default Market Value")¹¹~~. 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:

(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);

¹¹ [See paragraph 2\(j\) GMRA 1995; definition of "Default Market Value"](#)

- (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. **6.3.4 GMRA 2000**

The GMRA 2000 basically uses the same valuation approach as the GMRA 1995. Under the GMRA 2000, there is however 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 reasonable 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. ~~Fair value is the amount which, in its reasonable opinion, represents the fair value having regard to such pricing sources and methods (including available prices for similar securities – similar in maturity, terms and credit characteristics) as it considers appropriate (taking into account reasonable transaction costs which would be incurred).~~

- (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.

E. **6.3.5 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 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. ~~6.3.6~~ GMSLA ~~2009~~2010

The general approach under the GMSLA ~~2009~~2010 is similar to the position under the GMSLA 2000. However, the GMSLA ~~2009~~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 lit (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 lit (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 the 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 lit (a) above; and/or
- (ii) to obtain quotations as set out under lit (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.

~~6.3.7 — 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 such party under any Transaction but remained 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) if the assets are or were to be delivered by the Calculation Party, 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, (ii) if the assets are or were to be delivered to the Calculation Party, 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, 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.~~

~~6.4~~ Termination currency

6.3.2 ~~6.4.1~~ Termination currency

A. ~~(i)~~ ISDA 1992 ~~and~~ /2002

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

B. EMA 2004

Any Amounts Due, Default Value, Margin Claims and Transaction Value which are 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, and (ii) sell such currency for, the Base Currency on the date as of which such amount is calculated or converted.

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

C. ~~(ii)~~ GMRA 1995 ~~and~~ /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. ~~(iii)~~ GMSLA 2000 ~~and 2009/2010~~

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 2009,2010, 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.

~~In both~~ According to the GMSLA 2000 ~~and 2009,2010~~ the Base Currency ~~is to~~ shall be agreed by the parties in the respective Schedules.

~~(iv)~~ EMA 2004

~~Any Amounts Due, Default Value, Margin Claims and Transaction Value which are 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, and (ii) sell such currency for, the Base Currency on the date as of which such amount is calculated or converted.~~

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

~~6.4.2~~ Are these provisions robust enough?

~~The recent turmoil has shown that the calculation of close-out amounts under the rules set out in the Master Agreements may be problematic. This is particularly the case, where the rules do not allow sufficient flexibility for the scope and timing of replacement transactions or the application of quotes. This raises a number of questions which should be taken into account when considering changes to or a harmonization of the Master Agreements. Some of these questions and considerations are summarised below.~~

~~(i)~~ General Considerations

- ~~• The requirement “for value on the relevant Early Termination Date” may lead to using a rate quoted one or two days prior to the relevant date. Would this be covered by the Master Agreements?~~
- ~~• If a calculation of the Termination Currency Equivalent is not possible for any reason, should the last available values be used? Should the determination be postponed until the Spot Rate is available? Should any other possible fallback be considered?~~
- ~~• Most of the agreements do not provide significant detail on the timing of currency conversions. As a consequence, there may be conversions at different times and on different dates.~~

6.3.3 Other Ambiguities / Issues

A. (ii) 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 making the calculation after obtaining the Market Value, or the last dealing day preceding the date of suspension?
- What exactly means “relevant date” and “relevant time” in paragraph 10(c)(ii) of the GMRA 1995 / GMRA 2000?

B. (iii) GMSLA 2000/2010

- The close-out value calculation under the GMSLA ~~2009~~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.

~~6.5 Discretion granted to the non defaulting party~~

~~One of the lessons learned from the recent crisis was that a Master Agreement may cause problems for solvent parties if the mechanisms and the permitted timing to enter into replacement transactions or to obtain quotations are too restrictive. This may lead to quotations or sales or purchases of assets at inappropriate prices. A solution to this issue could be the implementation of more flexible mechanisms. The pros and cons for a broader discretion for the benefit of the non defaulting party can be summarised as follows:~~

~~6.5.1 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 valuation of large portfolios.~~

~~6.5.2 Cons~~

- ~~Reputation risk if valuation process is attacked or if discretion exercised differently by different departments of an institution or differently 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 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.~~

~~6.5.3 Conclusion~~

6.4 Recommendations

6.4.1 Extended Discretion of Non-Defaulting Party

~~Discretion of the non-defaulting party is advisable but should be considered to be limited by the need~~ 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), principles of commercial reasonableness as well as principles of good faith (by law and contractually), and to act in good faith and commercially reasonable.

