
User's Guide to the 1992 ISDA Master Agreements

1993 EDITION

ISDA[®]

INTERNATIONAL SWAP DEALERS ASSOCIATION, INC.

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INTRODUCTION

In 1991, the Board of Directors of the International Swap Dealers Association, Inc. (“ISDA”), authorized a project to revise the 1987 Interest Rate and Currency Exchange Agreement (the “1987 Agreement”) and related ISDA standard documentation. This project resulted in the publication of two versions of the 1992 ISDA Master Agreement (the “1992 Agreements”), specifically a multicurrency — cross border version and a local currency— single jurisdiction version, and several product-specific definitional booklets and forms of confirmations. In revising the 1987 Agreement, the main objectives were to (i) expand the ISDA documentation architecture to facilitate inclusion of derivative products in addition to those products originally contemplated by earlier generations of ISDA documentation and thereby promote the benefits of cross-product netting, (ii) address legal developments since 1987 (*e.g.*, 1990 amendments to the U.S. Bankruptcy Code) and (iii) incorporate modifications and clarifications deemed important based on experience gained since 1987 and form a consensus of the ISDA membership on such modifications and clarifications.

This User’s Guide is designed to explain the 1992 Agreements and to highlight significant changes from the 1987 Agreement. The User’s Guide also identifies and discusses certain issues that merit additional consideration by market participants. Section I of the User’s Guide focuses on architecture and particularly on the broad product coverage contemplated by the 1992 ISDA documentation. Section II provides a section-by-section guide to the 1992 Agreements. Section III discusses what can be done if parties enter into a confirmation with respect to a particular derivative transaction prior to execution of a 1992 Agreement. Section IV explains the tax provisions in the multicurrency — cross border version of the 1992 Agreements. Section V discusses set-off and presents standard set-off clauses for consideration by market participants. Section VI discusses the modifications to the 1987 Agreement designed to permit the documentation of transactions that settle by physical delivery and also discusses further modifications to the 1992 Agreements that market participants may find desirable in connection with the documentation of such transactions. Sections VII and VIII discuss issues relating to severability and impossibility, respectively. Section IX considers the changing operational technologies in the marketplace and discusses certain issues concerning recorded conversations and electronic messaging systems. Section X discusses certain matters relating to netting-by-novation. Sections XI and XII review certain issues relevant to documentation under the laws of the United States and the State of New York and of England, respectively. The publication date of this User’s Guide is January 19, 1993.

THIS USER’S GUIDE DOES NOT PURPORT AND SHOULD NOT BE CONSIDERED TO BE A GUIDE TO OR EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN A PARTICULAR TRANSACTION OR CONTRACTUAL RELATIONSHIP. PARTIES SHOULD THEREFORE CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING ANY ISDA STANDARD DOCUMENTATION. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR ANY DEFINITION OR PROVISION CONTAINED THEREIN MAY BE PUT.

Capitalized terms used in this User's Guide and not defined have the meanings given such terms in the 1992 Agreements unless otherwise indicated. Unless otherwise indicated, Section references in this User's Guide are to the 1992 Agreements and relate to both versions of the 1992 Agreements. Where the section reference to a specific provision of the multicurrency—cross border version of the 1992 Agreements differs from the comparable section of the local currency—single jurisdiction version of the 1992 Agreements, or where a comparable section is not included in such version, appropriate indications have been made.

Copies of any of the published ISDA standard documentation may be obtained from the executive offices of ISDA as may copies of the 1992 Agreements marked to show all changes from the 1987 Agreement.

A NOTE ON COPYRIGHT

ISDA consents to the use and photocopying of its documentation for the preparation of agreements with respect to derivative transactions. ISDA does not, however, consent to the reproduction of any of its documents for purposes of public distribution or sale. ISDA also does not consent to the reproduction of this User's Guide for any purpose.

USER'S GUIDE TO THE 1992 ISDA MASTER AGREEMENTS

I. ISDA DOCUMENTATION ARCHITECTURE

This Section explains the ISDA documentation architecture and its development. Particular focus is given to the architecture of the 1992 Agreements.

A. The 1992 Architecture

The discussion in this Section I.A. explains the choices parties will typically consider in using the 1992 ISDA standard documentation to document derivative transactions and assumes that the parties are initially entering into a 1992 Agreement to be followed by one or more confirmations containing the economic terms of particular transactions. ISDA recognizes that, in practice, parties often enter into a confirmation for a particular transaction and then enter into a 1992 Agreement (*but see* Section III below). A chart set forth as Appendix A to this User's Guide illustrates the 1992 ISDA documentation architecture.

1. *Selecting a Form: Multicurrency Master v. Local Currency Master.* Parties contemplating a contractual relationship using the 1992 ISDA documentation must first decide whether to use the multicurrency—cross border version of the 1992 Agreements (the “Multicurrency Master”) or the local currency—single jurisdiction version of the 1992 Agreements (the “Local Currency Master”). The Multicurrency Master and the Local Currency Master are each master agreements which can govern multiple derivative transactions, the economic terms of which are documented in separate confirmations which each form a part of the relevant 1992 Agreement. The Multicurrency Master and the Local Currency Master are structured as complete contracts containing payment provisions, representations, agreements, events of default, termination events, provisions for early termination, methods for calculating payments on early termination and other provisions. A party may choose the Local Currency Master when dealing with a counterparty located in the same jurisdiction as such party in transactions involving only one currency (generally the local currency of such jurisdiction). The provisions included in the Multicurrency Master and not included in the Local Currency Master are as follows:

- a. Section 2(d) (Deduction or Withholding for Tax);
- b. Sections 3(e) and (f) (Payer and Payee Tax Representations);
- c. Sections 4(a)(i) and (iii) (agreements to provide tax forms or documents);
- d. Section 4(d) (Tax Agreement);
- e. Section 4(e) (Payment of Stamp Tax);
- f. Sections 5(b)(ii) and (iii) (Tax Event and Tax Event Upon Merger);

- g. Section 6(b)(ii) (Transfer To Avoid Termination Event);¹
- h. Sections 6(e)(i) and (ii) (references to Termination Currency Equivalent removed);
- i. Section 8 (Contractual Currency);
- j. Section 10 (Offices; Multibranch Parties);
- k. Section 13(c) (Service of Process); and
- 1. Part 2 of the Schedule (Tax Representations).

These differences also result in various conforming changes in certain Sections of the Local Currency Master (*e.g.*, deletion of references to Tax Event and certain definitions and deletion of place in schedule allowing for designation of agent for service of process). Parties from the same jurisdiction contemplating transactions involving only the local currency are unlikely to require the benefits provided by the above-listed provisions contained in the Multicurrency Master. Accordingly, these parties may prefer the Local Currency Master unless a relevant jurisdiction in question imposes withholding taxes on domestic payments, which may be the case in certain circumstances when parties are located in England. This also may be the case where other cross border issues arise that ordinarily would only arise in transactions between parties located in different jurisdictions. Parties should carefully contemplate this choice, however, as circumstances may change in the relationship between parties so that provisions contained in the Multicurrency Master but not in the Local Currency Master become desirable or necessary.

2. *Completing the 1992 Agreements.* Once the parties have selected a form, they must complete it. The advantage to market participants using the printed forms is to reduce the time and expense involved in reviewing documentation prepared by another party. This benefit is lost if the forms are retyped. It is also advantageous to use the printed forms even if market participants wish to make additions or deletions, for this enables them to focus on the actual changes being made to a 1992 Agreement. Parties need only provide identifying information in the main text of a 1992 Agreement and complete the schedule (the “Schedule”) attached to it. It may be more practical to retype the Schedule where significant additions to a 1992 Agreement are made. In the Schedule parties choose whether and how certain optional provisions in a 1992 Agreement will apply. For example, in the Schedule parties may elect between the First Method or the Second Method as the applicable payment method for an Early Termination Date. *See* Section II.G.3. below. Also, in the

¹ In a related change, the first clause of Section 6(b)(iii)(2) of the Local Currency Master — “an Illegality other than that referred to in Section 6(b)(ii)” — is different from the corresponding provision in Section 6(b)(iv)(2) of the Multicurrency Master because the transfer provisions in Section 6(b)(ii) of the Multicurrency Master are not included in the Local Currency Master.

Schedule parties may alter or amend the provisions of a 1992 Agreement as they wish through specification of additional or alternative provisions. For example, parties may decide to amend a 1992 Agreement by including a set-off provision in their Schedule. *See* Section V below. Deletions from a 1992 Agreement can be made either with an appropriate statement in the Schedule or by crossing out a provision in the printed main text with an appropriate indication (*e.g.*, initials) reflecting the agreement of the parties to such deletion.²

3. *Confirmations and Definitional Booklets.* Once the parties have chosen the appropriate 1992 Agreement, provided the necessary identifying information in a 1992 Agreement and negotiated the Schedule, the parties must then select the appropriate confirmation for documenting the economic terms of a contemplated transaction under a 1992 Agreement.

a. *Interest Rate and Currency Swaps.* If the relevant transaction is a rate swap, basis swap, forward rate agreement, interest rate option, rate cap, floor or collar, currency swap, cross-currency rate swap or any other similar transaction (including any option with respect to any of these transactions), parties should make use of the 1991 ISDA Definitions (the “1991 Definitions”) and the included forms of confirmations. In these forms of confirmations parties will incorporate the 1991 Definitions, will specify the economic terms of the relevant transaction and can provide any individual modifications to a 1992 Agreement beyond those contained in the Schedule.³

b. *FX and Currency Options.* If the relevant transaction is a foreign exchange transaction or currency option, parties should make use of the 1992 ISDA FX and Currency Option Definitions (the “FX and Currency Option Definitions”) and the included forms of confirmations. In these forms of confirmations parties will incorporate the FX and Currency Option Definitions, will specify the economic terms of the relevant transaction and can provide any individual modifications to a 1992

² Where a party is contemplating a contractual relationship with a U.S. municipal counterparty or other U.S. governmental counterparty, that party should consider using the U.S. Municipal Counterparty Schedule published by ISDA. *See* Sections I.A.3.e. and II.P. below. Although the U.S. Municipal Counterparty Schedule was designed for use with the Local Currency Master, the particular provisions and modifications to the Local Currency Master contained in it can be used to modify the Multicurrency Master with certain technical drafting modifications (*e.g.*, changes in section references). However, parties using the Multicurrency Master because of, for example, the existence of cross border or tax issues should carefully consider those issues in implementing the provisions in the U.S. Municipal Counterparty Schedule in a Schedule to the Multicurrency Master.

³ Although the term “Swap Transaction” used in the 1987 Agreement has been changed to “Transaction” (*see* Section II.A.2. below), parties may continue to use the term “Swap Transaction”, as used in the 1991 Definitions, without modification in confirmations incorporating the 1991 Definitions.

Agreement beyond those contained in the Schedule. For a discussion of certain documentation issues concerning foreign exchange transactions and currency options, *see* Section X below.

c. *Commodity Derivatives.* If the relevant transaction is a commodity swap, cross commodity swap, commodity cap, floor or collar, commodity option or any other similar transaction (including any option with respect to any of those transactions), parties should make use of the 1993 ISDA Commodity Derivative Definitions (the “Commodity Derivative Definitions”)⁴ and the included forms of confirmations. In these forms of confirmations parties will incorporate the Commodity Derivative Definitions, will specify the economic terms of the relevant transaction and can provide any individual modifications to a 1992 Agreement beyond those contained in the Schedule.

d. *Equity Derivatives.* If the relevant transaction is an equity index option, parties should use the 1992 Form of OTC Equity Index Option Confirmation (the “Equity Index Confirmation”) to set forth the specific economic terms of the transaction and any modifications to a 1992 Agreement agreed to by the parties beyond those contained in the Schedule. ISDA contemplates the publication of additional forms of confirmations for other types of equity derivative transactions (*e.g.*, single share and basket options and equity swaps) along with a comprehensive definitional booklet for equity derivative transactions. Until the publication of these documents, however, ISDA members may wish to reflect or incorporate provisions from the 1991 Definitions or Equity Index Confirmation in connection with the documentation of these other types of equity derivative transactions under a 1992 Agreement.

e. *U.S. Municipal Counterparties.* If the relevant transaction is a rate swap, basis swap, rate cap, floor or collar denominated in U.S. dollars and is with a U.S. municipal counterparty or other U.S. governmental counterparty, parties may choose the 1992 ISDA U.S. Municipal Counterparty Definitions (the “Municipal Counterparty Definitions”) and the included forms of confirmations.⁵ In these forms of confirmations parties will incorporate the Municipal Counterparty Definitions, will specify the economic terms of the relevant transaction and can include any individual modifications to a 1992 Agreement beyond those included in the Schedule. For other types of transactions (*e.g.*, swap options) with U.S. municipal counterparties or other U.S. governmental counterparties parties may make use of the other appropriate

⁴ At the time of publication of this User’s Guide, the Commodity Derivative Definitions were in draft form.

⁵ As noted in the introduction to the Municipal Counterparty Definitions, the Municipal Counterparty Definitions are essentially an abridged version of the 1991 Definitions. Accordingly, the Municipal Counterparty Definitions could be utilized for the documentation of a rate swap, basis swap, rate cap, floor or collar with other types of counterparties.

confirmations and definitional booklets published by ISDA. In addition, when considering entering into a contractual relationship with a U.S. municipal counterparty or other U.S. governmental counterparty, parties should consider using the U.S. Municipal Counterparty Schedule published by ISDA for use with the Local Currency Master. *See* also Section I.A.2. above and Section II.P. below.

4. *Addenda for Caps, Collars and Floors and Options.* In May 1989, ISDA published two addenda—one each for the 1987 Interest Rate Swap Agreement (the “1987 Interest Rate Swap Agreement”) and the 1987 Agreement (collectively, the “Caps Addenda”)—designed to facilitate documentation of caps, collars and floors and similar products. Also, in July 1990, ISDA published two additional addenda—one each for the 1987 Interest Rate Swap Agreement and the 1987 Agreement (collectively, the “Options Addenda”)—designed to facilitate documentation of swap options. With the publication of the 1992 Agreements, the necessary provisions in ISDA publications for documenting caps, collars and floors and options are included in the 1992 Agreements and the 1991 Definitions, with one exception. As was explained in the introduction to the 1991 Definitions, the provisions of paragraphs (1) and (2) of the Caps Addenda and the provisions of paragraphs (1), (2) and (3) of the Options Addenda were included in the 1991 Definitions.⁶ Paragraphs (3) and (4) of the Caps Addenda and paragraphs (4) and (5) of the Options Addenda are not part of the 1991 Definitions, and, accordingly, parties incorporating the 1991 Definitions and wishing to include those provisions in their contractual relationships have had to include such provisions in a Schedule to the 1987 Agreement or the 1987 Interest Rate Swap Agreement, as appropriate, or otherwise incorporate those provisions into such Agreements. However, the provisions of paragraph (3) of the Caps Addenda and the provisions of paragraph (4) of the Options Addenda are now part of the 1992 Agreements (*see* Section II.G.4. below) so that parties making use of the 1991 Definitions need only consider paragraph (4) of the Caps Addenda and paragraph (5) of the Options Addenda for inclusion in the Schedule to a 1992 Agreement or elsewhere in a 1992 Agreement.⁷

⁶ However, parties still had to modify the definition of “Specified Swap” in Section 14 of the 1987 Agreement to account for the inclusion of rate cap, rate floor, rate collar or option transactions under the 1987 Agreement if they wanted to expand the cross default to “Specified Swaps” in Section 5(a)(v).

⁷ This explanation applies equally to parties making use of the Municipal Counterparty Definitions or the Commodity Derivative Definitions in connection with a 1992 Agreement and will apply equally to parties that make use of the definitional booklet to be published by ISDA for equity derivative transactions in connection with a 1992 Agreement.

Paragraph (4) of the Caps Addenda and paragraph (5) of the Options Addenda, which are identical, read substantially as follows:⁸

“Notwithstanding the terms of Sections 5 and 6 of this Agreement, if at any time and so long as one of the parties to this Agreement ('X') shall have satisfied in full all its payment and delivery obligations under Section 2(a)(i) of this Agreement and shall at the time have no future payment or delivery obligations, whether absolute or contingent, under such Section, then unless the other party ('Y') is required pursuant to appropriate proceedings to return to X or otherwise returns to X upon demand of X any portion of any such payment or delivery, (a) the occurrence of an event described in Section 5(a) of this Agreement with respect to X, any Credit Support Provider of X or any Specified Entity of X shall not constitute an Event of Default or a Potential Event of Default with respect to X as the Defaulting Party and (b) Y shall be entitled to designate an Early Termination Date pursuant to Section 6 of this Agreement only as a result of the occurrence of a Termination Event set forth in (i) either Section 5(b)(i) or 5(b)(ii) of this Agreement with respect to Y as the Affected Party or (ii) Section 5(b)(iii) of this Agreement with respect to Y as the Burdened Party.”

These paragraphs were included in the Caps Addenda and the Options Addenda because it was anticipated that, as a result of credit concerns, certain parties might conduct business so that from time to time one party would be only a purchaser of fully-paid transactions (*e.g.*, cash-settled swap options, caps and floors) from the other. Therefore, in the case where the First Method (limited two-way payments) applies, the consistent buyer might argue that it would be inappropriate for the consistent seller to designate an Early Termination Date with respect to such transactions, at least so long as the buyer had satisfied in full all its payment obligations, because the seller does not have any exposure to the credit of the buyer. However, because the occurrence of certain Termination Events in such a situation could adversely affect the seller, these paragraphs limit the seller's ability to designate an Early Termination Date to those specified Termination Events, although it is possible that a seller could want to expand its ability to designate an Early Termination Date to include the defaults in Section 5(a)(v) and Section 5(a)(vi) of the 1992 Agreements because of a belief by the seller that it could be harmed if a default under a derivative transaction or other agreement between the buyer and the seller occurred.⁹

⁸ The quoted language as set forth here has been modified slightly to account for the potential inclusion of delivery obligations under a 1992 Agreement and the use of the term “Credit Support Provider” in the 1992 Agreements. The paragraphs are also drafted for use with the Multicurrency Master. Accordingly, the references to Section 5(b)(ii) and Section 5(b)(iii) should be deleted by parties using the paragraphs with the Local Currency Master.

⁹ Optional paragraph (5) contained in the commentary to the Caps Addenda also is not included in the 1992 Agreements. If parties wanted to include this paragraph in a 1992 Agreement, the paragraph, now modified to account for the deletion of the proviso to the definition of “Settlement Amount” in the 1992 Agreements, would read as follows:

Paragraph (4) of the Caps Addenda and paragraph (5) of the Options Addenda are, in large part, only relevant in the case where the First Method applies. Arguably, there is at least one potential problem, however, if these paragraphs are not included regardless of whether the First Method applies. Specifically, if an Event of Default has occurred in relation to a buyer, a seller might attempt to abuse the terms of Section 2(a)(iii) and avoid making payments to a buyer but not terminate the relevant 1992 Agreement. A party concerned about this potential problem could address it by including a provision in the Schedule to the effect that:

“The condition precedent in Section 2(a)(iii)(1) does not apply to a payment and delivery owing by a party if the other party shall have satisfied in full all its payment or delivery obligations under Section 2(a)(i) of this Agreement and shall at the relevant time have no future payment or delivery obligations, whether absolute or contingent, under Section 2(a)(i).”