6.6 ~~Should harmonization be attempted?~~

~~Finally, the question has to be answered whether there should be a harmonization of the clauses relating to the calculation of close-out amounts (including currency conversion issues).~~

6.4.2 Limitation of Discretion

Another way to limit the discretion of the non-defaulting party, but at the same time to give more fallback options to it 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 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

~~Such a harmonization is advisable between~~It is also advisable to harmonise the relevant provisions of the different versions of the same Master Agreement. ~~It has, for example, already been initiated with the publication of the GMSLA 2009 and the ISLA 2009 Secured Lending Protocol as well as with the ISDA Protocol 2002 and 2009. It would be possible (at least as regards the basic concepts) with respect to the following issues: 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:

- ~~The~~Determination by the non-defaulting party ~~determines in good faith its costs or losses of its costs and losses having the discretion and restrictions specified in paragraph 6.4.1 above;~~
- ~~Determination makes use of~~Such 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 having regard to the pricing sources and methods (including available prices for securities with similar maturity, terms and credit characteristics) as it considers appropriate (taking into account reasonable transaction costs which would be incurred);

- ~~The inclusion of other items in the determination~~Other values, such as realised losses (gains) or hypothetical losses (gains), shall be taken into account for determination of close-out amounts.

~~Harmonization would be advisable for (i) certainty of process if all Master Agreements use the same format, (ii) speed of process if all Master Agreements use the same format and (iii) clarity for end users across market standard documentation.~~

First steps to harmonise close-out provisions across the market have already been taken by the publication of the GMSLA 2009 and the ISLA 2009 Secured Lending Protocol as well as with the ISDA Protocol 2002 and 2009. [For more details please refer to paragraph 8 below.]

~~Downsides to be considered could be that this~~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 harmonized valuation process across products.

6.4.4 Methods of Determination

As Master Agreements are used to document different products of different economic and legal nature, some of them 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 parties, judgmental calls and can be easily challenged by the other party. Therefore, it is highly practicable to have a time-efficient dispute resolution mechanism incorporated into the Masters 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 consider potential limits under applicable insolvency law, including but not limited to the relevant avoidance regime.

7 Topic 5: Collateral and Margin ~~Disputes~~Dispute Resolutions

7.1 ~~Questions~~Overview

~~Are the provisions on dispute resolutions recommendable and should they be harmonized? What are the main principles?~~

~~7.2~~ ~~Importance of Dispute Resolutions~~

Prior to the financial crisis of 2008/2009, most of the collateral and margin call disputes had not been a significant issue between the parties and had usually been resolved informally in the ordinary course of business. The recent credit market stress led to a dramatic increase in size and frequency of collateral and margin call disputes and showed the sharply increased significance of a standardised dispute resolution procedure for both market participants² ~~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 the circumstances when the parties have reached an agreement as to what sources shall be used, in the 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 is a valuation, calculation or determination to be made by one party to a contract in its (sole or reasonable) discretion. In such 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 of the market participants have their own internal standards on valuation of security and margin calls, which substantially differ 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 efficient approach recognised across the industry to resolution of collateral and margin disputes 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, as well as 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 ~~7.3~~ ~~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.

~~ISDA Credit Support Annex~~

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 the case when 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 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:

Step 1 Notification

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

Step 2 Transfer of Undisputed Amount

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

Step 3 Consultation and Informal Dispute Resolution

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

Step 4 Formal Dispute Resolution

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 upon demand make the appropriate transfer.

7.3

~~7.4~~ **ISDA Initiative: ISDA 2009 Collateral Dispute Resolution Procedure**

7.3.1 ~~7.4.1~~ Background

Following the significantly increased 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 require to be processed in a more structured and comprehensive way. In response to that 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 commenting, the DR Procedure was published on 30 September 2009.

According to the Guidelines, the DR Procedure is aimed 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 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 most substantial two ones 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 to provide a fall back for the existing dispute resolution language of the Credit Support Annex (non-exclusive adoption) or to replace it in its entirety (exclusive adoption).

7.3.2 ~~7.4.2~~ 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:](#)

		Standard timings	Extended timings	
Step 1	<u>Preliminary Collateralisation</u> 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 such party receives the maximum protection possible pending resolution of the dispute.	D ⁺	D	
Step 2	<u>Portfolio Reconciliation</u> The parties shall exchange relevant transaction information such as, <i>inter alia</i> , 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 lesser than the Tolerance level may be ring-fenced and designated as Transactions Under Investigation by either party.	D	D	D D

⁺—“D” means the day on which a collateral call is made.