5. *Implementation and Use of the 1992 Architecture.* ISDA recommends the use of its 1992 standard documentation for new contractual relationships between parties. ISDA also recommends that, where feasible, parties should implement the 1992 documentation architecture into existing contractual relationships, especially where derivative products other than or in addition to interest rate and currency swaps and related products are included. ISDA believes that, in most jurisdictions, the most efficient means through which the 1992 documentation can be implemented for existing contractual relationships is to replace an existing 1987 Agreement with a 1992 Agreement. A form of Amendment Agreement that may help to effect such a replacement is set forth as Appendix B to this User’s Guide.¹⁰ Although this replacement process may consume some time in the short-term, it should significantly reduce long-term documentation risk and produce potential netting

“For purposes of calculating amounts payable in respect of an Early Termination Date (including any amounts under Section 6(e) and, to the extent applicable, any Unpaid Amounts), an Event of Default specified in Section 5(a)(vii) of this Agreement shall be treated as if it were a Termination Event with the Defaulting Party as the Affected Party. Such Event of Default treated as a Termination Event shall take precedence over any other Event of Default which is existing at the time of the designation or deemed occurrence of such Early Termination Date.”

This optional paragraph should be relevant only in the case where the First Method applies to a 1992 Agreement.

¹⁰ Market participants may, of course, develop their own form of amendment agreement to implement a 1992 Agreement. For example, depending on the circumstances, including the content of the documentation governing a particular contractual relationship, it is conceivable that a form of amendment agreement could be used which would (i) substitute the new printed form of 1992 Agreement, (ii) provide for the elections in the 1992 Agreements not contained in the 1987 Agreement and (iii) leave in place the schedule relating to the 1987 Agreement.

benefits, especially where derivative products other than or in addition to interest rate and currency swaps and related products are or may in the future be included.

B. The Pre-1992 Architecture

This Section I.B. describes pre-1992 ISDA documentation architecture.

1. 1991. Parties contemplating a contractual relationship using the ISDA standard documentation as it stood in 1991 would, as a general rule, use the 1987 Agreement which was designed for the documentation of interest rate and currency swaps and related transactions. The 1987 Agreement was structured as a complete contract containing payment provisions, representations, agreements, events of default, termination events, provisions for early termination, methods for calculating payments on early termination and other provisions. Parties would then provide identifying information in the main text of the 1987 Agreement and complete the schedule, in which the parties would modify the 1987 Agreement and choose whether and how certain optional provisions in the 1987 Agreement would apply. Once the parties completed the 1987 Agreement, and at the point where the parties contemplated entering into a transaction, the parties would incorporate the 1991 Definitions, set forth the specific economic terms of each transaction and include any individual modifications to the 1987 Agreement beyond those included in their schedule. Under the 1991 ISDA documentation architecture, the coverage of the 1991 Definitions included any transaction which was a rate swap, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, rate cap, floor or collar, currency swap, cross-currency rate swap, currency option or any other similar transaction. The 1991 Definitions also included forms of confirmations for use in connection with these transactions in which parties would incorporate the 1991 Definitions, specify the economic terms of each transaction and include any individual modifications to the 1987 Agreement beyond those contained in the schedule relating to that Agreement. The chart set forth as Appendix C to this User's Guide illustrates the ISDA documentation architecture in 1991.

2. Pre-1991. Prior to 1991, parties contemplating a contractual relationship using the ISDA documentation for interest rate or currency swaps and related transactions would choose between the 1987 Agreement or the 1987 Interest Rate Swap Agreement. As a general matter, the architecture based upon the 1987 Agreement was essentially the same as the architecture in 1991 discussed in Section I.B.1. above except that parties would use the 1987 Interest Rate and Currency Exchange Definitions and the provisions in the Caps Addenda and Options Addenda played a more significant role. For a discussion of the Caps Addenda and Options Addenda, *see* Section I.A.4. above. Before 1991, market participants also made use of a documentation architecture based upon the 1987 Interest Rate Swap Agreement. The 1987 Interest Rate Swap Agreement was, as a general rule, used only for U.S dollar-denominated interest rate swaps and related products. The 1987 Interest Rate Swap Agreement was structured as a complete contract containing payment provisions, representations, agreements, events of default, termination events, provisions for early termination and methods for calculating payments on early termination. Many of these provisions were incorporated by reference from the 1986 Edition of the Code of Standard

Wording, Assumptions and Provisions for Swaps (the “Code”) (*n.b.*, there had been an earlier 1985 Edition of the Code) with certain modifications. Also, as in the case of the 1987 Agreement, parties would make use of the provisions in the Caps Addenda and Option Addenda for the documentation of caps, collars and floors and options. The only substantive differences between the 1987 Agreement and the 1987 Interest Rate Swap Agreement were minor differences necessitated by the multicurrency aspects of the 1987 Agreement and differences in the Sections concerning jurisdiction and governing law of the two Agreements, as noted in Part III of the 1987 User’s Guide to the Standard Form Agreements. The chart set forth as Appendix D to this User’s Guide illustrates the ISDA documentation architecture before 1991.

II. DESCRIPTION OF THE 1992 AGREEMENTS—A SECTION-BY-SECTION GUIDE

The following is a section-by-section guide to the 1992 Agreements. This Section II explains significant provisions of the 1992 Agreements and sets forth certain considerations, including potential modifications. This Section also explains significant changes from the 1987 Agreement. Copies of the 1992 Agreements marked to show all changes from the 1987 Agreement are available from the executive offices of ISDA. An explanation of tax provisions in the Multicurrency Master (including tax representations and tax-related Termination Events) may be found in Section IV below. A discussion of definitions contained in Section 14 of the Multicurrency Master and Section 12 of the Local Currency Master and provisions contained in the Schedule is integrated into the discussion below.

A. Heading

1. *Identifying Information.* The name of each party and, if desired, the form and jurisdiction of its organization must be set forth on the first page of the main text as well as in the heading of the Schedule. The date from which the agreement of the parties has effect must be set forth on the first page of the 1992 Agreements and in the heading to the Schedule. For a discussion of the interrelationship between the date specified in the heading and the date specified in the signature block, *see* Section II.O. below.

2. *Text of Heading.* The heading to the 1992 Agreements sets forth the master agreement architecture contemplated by the parties by specifically indicating that the contractual relationship of the parties will be governed by both the Master Agreement (which includes the Schedule) and, in the case of any Transaction, any “documents and other confirming evidence . . . exchanged between the parties” that confirms that particular Transaction. Unlike the 1987 Agreement, the heading to the 1992 Agreements acknowledges that parties may create a Confirmation through a means other than an exchange of documents. Parties entering into a Confirmation through “confirming evidence” exchanged in a form other than written and signed documents should carefully consider whether use of such “confirming evidence” complies with any applicable statute of frauds or other legal requirements. For a discussion of issues relating to the applicable New York statute of frauds, *see* Section XI.B. below. For a discussion of issues relating to

the required form of contract under English law and the use of recorded conversations under English law, *see* Section XII below. The heading also acknowledges that parties may have already entered into Transactions prior to executing a 1992 Agreement but makes clear that such Transactions can be included within that 1992 Agreement (*see also* Section III below). Finally, in the heading and throughout the 1992 Agreements, the term “Swap Transaction” contained in the 1987 Agreement has been changed to “Transaction” to reflect the fact that the 1992 Agreements have added flexibility to facilitate a wider variety of derivative transactions than the 1987 Agreement.

B. Section 1—Interpretation

Section 1 sets forth certain rules of interpretation. The Section establishes a priority for reconciling any inconsistencies between the Schedule and the remainder of the Master Agreement and inconsistencies between provisions of any Confirmation and the Master Agreement (including the Schedule). The 1987 Agreement had not addressed the treatment of inconsistencies between the printed form and the schedule on the assumption that parties would address that issue in their schedule. Also, Section 1 states that the parties intend that all components of a 1992 Agreement form one single agreement between the parties. This statement of intent had previously been set forth in the heading to the 1987 Agreement but its new location reflects a consensus that the statement was important enough to highlight in a separate section.

C. Section 2—Obligations

1. *General Conditions.* Section 2(a) indicates that each Confirmation will set forth the economic terms for a particular Transaction and when and how payments or deliveries will be made.¹¹ Section 2(a) of the 1992 Agreements also provides that the obligations of parties to make payments or deliveries are subject to various conditions precedent. Section 2(a) of the 1992 Agreements has been modified from the 1987 Agreement to add a reference to transactions that settle by physical delivery and to clarify that the obligations of parties to make payments or deliveries are subject to the condition precedent that no Early Termination Date in respect of a Transaction has occurred or been effectively designated. For further discussion of this Section of the 1992 Agreements and transactions that settle by physical delivery, *see* Section VI below.

2. *Change of Account.* The 1992 Agreements contemplate that parties will specify their respective accounts for receiving payments or deliveries under each Transaction in the relevant Confirmation or in other documentation exchanged between the parties. Of course,

¹¹ Parties may designate the Calculation Agent in Part 4(e) of the Schedule to the Multicurrency Master and Part 3(b) of the Schedule to the Local Currency Master. The Calculation Agent may also be designated for a particular type of Transaction or particular Transaction by so providing in the Schedule or the relevant Confirmation. The Calculation Agent may, among other things, perform various calculations in respect of a Confirmation. *See, e.g.,* Section 4.14 of the 1991 Definitions.

parties may also specify their respective accounts in the Schedule. Section 2(b) provides that a party may change its account upon giving prior notice of five Local Business Days unless the other party provides timely notice of a reasonable objection to such change. Section 2(b) has been changed from the 1987 Agreement by clarifying that the time for notice is calculated in the place where the relevant new account is to be located and by permitting the other party to assert reasonable grounds for objecting to a change of account. The other party has been granted the ability to object because, for example, in some jurisdictions changes in account location could result in adverse tax consequences.

3. *Netting of Payments.* Section 2(c) provides that payments due on the same date and in the same currency under a particular Transaction will be netted. This provision also enables parties to elect for two or more Transactions that a net amount will be determined for all amounts payable on the same date and in the same currency regardless of whether those amounts are payable for the same Transaction. Interested parties may make this election in the Schedule by specifying that subparagraph (ii) will not apply to those Transactions from a specified date. The 1987 Agreement allowed parties to specify in their Schedule “Net Payments—Corresponding Payment Dates” so that subparagraph (ii) of Section 2(c) would cease to apply to all transactions under a 1987 Agreement. This option has been modified to permit payment date netting over groups of Transactions because the systems capabilities of many ISDA members currently do not permit payment date netting across all types of Transactions. For example, a party could elect in a Schedule that subparagraph (ii) of Section 2(c) of a 1992 Agreement does not apply to commodity swaps so that a single net amount will be payable in respect of all amounts payable on the same date and in the same currency in respect of commodity swaps. Parties can also make an election with respect to subparagraph (ii) of Section 2(c) in a Confirmation. Under Section 2(c) of the 1992 Agreements, any such election made will only apply where the relevant Transactions are between the same Offices of the parties.¹²

4. *Default Interest; Other Amounts.* Section 2(e) of the Multicurrency Master (Section 2(d) of the Local Currency Master) provides that a party that defaults in the performance of any payment obligation will be required to pay interest as specified on the overdue amount at the Default Rate, which rate is determined based on the cost of funds of the relevant payee plus 1% per annum. Upon the occurrence or effective designation of an Early Termination Date, interest on overdue amounts will accrue in accordance with Section 6(d)(ii) of the 1992 Agreements. *See* Section II.G.4.f. below. Language has been added to Section 2(e) in the 1992 Agreement (Section 2(d) of the Local Currency Master)

¹² As part of the consideration by market participants of payment flows in connection with the Section 2(c) election and related settlement exposure in connection with Transactions in which principal is exchanged, some market participants incorporate a mechanism in their agreements to limit settlement exposure arising from time differences between cities in which payments are to be made. Specifically, some market participants use an escrow arrangement to avoid settlement risk associated with time differentials, with payments by each party to be made in escrow to a mutually acceptable escrow agent and not to be released until both payments are received.

to indicate that interest on overdue payments is to be determined in accordance with Section 2(e) (Section 2(d) of the Local Currency Master) only prior to the occurrence or effective designation of an Early Termination Date for a particular Transaction. For an indication of the changes to Section 2(e) of the Multicurrency Master (Section 2(d) of the Local Currency Master) made to permit documentation of transactions that settle by physical delivery and further changes the parties may wish to make if they choose to document transactions that settle by physical delivery under the 1992 Agreements, *see* Section VI below.

D. Section 3—Representations

1. *General.* Section 3 contains the representations of the parties (apart from the representation, if applicable, contained in Section 10(a) of the Multicurrency Master and any tax representations, which tax representations, if any, are referred to in Sections 3(e) and (f) of the Multicurrency Master and discussed in Section IV below). Each representation is repeated by each party on each date on which the parties enter into a Transaction (other than the tax representations given by a party under the Multicurrency Master in its capacity as a payee, which are made at all times as discussed in Section IV.A.2.b. below). The representations contained in Sections 3(a) (Basic Representations) and (b) (Absence of Certain Events) are largely self-explanatory.

2. *Absence of Litigation.* The representation in Section 3(c) applies to each party and its Affiliates. In allocating risk and responsibility some market participants have modified Section 3(c) to apply only to Specified Entities or Credit Support Providers set forth in the Schedule as opposed to Affiliates. Based on widespread market practice, reflecting in part a concern as to ambiguity, this representation has been modified from the 1987 Agreement to delete language concerning judicial proceedings that “purport to draw into question” the legality, validity or enforceability of a 1987 Agreement or a Credit Support Document.

3. *Accuracy of Specified Information.* The representation in Section 3(d) applies only to information specified as being covered by such representation in the Schedule. Accordingly, parties should specify in the Schedule those documents or other information to which this representation applies.

E. Section 4—Agreements

1. *General.* Section 4 contains certain agreements of the parties. The agreements contained in Sections 4(d) and (e) of the Multicurrency Master, which concern tax-related matters, are explained in Section IV below. The agreements contained in Sections 4(b) (Maintain Authorisations) and (c) (Comply with Laws) are largely self-explanatory.

2. *Furnish Specified Information.* Section 4(a) sets forth the agreement of the parties to furnish certain specified information. In respect of Sections 4(a)(i) and (ii) of the Multicurrency Master parties must specify in the Schedule or in a Confirmation any forms,

documents or certificates which are required to be delivered and when delivery is required.¹³ In addition to requiring delivery in Section 4(a)(i) of the Multicurrency Master of any forms, documents or certificates relating to taxation, parties may wish to require in Section 4(a)(ii) of the Multicurrency Master delivery of financial statements, authorizing resolutions, legal opinions, director's or officer's certificates or incumbency certificates and such other documents as the parties may deem appropriate for their particular contractual relationship. The delivery of Credit Support Documents such as letters of credit, keepwell agreements, pledge agreements, security agreements or guarantee agreements should also be specified where delivery is to occur after execution of a 1992 Agreement.¹⁴ Section 4(a)(iii) of the Multicurrency Master is new and provides that a party may be required to deliver to the other party or, in certain cases, to a government or taxing authority certain forms or documents in order to allow such other party or its Credit Support Provider to make a payment under a Multicurrency Master or any applicable Credit Support Document without deduction or withholding for or on account of any tax or with such deduction or withholding at a reduced rate. Under Section 4(a)(iii) of the Multicurrency Master, however, a party need not complete, execute or submit such a form or document if doing so would "materially prejudice" its "legal or commercial position". For further discussion of Sections 4(a)(i) and (iii) of the Multicurrency Master, *see* Sections IV.A.2.c. and IV.A.3.b. below.

F. Section 5—Events of Default and Termination Events

1. General—Specified Entities and Credit Support Providers. Section 5 contains the Events of Default and Termination Events in the 1992 Agreements (*n.b.*, the different treatment of Events of Default, as compared with Termination Events, following termination is set forth in Section II.G. below). In some cases, an Event of Default or Termination Event may be triggered by a third party. For example, market participants should note that the term "Specified Entity" is used in the Events of Default in Sections 5(a)(v), (vi) and (vii) and the Termination Event in Section 5(b)(iv) (Section 5(b)(ii) of the Local Currency Master). The meaning of the term "Specified Entity" for each such Event of Default and Termination Event should be specified in Part 1(a) of the Schedule in each case where the parties to a 1992 Agreement intend the term to be applicable. Market participants could, for example, use the term "Affiliate" (which is defined in Section 14 of the Multicurrency Master and Section 12 of the Local Currency Master) to define "Specified Entity". Narrower definitions may also be used. In addition, market participants should note that the term "Credit Support Provider", which was not included in the 1987 Agreement, is used in the Events of Default in Sections 5(a)(iii), (iv), (v), (vi), (vii) and (viii) and the Termination Events contained in Sections 5(b)(i) and (iv) (Sections 5(b)(i)

¹³ Section 4(a) of the Local Currency Master is not divided into subsections because the Local Currency Master does not contemplate the delivery of forms, documents or certificates relating to taxation. Accordingly, Section 4(a) of the Local Currency Master serves essentially the same purpose as Section 4(a)(ii) of the Multicurrency Master.

¹⁴ Any such document should also be identified as a "Credit Support Document" so that the provisions in the 1992 Agreements concerning Credit Support Documents apply.

and (ii) of the Local Currency Master). The identity of each “Credit Support Provider” should be provided in Part 4(g) of the Schedule to the Multicurrency Master (Part 3(d) of the Schedule to the Local Currency Master) if the obligations of a party to a 1992 Agreement are to be supported by a Credit Support Document issued by such a third party. The meaning of “Credit Support Provider” is expected to remain consistent throughout a 1992 Agreement and should apply to any person or entity (other than either party) providing, or a party to, a Credit Support Document delivered on behalf of a particular party. In some cases in the 1992 Agreements, Credit Support Provider has replaced Specified Entity where market participants using a 1987 Agreement would have been likely to set forth each relevant Credit Support Provider as a Specified Entity for a particular provision. Where it was thought that parties might list entities in addition to each relevant Credit Support Provider for a particular provision, the option to set forth a Specified Entity along with any Credit Support Provider remains. Market participants should also note that the meaning of the term “Credit Support Document” must be specified in Part 4(f) of the Schedule to the Multicurrency Master (Part 3(c) of the Schedule to the Local Currency Master). The meaning of Credit Support Document is important for many provisions of the 1992 Agreements, including the Events of Default in Sections 5(a)(iii), (iv) and (viii) and the Termination Event in Section 5(b)(i).

2. Events of Default.

a. *Failure to Pay or Deliver.* Section 5(a)(i) applies to the failure by a party to make any payment or delivery under Section 2(a)(i) or 2(e) of the Multicurrency Master (Section 2(a)(i) or Section 2(d) of the Local Currency Master) after passage of a grace period of three Local Business Days after notice. This Event of Default has been modified from the 1987 Agreement to address transactions that settle by physical delivery and clarify the calculation of the applicable grace period. For a discussion of Section 5(a)(i) and transactions that settle by physical delivery, *see* Section VI below.

b. *Breach of Agreement.* Section 5(a)(ii) applies to a failure to comply with any agreement or obligation under a 1992 Agreement after passage of a grace period of 30 days after notice. However, exempted from this provision are any obligations covered by the Event of Default concerning failure to pay or deliver, any failure to give notice of a Termination Event and, in the case of the Multicurrency Master, any failure to comply with certain tax-related agreements or obligations contained in Section 4 of the Multicurrency Master. Since such events are subject to different treatment elsewhere, it was thought that such events should not, in and of themselves, give rise to early termination under Section 5(a)(ii). This Event of Default has been modified from the 1987 Agreement to address transactions that settle by physical delivery. For a discussion of Section 5(a)(ii) and transactions that settle by physical delivery, *see* Section VI below.

c. *Credit Support Default.* Section 5(a)(iii) only applies to a party if a Credit Support Document is provided by or on behalf of that party and is identified as such in the Schedule (or appropriately identified in other relevant documentation between the parties) or that Credit Support Document. The parties should specify in the Schedule

any Credit Support Document (such as a guarantee agreement, keepwell agreement, security agreement, pledge agreement or letter of credit) and the party whose obligations are supported by that Credit Support Document. In addition, if the Credit Support Document constitutes an obligation of an entity other than a party to a 1992 Agreement (such as a third-party guarantee), parties should specify in the Schedule that such entity is a “Credit Support Provider” since this Event of Default also applies to any Credit Support Provider of a party. This Event of Default is triggered if (i) a party or any Credit Support Provider of a party breaches a Credit Support Document and the breach is continuing after passage of any applicable grace period, (ii) the Credit Support Document is not in effect prior to the satisfaction of all obligations under related Transactions without the written consent of the other party or (iii) a party or a Credit Support Provider, among other things, repudiates a Credit Support Document. Section 5(a)(iii) of the 1992 Agreements has been modified from the 1987 Agreement to replace the reference to “Specified Entity” with “Credit Support Provider”. Also, Section 5(a)(iii) of the 1992 Agreements has been modified from the 1987 Agreement to make clear that an Event of Default will occur if a Credit Support Document is no longer in effect prior to the satisfaction of all obligations of the relevant party under each Transaction to which a Credit Support Document relates.¹⁵

d. *Misrepresentation.* Section 5(a)(iv) applies to certain breaches of representations (other than tax representations, in the case of the Multicurrency Master) made in a 1992 Agreement or in a Credit Support Document by a party or any applicable Credit Support Provider. In the 1987 Agreement this Event of Default applied to any Specified Entity of a party as opposed to a Credit Support Provider of a party.

e. *Default Under Specified Transaction.* Section 5(a)(v) applies to certain events which would indicate that there has been an event of default or other unexcused failure to perform in respect of a “Specified Transaction”. It applies to each party, any Credit Support Provider of a particular party or any applicable Specified Entity of a particular party. The definition of “Specified Transaction”, which has been expanded substantially from the 1987 Agreement, includes a broad range of derivative transactions between one party to a 1992 Agreement (or any Credit Support Provider of such party or any applicable Specified Entity of such party) and the other party to a 1992 Agreement (or any Credit Support Provider of such other party or any applicable Specified Entity of such other party).

In addition to the changes resulting from the expansion of the definition of “Specified Transaction” and the addition of Credit Support Provider, this Event of Default has been modified from the 1987 Agreement in other respects. First, in a

¹⁵ Some market participants advocate inclusion of an additional Event of Default in respect of a Credit Support Document which essentially provides that it is an Event of Default if a party or a Credit Support Provider of such party amends or modifies a Credit Support Document without the prior consent of the other party.

manner consistent with the 1987 Agreement, clause (1) of this Event of Default contains a cross-acceleration clause to any Specified Transaction. The 1992 Agreements now also include a new clause (2) that provides that this Event of Default may be triggered by a default in making any payment or delivery due on maturity after giving effect to any applicable notice or grace period or a period of at least three Local Business Days if the relevant Specified Transaction has no applicable notice requirement or grace period. This “deemed” grace or notice period permits coverage of transactions not under the 1992 Agreement that may not include grace or notice periods while trying to avoid an inadvertent collapse of the entire contractual relationship between the parties;¹⁶ a related clause is included in clause (d) of the definition of “Local Business Day” to assist in the calculation of this “deemed” grace or notice period. Clause (3), which also is new, addresses particular situations involving swaps or related derivatives with respect to certain counterparties organized under U.S. law that fall outside the protections for “swap agreements”, “qualified financial contracts” and “netting contracts” under the U.S. Bankruptcy Code, the U.S. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) and the U.S. Federal Deposit Insurance Corporation Improvement Act of 1991 (“FDICIA”), respectively. Clause (3) also addresses, among other things, situations in which a party, a Credit Support Provider of a party or a Specified Entity of a party repudiates a Specified Transaction. Parties may broaden or narrow the application of this Event of Default by modifying the definition of “Specified Transaction”¹⁷ and by the respective meanings, if any, given to “Specified Entity” and “Credit Support Provider”.

f. Cross Default. Section 5(a)(vi) only applies to a party if so specified in the Schedule (*see* Part 1(c) of the Schedule). The election should include a “Threshold Amount”. To avoid ambiguity, a party that wants Cross Default to apply without regard to the amount involved should specify that the Threshold Amount is zero. In specifying a Threshold Amount, parties should make clear that the amount specified includes the equivalent amount in the specified currency of any obligations stated in any other currency, currency unit or combination. For example, if the Threshold Amount is \$10,000,000, an indication should be made that the Threshold Amount as of any date includes the U.S. dollar equivalent of any obligations stated in any other currency, currency unit or combination, as reasonably determined by the other party as of that date. Unless otherwise agreed, this Event of Default will automatically be determined by reference also to the Credit Support Provider of any party subject to Cross Default but, if it is to be determined by reference to any other Specified Entity, that entity must be expressly included. If this Event of Default applies, it is triggered

¹⁶ For similar reasons some market participants advocate a modification to this Event of Default or the Cross Default discussed immediately below to carve out “technical defaults” resulting from “administrative error”, “back office error” or “other similar difficulties”.

¹⁷ In fact, Part 1(b) of the Schedule anticipates that parties may modify the definition of “Specified Transaction”.

by the following defaults or similar events under one or more agreements or instruments relating to Specified Indebtedness (individually or collectively) in an amount not less than the applicable Threshold Amount:

- (i) a default or similar event under such agreements or instruments that has resulted in the acceleration of such indebtedness;
- (ii) a default or similar event under such agreements or instruments that permits holders to accelerate such indebtedness;¹⁸ and
- (iii) a failure to make any payments on their due date under such agreements or instruments after giving effect to any applicable notice or grace period.

This Event of Default has been modified from the 1987 Agreement in several significant ways. In addition to making any “Credit Support Provider” subject to this Event of Default, clause (1) now states that if, for example, a default occurred under Specified Indebtedness of each of the party, a Credit Support Provider of such party and a Specified Entity of such party, the amounts involved in such defaults can be added together to determine whether the Threshold Amount has been exceeded. Furthermore, while clause (2) of this Event of Default in the 1987 Agreement only applied to payments at maturity, clause (2) now applies to any defaulted payments in excess of the Threshold Amount (*e.g.*, tax calls, sinking fund payments). As in the case of clause (1), a failure by a party, any Credit Support Provider of a party or any Specified Entity of a party to make any such payments can also be considered collectively in respect of the Threshold Amount. The language in Section 5(a)(vi)(1) has also been revised to make clear that this Event of Default covers only “a default, event of default or other similar condition or event” and not optional repayments or prepayments made in accordance with the terms of a debt obligation.

The scope of this Event of Default may be regulated by the parties in several ways. First, parties may regulate the scope through the manner in which they specify a Threshold Amount in the Schedule (*i.e.*, the lower the Threshold Amount the broader the scope of the Event of Default). Second, parties may modify the definition of “Specified Indebtedness” by, for example, expanding the definition to address other types of indebtedness (*e.g.*, capital lease obligations, bankers’ acceptances or derivative transactions with third parties) in addition to obligations for borrowed money or, alternatively, narrowing the definition to exclude, for example, obligations in respect of deposits received in the ordinary course of a party’s banking business. Third, parties may narrow or broaden the scope of this Event of Default by defining “Specified Entity” narrowly or broadly for purposes of this Event of Default or by failing to add meaning to “Credit Support Provider”.

¹⁸ Market participants who wish to delete the trigger referred to in clause (ii) may do so by deleting “, or becoming capable at such time of being declared,” from clause (1) of Section 5(a)(vi).

g. *Bankruptcy.* Section 5(a)(vii) applies to each party, any Credit Support Provider of a party (Credit Support Providers were not specifically included in the 1987 Agreement) and any applicable Specified Entity of a party. It is drafted so as to be triggered by a variety of events associated with bankruptcy or insolvency proceedings under New York or English law but recognizes that market participants will be located in and organized under the laws of different countries around the world. Accordingly, the Bankruptcy Event of Default has been drafted with the intention that it be broad enough to be triggered by analogous proceedings or events under any bankruptcy or insolvency laws pertaining to a particular party. Specific changes in this Event of Default from the 1987 Agreement were made in furtherance of this goal. The concept of “official management”, which addresses Australian law concerns, is now set forth in clause (5) and the concept of “provisional liquidator”, which also addresses Australian law concerns, is set forth in clause (6). In addition, clause (6) now includes a reference to “conservator” which has general application. Clause (7) now also addresses situations where a secured party takes certain actions with respect to the assets of a party, any Credit Support Provider of a party or any applicable Specified Entity of a party. Despite this broad provision, however, where a party is organized in a jurisdiction other than the United States or England, market participants may, in certain cases, wish to modify this Event of Default to refer to specific insolvency concepts relevant in other jurisdictions. Market participants should note that the scope of this provision will be affected by the meanings given to “Specified Entity” and “Credit Support Provider”.

h. *Merger Without Assumption.* Section 5(a)(viii) of the 1992 Agreements applies to situations where a party or any Credit Support Provider of a party consolidates or amalgamates with, or merges with or into or transfers all or substantially all its assets to, another entity and (i) such entity fails to assume the obligations of a party under any 1992 Agreement or the obligations of a party or a Credit Support Provider under a Credit Support Document or (ii) the benefits of any Credit Support Document are no longer available after consummation of the relevant transaction (unless the other party consents to such a result). There is no requirement in connection with this Event of Default that the new entity be incorporated or organized in the same country as the party engaging in the merger or other strategic transaction covered by the Event of Default. This Event of Default has been modified from the 1987 Agreement to include not only mergers in which a party merges *into* a third party (and therefore ceases to exist) but also those mergers in which a party to a 1992 Agreement merges *with* a third party (and is the surviving party). In addition, this Event of Default has been expanded to apply to mergers affecting Credit Support Providers of a party.

3. *Termination Events.*¹⁹

a. *Illegality.* Section 5(b)(i) provides that a Termination Event will occur if it becomes unlawful for a party to make a payment or delivery or receive a payment or delivery or comply with any material provision of a 1992 Agreement or it becomes unlawful for a party or a Credit Support Provider to perform under a Credit Support Document. The party in respect of which the Illegality has occurred will be the Affected Party. This Termination Event excludes any event which results from a breach by a party of the agreement in Section 4(b) to maintain authorizations necessary in connection with a 1992 Agreement or any Credit Support Document. Any such breach thus will be treated as an Event of Default and not an Illegality.

This Termination Event has been modified from the 1987 Agreement to make reference to transactions that settle by physical delivery and to replace the reference to “Specified Entity” in the corresponding provision of the 1987 Agreement with “Credit Support Provider” because clause (2) of Illegality relates to Credit Support Documents.

Section 5(c) of the 1992 Agreements addresses the case where an Event of Default occurs that also constitutes an Illegality by providing that such a case will be treated as an Illegality.

b. *Credit Event Upon Merger.* Section 5(b)(iv) of the Multicurrency Master (Section 5(b)(ii) of the Local Currency Master) only applies to a party if so specified in the Schedule (*see* Part 1(d) of the Schedule). It addresses the occurrence of transactions in which a party, a Credit Support Provider of a party or any applicable Specified Entity of a party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity. A Termination Event will occur under this provision if such a transaction does not result in an Event of Default under the provisions concerning merger without assumption (Section 5(a)(viii)) and the creditworthiness of the surviving entity is “materially weaker” than that of such party, such Credit Support Provider or such Specified Entity, as the case may be, immediately prior to the transaction. If this Termination Event occurs, the party who has entered into, or whose Credit Support Provider or Specified Entity has entered into, such a transaction is the Affected Party and the other party is entitled to terminate all Transactions under the relevant 1992 Agreement. This Termination Event has been modified from the 1987 Agreement to include not only mergers in which a party to a 1992 Agreement merges *into* a third party (and therefore ceases to exist) but also mergers in which a party to a 1992 Agreement merges *with* a third party (and is the surviving party). In addition, this Termination Event has been expanded to apply to Credit Support Providers and Specified Entities of a party. Accordingly, the

¹⁹ Those Termination Events in the Multicurrency Master relating to tax matters, specifically “Tax Event” and “Tax Event Upon Merger”, are discussed in Section IV.A.4. below.

scope of this Termination Event will be affected by the meanings given to “Specified Entity” and “Credit Support Provider”.

After consultation with their appropriate credit advisers, some market participants modify this Termination Event to define “materially weaker” in terms of, for example, situations in which one or more specified rating agencies downgrades its ratings of any outstanding long-term debt securities of a party below a specified rating or any such debt securities fail or cease to be rated by such rating agency. Moreover, this Termination Event does not cover certain transactions that could cause the creditworthiness of a surviving entity to become “materially weaker”. Some market participants, therefore, expand this Termination Event to encompass additional transactions such as (i) the acquisition of the direct or indirect beneficial ownership of equity securities having the power to elect a majority of the board of directors of a party, a Credit Support Provider of a party or any Specified Entity of a party, (ii) a leveraged recapitalization or (iii) the entry into an agreement providing for any transaction encompassed by this Termination Event. Other market participants, however, oppose this expansion as being inappropriate or beyond the scope of a 1992 Agreement.

c. *Additional Termination Event.* Section 5(b)(v) of the Multicurrency Master (Section 5(b)(iii) of the Local Currency Master) has been added because some market participants include additional Termination Events in their contractual relationships. This Section is designed so that parties may specify an Additional Termination Event in the Schedule or any Confirmation and any Affected Party or Affected Parties for such an Additional Termination Event. It is presumed that, in the case of an Additional Termination Event, all Transactions will be Affected Transactions and the party that is not the Affected Party will be the party entitled to terminate. *See* Sections 5(b)(v) of the Multicurrency Master (Section 5(b)(iii) of the Local Currency Master) and 6(b)(iv) of the Multicurrency Master (Section 6(b)(iii) of the Local Currency Master) and the definition of “Affected Transactions”. These presumptions, which can be modified, were included in the 1992 Agreements based upon a belief that most additional Termination Events included by market participants in their contractual relationships are credit-related (*e.g.*, some market participants, after consultation with their credit advisers, add a Termination Event which is implicated if one or more specified rating agencies downgrades its rating of any outstanding long-term debt securities of a party below a specified rating or any such debt securities fail or cease to be rated by such rating agency) and therefore were intended to affect the entire contractual relationship between the parties and not any particular group of Transactions. It should be noted, however, that the optional nature of the Additional Termination Event and its lack of specificity reflect the position of some market participants that such additional credit-related Termination Events should not be included in a 1992 Agreement.

G. Section 6—Early Termination

1. *How to Terminate.*

a. *Events of Default.* Under Section 6(a), the Non-defaulting Party has the right to designate an Early Termination Date for all outstanding Transactions upon the occurrence and continuance of an Event of Default. Section 6(a) also affords parties the opportunity to elect in Part 1(e) of the Schedule that “Automatic Early Termination” will apply to a party upon the occurrence of certain bankruptcy or insolvency events. If parties fail to make an election in Part 1(e), Automatic Early Termination will not apply. If Automatic Early Termination applies and certain insolvency events in Section 5(a)(vii) occur, an Early Termination Date will occur automatically for all outstanding Transactions.

Section 6(a) has been modified from the 1987 Agreement to account for recent changes under relevant U.S. insolvency laws and a practice of some market participants to provide that Automatic Early Termination would not apply to a party in other jurisdictions where they concluded that Automatic Early Termination would not be advantageous. Section 6(a) of the 1992 Agreements has also been modified from the 1987 Agreement to remove certain insolvency events set forth in Section 5(a)(vii) from Automatic Early Termination so that Automatic Early Termination only applies to insolvency events that are likely to occur on a readily determinable date.

Market participants should carefully balance the advantages and disadvantages of electing Automatic Early Termination as well as considering the enforceability of such a provision in an insolvency proceeding. The primary advantage of Automatic Early Termination may be that, by providing that an Early Termination Date in respect of a 1992 Agreement will occur prior to, for example, the filing of an insolvency petition with respect to a counterparty (*see* Section 5(a)(vii)(4) of the 1992 Agreements), it may be more likely in some jurisdictions that a Non-defaulting Party may exercise its termination rights outside of an insolvency proceeding. Prior to the recent enactment of the protections for “swap agreements” and “qualified financial contracts” under U.S. law, this advantage was the reason many market participants strongly preferred Automatic Early Termination when dealing with U.S. counterparties.²⁰ It is also conceivable that, in certain jurisdictions, the choice of Automatic Early Termination would be favorably received by an independent third party (*e.g.*, judicial body) because of the relative certainty and objectivity of the timing provided by Automatic Early Termination.

The primary disadvantage of Automatic Early Termination is that an Early Termination Date could occur without the knowledge of the Non-defaulting Party and,

²⁰ Automatic Early Termination may remain a prudent choice for market participants dealing with U.S. counterparties to which the U.S. Bankruptcy Code, FIRREA or FDICIA does not apply (*e.g.*, insurance companies).

prior to the discovery by the Non-defaulting Party of the occurrence of such a termination, the relevant market could have moved significantly from its position on the Early Termination Date. To mitigate the consequences for a Non-defaulting Party, the 1992 Agreements determine payments on early termination as of the Early Termination Date or as soon thereafter as is reasonably practicable.²¹

THE ISSUES POSED BY AUTOMATIC EARLY TERMINATION ARE COMPLEX AND WILL VARY DEPENDING ON THE JURISDICTION OF ORGANIZATION OF EACH COUNTERPARTY TO A 1992 AGREEMENT. ACCORDINGLY, PARTIES SHOULD CAREFULLY CONSIDER WITH THEIR LEGAL AND CREDIT ADVISERS THE PRACTICAL AND LEGAL ADVANTAGES AND DISADVANTAGES OF ELECTING AUTOMATIC EARLY TERMINATION AND THE ENFORCEABILITY OF AUTOMATIC EARLY TERMINATION.

b. *Termination Events.* Under Section 6(b)(i), if a Termination Event occurs, an Affected Party must inform the other party of the particular Termination Event and each Affected Transaction. The party who is entitled to designate an Early Termination Date in response to a Termination Event varies in the case of each Termination Event as set forth in Section 6(b)(iv) of the Multicurrency Master (Section 6(b)(iii) of the Local Currency Master). Also, in certain cases the right to designate an Early Termination Date is conditioned upon compliance with certain conditions set forth in Section 6(b) based on the assumption that it is generally preferable to continue a transaction where possible. Section 6(b)(ii) of the Multicurrency Master requires a party with respect to which certain Termination Events have occurred first to use all reasonable efforts to transfer all Affected Transactions to another Office or Affiliate to avoid the relevant Termination Event. This Section also grants the other party the ability to effect such a transfer if the party with respect to which the relevant Termination Event has occurred has not been able to make such a transfer after passage of a specified period of time.²² Also, in the case where an Illegality under Section 5(b)(i)(1) or Tax Event under Section 5(b)(ii) (in the case of the Multicurrency Master) has occurred and there are two Affected Parties,

²¹ Some market participants have suggested that Automatic Early Termination should be limited to insolvency events of which the Non-defaulting Party is likely to have knowledge. Some market participants have also considered inclusion of a provision in the Schedule to a 1992 Agreement in which the parties have elected Automatic Early Termination that would grant the Non-defaulting Party the right to waive Automatic Early Termination if it were determined by such party that Automatic Early Termination, when actually triggered, was not advantageous. Before including such a provision, however, parties should carefully consider the legal implications of such a provision with their legal advisers.