		Standard timings	Extended timings		
				D	+
				D	+
Step 3	<u>Consultation and Informal Dispute Resolution</u>	D	D+2		
	<p>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.</p> <p>The DR Procedure explicitly stipulates that the parties may also mutually agree to any other resolution method.</p> <p>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 Transaction Under Formal Dispute Resolution.</p>				
				D	D
				+	+
				+	7
Step 4	<u>Formal Dispute Resolution</u>	D+1	D+7		
	<p>This step is mandatory and is aimed 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:</p> <p>(a) <i>Polling Process Consultation</i>: 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;</p> <p>(b) <i>Quote Gathering</i>: Each party shall obtain and submit the relevant Quotes; and</p> <p>(c) <i>Quote Evaluation</i>: 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.</p>				
		D+3	D+9		

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 ~~7.4.3~~ 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.

~~7.5~~ **Further Development of Dispute Resolution Regulations**

7.4 **Recommendations**

7.4.1 ~~7.5.1~~ Incorporation of Dispute Resolution Provisions into Master Agreements

As mentioned above, introduction of an efficient formal widely recognised dispute resolution mechanism helps to decrease uncertainty for market participants, facilitates better risk management and makes transactions more transparent for regulators and, 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 ~~7.5.2~~ Common Approach

Since the majority of ~~the~~ 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 the 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 starting point may be further developed for each Master Agreement to reflect specifics of the relevant type of transactions and to address certain deal-specific issues.

7.4.3 ~~7.5.3~~ Implementation

As of 15 December 2009, the dispute resolution mechanism set out in the DR Procedure has being at a trial stage and at the end thereof may be revised to address any issues that arise 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 such trial process.

7.4.4 ~~7.5.4~~ Two-step Adoption

In order to avoid any unforeseeable practical difficulties the implementation of the new dispute resolution mechanism may be divided into two stages: (a) at the first 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) at the second stage, the time-tried provisions may be incorporated into the actual Master Agreements and become mandatory upon the parties thereto.

7.4.5 ~~7.5.5~~ 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 panel, however, requires prior consultations with major market players and industry regulators, as the calls made by it will have a strong advantage of being objective as well as a serious disadvantage of being very time-consuming.

8 Outlook

[to be inserted]

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

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 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)

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 <u>2010</u>
				2009: Para. 2.1.(b)
3. Petition for bankruptcy, winding-up or insolvency	Yes	Yes	Yes	Yes
Initiated by	<p>1992: the party, any Credit Support Provider of such party or any applicable Specified Entities of such party, OR proceedings are instituted against any of the above entities (by third parties)</p> <p>2002: In addition to 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 organization or the jurisdiction of its head or home office</p>	<p>(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</p>	<p>anyone, apart from the counterparty to this Agreement in respect of any obligation under this Agreement</p>	<p>anyone, apart from the counterparty to this Agreement in respect of any obligation under this Agreement</p>
Procedure	1992:	commences an Insolvency	presenting or filing	presenting or filing

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 <u>2010</u>
	<p>institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy, and (if instituted against it)</p> <p>(A) 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</p> <p>(B)...(see “Grace Period” below regarding lapse of grace period)</p> <p>2002:</p> <p>(A) institutes or has instituted against it by a regulator a proceeding seeking a judgement of insolvency or bankruptcy, and</p> <p>(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)</p>	<p>Proceeding against itself or takes any corporate action to authorize such Insolvency Proceeding</p>	<p>of a petition in respect of it [the party] in any court or before any agency alleging</p>	<p>of a petition in respect of it [the party] in any court or before any agency alleging</p>

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 <u>2010</u>
Grace Period	<p>ISDA 1992: in case 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</p> <p>ISDA 2002: If a petition, instituted or presented by a third party as described above for (see “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</p>	<p>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 person <u>or under the given circumstances is obviously inadmissible or frivolous</u></p>	<p>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)</p>	<p>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)</p>
	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

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 2010
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 officer	Yes for it [the party] or for all or substantially all its assets	Yes similar official for such party or for all or any substantial parts of its assets under any bankruptcy, insolvency or similar law or any bankruptcy, insurance or similar law governing the operation of the party	Yes analogous officer for the party	Yes analogous officer for the party
6. Restructuring	Yes	Yes	Yes	Yes
a) general assignment	Yes	Yes	Yes	Yes

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 <u>2010</u>
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 has a distress, execution, attachment, sequestration or other legal process, levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30	No	No	No

Criteria for defining Act of Insolvency/Bankruptcy	ISDA 1992 / 2002	EMA 2001 / 2004	GMRA 1995 / 2000	OSLA 1995, GMSLA 2000 / 2009 <u>2010</u>
	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 <i>Para. 2.(a)(iv)(2nd HS): "...or similar relief"</i> <i>Para. 2.(a)(vi): "...or any analogous proceeding"</i>	Yes 1995: Para. 1.1.(d)(2nd HS) 2000: Para. 2.1.(iv)(2nd HS) 2009 <u>2010</u> : Para 2.1. (d)(2nd HS): "...or similar relief" 1995: Para. 1.1.(d)(2nd HS) 2000: Para. 2.1.(iv)(2nd HS) 2009 <u>2010</u> : Para 2.1. (d)(2nd HS) "...or any analogous proceeding"

Annex 2: General Notice Provisions—~~Minor Differences~~

GMSLA 2000:	GMSLA 2009:
<i>Paragraph 14.2</i>	<i>Paragraph 10.2</i>
14.2 — Each Party shall notify the other (in writing) if an Event of Default or an event which, with the passage of time and/or upon the serving of a written notice as referred to above, would be an Event of Default, occurs in relation to it.	10.2 — Each Party shall notify the other (in writing) if an Event of Default or an event which, with the passage of time and/or upon the serving of a written notice as referred to above, would be an Event of Default, occurs in relation to it.
<i>Paragraph 21</i>	<i>Paragraph 20</i>
21. — NOTICES 21.1 — Any notice or other communication in respect of this Agreement may be given in any manner set forth below to the address or number or in accordance with the electronic messaging system details set out in paragraph 4 of the Schedule and will be deemed effective as indicated: (i) — if in writing and delivered in person or by courier, on the date it is delivered; (ii) — if sent by telex, on the date the recipient's answerback is received; (iii) — if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission	20. — NOTICES 20.1 — Any notice or other communication in respect of this Agreement may be given in any manner set forth below to the address or number or in accordance with the electronic messaging system details set out in paragraph 5 of the Schedule and will be deemed effective as indicated: (a) — if in writing and delivered in person or by courier, on the date it is delivered; (b) — if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine); (c) — if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt

<p>report generated by the sender's facsimile machine);</p> <p>(iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or</p> <p>(v) if sent by electronic messaging system, on the date that electronic message is received,</p> <p>unless the date of that delivery (or attempted delivery) or the receipt, as applicable, is not a Business Day or that communication is delivered (or attempted) or received, as applicable, after the Close of Business on a Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Business Day.</p> <p>21.2 — Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.</p>	<p>requested), on the date that mail is delivered or its delivery is attempted; or</p> <p>(d) — if sent by electronic messaging system, on the date that electronic message is received,</p> <p>unless the date of that delivery (or attempted delivery) or the receipt, as applicable, is not a Business Day or that communication is delivered (or attempted) or received, as applicable, after the Close of Business on a Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Business Day.</p> <p>20.2 — Either Party may by notice to the other change the address or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.</p>
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GMRA 2000:

Paragraph 14

~~14 — Notices and Other Communications~~

~~(a) — Any notice or other communication to be given under this Agreement:~~

~~(i) — shall be in the English language, and except where expressly otherwise provided in this Agreement, shall be in writing;~~

~~(ii) — may be given in any manner described in sub-paragraphs (b) and (c) below;~~

~~(iii) — shall be sent to the party to whom it is to be given at the address or number, or in accordance with the electronic messaging details, set out in Annex I hereto.~~

~~(b) — Subject to sub-paragraph (c) below, any such notice or other communication shall be effective:~~

~~(i) — if in writing and delivered in person or by courier, at the time when it is delivered;~~

~~(ii) — if sent by telex, at the time when the recipient's answerback is received;~~

~~(iii) — if sent by facsimile transmission, at the time when the transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);~~

~~(iv) — if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), at the time when that mail is delivered or its delivery is attempted;~~

~~(v) — if sent by electronic messaging system, at the time that electronic message is received;~~

~~except that any notice or communication which is received, or delivery of which is attempted, after close of business on the date of receipt or attempted delivery or on a day which is not a day on which commercial banks are open for business in the place where that notice or other communication is to be given shall be~~

~~treated as given at the opening of business on the next following day which is such a day.~~

~~(c) — If:~~

~~(i) — there occurs in relation to either party an event which, upon the service of a Default Notice, would be an Event of Default; and~~

~~(ii) — the non-Defaulting Party, having made all practicable efforts to do so, including having attempted to use at least two of the methods specified in sub-paragraph (b)(ii), (iii) or (v), has been unable to serve a Default Notice by one of the methods specified in those sub-paragraphs (or such of those methods as are normally used by the non-Defaulting Party when communicating with the Defaulting Party);~~