²² The transfer requirement in the Multicurrency Master is not included in the Local Currency Master. For a discussion of the differences between the Local Currency Master and the Multicurrency Master, *see* Section I.A.1. above.

Section 6(b)(iii) of the Multicurrency Master (Section 6(b)(ii) of the Local Currency Master) provides that parties must use all reasonable efforts to agree on action to avoid the relevant Termination Event. If the parties are unable to agree, transfer or otherwise avoid the relevant Termination Event, as appropriate, an Early Termination Date may be designated in accordance with Section 6(b)(iv) of the Multicurrency Master (Section 6(b)(iii) of the Local Currency Master).

2. Effect of “Termination”. All Transactions are “terminated” if an Early Termination Date is designated as a result of an Event of Default or a Credit Event Upon Merger. However, if an Early Termination Date is designated as a result of an Illegality or a Tax Event or Tax Event Upon Merger, in the case of the Multicurrency Master, only Transactions affected by the relevant Termination Event are “terminated”. As discussed above in Section II.F.3.c., the 1992 Agreements contain a presumption (which can be modified) that all Transactions will be “terminated” by the occurrence of an Additional Termination Event. As set forth in Section 6(c)(ii) of the 1992 Agreements, upon the occurrence or effective designation of an Early Termination Date each party is no longer required to make payments or deliveries pursuant to Section 2(a)(i) or 2(e) of a Multicurrency Master (Section 2(a)(i) or 2(d) of a Local Currency Master) with respect to the Transactions that have been “terminated”. However, the obligations that would have been due on dates occurring after the effectiveness of such notice but on or prior to the Early Termination Date (as well as any obligations that did not become payable or deliverable because of the failure to satisfy all conditions precedent) are included in the definition of “Unpaid Amounts” or “Loss”, as the case may be, and are thereby included in the calculation of the amount, if any, payable as a result of the early termination.

3. Payments on Early Termination—General. The 1992 Agreements have been modified significantly from the 1987 Agreement in terms of calculating payments owed if an Early Termination Date occurs. First, the 1992 Agreements allow the parties to elect in Part 1(f) of the Schedule a payment measure based upon either Market Quotation or Loss. In the event parties do not select a payment measure in the Schedule, Market Quotation will be the applicable payment measure. Previously, in the 1987 Agreement, Market Quotation was the applicable payment measure with Loss used as the measure of damages with respect to the future value of a Transaction where a Market Quotation could not be determined. Although Loss remains a fallback provision in the event a Market Quotation cannot be determined or (in the reasonable belief of the party making the determination) would not produce a commercially reasonable result, the 1992 Agreements also provide that Loss may be the primary choice as a payment measure. This change was made to address products documented under a 1992 Agreement for which it may not be possible to obtain a Market Quotation (*e.g.*, products in a thinly-traded market or products for which quotations are given on a future value basis) or for which Loss may be a more appropriate payment measure (*e.g.*, transactions that settle by physical delivery) and to provide parties with greater flexibility in measuring their payments on early termination. It is expected that parties will elect one payment measure to apply to all Transactions documented under a 1992 Agreement. Those market participants who, for example, elect to have a payment measure applied to one type of Transaction or event and a different payment measure applied to another type of Transaction or event can easily do so under a 1992 Agreement;

however, before employing such an approach, market participants should consult with their legal advisers.

Second, Part 1(f) of the Schedule allows parties to elect between two payment methods, specifically the First Method or the Second Method. The 1987 Agreement only provided for the First Method (limited two-way payments), although parties could easily modify the 1987 Agreement to provide for the Second Method (full two-way payments). The fallback provision for the payment method on early termination in the event parties fail to select a payment method in the Schedule has been designated as the Second Method, partly in response to past and recent statements by bank regulators suggesting that recognition of netting for capital purposes could be conditioned on use of the Second Method. In addition, as discussed in Section V below, partly in response to the more prominent placement of the Second Method in the 1992 Agreements, Section 6(e) provides that any amount determined to be payable in respect of an Early Termination Date is subject to any “Set-off” that may apply, for example, by operation of law or that the parties may set forth in a Schedule. For a discussion of set-off and examples of standard set-off clauses and consideration of certain other related approaches for use in connection with a 1992 Agreement, *see* Section V below.

4. Payments on Early Termination—Explanation. This Section II.G.4. of the User’s Guide (i) explains the definitions of “Market Quotation” and “Loss” and illustrates changes to those definitions from the 1987 Agreement; (ii) explains the mechanics and results depending on whether Market Quotation or Loss applies, the First Method or the Second Method applies and an Event of Default or Termination Event occurs (and, if a Termination Event occurs, the result if there is one Affected Party or two Affected Parties) and (iii) discusses Termination Currency, adjustments for bankruptcy and interest on certain amounts owed.

a. Market Quotation. Market Quotation is a payment measure determined on the basis of quotations from leading dealers (*i.e.*, Reference Market-makers) in the relevant market selected by the party determining a Market Quotation. Unlike the 1987 Agreement, which only provided for Market Quotations in respect of single Terminated Transactions, under the 1992 Agreements the Market Quotation provided by Reference Market-makers can be for one or more Terminated Transactions. Therefore, a quotation may now be obtained for an entire portfolio of Terminated Transactions, a group of Terminated Transactions or one Terminated Transaction. The Market Quotation provided by the Reference Market-makers will be for the replacement cost of the relevant Terminated Transaction(s). If fewer than three quotations are provided (*i.e.*, a Market Quotation cannot be determined) or a Market Quotation would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result, Loss will apply in respect of the relevant Terminated Transaction or group of Terminated Transactions. In a significant change from the 1987 Agreement the definition of “Market Quotation” acknowledges the practical difficulties that may arise in obtaining quotations from Reference Market-makers on the relevant Early Termination Date and, accordingly, provides that a party making the determination of Market Quotation may request quotations “on or as soon

as reasonably practicable after the relevant Early Termination Date”. Parties should be careful in utilizing this additional flexibility in Market Quotation, however, because any abuse of this flexibility could undermine its enforceability. The definition of “Market Quotation” has also been modified from the 1987 Agreement to account for quotations obtained in respect of fully-paid Transactions (*see* the parenthetical in lines 7-9 of the definition of “Market Quotation”) in a manner consistent with paragraph (3) of the Caps Addenda and paragraph (4) of the Option Addenda. *See* Section I.A.4. above. Finally, as was the case in the 1987 Agreement, in Section 6(e)(iv) the parties agree that, if Market Quotation applies, an amount recoverable on termination determined based upon Market Quotation is “a reasonable pre-estimate of loss and not a penalty”.²³

b. Loss. Loss, which is a general indemnification provision, is a payment measure in which a party reasonably determines in good faith its total losses (expressed as a positive number) and gains (expressed as a negative number) in connection with either an entire 1992 Agreement, a Terminated Transaction or a group of Terminated Transactions. As in the case of Market Quotation, the 1987 Agreement had only provided for a determination of Loss in respect of individual Terminated Transactions. The definition of “Loss” has also been expanded from the 1987 Agreement to provide that a party making a determination of its total losses and costs may include in its calculation certain “breakage costs”. Those amounts included in the definition of “Unpaid Amounts” are now encompassed in the definition of “Loss” and are not considered separately except where Loss becomes relevant as a fallback for Market Quotation. The definition of “Loss” does not include a party’s expenses referenced under Section 11 of the Multicurrency Master (Section 9 of the Local Currency Master). As in the case of the definition of “Market Quotation”, the definition of “Loss” now acknowledges the practical difficulties of determining Loss as of the Early Termination Date and, accordingly, permits a party to determine its Loss as of the earliest date reasonably practicable after the Early Termination Date. Again, as in the case of Market Quotation, parties should be careful in utilizing this additional flexibility in Loss, because any abuse of this flexibility could undermine its enforceability. Finally, in language added to the 1987 formulation, the definition of “Loss” acknowledges that a party may determine its Loss based upon quotations obtained from leading dealers in the relevant markets in a manner similar to Market

²³ Some market participants have advocated a change to Market Quotation to allow parties to seek quotations from only one Reference Market-maker to allow for the fact that, in certain product markets, less than four quotations may be sufficient to obtain a commercially reasonable result. As part of this position, these same market participants advocate a modification to Market Quotation to account for the fact that, in certain product markets (*e.g.*, the market for foreign exchange transactions), quotations may be provided on a future value basis and thus must be discounted to present value. These market participants, however, acknowledge that electing Loss would permit them the requisite flexibility they do not find in Market Quotation.

Quotation (although not necessarily in accordance with the technical requirements set forth in Market Quotation).

c. ***Calculations of Early Termination Payments.*** Under the 1992 Agreements a payment on early termination can be viewed as consisting of the following three components: (i) payments for obligations which became payable or deliverable but which were not paid or delivered prior to the Early Termination Date, (ii) payments for obligations which would have been payable or deliverable prior to the Early Termination Date if all conditions to payment or delivery (such as the absence of any Event of Default) had been satisfied or if the Early Termination Date had not been designated and (iii) payments for the future value of the Terminated Transactions or the Agreement, as the case may be. The amounts referred to in clauses (i) and (ii) are included in the definition of “Unpaid Amounts”.²⁴ Amounts referred to in clause (iii) are included in the definition of “Market Quotation”. Amounts referred to in clauses (i)-(iii) are encompassed within the definition of “Loss”. Unpaid Amounts are still separately determined under the 1992 Agreements when determining payments on termination under Market Quotation. In the case of Loss, Unpaid Amounts are no longer separately determined under the 1992 Agreements but are part of the calculation by a party of its Loss (unless Loss is being determined in the case where a Market Quotation cannot be determined or would not produce a commercially reasonable result). Depending on whether Market Quotation or Loss applies, whether the First Method or the Second Method applies and whether an Event of Default or Termination Event occurs (and, if a Termination Event occurs, whether there is one Affected Party or two Affected Parties), calculations of payments on early termination will be made as follows:²⁵

(i) ***First Method, Market Quotation and Event of Default.*** The Market Quotations for each Terminated Transaction and group of Terminated Transactions, whether positive or negative numbers, are added together. The net amount, whether a positive or negative number, is then added to the Unpaid Amounts due to the Non-defaulting Party. The Unpaid Amounts due to the Defaulting Party are then subtracted from this total. The net amount, if a positive number, is paid by the Defaulting Party. In the case where the net amount is a negative number, no payment is made. For each Terminated Transaction or group of Terminated Transactions for which a Market Quotation cannot be determined or would not produce a commercially reasonable result, a party’s Loss for such Transaction(s) is included as part of the calculation in which the Market Quotations are added together and such Loss is calculated excluding any Unpaid Amounts. The Non-defaulting Party is the party that makes the relevant determinations in this case.

²⁴ For a discussion of the definition of “Unpaid Amounts” and transactions that settle by physical delivery, *see* Section VI below.

²⁵ Section 6(d)(i) provides requirements concerning a statement setting forth calculations with respect to a payment determination.

(ii) **First Method, Loss and Event of Default.** If the amount of a Non-defaulting Party's Loss is a positive number, the Defaulting Party pays that amount to the Non-defaulting Party, and, if that amount is a negative number, no payment is made. The Non-defaulting Party is the party that makes the relevant determinations in this case.

(iii) **Second Method, Market Quotation and Event of Default.** The Market Quotations for each Terminated Transaction and group of Terminated Transactions, whether positive or negative numbers, are added together. The net amount, whether a positive or negative number, is then added to the Unpaid Amounts due to the Non-defaulting Party. The Unpaid Amounts due to the Defaulting Party are then subtracted from this total. The net amount, if a positive number, is paid by the Defaulting Party. In the case where the net amount is a negative number, the absolute value of that amount is paid by the Non-defaulting Party. For each Terminated Transaction or group of Terminated Transactions for which a Market Quotation cannot be determined or would not produce a commercially reasonable result, a party's Loss for such Transaction(s) is included as part of the calculation in which the Market Quotations are added together and such Loss is calculated excluding any Unpaid Amounts. The Non-defaulting Party is the party that makes the relevant determinations in this case.

(iv) **Second Method, Loss and Event of Default.** If the amount of a Non-defaulting Party's Loss is a positive number, the Defaulting Party pays that amount to the Non-defaulting Party, and, if that amount is a negative number, the Non-defaulting Party pays the absolute value of that amount to the Defaulting Party. The Non-defaulting Party is the party that makes the relevant determinations in this case.

(v) **Market Quotation and Termination Event (One Affected Party).** The amount payable is determined on the same basis as subsection (iii) above, except that the party that is not the Affected Party makes the relevant determinations.

(vi) **Loss and Termination Event (One Affected Party).** The amount payable is determined on the same basis as subsection (iv) above (including if fewer than all Transactions are being terminated), except that the party that is not the Affected Party makes the relevant determinations.

(vii) **Market Quotation and Termination Event (Two Affected Parties).** The Market Quotations for each Terminated Transaction and group of Terminated Transactions, whether positive or negative numbers, are added together by each party (as determined by each party) so that two net amounts are determined. The parties then determine an amount equal to one-half of the difference between the higher net amount and the lower net amount. This amount is then added to the Unpaid Amounts payable to the party with the higher net amount. Unpaid Amounts due to the other party are then subtracted from this total. If the amount is a positive number, the party with the lower net amount pays that amount to the

other party. If the amount is a negative number, the party with the higher net amount pays the absolute value of that amount to the other party. For each Terminated Transaction or group of Terminated Transactions for which a Market Quotation cannot be determined or would not produce a commercially reasonable result, a party's Loss (as determined by the relevant party) for such Transaction(s) is included as part of the calculation in which the Market Quotations are added together and such Loss is calculated excluding any Unpaid Amounts.

The following is an example of how the actual calculations might look in a particular situation:

Settlement Amount for X = 90
Settlement Amount for Y = -100
Unpaid Amounts = 0

Difference between Settlement Amounts = 190
One-half of such difference = 95
Result = Y pays 95 to X.

(viii) Loss and Termination Event (Two Affected Parties). Each party determines its Loss for the Agreement or all Terminated Transactions if fewer than all Transactions are being terminated so that two amounts are determined. An amount is then payable equal to one-half of the difference between the Loss of the party with the higher Loss and the Loss of the party with the lower Loss. If the amount is a positive number, the party with the lower Loss pays that amount to the other party. If the amount is a negative number, the party with the higher Loss pays the absolute value of that amount to the other party.

The following is an example of how the actual calculations might look in a particular situation:

Loss for X = 90
Loss for Y = -100

Difference between Losses = 190
One-half of such difference = 95
Result = Y pays 95 to X.

d. Currency of Termination Payment. Under the Multicurrency Master, a payment on early termination will be made in the Termination Currency. The "Termination Currency" must be specified in Part 1(g) of the Schedule to the Multicurrency Master and, if not specified, will be the U.S. dollar. If the currency specified is not freely available, the Termination Currency will be the U.S. dollar. In calculating amounts payable, any Market Quotation, Loss or Unpaid Amount is converted to a "Termination Currency Equivalent" on the basis of an exchange rate determined in accordance with the Multicurrency Master by a foreign exchange agent

(selected in accordance with the Multicurrency Master). The definition of “Termination Currency Equivalent” has been modified from the 1987 Agreement to account for the possibility discussed above that a Market Quotation or Loss may be determined as of a date later than the relevant Early Termination Date.

e. *Bankruptcy Adjustment.* Section 6(e)(iii) provides that the amount due on early termination will be adjusted in a circumstance where an Early Termination Date is deemed to have occurred as a result of the operation of Automatic Early Termination on a date prior to a date on which a payment or delivery was nevertheless made (for instance, where a party was unaware of the deemed early termination).²⁶

f. *Applicable Rate-Payment Date/Unpaid Amounts.* Under Section 6(d)(ii), an amount calculated as being due in respect of an Early Termination Date is payable either on the day that notice of the amount payable is effective (in the case of an Event of Default) or two Local Business Days after effectiveness of notice (in the case of a Termination Event). That amount must be paid by the relevant party with interest from the relevant Early Termination Date to, but excluding, the date the amount is paid at a specified rate determined based upon the definition of “Applicable Rate”. A Defaulting Party will pay interest on such an amount at the Default Rate (*i.e.*, payee’s cost of funds plus 1% per annum) for the period from (and including) the Early Termination Date to (but excluding) the date such amount is paid. A Non-defaulting Party will pay interest on such an amount at the Non-default Rate (*i.e.*, Non-defaulting Party’s cost of funds) for the period from (and including) the Early Termination Date to (but excluding) the date that is two Local Business Days after the date notice of payment is effective. For the period from (and including) such date to (but excluding) the date such amount is paid, a Non-defaulting Party will pay interest on such an amount at the Default Rate. In the case of an amount calculated under Section 6(e) as a result of a Termination Event, interest will be paid at the Termination Rate (*i.e.*, arithmetic mean of the cost of funds for each party) by the party owing the amount for the period from (and including) the Early Termination Date to (but excluding) the date that is two Local Business Days after the date notice of payment is effective. For the period from (and including) such date to (but excluding) the date such amount is paid, such party will pay interest at the Default Rate. In the 1987 Agreement, interest on the amount due in respect of an Early Termination Date would accrue from (and including) the Early Termination Date to (but excluding) the relevant due date at the Default Rate (*i.e.*, payee’s cost of funds plus 1% per annum) in the case of an Event of Default or at the Default Rate minus 1% per annum in the case of a Termination Event. In both cases from and after such due date, interest would accrue at the Default Rate as set forth in Section 2(e) of the 1987 Agreement (*i.e.*, payee’s cost of funds plus 1% per annum).

The interest rate applied to Unpaid Amounts is also determined based on the definition of “Applicable Rate”. The definition of “Unpaid Amounts” requires that

²⁶ Section 6(e)(iv) is discussed at Section II.G.4.a. above.

interest be paid on any Unpaid Amount from (and including) the date such amounts or obligations were or would have been required to be paid or performed to (but excluding) the Early Termination Date. Under the definition of “Applicable Rate”, a Non-defaulting Party would pay such interest for such period at the Non-default Rate. A Defaulting Party would pay such interest for such period at the Default Rate. Parties paying interest on an Unpaid Amount as a result of a Termination Event would pay interest for such period at the Termination Rate. In the 1987 Agreement, interest on Unpaid Amounts for such period would be calculated at the Default Rate (*i.e.*, payee’s cost of funds plus 1% per annum) in the case of a Defaulting Party and an Event of Default, the arithmetic mean of the cost of funds for each party in the case of a Termination Event and the cost of funds to the Non-defaulting Party in the case of a Non-defaulting Party and an Event of Default.