~~the non-Defaulting Party may sign a written notice (a “Special Default Notice”) which:~~

~~(aa) — specifies the relevant event referred to in paragraph 10(a) which has ——— occurred in relation to the Defaulting Party;~~

~~(bb) — states that the non-Defaulting Party, having made all practicable efforts to do so, including having attempted to use at least two of the methods specified in sub-paragraph (b)(ii), (iii) or (v), has been unable to serve a Default Notice by one of the methods specified in those sub-paragraphs (or such of those methods as are — normally used by the non-Defaulting Party when communicating with the — Defaulting Party);~~

~~(cc) — specifies the date on which, and the time at which, the Special Default Notice is signed by the non-Defaulting Party; and~~

~~(dd) — states that the event specified in accordance with sub-paragraph (aa) above shall be treated as an Event of Default with effect from the date and time so specified.~~

~~On the signature of a Special Default Notice the relevant event shall be treated with effect from the date and time so specified as an Event of Default in relation to the Defaulting Party, and accordingly references in paragraph 10 to a Default Notice shall be treated as including a Special Default Notice. A Special Default Notice shall be given to the Defaulting Party as soon as practicable after it is signed.~~

~~(d) — Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.~~

ISDA 1992:	ISDA 2002:
<i>Section 12</i>	<i>Section 12</i>
<p>12 — Notices</p> <p>(a) — Effectiveness. Any notice or other communication in respect of this Agreement may be given in any manner set forth below (except that a notice or other communication under Section 5 or 6 may not be given by facsimile transmission or electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective as indicated:-</p> <p>(i) — if in writing and delivered in person or by courier, on the date it is delivered;</p> <p>(ii) — if sent by telex, on the date the recipient's answerback is received;</p> <p>(iii) — if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);</p> <p>(iv) — if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its</p>	<p>12. — Notices</p> <p>(a) — Effectiveness. Any notice or other communication in respect of this Agreement may be given in any manner described below (except that a notice or other communication under Section 5 or 6 may not be given by electronic messaging system or e-mail) to the address or number or in accordance with the electronic messaging system or e-mail details provided (see the Schedule) and will be deemed effective as indicated: —</p> <p>(i) — if in writing and delivered in person or by courier, on the date it is delivered;</p> <p>(ii) — if sent by telex, on the date the recipient's answerback is received;</p> <p>(iii) — if sent by facsimile transmission, on the date it is received by a responsible employee of the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine);</p> <p>(iv) — if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date it is delivered or its delivery</p>

<p>delivery is attempted; or</p> <p>(v) — if sent by electronic messaging system, on the date that electronic message is received;</p> <p>unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Local Business Day.</p> <p>(b) — Change of Addresses. Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.</p>	<p>is attempted;</p> <p>(v) — if sent by electronic messaging system, on the date it is received; or</p> <p>(vi) — if sent by e mail, on the date it is delivered,</p> <p>unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication will be deemed given and effective on the first following day that is a Local Business Day.</p> <p>(b) — Change of Details. Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system or e mail details at which notices or other communications are to be given to it.</p>
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	<u>ISDA 1992 / 2002</u>	<u>EMA 2004</u>	<u>GMRA 1995 / 2000</u>	<u>GSMSLA 2000 / 2010</u>
<u>Language</u>	<u>Not specified</u>	<u>Not specified</u>	<u>English language</u> <u>Para. 14(a)(i)</u>	<u>Not specified</u>
<u>Manner</u>	<u>General/</u> <u>Termination</u>	<u>General/</u> <u>Termination</u>	<u>General/</u> <u>Termination</u>	<u>General/</u> <u>Termination</u>
(i) <u>in writing delivered in person or by courier</u>	<u>Effectiveness</u> <u>Yes</u> <u>Date of delivery</u>	<u>Effectiveness</u> <u>Yes</u> <u>Date of receipt</u>	<u>Effectiveness</u> <u>Yes</u> <u>Date of delivery</u>	<u>Effectiveness</u> <u>Yes</u> <u>Date of delivery</u>

	<u>ISDA 1992 / 2002</u>	<u>EMA 2004</u>	<u>GMRA 1995 / 2000</u>	<u>GSM SLA 2000 / 2010</u>
(ii) <u>telex</u>	<u>Yes</u> <u>Date of receipt of recipient's answerback</u>	<u>Yes</u> <u>Date of receipt of recipient's answerback</u>	<u>Yes</u> <u>Date of receipt of recipient's answerback</u>	<u>Only 2000 Version</u> <u>Date of receipt of recipient's answerback</u>
(iii) <u>facsimile transmission</u>	<u>Yes</u> <u>Date of receipt</u>	<u>Yes</u> <u>Date of receipt</u>	<u>Yes</u> <u>Date of receipt</u>	<u>Yes</u> <u>Date of receipt</u>
(iv) <u>certified or registered mail or equivalent</u>	<u>Yes</u> <u>Date of delivery or attempt delivery</u>	<u>Yes</u> <u>Date of receipt</u>	<u>Yes</u> <u>Date of delivery or attempt delivery</u>	<u>Yes</u> <u>Date of delivery or attempt delivery</u>
(v) <u>electronic messaging system</u>	<u>Yes/No</u> <u>Date of receipt</u>	<u>Yes</u> <u>Date of receipt</u>	<u>Yes/No</u> <u>Date of receipt</u>	<u>Yes/No</u> <u>Date of receipt</u>
(vi) <u>email</u>	<u>Yes/No</u> <u>Date of delivery</u> <u>Sec. 12(a)</u>	<u>No</u> <u>Sec. 8(1), 8(2)</u>	<u>No</u> <u>Para. 14(b)</u>	<u>No</u> <u>Para. 21.1</u>
<u>Default Manner</u>	<u>Not specified</u>	<u>Not specified</u>	<u>In writing</u> <u>Para. 14(a)(i)</u>	<u>Not specified</u>
<u>Oral Notifications</u>	<u>No</u>	<u>No</u>	<u>In specified cases</u> <u>Para. 14(a)(i), 4(b)</u>	<u>No</u>
<u>Special Requirements to Facsimile Transmissions</u>				
(i) <u>receipt by responsible employee</u>	<u>Required</u>	<u>No</u>	<u>Required</u>	<u>Required</u>
(ii) <u>burden of proof</u>	<u>Sender</u>	<u>Not specified</u>	<u>Sender</u>	<u>Sender</u>
(iii) <u>proof by transmission report by sender's facsimile machine</u>	<u>Excluded</u>	<u>Not specified</u>	<u>Excluded</u>	<u>Excluded</u>

	<u>ISDA 1992 / 2002</u> <u>Sec. 12(a)(iii)</u>	<u>EMA 2004</u>	<u>GMRA 1995 / 2000</u> <u>Para. 14(b)(iii)</u>	<u>GSMSLA 2000 / 2010</u> <u>Para. 21.1(iii)</u>
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EMA 2004:
<i>Section 8</i>
<p>8. Notices</p> <p>(1) Manner of Giving Notices. Unless otherwise specified in the Agreement, any notice or other communication under the Agreement shall be made by letter, telex, telefax or any electronic messaging system agreed to by the parties in the Special Provisions to the address (if any) previously specified by the addressee.</p> <p>(2) Effectiveness. Every notice or other communication made in accordance with subsection 1 shall be effective (a) if made by letter or telefax, upon receipt by the addressee, (b) if made by telex, upon receipt by the sender of the addressee's answerback at the end of transmission, and (c) if made by an electronic messaging system, upon receipt of that electronic message, provided that if, in any such case, such notice or other communication is not received on a Business Day or is received after the close of business on a Business Day, it shall take effect on the first following day that is a Business Day.</p> <p>(3) Change of Address. Either party may by notice to the other change the address, telex or telefax number or electronic messaging system details at which notices or other communications are to be given to it.</p>

Annex 3: Termination Notice (Automatic Early Termination) Provisions

GMSLA 2000:	GMSLA 2009:
<i>Paragraph 14.1(v)</i>	<i>Paragraph 10.1(d)</i>
<p>14.1 — Each of the following events occurring in relation to either Party (the "Defaulting Party", the other Party being the "Non-Defaulting Party") shall be an Event of Default for the purpose of paragraph 10 but only (subject to sub-paragraph (v) below) where the Non-Defaulting Party serves written notice on the Defaulting Party:</p> <p>(v) — an Act of Insolvency occurring with respect to Lender or Borrower, an Act of Insolvency which is 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 not requiring the Non-Defaulting Party to serve written notice on the Defaulting Party;</p>	<p>10.1 — Each of the following events occurring and continuing in relation to either Party (the Defaulting Party, the other Party being the Non-Defaulting Party) shall be an Event of Default but only (subject to sub-paragraph 10.1(d)) where the Non-Defaulting Party serves written notice on the Defaulting Party:</p> <p>(d) — an Act of Insolvency occurring with respect to Lender or Borrower, provided that, where the Parties have specified in paragraph 5 of the Schedule that Automatic Early Termination shall apply, an Act of Insolvency which is 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 shall not require the Non-Defaulting Party to serve written notice on the Defaulting Party (Automatic Early Termination);</p>