H. Section 7—Transfer

Section 7 contains a general prohibition on the transfer of a 1992 Agreement and rights and obligations under a 1992 Agreement without prior written consent. Section 7 provides two exceptions to this general prohibition. First, if a transfer of a 1992 Agreement results from a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of a party’s assets to, another entity, that transfer is not prohibited by Section 7. A clarifying parenthetical has been added in the 1992 Agreements to this exception so as to indicate that other limitations in the 1992 Agreements with respect to mergers and similar transactions are in no way prejudiced by this exception. Thus, if a particular merger would give rise to an Event of Default under the provisions concerning merger without assumption (*see* Section II.F.2.h. above), that Event of Default will not be excused by virtue of Section 7(a). Second, if a party transfers its interest in any amount payable to it from a Defaulting Party under Section 6(e), that transfer is not prohibited by Section 7. This second exception was added to allow for certain transactions in the marketplace in which a party transfers amounts payable to it from a Defaulting Party under Section 6(e) as part of another financing transaction. Section 7 has also been modified to make clear that granting a security interest in respect of a 1992 Agreement constitutes a transfer for purposes of Section 7.

PARTIES ASKED TO CONSENT TO A TRANSFER, OR AN AMENDMENT TO SECTION 7 TO ALLOW A TRANSFER, SHOULD CAREFULLY CONSIDER WITHHOLDING TAX IMPLICATIONS, INCLUDING THE POSSIBLE NEED UPON A TRANSFER FOR REVISIONS IN THE TAX REPRESENTATIONS MADE IN PART 2 OF THE SCHEDULE TO THE MULTICURRENCY MASTER. *SEE* SECTION IV.A. BELOW.

I. Section 8 — Contractual Currency²⁷

1. *Payments in Contractual Currency.* Section 8(a) of the Multicurrency Master provides that all payments will be made in the currency specified by the parties for that payment. Payment made in a non-specified currency will not discharge any payment obligation unless payment in the non-specified currency allows a payee to convert into the full amount payable in the specified currency. The party required to make payment must compensate for any shortfall existing after conversion, and the party receiving payment will refund any excess after conversion.

2. *Judgments.* Section 8(b) of the Multicurrency Master provides that any amounts recovered as a result of a judicial proceeding in a non-specified currency with respect to certain matters relating to a Multicurrency Master may be converted into the specified currency by the party seeking recovery. The party seeking recovery will be entitled to any shortfall existing after conversion and will be required to refund any excess received.

3. *Separate Indemnities.* Section 8(c) of the Multicurrency Master describes the provisions in Section 8(a) and (b) as separate indemnities to avoid the risk that a judicial body would treat a claim based on either indemnity as having been merged in an initial judgment.

J. Section 9 — Miscellaneous²⁸

As discussed in Section IX below, Section 9 of the Multicurrency Master (Section 8 of the Local Currency Master) addresses certain relevant changes in operational technologies since the publication of the 1987 Agreement. Section 9(b) of the Multicurrency Master (Section 8(b) of the Local Currency Master) now provides that amendments, modifications or waivers may be effected in a writing evidenced by facsimile transmission or confirmed by an exchange of electronic messages on an electronic messaging system. Similarly, Section 9(e)(i) of the Multicurrency Master (Section 8(e)(i) of the Local Currency Master) recognizes that parties may execute and deliver in counterparts, including by facsimile transmission, a 1992 Agreement and any related amendment, modification or waiver.

Section 9(e)(ii) of the Multicurrency Master (Section 8(e)(ii) of the Local Currency Master) acknowledges that parties often first agree to the terms of a Transaction orally. Parties relying on this provision of Section 9(e)(ii) of the Multicurrency Master (Section 8(e)(ii) of the Local Currency Master) should consider the relevance of any applicable statute of frauds or other similar laws; this provision does not supersede the requirements of any such statute or law. This Section also now provides that a

²⁷ This Section is not included in the Local Currency Master. For a discussion of the differences between the Local Currency Master and the Multicurrency Master, *see* Section I.A.1. above.

²⁸ The corresponding section in the Local Currency Master is Section 8.

Confirmation may be entered into through the use of a facsimile machine or electronic messaging system.

For a discussion of issues with respect to Section 9 of the Multicurrency Master (Section 8 of the Local Currency Master) and the applicable New York statute of frauds, *see* Section XI.B. below. For a discussion of issues with respect to Section 9 of the Multicurrency Master (Section 8 of the Local Currency Master) and the required form of contract under English law, *see* Section XII.A. below.

K. Section 10 — Offices; Multibranch Parties²⁹

An optional representation is included in Section 10(a) of the Multicurrency Master and provides that a party entering into a Transaction through an Office other than its head or home office is obligated to the other party to the same extent as if it had entered into a Transaction through its head or home office. The party making this representation is thus confirming to the other party that such other party will have recourse to the head or home office of the representing party in the event, for example, of a default under a Multicurrency Master. This representation, if specified in Part 4(c) of the Schedule to the Multicurrency Master as applying, relates to all parties, not just Multibranch Parties. The representation is also repeated by a party on each date on which a Transaction is entered into. This Section has changed from the corresponding section of the 1987 Agreement to clarify that the representation in Section 10(a) applies to all parties, not just Multibranch Parties, and is now optional.

Section 10(b) of the Multicurrency Master precludes a party from changing the Office through which it makes and receives payments or deliveries without the prior written consent of the other party so as to avoid, among other things, possible adverse tax consequences for the non-transferring party. Booking offices may also be relevant to the application of the payment netting provisions in Section 2(c). *See* Section II.C.3. above. If a party intends to make and receive payments under different Transactions through different Offices, it should be specified in Part 4(d) of the Schedule to the Multicurrency Master as a Multibranch Party as contemplated in Section 10(c) of the Multicurrency Master and the addresses of all such Offices should be listed in Part 4(d) of the Schedule to the Multicurrency Master. The relevant Office for a particular Transaction should also be specified in the Confirmation. For a discussion of certain tax-related issues concerning Multibranch Parties, *see* Section IV.A.2.d. below.

²⁹ This Section is not included in the Local Currency Master. For a discussion of the differences between the Local Currency Master and the Multicurrency Master, *see* Section I.A. 1. above.

L. Section 11 — Expenses³⁰

Section 11 of the Multicurrency Master (Section 9 of the Local Currency Master) requires a Defaulting Party to pay certain reasonable out-of-pocket expenses incurred by the other party in connection with enforcement and protection of its rights under a 1992 Agreement or any Credit Support Document to which the Defaulting Party is a party. The inclusion of expenses relating to such Credit Support Document represents a modification from the 1987 Agreement. Section 11 of the Multicurrency Master (Section 9 of the Local Currency Master), however, does not specifically provide for the payment of expenses arising from the enforcement and protection of rights under any other Credit Support Document, Market participants should therefore ensure that, if desired, any such Credit Support Document includes an appropriate indemnity for expenses.

M. Section 12 — Notices³¹

Section 12 of the Multicurrency Master (Section 10 of the Local Currency Master), which sets forth the means by which any notice or other communication in connection with a 1992 Agreement may be given, addresses certain relevant operational and technological changes since publication of the 1987 Agreement (*see also* Section IX below). This Section has been modified so as to contemplate notices or other communications by facsimile transmission or electronic messaging system for certain purposes. Notices or other communications under Section 5 or 6 may not be given by facsimile transmission or electronic messaging system. Under Section 12 of the Multicurrency Master (Section 10 of the Local Currency Master) a permitted notice or other communication sent by facsimile machine is effective on the date a responsible employee receives the facsimile transmission in legible form. The sender bears the burden of proving receipt and, as set forth in Section 12 of the Multicurrency Master (Section 10 of the Local Currency Master), will not effectively discharge that burden with only a transmission report generated by its own facsimile machine because of concerns about the reliability of such a report. A permitted electronic message is effective on receipt. Relevant addresses, numbers or electronic messaging details must be specified in Part 4(a) of the Schedule to the Multicurrency Master (Part 3(a) of the Schedule to the Local Currency Master).

N. Section 13 — Governing Law and Jurisdiction³²

1. Governing Law. In accordance with Section 13(a) of the Multicurrency Master (Section 11(a) of the Local Currency Master), parties must specify the governing law for a 1992 Agreement in Part 4(h) of the Schedule to the Multicurrency Master (Part 3(e) of the Schedule to the Local Currency Master). The 1992 Agreements contemplate a choice between English law and the laws of the State of New York. Parties who wish to elect that

³⁰ The corresponding section in the Local Currency Master is Section 9.

³¹ The corresponding section in the Local Currency Master is Section 10.

³² The corresponding section in the Local Currency Master is Section 11.

a body of law other than New York or English law will apply should carefully consider such an election with their legal advisers. If parties wish to elect that the governing law will be the law of a State or Territory in the Commonwealth of Australia, they may also wish to consult the 1992 AFMA/ISDA Standard Documentation Guide available from the Australian Financial Markets Association in Sydney, Australia (ph. no. (02) 299-4411; fax. no. (02) 299-4060).

2. Jurisdiction; Service of Process; Waiver of Immunities. Section 13(b) of the Multicurrency Master (Section 11(b) of the Local Currency Master) provides that the parties submit to the jurisdiction of the English courts if English law applies and to the jurisdiction of the courts of the State of New York and the U.S. District Court located in the Borough of Manhattan in New York if New York law applies. A waiver of objection to venue is also provided. The submission to the jurisdiction of the New York courts is non-exclusive. The submission to jurisdiction of the English courts is exclusive so far as courts of the Contracting States of the European Economic Community are concerned and non-exclusive as to other courts. This is in response to the provisions of the English Civil Jurisdiction and Judgments Act 1982. Under Section 13(c) of the Multicurrency Master³³ each party also consents to service of process in the manner provided for notices in Section 12 of the Multicurrency Master. Market participants should note, however, that certain means of providing notice in Section 12 of the Multicurrency Master may not be practical for serving process and may not be a valid means of serving process in the relevant jurisdiction despite the consent by the parties set forth in Section 13(c) of the Multicurrency Master (*e.g.*, telex or electronic messaging system). Section 13(c) of the Multicurrency Master also provides that parties may appoint a Process Agent to receive service and, if so, such Process Agent should be specified in Part 4(b) of the Schedule to the Multicurrency Master for the relevant party. Section 13(d) of the Multicurrency Master (Section 11(c) of the Local Currency Master) provides for a waiver of immunities by the parties to the fullest extent permitted by applicable law.³⁴

³³ This Section is not included in the Local Currency Master. For a discussion of the differences between the Local Currency Master and the Multicurrency Master, *see* Section I.A.1. above.

³⁴ Some market participants also add a provision with respect to a waiver of the right to jury trial. An example of such a provision is as follows:

“Waiver of Jury Trial. Each party waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect of any suit, action or proceeding relating to this Agreement or any Credit Support Document. Each party (i) certifies that no representative, agent or attorney of the other party or any Credit Support Provider has represented, expressly or otherwise, that such other party would not, in the event of such a suit, action or proceeding, seek to enforce the foregoing waiver and (ii) acknowledges that it and the other party have been induced to enter into this Agreement and provide for any Credit Support Document, as applicable, by, among other things, the mutual waivers and certifications in this Section.”

O. Signature Block

The name of each party and the names and titles of signatories must be filled in on the signature page along with the dates of signing by each signatory. Additional signatures may be added on that page as necessary. For example, parties may want each Office that a Multibranch Party will act out of to execute a 1992 Agreement. The main text of the 1992 Agreements must be signed; however, the Schedule may, but need not, be signed. The signature block has been modified from the 1987 Agreement to state that the parties signed the document on a particular date with effect from the date specified on the first page of a 1992 Agreement to make clear both the date a 1992 Agreement was signed and the date the parties intend that 1992 Agreement to be effective, which dates may be different.

P. U.S. Municipal Counterparty Schedule

As discussed in Sections I.A.2. and I.A.3.e. above, ISDA has produced a standard document for use with the Local Currency Master in connection with transactions with U.S. municipal counterparties and other U.S. governmental counterparties. This standard document, the U.S. Municipal Counterparty Schedule, modifies certain provisions of the Local Currency Master and contains certain other customized provisions for documentation of transactions with these types of counterparties. The following is a discussion of those modifications and customized provisions.

1. *Events of Default.* The provisions in Part 1(h)(i) of the U.S. Municipal Counterparty Schedule modify the Bankruptcy Event of Default in the Local Currency Master to cover events that could affect a U.S. government entity, a Credit Support Provider of a U.S. government entity or any Specified Entity of a U.S. government entity in the case where such government entity, Credit Support Provider or Specified Entity is in a state of financial distress. The provisions in Part 1(h)(ii) of the U.S. Municipal Counterparty Schedule also modify the Merger Without Assumption Event of Default in the Local Currency Master to address situations in which an organization, board, commission, authority, agency or body succeeds to the principal functions, powers or duties of a U.S. government entity or Credit Support Provider of a U.S. government entity.

2. *Credit Event Upon Merger.* Part 1(i) of the U.S. Municipal Counterparty Schedule modifies Credit Event Upon Merger in the Local Currency Master so as to address situations in which an organization, board, commission, authority, agency or body succeeds to the principal functions, powers or duties granted to a U.S. government entity, any Credit Support Provider of a U.S. government entity or any Specified Entity of a U.S. government entity.

3. *Incipient Illegality.* Part 4(a) of the U.S. Municipal Counterparty Schedule modifies Section 2(a)(iii) of the Local Currency Master to make any payment or delivery under Section 2(a)(i) of the Local Currency Master subject to an additional condition precedent, specifically that no “Incipient Illegality” has occurred and is continuing, because of the marked sensitivity to the doctrine of ultra vires in the municipal and government swaps market after swap transactions involving the London Borough of Hammersmith and

Fulham and other U.K. local authorities were held to be ultra vires. The definition of “Incipient Illegality” in the U.S. Municipal Counterparty Schedule addresses certain events that could occur prior to the occurrence of an Illegality. Parties may find that the definition of “Incipient Illegality” requires modification depending on the circumstances or as market practice with respect to this condition precedent develops. Part 4(b)(iii) of the U.S. Municipal Counterparty Schedule modifies Section 3(b) of the Local Currency Master to add a related representation by the U.S. government entity concerning Incipient Illegality. Also, Part 4(c)(ii) of the U.S. Municipal Counterparty Schedule adds an agreement to Section 4 of the Local Currency Master requiring that a U.S. government entity notify its counterparty upon it becoming aware of the occurrence of an Incipient Illegality.

4. Representations. Part 4(b) of the U.S. Municipal Counterparty Schedule modifies Section 3 to provide that the representations contained in Section 3(a) of the Local Currency Master are made at all times (and not just on the date of the relevant 1992 Agreement and the date of each Transaction under it, as would otherwise be the case under the 1992 Agreements). This modification is meant to provide added protection concerning, among other things, the authority of a governmental entity to enter into and perform under a 1992 Agreement. In Section 3(a)(ii) it adds a representation that all necessary actions and determinations and findings have been made by the parties, which representation could be helpful or necessary to demonstrate the requisite authority in transactions with certain U.S. government entities. The U.S. Municipal Counterparty Schedule also adds a representation applicable only to the governmental entity under the Local Currency Master to the effect that a 1992 Agreement and each Transaction thereunder are for purposes of managing such entity’s borrowings and investments and “not for purposes of speculation”. This representation was included because, in many U.S. jurisdictions, this is an express or implied requirement in order for a government entity to be authorized to enter into a 1992 Agreement or Transaction thereunder. A representation has also been added to Section 3 of the Local Currency Master to the effect that neither party is entitled to claim certain immunities.

5. Covered Indenture. The U.S. Municipal Counterparty Schedule in Part 4(c)(ii) adds an agreement to the Local Currency Master designed to provide a party to a 1992 Agreement with the benefits of provisions such as financial covenants contained in, for example, an indenture to which a government entity is a party. This new agreement restricts the ability of amendments, supplements or modifications to such an indenture to affect the contractual relationship between a U.S. government entity and its counterparty by requiring the prior written consent of the counterparty before any such amendment, supplement or modification affects the scope of a 1992 Agreement. In addition, this new agreement provides that, if such an indenture ceases to be in effect prior to the termination of a 1992 Agreement, the benefits of the provisions contained in that indenture will continue for purposes of a 1992 Agreement until all obligations under such 1992 Agreement and any Credit Support Document have been fully satisfied. As is noted in the U.S. Municipal Counterparty Schedule, this agreement may require modification or deletion depending on the circumstances.

6. Jurisdiction. Part 4(d) of the U.S. Municipal Counterparty Schedule modifies Section 11(b) of the Local Currency Master to provide that the parties submit to the non-exclusive jurisdiction of certain courts located in the State of New York as well as the courts of the state in which the U.S. government entity or the principal executive offices of its counterparty are located and the United States District Court with jurisdiction over such locations. This modification to Section 11(b) of the Local Currency Master was made because many U.S. government entities would likely be concerned about consenting only to the jurisdiction of courts located in New York. Part 4(d) also removes references from Section 11(b) of the Local Currency Master to matters relating to English law.

7. Other Considerations. The U.S. Municipal Counterparty Schedule attempts to standardize certain issues relating to documentation but does not address all issues that could be raised by the varied transaction structures that exist in the municipal and government swaps market or by the number of jurisdictions under which a U.S. municipal counterparty or other U.S. government counterparty may exist.³⁵ **PARTIES SHOULD THEREFORE CONSULT WITH THEIR LEGAL ADVISERS TO DETERMINE WHETHER OTHER PROVISIONS SHOULD BE INCLUDED IN THE U.S. MUNICIPAL COUNTERPARTY SCHEDULE.**

Q. Errata

Two errors have been identified in the first printing of the Local Currency Master. First, in the initial line of Section 6(b)(ii), the cross-reference should have been to Section 5(b)(i)(1). Second, lines three-four of Section 5(a)(ii) should not have included “or any agreement or obligation under Section 4(a)”. ISDA has identified these errors, made the necessary corrections and produced a second printing of the Local Currency Master. This second printing will be identified by a notation in the bottom right-hand corner of each page of the Local Currency Master indicating that it is a second printing. Accordingly, parties should use the version of the Local Currency Master so identified.

III. CONFIRMATIONS PRIOR TO EXECUTION OF A 1992 AGREEMENT

The forms of confirmations provided in the definitional booklets are designed to be used where the parties have already entered into a 1992 Agreement. These forms of

³⁵ For example, a party may engage in a swap transaction with a government counterparty that is a revenue bond issuer (*i.e.*, a revenue stream from one or more specified projects has been pledged to the payment of debt obligations). In such a case, it will likely be important to that party to determine whether payments under a 1992 Agreement constitute either operating expenses (which often, but not always, have a first priority on such a revenue stream), debt service (which is entitled to the priority accorded principal and interest payments payable from, and probably secured by, such a revenue stream) or other expenses (which do not fall into the category of operating expenses or debt service, in which case they may be subordinated to payments of operating expenses and debt service).

confirmations may also be used, with some revisions, where the parties have not yet entered into a 1992 Agreement. For example, in the case of an interest rate swap transaction initially to be documented under the relevant form of confirmation attached as an exhibit to the 1991 Definitions, the following changes may be made:

(i) Replace paragraph No. 1 with the following paragraph:

“This Confirmation evidences a complete binding agreement between you and us as to the terms of the Swap Transaction to which this Confirmation relates. In addition, you and we agree to use [our best] [all reasonable] [our reasonable] efforts promptly to negotiate, execute and deliver a Master Agreement [(Multicurrency—Cross Border)] [(Local Currency—Single Jurisdiction)] in the form published by the International Swap Dealers Association, Inc. (‘ISDA’), with such modifications as you and we shall in good faith agree. Upon the execution by you and us of such a Master Agreement (the ‘Agreement’), this Confirmation will supplement, form a part of, and be subject to the Agreement. All provisions contained or incorporated by reference in the Agreement upon its execution shall govern this Confirmation except as expressly modified below.”

(ii) Set forth each party’s obligations to make payments. For example, this paragraph would set forth the essential provisions contained in Section 2 of the 1992 Agreements as follows:

“Each party will make each payment specified in this Confirmation to be made by it. Such payments will be made on the due date for value on that date in the place of the account specified below, in freely transferable funds and in the manner customary for payments in the required currency. If on any date amounts would otherwise be payable in the same currency by each party to the other, then, on such date, each party’s obligation to make payment of any such amount will be automatically satisfied and discharged and, if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, replaced by an obligation upon the party by whom the larger aggregate amount would have been payable to pay to the other party the excess of the larger aggregate amount over the smaller aggregate amount.”

(iii) Specify the governing law of the Confirmation.

In addition, if parties want the benefit of certain provisions under the 1992 Agreements during the period from execution of the confirmation until execution of a 1992 Agreement, all or a portion of the relevant 1992 Agreement could be referenced and made a part of the agreement between the parties to the confirmation. The following, which would be added to the paragraph set forth in subparagraph (i) above, could be a helpful step to achieving that objective:

“Prior to execution of the Agreement the provisions [of] [specify] Section[s]] of the Master Agreement [(Multicurrency—Cross Border)] [(Local Currency—Single

Jurisdiction], in the form published by the International Swap Dealers Association, Inc., are deemed to be incorporated by reference herein and form a part of this Confirmation. In the event of any inconsistency between those provisions and this Confirmation, this Confirmation will govern.”

Although it probably is not necessary to include any other provisions in the confirmation in order to have a binding agreement, the parties may wish to consider including additional provisions that would otherwise be in a 1992 Agreement where such provisions are important to the business terms of the Transaction (*e.g.*, events of default, representations and agreements, obligation to pay without withholding taxes).

IV. TAX PROVISIONS IN THE MULTICURRENCY MASTER

A. Withholding Taxes

1. General Approach to Withholding Taxes.

At the most general level, the tax-related provisions in the Multicurrency Master serve three functions.

First, through the use of payer tax representations and payee tax representations under Sections 3(e) and (f) of the Multicurrency Master and Part 2 of the Schedule, the parties establish the necessary legal and factual foundation to conclude that no withholding tax will apply to payments made under a Transaction pursuant to the law as in effect on the date the parties enter into the Transaction. Each party makes the payer tax representation in Part 2(a) of the Schedule, stating generally that it will not be required by any Relevant Jurisdiction to withhold tax from payments it makes, in reliance on any payee tax representations or tax agreements it has requested from the other party. (Generally, a Relevant Jurisdiction of a payer is one in which the payer is resident or through which it is acting for purposes of the Transaction.)

Second, through the tax gross-up provisions in Section 2(d)(i)(4) of the Multicurrency Master and the definition of “Indemnifiable Tax” in Section 14 of the Multicurrency Master, if any withholding tax does apply to a payment, the financial burden of that withholding tax is allocated to either the payer or the payee of that payment. Under the gross-up requirement of Section 2(d)(i)(4) the payer generally bears the burden of the withholding tax where the withholding tax is an Indemnifiable Tax. Where the tax is a non-Indemnifiable Tax (*i.e.*, a tax imposed by reason of a voluntary connection between the payee and the taxing jurisdiction), the payee will generally bear the burden of the tax.³⁶

³⁶ For example, if a French payee acting through its London Office receives a payment from a Japanese payer acting through its New York Office, the French payee generally would be grossed-up by the Japanese payer for a tax imposed on that payment by Japan or the U.S. (because that tax *is not* imposed because of a connection between the French payee and the taxing jurisdiction, and thus is an Indemnifiable Tax) and would not

There are two exceptions to the payer's obligation under Section 2(d)(i)(4) to gross-up for an Indemnifiable Tax that it is required to withhold. First, the payer is not required to gross-up for an Indemnifiable Tax imposed because the payee has made a payee tax representation that was untrue when made or later became untrue (unless the representation became untrue as a result of a Change in Tax Law or similar legal development). *See* Section 2(d)(i)(4)(B). Second, no gross-up is required for an Indemnifiable Tax imposed because the payee has failed to comply with certain tax-related agreements contained in the Multicurrency Master. *See* Section 2(d)(i)(4)(A). The underlying rationale for those exceptions is that the payer relies on the payee's representations and agreements in deciding to enter into a Transaction and assuming the gross-up obligations of Section 2(d)(i)(4) and should not be required to bear the cost of grossing-up a tax that results from a breach by the payee of such a representation or agreement.

It should be noted that the allocation to the payer or the payee of the financial responsibility for a withholding tax generally follows the structure of the tax representations made by the parties. The payer generally represents, based on certain representations or agreements of the payee, that the payer will not be required by a Relevant Jurisdiction to withhold taxes from payments it makes. If any such tax is imposed because either the payer was incorrect at the outset or there has been a Change in Tax Law or similar legal development after the outset, the payer is required to gross-up; if any such tax is imposed because the payee has breached a representation or agreement upon which the payer relied in giving its original payer tax representation (unless the breach is attributable to a Change in Tax Law or similar legal development), the payee receives payments net of withholding tax with no gross-up.

Third, if a withholding tax applies to a payment made under a Transaction, the party that bears the financial burden of that tax (the payer if the tax is grossed-up, the payee if it is not grossed-up) may terminate the Transaction, but only if the withholding tax applies by reason of a Change in Tax Law or similar legal development or a merger or similar transaction. *See* Sections 5(b)(ii) and (iii) (Tax Event and Tax Event Upon Merger) and Section 6 (Early Termination) of the Multicurrency Master.

The tax provisions of the Multicurrency Master summarized above are discussed in more detail below. In addition, a chart set forth as Appendix E to this User's Guide illustrates the application of the gross-up and the tax-related termination provisions of the Multicurrency Master.

The Local Currency Master does not contain similar tax provisions. For a discussion of the differences between the Local Currency Master and the Multicurrency Master, *see* Section I.A.1. above.

be grossed-up for a tax imposed by France or the U.K. (because that tax *is* imposed because of a connection between the French payee and the taxing jurisdiction and consequently is not an Indemnifiable Tax).

2. Establishing Absence of Withholding Tax.

a. Payer Tax Representation. Parties generally enter Transactions with the expectation that no withholding tax will be imposed by any jurisdiction on payments made under the Transaction. That expectation is expressed in the payer tax representation in Section 3(e) of the Multicurrency Master and Part 2(a) of the Schedule. Each party normally makes the payer tax representation, stating that it will not be required to withhold “Taxes” on behalf of any Relevant Jurisdiction from payments it makes under a Multicurrency Master. Relevant Jurisdictions are the payer’s “home” jurisdiction, the jurisdiction in which the Office through which the payer is acting in the Transaction is located, the jurisdiction in which the payer executes the relevant Multicurrency Master and the jurisdiction from or through which the payer makes payments. *See* Section 14 of the Multicurrency Master (definition of “Relevant Jurisdiction”). In view of the payer’s voluntary association with those jurisdictions, the payer is assigned the responsibility to ascertain that such jurisdictions will not require the payer to withhold taxes from payments it makes.³⁷

Most jurisdictions do not require taxes to be withheld from payments made under the types of Transactions expected to be most commonly documented under the Multicurrency Master. Certain jurisdictions, however, do impose withholding taxes unless the payee qualifies for an exemption from such taxes (*e.g.*, pursuant to a tax treaty). A payer in the latter type of jurisdiction can therefore make the payer tax representation only if the payer can ascertain that the payee qualifies for such an exemption. In that case the payer should request from the payee evidence of the payee’s qualification for exemption. The required evidence will depend on the law of the jurisdiction imposing the tax, but will most often consist of (i) a representation made by the payee as to its tax status (a payee tax representation) and/or (ii) a particular governmental form completed by the payee (a tax form).

In making the payer tax representation, the payer is entitled to rely on payee tax representations and tax-related agreements of the payee, including an agreement to deliver tax forms, and the accuracy and effectiveness of any document provided by the payee pursuant to a tax-related agreement.

If either party cannot give the payer tax representation because it believes withholding taxes will be imposed on payments it makes under a Transaction, the parties should consider restructuring the Transaction to avoid that built-in tax inefficiency.

³⁷ That responsibility is reinforced by generally requiring the payer to gross-up for any Indemnifiable Tax imposed on payments by a Relevant Jurisdiction. *See* Section 2(d)(i)(4) of the Multicurrency Master and Section IV.A.3. below. It would not be expected that a payer would be required to withhold taxes imposed by a jurisdiction that is not, as to it, a Relevant Jurisdiction.

The payer tax representation does not apply to payments of default interest under Section 2(e) or, under a modification to the 1987 Agreement, to payments of interest upon early termination under Section 6(d)(ii) or 6(e) of the Multicurrency Master.

In addition, the Multicurrency Master modifies the payer tax representation which was in the 1987 Agreement to reflect the agreement of the payee to deliver tax forms in Section 4(a)(iii) of the Multicurrency Master. Under Section 4(a)(iii), the payee may refuse to deliver requested forms if delivery would “materially prejudice the legal or commercial position” of the payee. *See* Section IV.A.2.c. below. The payer tax representation has therefore been amended to provide that it is not breached if withholding is required because the payee fails to deliver requested tax forms, provided that failure is attributable to the “material prejudice” exception contained in Section 4(a)(iii). For a discussion of the gross-up and termination right implications of a payee’s failure to deliver tax forms by reason of the “material prejudice” exception, *see* Section IV.A.3.b.(i) below.

b. Payee Tax Representations. As noted above, certain jurisdictions may impose withholding tax on payments made under a Transaction unless the payee is eligible for an exemption from that tax. A payer in such a jurisdiction will normally require the payee to provide payee tax representations pursuant to Section 3(f) of the Multicurrency Master which will allow the payer to determine that the payee is eligible for such an exemption and thus that the payer may give its payer tax representation. Any payee tax representation should be set forth in Part 2(b) of the Schedule or in a Confirmation.

Payee tax representations are made continuously until the termination of a Multicurrency Master. *See* introductory clause to Section 3 of the Multicurrency Master. Each party is required under Section 4(d) of the Multicurrency Master to give notice of the failure of any payee tax representation made by it to be true.

Part 2(b) of the Schedule to the Multicurrency Master contains several standard-form representations that a payer may find useful to establish that the payee is eligible for an exemption from withholding tax imposed by a Relevant Jurisdiction of the payer. The standard payee tax representations address certain issues that are relevant principally to payers concerned about the application of U.S. or U.K. withholding tax; other representations may be required to be provided by the parties to address other situations.

The standard payee tax representations are as follows:

(i) Treaty. If a Relevant Jurisdiction of the payer provides an exemption from its withholding tax if the payee is eligible for the benefits of a tax treaty, the payer should request from the payee the representation in Part 2(b)(i) of the Schedule, which states that the payee is eligible for the benefits of an income tax treaty (the “Specified Treaty”) between the jurisdiction potentially imposing the tax (the “Specified Jurisdiction”) and another jurisdiction. In general, the

representation means that the payee is a “resident” of the second jurisdiction.³⁸ In addition, the representation states that the payee is not acting through a permanent establishment in the jurisdiction potentially imposing the tax, as most treaties do not provide protection to income attributed to such a permanent establishment.

It should be noted that treaty benefits ordinarily apply only if both (A) the income in question is of a type for which the treaty provides benefits and (B) the recipient of the income is eligible for the protection of the treaty. The representation in Part 2(b)(i) of the Schedule addresses only the eligibility of the payee for protection under the Specified Treaty. The representation made by the payee does not address whether payments made under a Transaction in fact constitute “business profits”, “interest” or any other type of treaty-favored income. As a result, it is the responsibility of the payer to determine whether the type of income to be realized in the Transaction is or is not eligible under the Specified Treaty for an exemption from an otherwise applicable tax imposed by a Relevant Jurisdiction.

(ii) *Effectively Connected.* Under U.S. law, where income received by a non-U.S. party is “effectively connected” to a trade or business carried on in the U.S. by that party (*e.g.*, where income is attributable to a U.S. branch of that party), that income is subject to regular U.S. net income tax but generally is exempt from U.S. withholding tax. A similar rule applies in many other countries as well. Thus, a payee organized outside such a country (the “Specified Jurisdiction”) but acting through an Office in the Specified Jurisdiction may be requested to give the “effectively connected” representation to allow a payer resident in, or acting through an Office in, the Specified Jurisdiction to determine that the Specified Jurisdiction will not require the payer to withhold taxes from payments it makes to the payee.

It should be noted that any net income tax imposed by the Specified Jurisdiction on “effectively connected” income of a payee would not be an Indemnifiable Tax because it is imposed by reason of a connection between the Specified Jurisdiction and the payee, and thus would not be grossed-up. *See* Section IV.A.3. below.

(iii) *Recognized U.K. Bank or Swaps Dealer.* Where a U.K. payer (including a payer acting through an Office in the U.K.) is not a “financial trader”, any payment made by the payer under a currency or interest rate swap may be treated by U.K. Inland Revenue practice as an “annual payment” that will generally be subject to U.K. withholding tax. If the payee is a non-U.K. resident eligible for the benefits of a tax treaty between the payee’s home jurisdiction and the U.K., an

³⁸ Where the payee is acting through an Office located outside its home jurisdiction, residence will normally be determined by reference to the jurisdiction in which the party as a whole is resident. *See* Section IV.A.2.d. below.

exemption from that withholding tax should normally be available under the terms of that treaty and, accordingly, the U.K. payer should request that the payee make the treaty representation in Part 2(b)(i) of the Schedule, as described above.

Where the payee is a U.K. resident, the payment will not be subject to U.K. withholding tax if U.K. Inland Revenue Extra Statutory Concession C17 (“C17”) applies. Under C17, an exemption from the general withholding obligation applies to a payment made under an interest rate or currency swap to a U.K. payee by a U.K. payer that is not a financial trader provided the payee is a recognized U.K. bank or a recognized U.K. swaps dealer (as determined under C17) entering into the Transaction in the ordinary course of its trade. In such a case, the U.K. payer should therefore request the payee tax representation set forth in Part 2(b)(iii) of the Schedule to establish the payee’s eligibility for the exemption of C17 and thereby to permit the payer to make the payer tax representation.

The treatment of payments made by a non-financial trader as annual payments and C17 apply only to payments made under interest rate and currency swaps. The tax consequences (including withholding tax consequences) of payments made by U.K. payers that are not financial traders under other types of Transactions that may be documented using the Multicurrency Master are somewhat unclear. It should be noted that the Inland Revenue has recently issued a Consultative Document on Financial Instruments concerning the tax treatment of such payments generally and is proposing to introduce draft legislation based on that Document. It is currently expected that the Multicurrency Master will be supplemented, if appropriate, to reflect the results of any developments in this regard.

(iv) *Changes from 1987 Agreement.* The Multicurrency Master eliminates the payee tax representation contained in the 1987 Agreement that payments received by the payee relate to the “regular business operations” of the payee and not to an “investment” of the payee. Where a payee made a treaty representation to a payer located in the U.S., the “regular business operations” representation was thought to be useful to establish that payments made under a Transaction were “business profits” or “industrial or commercial profits” within the meaning of the applicable treaty as interpreted by the U.S. Internal Revenue Service, which may distinguish “business profits” from “investment profits”. The representation was eliminated because recent changes in U.S. tax laws have substantially reduced the circumstances in which a U.S. payer will rely on the “business profits” provision of a treaty.

c. *Agreement to Deliver Tax Forms.* Under the laws of a payer’s jurisdiction, a withholding tax exemption may be available if the payee submits certain tax-related forms to either the payer or the relevant taxing authority. Sections 4(a)(i) and 4(a)(iii) of the Multicurrency Master require the payee to supply such forms in certain cases.

A payer in a jurisdiction known to require tax forms as a condition to providing a withholding tax exemption should specify under Section 4(a)(i) of the Multicurrency Master and in Part 3(a) of the Schedule or in a Confirmation each tax form required under law and practice in effect on the date the parties enter into each Transaction to be delivered by the payee and the date by which each such tax form must be delivered.

Because changes in law or administrative practice may require the delivery of tax forms that are not known at the time a Transaction is entered into, the Multicurrency Master, in a modification to the 1987 Agreement, incorporates in Section 4(a)(iii) an ongoing agreement by each party to deliver unspecified tax forms to allow the other party to make payments free of, or subject to a reduced rate of, withholding tax.

Section 4(a)(iii) is adapted from the “Provide Tax Forms” covenant in the Code but with three important changes. First, the Multicurrency Master requires a party to deliver such forms only upon reasonable demand by the other party, while the Code required a party to deliver forms upon the earlier of reasonable demand and learning the form was required. Second, the Multicurrency Master requires forms to be delivered if withholding taxes on payments made by a party to the Transaction or a Credit Support Provider would be reduced or eliminated, while the Code looked only to withholding taxes imposed on payments made by a party. Third, a party is not required to deliver a form under Section 4(a)(iii) if the “completion, execution or submission” of the form would “materially prejudice the legal or commercial position” of that party, while the Code did not contain such a provision.

d. *Multiple Relevant Jurisdictions; Multibranch Parties.* Where the payer or the payee has a connection to more than one jurisdiction with respect to a Multicurrency Master, the issues involved in determining at the outset that no withholding tax applies do not change but do become more complex to administer. Each party, as payer, must (i) determine whether any of its Relevant Jurisdictions impose withholding tax on payments under any type of Transaction that may be effected under a Multicurrency Master, (ii) if so, determine whether the payee is eligible for an exemption from that withholding tax (which may depend on the Office through which the payee is acting for purposes of a particular Transaction under a Multicurrency Master) and (iii) request from the payee the payee tax representations or tax forms necessary to establish the availability of the exemption. The payer must perform this analysis for each combination of a Relevant Jurisdiction of the payer and an Office through which a payee may act in order to be able to make the payer tax representation.

An example is set forth below and in Appendix F to illustrate the analysis that each payer must perform.

Assume that a Japanese bank acting through its New York Office enters into a Multicurrency Master with a French bank and that the French bank may act under the Multicurrency Master through its London or New York Office. The Japanese bank, as payer, must first determine whether any of its Relevant Jurisdictions (Japan and the U.S.) impose any withholding tax on payments under any type of Transaction that may

be documented under the Multicurrency Master. Generally, Japan does not impose any such withholding tax and the U.S. imposes such withholding tax only in limited circumstances. The Japanese bank must next determine whether the payee is eligible for an exemption from the U.S. withholding tax that might arise. Under U.S. law, an exemption is generally available for a payee that is resident in a treaty country or the income of which is “effectively connected” with a U.S. trade or business of the payee.³⁹

Having determined that an exemption from U.S. tax is available in certain circumstances, the Japanese bank would then request from the payee the relevant payee tax representations or tax forms necessary to document the availability of the exemption. In this case, the Japanese bank would request the “effectively connected” representation and IRS Form 4224 (which is necessary in order to apply the exemption for “effectively connected” income) with respect to the payee’s New York Office and would request a treaty representation and IRS Form 1001 (which is necessary in order to apply the treaty exemption) in respect of the payee’s London Office. It should be noted that the “Specified Treaty” for purposes of the treaty representation would be the U.S.-France Treaty, because the treaty that provides an exemption from withholding tax is normally the treaty between the jurisdiction that would otherwise impose the withholding tax (the U.S.) and the jurisdiction in which the payee is a tax resident, which is usually the jurisdiction in which it is organized or in which its head office is located (France), *not* the jurisdiction in which the Office through which it is acting is located (the U.K.).