GMRA 2000:
<i>Paragraph 10(a)(vi)</i>
10 — Events of Default
(a) — If any of the following events (each an "Event of Default") occurs in relation to either party (the

“Defaulting Party”, the other party being the “non-Defaulting Party”) whether acting as Seller or Buyer:

(vi) ~~an Act of Insolvency occurs with respect to Seller or Buyer and (except in the case of an Act of Insolvency which is 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 in which case no such notice shall be required) the non-Defaulting Party serves a Default Notice on the Defaulting Party; or...~~

ISDA 1992:	ISDA 2002:
<i>Section 6(a)</i>	<i>Section 6(a)</i>
<p>6 Early Termination</p> <p>(a) Right to Terminate Following Event of Default. If at any time an Event of Default with respect to a party (the “Defaulting Party”) has occurred and is then continuing, the other party (the “Non-defaulting Party”) may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, “Automatic Early Termination” is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant</p>	<p>6. Early Termination; Close-Out Netting</p> <p>(a) Right to Terminate Following Event of Default. If at any time an Event of Default with respect to a party (the “Defaulting Party”) has occurred and is then continuing, the other party (the “Non-defaulting Party”) may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, “Automatic Early Termination” is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant</p>

~~petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).~~

~~petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).~~

	<u>ISDA</u>		EMA 2004+	<u>GMRA</u>		<u>GSMSLA</u>	
	<u>1992</u>	<u>2002</u>		<u>1995</u>	<u>2000</u>	<u>2000</u>	<u>2010</u>
<u>Termination Notice</u>							
(i) <u>generally required to be given</u>	<u>Yes</u>		<u>Yes</u>	<u>Yes</u>		<u>Yes</u>	
(ii) <u>required to be given in case of insolvency*</u>	<u>Yes</u>		<u>No</u>	<u>No</u>		<u>No</u>	<u>Yes</u>
(iii) <u>exceptions from (ii) above</u>	<u>Automatic Early Termination is specified as applicable to the defaulting party in the Schedule</u>		<u>Need to serve notice specified in the Special Provisions</u>		<u>No</u>		<u>Automatic Early Termination specified as applicable in the Schedule</u>
* <u>insolvency for the purposes of automatic termination (the “Insolvency Event”) means</u>	<u>= dissolution</u> <u>= general assignment, arrangement or composition for the benefit creditors</u> <u>= proceeding seeking a judgment of insolvency or bankruptcy</u> <u>= winding-up or liquidation</u> <u>= appointment of administrator, provisional liquidator, conservator, receiver, trustee or</u>		<u>= dissolution</u> <u>= insolvency proceedings initiated by the defaulting party, competent authority or a third party</u> <u>= event analogous to the above</u>		<u>= petition for winding-up or any analogous proceeding</u> <u>= appointment of a liquidator or analogous officer</u>		<u>= petition for winding up or any analogous proceeding</u> <u>= appointment of a liquidator or analogous officer</u>

	<u>ISDA</u> <u>1992</u> <u>2002</u>	EMA 2004:	<u>GMRA</u> <u>1995</u> <u>2000</u>	<u>GSM SLA</u> <u>2000</u> <u>2010</u>
	<u>custodian</u> = <u>event analogous to the above</u> <u>Sec. 6(a), 5(a)(vii)</u>	<i>Section</i> <u>Sec. 6(1)(b)</u>	<u>Para. 10(a)(iv) GMRA 1995</u> <u>Para. 10(a)(vi) GMRA 2000</u>	<u>Para. 14.1(v) GSM SLA 2000</u> <u>Para. 10.1(d) GSM SLA 2010</u>
<u>Termination Date</u>		(b) Termination. If an Event of Default occurs with respect to a party (the “Defaulting Party”) and is continuing, the other party (the “Non-Defaulting Party”) may, by giving not more than twenty days’ notice specifying the relevant Event of Default, terminate all outstanding Transactions, but not part thereof only, with effect as from a date (the “Early Termination Date”) to be designated by it in such notice. Notwithstanding the foregoing, unless otherwise specified in the Special Provisions, all Transactions shall terminate, and the Early Termination Date shall occur, automatically in the case of an Event of Default mentioned in paragraph (a)(viii)(1), (2), (3), (5)(A) or, to the extent analogous thereto, (9) as of the time		