The French bank, as payer, must perform the same analysis with respect to each of its Relevant Jurisdictions (France, the U.K. when it is acting through its London Office, and the U.S. when it is acting through its New York Office). Thus, the French bank would request (i) in order to avoid U.S. withholding tax when the French bank is acting through its New York Office, that the payee provide the “effectively connected” representation and a Form 4224; (ii) in order to avoid U.K. withholding when the French bank is acting through its London Office, that the payee provide a treaty representation (in which case the Specified Treaty would be the U.K.-Japan Treaty,

³⁹ **THE CIRCUMSTANCES UNDER WHICH THE LAWS OF ANY PARTICULAR COUNTRY, INCLUDING THE U.S., MAY APPLY TO THE VARIOUS TYPES OF TRANSACTIONS THAT COULD BE DOCUMENTED UNDER A 1992 AGREEMENT ARE BEYOND THE SCOPE OF THIS USER’S GUIDE. ACCORDINGLY, THE DISCUSSION IN THE TEXT ABOVE IS NOT COMPLETE WITH RESPECT TO THE TAX LAWS OF ANY JURISDICTION, AND IS SET FORTH ONLY TO ILLUSTRATE THE PROCEDURES PARTIES SHOULD UNDERTAKE TO DETERMINE THAT NO WITHHOLDING TAX APPLIES TO PAYMENTS MADE UNDER THEIR PARTICULAR TRANSACTIONS.** In order to avoid confusion, however, it should be noted that recent changes to U.S. tax law have eliminated the risk of withholding tax on payments made under many “notional principal contracts”.

because the jurisdiction that would otherwise impose withholding tax is the U.K., and the country of residence of the payee is Japan) and any necessary U.K. tax form under that treaty;⁴⁰ and (iii) no payee representations in respect of withholding taxes that may be applied by France, because France does not ordinarily apply withholding tax to the types of Transactions expected to be documented under the Multicurrency Master.

3. Allocation of Financial Burden of Withholding Tax. Although the parties to a Transaction normally expect that no withholding tax will apply to payments made under the Transaction, it is possible that a withholding tax nevertheless may apply. The burden of such a withholding tax is allocated to either the payer or the payee through the definition of “Indemnifiable Tax” in Section 14 of the Multicurrency Master and through the gross-up provisions of Section 2(d)(i)(4) of the Multicurrency Master.

a. Definition of “Indemnifiable Tax”. Section 14 of the Multicurrency Master generally defines an Indemnifiable Tax as any Tax⁴¹ imposed on a payment *except* a tax imposed because of a connection between the taxing jurisdiction and the recipient of the payment (or a related person). For this purpose, such a connection does not include the mere execution or delivery of a Multicurrency Master, the performance of obligations or receipt of payments under a Multicurrency Master or the enforcement of a Multicurrency Master.

The definition of “Indemnifiable Tax” is a key feature of the Multicurrency Master because Section 2(d)(i)(4) generally requires the payer to gross-up for an Indemnifiable Tax but not for any other tax. *See* Section IV.A.3.b. below. As a consequence, a tax withheld without regard to whether the payee has any connection to the taxing jurisdiction (such as a conventional gross income withholding tax) would be an Indemnifiable Tax and generally would be borne by the payer through the gross-up provisions in Section 2(d)(i)(4), while a tax withheld because the payee has a connection with the taxing jurisdiction would not be an Indemnifiable Tax and generally would be borne by the payee through the receipt of a net payment. **IT IS THEREFORE ADVISABLE FOR EACH PARTY TO BE AWARE OF WHETHER ANY TAX MIGHT BE IMPOSED ON PAYMENTS IT RECEIVES UNDER THE TAX LAWS OF ANY JURISDICTION WITH WHICH IT HAS A CONNECTION, AS THAT PARTY WILL GENERALLY BEAR THE BURDEN OF ANY TAX IMPOSED BY SUCH A JURISDICTION ON SUCH PAYMENTS.**

⁴⁰ However, if the French bank’s Office in the U.K. is a “recognized bank” or “recognized swaps dealer” for U.K. tax purposes, it can generally make payments under interest rate or currency swaps without U.K. withholding tax regardless of the existence of a treaty.

⁴¹ “Tax” is defined in Section 14 as any tax, charge or other similar listed items, except a stamp, registration, documentation or similar tax (*i.e.*, a “Stamp Tax”, as defined in Section 14 of the Multicurrency Master).

In 1988 ISDA published an addition to the definition of Indemnifiable Tax that parties were free to use if they so chose. That addition to the definition has not been incorporated into the Multicurrency Master, since it has not been commonly adopted by parties and ISDA members did not support including it in the Multicurrency Master, but it continues to be available for parties to use. The addition to the definition is as follows:

“Notwithstanding the foregoing, ‘Indemnifiable Tax’ also means any Tax imposed in respect of a payment under this Agreement by reason of a Change in Tax Law by a government or taxing authority of a Relevant Jurisdiction of the party making such payment, unless the other party is incorporated, organized, managed and controlled or considered to have its seat in such jurisdiction, or is acting for purposes of this Agreement through a branch or office located in such jurisdiction.”

In essence, the addition to the definition treats as an Indemnifiable Tax a tax attributable to a connection between the payee and the taxing jurisdiction if (i) the tax is imposed by reason of a Change in Tax Law and (ii) the taxing jurisdiction is not the payee’s home jurisdiction or the jurisdiction through which the payee is acting under the Multicurrency Master. It thus eliminates the payee’s risk of bearing new taxes imposed by the payer’s jurisdiction, even if the payee’s activities in such jurisdiction are the basis for such taxes (so long as (ii) above is satisfied). The expansion of the definition of Indemnifiable Tax slightly increases the portion of the universe of taxes for which the payer may be required to gross-up. The expanded definition may be useful for parties who wish to allocate to the payer the burden of a withholding tax imposed by a jurisdiction to which both parties are connected. The proper party to bear such burden is not uniform in all Transactions and may depend on the type and degree of activities carried on by the payee in the taxing jurisdiction.

b. *Gross-up Provisions.* As discussed above, in the event that an Indemnifiable Tax is required to be withheld from a payment, the payer is required to gross-up the payee for that Indemnifiable Tax under Section 2(d)(i)(4) of the Multicurrency Master, subject to certain exceptions. Although parties entering into a Transaction normally expect that no Indemnifiable Taxes will be required to be withheld from payments made under that Transaction, such withholding may nevertheless apply for one of three reasons:

- the initial expectation of no withholding was incorrect at the outset;
- a withholding requirement is triggered after the date the parties enter into a Transaction by a change of facts concerning either the payee or the payer; or
- a withholding requirement is triggered after the date the parties enter into a Transaction by a Change in Tax Law or similar legal development.

Section 2(d)(i)(4) is drafted to allocate the financial burden of a withholding tax to the payer or the payee depending on the reason why the unexpected withholding obligation is triggered.

(i) *Initial Expectations Incorrect.* The initial expectation that neither party will be required to withhold an Indemnifiable Tax from any payments made under a Transaction is established through the willingness of each party to make the payer tax representation in Section 3(e) of the Multicurrency Master and Part 2(a) of the Schedule. If the laws of a Relevant Jurisdiction of a party generally require withholding but provide an exemption for certain payees, that party (as payer) will normally request the other party (as payee) to provide certain tax representations or tax forms so that the payer can establish that the payee is exempt and that the payer therefore can make the payer tax representation. *See* Section IV.A.2. above.

If the initial expectation is incorrect and withholding of an Indemnifiable Tax is required by a Relevant Jurisdiction of the payer, the general rule of Section 2(d)(i)(4) is that the payer must bear the burden of the Indemnifiable Tax through its obligation to gross-up the payee. The assignment of this financial responsibility to the payer is consistent with the fact that the payer incorrectly represented that, under the law in effect as of the date the parties entered into a Transaction, no such withholding was required.

There are two exceptions to this general rule which shift the responsibility for such withholding to the payee where the payee is considered to be “at fault”. Under the first exception, if (A) the payee makes a payee tax representation to enable the payer to determine whether any taxes apply, (B) that representation, which is made continuously, fails to be accurate and true, other than by reason of a Change in Tax Law or similar legal development and (C) an Indemnifiable Tax is required to be withheld as a result of that failure, then the payee bears the burden of the Indemnifiable Tax by receiving payments net of withholding with no gross-up right (Section 2(d)(i)(4)(B)). Under the second exception, the payee bears the burden if an Indemnifiable Tax is required to be withheld because of the payee’s failure to comply with its obligation to deliver tax forms or to give timely notice of its breach of a payee tax representation (Section 2(d)(i)(4)(A)).

It should be noted that the payer is required to gross-up under Section 2(d)(i)(4) for an Indemnifiable Tax imposed by reason of the payee’s refusal to deliver a requested tax form in reliance on the “material prejudice” exception in Section 4(a)(iii). So long as the payer has specified under Section 4(a)(i) and Part 3(a) of the Schedule or the Confirmation all tax forms required by the payer’s Relevant Jurisdictions under the laws and practice in effect on the date the parties enter into a Transaction, the payer’s request for an additional tax form under Section 4(a)(iii) would arise from a Change in Tax Law or similar legal development, and as a result the payer’s gross-up requirement would qualify as a Tax Event, giving the payer a termination right under

Sections 5(b)(ii) and 6(b). *See* Section IV.A.4.a. below. If the required tax form was required under law and practice in effect on the date the parties entered into the Transaction and the payer failed to request at the outset that the form be provided under Section 4(a)(i), however, the payer’s gross-up requirement would not give rise to a Tax Event and to termination rights. **EACH PARTY SHOULD THEREFORE CAREFULLY ASSESS ITS NEED FOR TAX FORMS AT THE OUTSET OF A TRANSACTION AND REQUEST THE OTHER PARTY TO DELIVER THOSE FORMS UNDER SECTION 4(A)(i), WHICH HAS NO “MATERIAL PREJUDICE” EXCEPTION.**⁴²

(ii) ***Change in Facts.*** Even if there is no requirement to withhold any Indemnifiable Tax at the outset of a Transaction, such a requirement might arise as a result of a change in facts concerning the payer or payee (*e.g.*, the termination of the payer’s status as a financial trader, which under U.K. practice can make certain payments free of U.K. withholding tax, or the termination of the payee’s status as a tax resident of a treaty country). If the payer has requested the payee tax representations (if any) necessary to determine at the outset that the Relevant Jurisdictions of the payer will not require withholding, then a change in facts concerning the payee can result in the imposition of withholding of an Indemnifiable Tax only if such Indemnifiable Tax results from the breach of a payee tax representation (which is made continuously) or the failure of a payee to provide an agreed tax form; in either of those circumstances, the exceptions to the payer’s gross-up obligations apply (*see* Sections 2(d)(i)(4)(A) and (B)) and the change in facts concerning the payee will thus result in the payee bearing the burden of the resulting withholding tax. If there is a change in facts concerning the payer, it cannot result in the breach by the payee of a payee tax representation or obligation to provide tax forms, so the payer will not be excused from its obligation under Section 2(d)(i)(4) to gross-up for any resulting Indemnifiable Tax.

Thus, if a change in facts concerning a party triggers an obligation to withhold any Indemnifiable Tax, Section 2(d)(i)(4) assigns the financial responsibility for the Indemnifiable Tax to that party.

(iii) ***Change in Tax Law or Similar Legal Development.*** If a Relevant Jurisdiction of the payer imposes a requirement to withhold an Indemnifiable Tax as a result of (I) an action taken by a taxing authority, or brought in a court of competent jurisdiction, on or after the date the parties entered into a Transaction or (II) a Change in Tax Law (as defined in Section 14 of the Multicurrency

⁴² The other party may, of course, refuse to agree at the outset to the provision of a particular tax form by reason of “material prejudice” (or any other reason, for that matter). In that case, the request for tax forms under Section 4(a)(i) will have uncovered a potentially difficult tax issue before the Transaction has commenced, at a time that it can most easily be dealt with by the parties.

Master), then the payer will be required to gross-up for that Indemnifiable Tax. This is true even if the Change in Tax Law or similar legal development causes a payee tax representation to become untrue, as the gross-up exception in Section 2(d)(i)(4)(B) has a carve-out for a breach of a payee tax representation arising from such events.⁴³

4. Tax-Related Termination Events.

A termination right in favor of a party arises under Section 6(b) upon the occurrence of a “Tax Event”, defined in Section 5(b)(ii) of the Multicurrency Master, or a “Tax Event Upon Merger”, defined in Section 5(b)(iii) of the Multicurrency Master.

a. Tax Event. Generally, a Tax Event occurs if a party is (or there is a substantial likelihood that it will be) burdened by a withholding tax (*i.e.*, the payer is required to gross-up or the payee receives a payment net of withholding with no gross-up) *if* the withholding tax risk is due to a Change in Tax Law or similar legal development. A termination right arises in such cases because neither party is considered to be sufficiently “at fault” as to require it to be burdened by an unanticipated tax through the scheduled maturity of the Transaction.

If a withholding tax applies and is *not* due to a Change in Tax Law or similar legal development, it either (i) applied at the outset of the Transaction or (ii) is due to a change in facts from the outset of the Transaction. As discussed in Section IV.A.3.b. above, in those cases the gross-up provisions of Section 2(d)(i)(4) allocate the financial burden of such a withholding tax to the “responsible” party. The widespread (but not universally accepted) view, adopted in the Multicurrency Master, is that a termination right should not arise in such cases, in order to reinforce each party’s duty of care and diligence in determining and applying the withholding tax rules of its Relevant Jurisdictions, and also to prevent a party from creating a “call” right through its own actions.

A Tax Event does not occur if a withholding tax applies only to default interest under Section 2(e) or, in a modification to the 1987 Agreement, interest payments upon early termination under Section 6(d)(ii) or (e).

There are three principal modifications to the Tax Event definition in the Multicurrency Master from such definition in the 1987 Agreement. First, the

⁴³ In a change from the 1987 Agreement, the Multicurrency Master expands the carve-out to the gross-up exception in Section 2(d)(i)(4)(B) to include actions taken by a taxing authority or brought in a court of competent jurisdiction that do not amount to a Change in Tax Law, but may nevertheless cause a payee tax representation to become false. Absent that modification, a payee would not be entitled to a gross-up if its representation became false even though the payee would not generally be considered “at fault” for such an occurrence.

Multicurrency Master incorporates the additional Tax Events published as optional provisions by ISDA in 1988, as they appear to have been commonly adopted by market participants and widespread support existed for their inclusion in the Multicurrency Master. Second, the 1987 Agreement contained a two paragraph definition of Tax Event that enabled parties to allow a Tax Event to occur upon a “substantial likelihood” of withholding due to an action taken by a taxing authority or brought in a court of competent jurisdiction, or to restrict the occurrence of a Tax Event to cases in which withholding would clearly apply as a result of a Change in Tax Law (but not a similar legal development). Again, practice has tended toward the broader definition of Tax Event, which has been adopted in the Multicurrency Master by combining the two paragraphs of the 1987 Agreement into a single paragraph.

The third principal modification to the Tax Event definition, as supplemented in 1988, is the addition in the Multicurrency Master of a carve-out from the right of a payee to terminate if it receives net payments without a gross-up where the absence of a gross-up right is due to the gross-up exceptions in Section 2(d)(i)(4)(A) or (B) (*i.e.*, the failure of a payee tax representation to be true (except by reason of a Change in Tax Law or similar legal development) or the failure of the payee to comply with its obligation to deliver tax forms). The original approach of the 1987 Agreement was that a burdened payer could terminate unless it was “at fault” and that a burdened payee could never terminate (in part because it was difficult to imagine how a payee could come to be burdened by a withholding tax without being “at fault”). The additional Tax Events published in 1988 extended a termination right to a payee burdened by a withholding tax, and could be read to do so regardless of “fault” on the part of the payee. The view reflected in the Multicurrency Master is that neither a payer nor a payee burdened by a withholding tax should be entitled to a termination right if the burdened party is “at fault” for the imposition of the tax.

Several participants continue to prefer the approach arguably taken by the additional Tax Events published in 1988, however, and are concerned that it is too harsh to require a payee that has breached a tax representation both to bear the burden of any resulting withholding tax and not to have a termination right available.

WHICHEVER VIEW IS ADOPTED BY PARTIES IN A PARTICULAR TRANSACTION, IT IS CLEAR THAT GREAT CARE SHOULD BE TAKEN IN MAKING BOTH PAYER TAX REPRESENTATIONS AND PAYEE TAX REPRESENTATIONS, IN ORDER TO ELIMINATE THE RISK THAT WITHHOLDING TAX WILL APPLY TO THE TRANSACTION UNDER THE LAW IN EFFECT ON THE DATE THE PARTIES ENTER INTO A TRANSACTION. As described above, so long as any withholding tax is attributable to a Change in Tax Law or a similar legal development after the date the parties enter into a Transaction, the party burdened by the withholding tax generally will be entitled to terminate the Transaction under Sections 5(b)(ii) and 6(b) of the Multicurrency Master.

b. Tax Event Upon Merger. Under Section 5(b)(iii), a Tax Event Upon Merger occurs if a party pays a gross-up or receives payments subject to withholding tax without a gross-up, if the withholding tax arises because either party consolidates or amalgamates with, merges with or into, or transfers all or substantially all its assets to, another entity. Such a transaction could result in the application of withholding tax, for example, if the transferee entity's jurisdiction of incorporation differs from the transferor's jurisdiction.

As in the definition of "Tax Event", certain exceptions apply. If a payee is not entitled to a gross-up because it has made a false tax representation (other than by reason of a Change in Tax Law or similar legal development) or has failed to deliver an agreed tax form, then a Tax Event Upon Merger will not arise in favor of the payee. Also, a withholding tax with respect to default interest under Section 2(e) or, in a change from the 1987 Agreement, with respect to interest on early termination under Section 6(d)(ii) or 6(e), will not result in a Tax Event Upon Merger. Finally, a Tax Event Upon Merger will not occur upon a transaction that falls within the provisions concerning merger without assumption (*see* Section II.F.2.h. above).

B. Stamp Taxes

Under Section 4(e) of the Multicurrency Master, each party agrees to pay Stamp Taxes imposed on it by its home jurisdictions and indemnify the other party against such Stamp Taxes if the jurisdiction is not a home jurisdiction of the other party. Under a clarification to the 1987 Agreement, Section 4(e) of the Multicurrency Master has been made subordinate to the requirement in Section 11 that a Defaulting Party indemnify the other party against certain Stamp Taxes.

Where both parties are resident in the jurisdiction imposing a Stamp Tax, there is no indemnification right and the burden of any Stamp Tax would generally be borne by the party primarily liable for the Stamp Tax under the laws of that jurisdiction. Although the burden of a Stamp Tax can be shifted by agreement of the parties (including the indemnification requirement in Section 11 of the Multicurrency Master), in certain jurisdictions (*e.g.*, the U.K.) such indemnification may be void.

C. Tax Considerations Relating to Physical Delivery

The 1992 Agreements accommodate or facilitate the inclusion of transactions that settle by physical delivery, which is a change from the 1987 Agreement. Parties should take great care in considering transactions that settle by physical delivery, as a Stamp Tax may apply in certain jurisdictions (*e.g.*, the U.K.) to either the documents relating to the conveyance of physical assets or to the relevant 1992 Agreement. In addition, transactions that settle by physical delivery may raise issues as to the applicability of value-added tax which are particularly unclear and complex in certain jurisdictions (*e.g.*, the U.K.) and should be considered carefully by the parties. The 1992 Agreements have, accordingly, not addressed the treatment of all taxes that may result from transactions that settle by physical delivery.