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

Annex 4: Calculation of Close-out Amounts

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

* As described in Annex 4, Part 2

Annex 5: Dispute Resolutions

<u>Step</u>	<u>ISDA Credit Support Annex</u>		<u>ISDA DR Procedure</u>	
			<u>Standard timing</u>	<u>Extended Timing</u>
<u>1. Notification</u> <u>The party raising a dispute shall notify the other party and the valuation agent thereof</u>	<u>Yes</u>	<u>No</u>		
<u>(a) Transfer of Undisputed Amounts</u> <u>Undisputed amounts shall be transferred by the relevant party in a timely manner</u>	<u>Yes</u>	<u>Yes</u>	<u>D¹</u> <u>D</u>	<u>D</u> <u>D</u>
<u>(b) Portfolio Reconciliation</u> <u>Parties shall exchange relevant information and identify transactions under investigation taking into account the Tolerance Level</u>	<u>No</u>	<u>Yes</u>	<u>D</u> <u>D</u>	<u>D</u> <u>D+1</u>
<u>(c) Consultation and Informal Dispute Resolution</u> <u>Parties shall consult with each other in an attempt to resolve the dispute</u>	<u>Yes</u>	<u>Yes</u>	<u>D</u> <u>D+1</u>	<u>D+2</u> <u>D+7</u>
<u>(d) Formal Dispute Resolution</u> <u>Market based determination for a disputed transactions</u>	<u>Yes</u>	<u>Yes</u>	<u>D+1</u>	<u>D+7</u>
	<u>Quotations at mid-market obtained by the Valuation</u>	<u>Quotations obtained by each party</u>		

¹ “D” means the day on which a collateral call is made.

<u>Step</u>	<u>ISDA Credit Support Annex</u>	<u>ISDA DR Procedure</u>	<u>Standard timing</u>	<u>Extended Timing</u>
	<u>Agent. If unavailable, the original calculations.</u>	<u>evaluated in accordance with the categories and scenarios set out in the DR Procedure</u>	<u>D+3</u>	<u>D+9</u>

Annex 6: EFMLG TASK FORCE ON STANDARD MARKET DOCUMENTATION

[To be updated/completed.]

Mr Mario Bona	Intesa Sanpaolo
Ms Chandra Bhargavan	Commerzbank
Ms Natalia Butragueño	Banco Santander
Ms Simone Davini	Intesa Sanpaolo
Mr Holger Hartenfels	Deutsche Bank, Chairman of the Task Force
Mr Stéphane Kerjean	ECB
Mr Klaus Löber	ECB
Ms Delphine Mariot-Thoreau	Calyon
Ms 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 57: EFMLG MEMBERS*[To be updated/completed]*

Mr Moïse Bâ	BNP Paribas
Ms Maureen Bal	ING Group
Ms Chandraleka Bhargavan	Commerzbank AG
Mr Bertrand Bréhier	Société Générale
Ms Natalia Butragueño	Banco Santander S.A.
Ms Helen Cockroft	Royal Bank of Scotland
Mr Fernando Conlledo Lantero	CECA
Mr Hubert de Vauplane	Crédit Agricole S.A., Vice Chair
Ms Hanneke Dorsman	ABN Amro Bank NV
Mr Pedro Ferreira Malaquias	Portuguese Euribor banks
Mr Adolfo Fraguas Bachiller	Banco Bilbao Vizcaya Argentaria
Ms Marie-Paule Gillen-Snyers	Kredietbank Luxembourg
Mr Mark Harding; Alternate: Mr Tom	Bartos Barclays Bank
Mr Holger Hartenfels	Deutsche Bank AG
Mr Stéphane Kerjean	ECB, Secretary
Mr Antonio Maladorno	Unicredito Italiano Spa
Ms Helen Moran	AIB Group
Mr Michael Holmgaard Mortensen	Danske Bank A/S
Mr Olof Myhrman	SEB
Ms Susan O'Malley	HSBC
Mr Ulrich Parche	HypoVereinsbank
Ms Francesca Passamonti	IntesaSanpaolo S.p.A.
Mr Klaus Poggemann	WestLB
Mr Esa Raitanen	Nordea Bank Finland
Mr Antonio Sáinz de Vicuña	ECB, Chairman
Mr Gregor Strehovec	SKB banka
Mr Frank Tillian	Bank Austria
Mr Dimitris Tsibanoulis	Greek Euribor banks
Mr Dirk Vloemans	Fortis Bank
Mr Andrew Williams	UBS Investment Bank
Ms Chiara Zilioli; Alternate: Niall Lenihan	ECB

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Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
Moved to	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:		
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Total changes	1687	