D. Early Termination

Where an early termination occurs pursuant to Section 6 of the Multicurrency Master, payment may be made between the parties in accordance with Section 6(e) in respect of such early termination. It should be noted that turnover tax issues are raised by such termination payments (*e.g.*, in the U.K.), particularly where made other than under the terms of a 1992 Agreement (*e.g.*, by the parties entering into a separate cancellation agreement).

V. SET-OFF

Parties may wish to consider the inclusion of a set-off clause in their 1992 Agreement. In Section 6(e) of the 1992 Agreements, there is a reference to Set-off designed to make clear that payments due in respect of an Early Termination Date will be subject to any “Set-off” (as defined). Parties may use this reference as the avenue for augmenting a 1992 Agreement in the Schedule by adding a form of set-off clause they find acceptable. Set-off may be of particular importance in the case of a 1992 Agreement that provides for the Second Method⁴⁴ because, without an effective set-off clause, the Non-defaulting Party might be required to make payment to the Defaulting Party under a 1992 Agreement upon termination while, at the same time, the Non-defaulting Party may not have any realistic expectation of receiving payments owed to it by the Defaulting Party (and its Affiliates) under other agreements. The countervailing risk, however, is that inclusion of a broad right of set-off such as the Guarantee and Assignment Provision below could be used by a counterparty as a tool to withhold payment to a party pending settlement of an unrelated dispute with one of its Affiliates.

Set forth below are examples of approaches to set-off that parties may consider employing in a 1992 Agreement (an assumption is made that the relevant example will be Section 6(f) of a 1992 Agreement). **ALL THESE EXAMPLES RAISE ISSUES THAT MAY BE SUBJECT TO DIFFERING TREATMENT IN DIFFERENT JURISDICTIONS AND SHOULD BE REVIEWED BY A PARTY’S LEGAL ADVISERS BEFORE BEING INCLUDED IN A 1992 AGREEMENT.**⁴⁵

⁴⁴ For a discussion of payments on early termination, *see* Section II.G.3. and II.G.4. above.

⁴⁵ In assessing issues of enforceability relating to the Basic Set-off Provision, the Guarantee and Assignment Provision or the approaches described in Section V.C. below, parties may consider modifying Section 3(a) of the 1992 Agreements to include the following representation to the extent, after reviewing such issues of enforceability, parties are concerned about a lack of mutuality between the parties as a result of the capacity in which parties are acting:

“**No Agency.** It is entering into this Agreement and each Transaction as principal (and not as agent or in any other capacity, fiduciary or otherwise).”

The Basic Set-off Provision in Section V.A. below attempts to reach obligations between the parties to a 1992 Agreement. The Guarantee and Assignment Provision in Section V.B. below attempts to reach obligations of Affiliates of parties to a 1992 Agreement. Before including either provision, however, parties should consult with their legal advisers as there may be complex issues of enforceability in the relevant jurisdictions for the parties involved. For example, the assignment clause of the Guarantee and Assignment Provision is believed to have potential benefits in respect of a counterparty organized in the United States and subject to the U.S. Bankruptcy Code or organized in England, but these potential benefits may be difficult to achieve in practice. Parties should also carefully consider the credit implications associated with inclusion of the Basic Set-off Provision and the Guarantee and Assignment Provision in a 1992 Agreement.

Section V.C. below also describes two other approaches that market participants have discussed in ISDA working groups that have considered the issue of set-off. In all likelihood, parties would structure these two approaches to reach obligations of Affiliates. Both approaches also raise complex issues of enforceability, and thus parties should consult with their legal advisers and carefully consider relevant credit implications before including either approach in a 1992 Agreement. An example favored by a few ISDA members, which these ISDA members believe implements the Withholding/Conditionality Approach, is set forth in Section V.C. below.

For a more detailed analysis of issues relating to set-off under New York and U.S. law, *see* the memorandum prepared by Cravath, Swaine & Moore for the ISDA Board of Directors dated April 15, 1991, entitled “Setoff Rights in Swap Agreements Under New York and U.S. Law” (which is available to ISDA members from the executive offices of ISDA). For a more detailed analysis of issues relating to set-off under English law, *see* the memorandum prepared by Linklaters & Paines for the ISDA Board of Directors dated July 26, 1991 (which is available to ISDA members from the executive offices of ISDA).

This representation may assist a party in establishing, among other things, that there is mutuality between the parties for purposes of any set-off that may be contemplated under a 1992 Agreement. Mutuality between parties is one necessary prerequisite to the enforceability of a right of set-off in certain jurisdictions and in certain situations, and mutuality arguably might not exist if parties are acting in different capacities. In some jurisdictions mutuality between parties may also be necessary for the enforceability of close-out netting.

This representation was considered for inclusion in the 1992 Agreements but was ultimately not included because of a lack of support from participants. The opposition to the representation was largely based on the view that the representation would be inapplicable in some cases and unnecessary in others. Support for the representation was generally based upon the aforementioned potential set-off benefits.

A. Basic Set-off Provision

The Basic Set-off Provision addresses claims between a pair of contracting parties, and is as follows:

“(f) Set-off. Any amount (the ‘Early Termination Amount’) payable to one party (the Payee) by the other party (the Payer) under Section 6(e), in circumstances where there is a Defaulting Party or one Affected Party in the case where a Termination Event under Section 5(b)(iv)⁴⁶ has occurred, will, at the option of the party (‘X’) other than the Defaulting Party or the Affected Party (and without prior notice to the Defaulting Party or the Affected Party),⁴⁷ be reduced by its set-off against any amount(s) (the ‘Other Agreement Amount’) payable (whether at such time or in the future or upon the occurrence of a contingency) by the Payee to the Payer (irrespective of the currency, place of payment or booking office of the obligation) under any other agreement(s) between the Payee and the Payer or instrument(s) or undertaking(s) issued or executed by one party to, or in favor of, the other party (and the Other Agreement Amount will be discharged promptly and in all respects to the extent it is so set-off). X will give notice to the other party of any set-off effected under this Section 6(f).

“For this purpose, either the Early Termination Amount or the Other Agreement Amount (or the relevant portion of such amounts) may be converted by X into the currency in which the other is denominated at the rate of exchange at which such party would be able, acting in a reasonable manner and in good faith, to purchase the relevant amount of such currency.

“If an obligation is unascertained, X may in good faith estimate that obligation and set-off in respect of the estimate, subject to the relevant party accounting to the other when the obligation is ascertained.

“Nothing in this Section 6(f) shall be effective to create a charge or other security interest. This Section 6(f) shall be without prejudice and in addition to any right of set-off, combination of accounts, lien or other right to which any party is at any time otherwise entitled (whether by operation of law, contract or otherwise).”

⁴⁶ The reference to this Termination Event may be deleted or expanded to include other Termination Events and also may be expanded to address a situation involving two Affected Parties. The reference is also to the relevant Section of the Multicurrency Master.

⁴⁷ This clause may be modified so that it applies automatically on the date the Early Termination Amount becomes payable.

B. Guarantee and Assignment Provision

The Guarantee and Assignment Provision expands the reach of the Basic Set-off Provision through the use of assignments to the Non-defaulting Party by its Affiliates and guarantees by the Defaulting Party of obligations of its Affiliates. The Provision may be written to apply to the Affiliates of one party and not the other. The Guarantee and Assignment Provision is as follows:

“(f) Set-off. Any amount (the ‘Early Termination Amount’) payable to one party (the ‘Payee’) by the other party (the ‘Payer’) under Section 6(e), in circumstances where there is a Defaulting Party or one Affected Party in the case where a Termination Event under Section 5(b)(iv)⁴⁸ has occurred, will, at the option of the party (‘X’) other than the Defaulting Party or the Affected Party (and without prior notice to the Defaulting Party or the Affected Party),⁴⁹ be reduced by its set-off against any amount(s) (the ‘Other Agreement Amount’) payable (whether at such time or in the future or upon the occurrence of a contingency) by the Payee or any Affiliate of the Payee to the Payer or any Affiliate of the Payer, including under (i) or (ii) below, irrespective of the currency, place of payment or booking office of the obligation, under any other agreement(s) between the Payee or any Affiliate of the Payee and the Payer or any Affiliate of the Payer or instrument(s) or undertaking(s) issued or executed by one party or any Affiliate thereof to, or in favor of, the other party or any Affiliate thereof (and the Other Agreement Amount will be discharged promptly and in all respects to the extent it is so set-off). X will give notice to the other party of any set-off effected under this Section 6(f).

“(i) Guarantee. Each party (‘B’) hereby unconditionally and irrevocably guarantees (but only to the extent of any Early Termination Amount payable to it), each as a primary obligor and not merely as a surety, the due and punctual payment and performance of all the obligations of B’s Affiliates to the other party (‘A’) (or any of A’s Affiliates), and B agrees that such guarantee is a guarantee of payment when due and not of collection and is a continuing guarantee, waives any and all rights of contribution, reimbursement or subrogation (except as provided below in this Section 6(f)) which may arise as a result of such guarantee and waives any and all defenses to payment that it or any of its Affiliates may have.

“(ii) Assignment. If either party (‘C’) has reasonable grounds for insecurity regarding a potential default under this Agreement by the other party (‘D’), then

⁴⁸ The reference to this Termination Event may be deleted or expanded to include other Termination Events and also may be expanded to address a situation involving two Affected Parties. The reference is also to the relevant Section of the Multicurrency Master.

⁴⁹ This clause may be modified so that it applies automatically on the date the Early Termination Amount becomes payable.

any right of an Affiliate of C to receive payment from D or any Affiliate of D may be assigned to C, in which case D hereby consents to any such assignment of the benefit of its obligations and agrees to use its best efforts to obtain any required consents from its relevant Affiliate to any such assignment of the benefit of an obligation of that Affiliate. C shall give prompt written notice to D of any assignments of rights to C by Affiliates of C pursuant to this provision.

“If the Early Termination Amount has been reduced or eliminated through its set-off against amounts payable under (i) above or assigned pursuant to (ii) above, the obligations guaranteed pursuant to (i) above and the obligations in respect of which rights were assigned pursuant to (ii) above shall be discharged promptly in all respects to the extent utilized to so reduce or eliminate the Early Termination Amount.

“Following the payment to the Payer or Payer’s Affiliates of all amounts owed to them by the Payee’s Affiliates and the expiration of any applicable legal period relating to bankruptcy, insolvency, administration or liquidation or other similar event, the Payee shall become subrogated to the rights of the Payer or the Payer’s Affiliates, as the case may be, under the obligations guaranteed pursuant to (i) above.

“For this purpose, either the Early Termination Amount or the Other Agreement Amount (or the relevant portion of such amounts) may be converted by X into the currency in which the other is denominated at the rate of exchange at which such party is able, acting in a reasonable manner and in good faith, to purchase the relevant amount of such currency.

“If an obligation is unascertained, X may in good faith estimate that obligation and set-off in respect of the estimate, subject to the relevant party accounting to the other when the obligation is ascertained.

“Nothing in this Section 6(f) shall be effective to create a charge or other security interest. This Section 6(f) shall be without prejudice and in addition to any right of set-off, combination of accounts, lien or other right to which any party is at any time otherwise entitled (whether by operation of law, contract or otherwise).”

C. Other Approaches

1. *Withholding/Conditionality Approach.* Some market participants have suggested an approach to issues relating to set-off in which payments on termination would be withheld until the occurrence of certain events or conditioned based upon the occurrence of certain events (the “Withholding/Conditionality Approach”). Under the Withholding/Conditionality Approach, a termination payment owed from a Non-defaulting Party to a Defaulting Party either (i) would be withheld until certain specified obligations of the Defaulting Party and its Affiliates to the Non-defaulting Party and its Affiliates have been satisfied or (ii) would be conditioned upon the satisfaction of certain obligations of the Defaulting Party and its Affiliates to the Non-defaulting Party and its Affiliates. This

approach may be designed to reach only the obligations of the parties to a 1992 Agreement or may be written to apply to the Affiliates of one party and not the other depending on which party is the Defaulting Party. The Withholding/Conditionality Approach could also be structured to apply to a Termination Event resulting from a Credit Event Upon Merger or other Termination Events. This approach may be added in lieu of or in combination with the Basic Set-off Provision. The intended economic effect of such an approach encompassing Affiliates of a Defaulting Party is not substantively different from the result sought under a 1992 Agreement containing the Guarantee and Assignment Provision.

The following is a provision favored by a few ISDA members that attempts to implement the Withholding/Conditionality Approach with respect to the occurrence of an Event of Default⁵⁰ where the parties have elected the Second Method:

“(f) *Conditions to Certain Payments.* Notwithstanding the provisions of Section 6(e)(i)(3) and (4), as applicable, if the amount referred to therein is a positive number, the Defaulting Party will pay such amount to the Non-defaulting Party, and if the amount referred to therein is a negative number, the Non-defaulting Party shall have no obligation to pay any amount thereunder to the Defaulting Party unless and until the conditions set forth in (i) and (ii) below have been satisfied⁵¹ at which time there shall arise an obligation of the Non-defaulting Party to pay to the Defaulting Party an amount equal to the absolute value of such negative number less any and all amounts which the Defaulting Party may be obligated to pay under Section 11:

(i) the Non-defaulting Party shall have received confirmation satisfactory to it in its sole discretion (which may include an unqualified opinion of its counsel) that (x) no further payments or deliveries under Section 2(a)(i) or 2(e) in respect of Terminated Transactions will be required to be made in accordance with Section 6(c)(ii) and (y) each Specified Transaction shall have terminated pursuant to its specified termination date or through the exercise by a party of a right to terminate and all obligations owing under each such Specified Transaction shall have been fully and finally performed; and

(ii) all obligations (contingent or absolute, matured or unmatured) of the Defaulting Party and any Affiliate of the Defaulting Party to make any payment

⁵⁰ The provision could be modified to include one or more Termination Events, in which case references to the Affected Party and the “non-Affected Party” would need to be included, as appropriate, where references to the Defaulting Party and Non-defaulting Party, respectively, are currently set forth. Please note that Section references in the provision are with respect to the Multicurrency Master.

⁵¹ Some market participants advocate a limitation on the scope of this “withholding/conditionality” right so that a party would have to make payments to the extent amounts owing to the Defaulting Party exceeded amounts owing to the Non-defaulting Party and its Affiliates.

or delivery to the Non-defaulting Party or any Affiliate of the Non-defaulting Party shall have been fully and finally performed.”

2. *Flawed Asset Approach.* Other market participants have suggested that a 1992 Agreement could be amended to provide that a termination payment owed to a Defaulting Party would be calculated by subtracting from the amounts otherwise owed to the Defaulting Party any amounts owed by the Defaulting Party and its Affiliates to the Non-defaulting Party and its Affiliates under other agreements (the “Flawed Asset Approach”). Under this approach the Defaulting Party would only have a limited right to receive a termination payment, with the “flawed asset” thus being the “impaired” right to the termination payment. This approach may be designed to reach only the obligations of the parties to a 1992 Agreement or may be written to apply to the Affiliates of one party and not the other depending on which party is the Defaulting Party. The Flawed Asset Approach could also be structured to apply to a Termination Event resulting from a Credit Event Upon Merger or other Termination Events. This approach may be added in lieu of or in combination with the Basic Set-off Provision. The intended economic effect of the Flawed Asset Approach encompassing Affiliates of a Defaulting Party is not substantively different from the result sought under a 1992 Agreement containing the Guarantee and Assignment Provision if the Flawed Asset Approach is implemented in combination with the Basic Set-off Provision.

VI. PHYSICAL DELIVERY

A. Modifications Included in the 1992 Agreements

The 1992 Agreements have been modified from the 1987 Agreement to accommodate or facilitate (but by no means require) the documentation of transactions providing for settlement by physical delivery. Some of the more significant changes are as follows:

1. Section 2(a)(ii) provides that settlement by delivery will be made for receipt on the due date in the manner customary for the relevant obligation unless the parties specify otherwise;
2. Section 2(e) (Section 2(d) of the Local Currency Master) recognizes that, in the case of physical delivery obligations, parties may wish to set forth special provisions in the relevant Confirmation or in the Schedule for calculating default interest or other compensation in respect of a party that defaults in the performance of any obligation required to settle by delivery;
3. Section 5(a)(i) provides that it is an Event of Default if a party fails to make any delivery required to be made by it under Section 2(a)(i) or 2(e) (Section 2(a)(i) or 2(d) in the case of the Local Currency Master) after passage of a grace period, which grace period is the same for payments owing;

4. Sections 5(b)(i)(1) and 6(c)(ii) have been modified to make reference to obligations that settle by physical delivery;

5. the definition of “Applicable Rate” refers to both obligations “payable” and obligations “deliverable”;

6. the definitions of “Loss” and “Market Quotation” contemplate that values in respect of transactions that settle by physical delivery are to be treated as cash amounts in determining payment amounts owed on termination; and

7. the definition of “Unpaid Amounts” contemplates that obligations required to be settled by delivery (or that would have been required to so settle but for Section 2(a)(iii)) on or prior to an Early Termination Date but not so settled will be converted to an amount equal to the fair market value (reasonably determined by the party specified in the definition of “Unpaid Amounts”) of that which was (or would have been) required to be delivered as of the originally scheduled date for delivery.

B. Additional Modifications to the 1992 Agreements

Although the 1992 Agreements contain several changes from the 1987 Agreement designed to permit the documentation of transactions that settle by physical delivery, parties should consider making additional modifications to the 1992 Agreements in the Schedule or in the relevant Confirmation or elsewhere in the 1992 Agreements to address issues raised by such transactions but not adequately covered in the 1992 Agreements, including:⁵²

1. specifying the means for settlement by delivery rather than relying on the language in Section 2(a)(ii);⁵³

2. including a provision that is analogous to Section 2(b) for the place of delivery;

3. providing in Section 2(e) (Section 2(d) of the Local Currency Master) for a means of determining default interest and any other compensation owed (*e.g.*, losses

⁵² This Section VI.B. is not intended to suggest that only transactions that settle by physical delivery will require modifications to a 1992 Agreement. Parties may find that a particular cash-settled transaction requires modifications to a 1992 Agreement that are also transaction-specific.

⁵³ As part of the consideration of this modification, parties could also provide that a failure to deliver by a party (“X”) resulting from a failure of the other party (“Y”) to make adequate arrangements to accept delivery shall not constitute an Event of Default and, in such an event, Y shall indemnify X for reasonable losses suffered by X in connection with such attempted delivery.

resulting from changes in market price from the original due date for delivery to the actual date of delivery) as a result of a party's failure to perform on time any obligation required to be settled by delivery;

4. including a representation in Section 3 to the effect that, at the time of delivery, the party making delivery has good title to the subject of the relevant physical delivery obligation and that the subject of such obligation is free of liens and other encumbrances;

5. including a representation in Section 3 to the effect that each party is entering into the Agreement and any Credit Support Document to which it is a party, and will enter into each Transaction, in reliance upon such tax, accounting, regulatory, legal and financial advisers as it deems necessary and not upon any view expressed by the other party (except with respect to any express representations made in this Agreement);

6. reducing or eliminating the grace period in Section 5(a)(i) for obligations that settle by delivery;

7. modifying the parenthetical in Section 5(a)(v)(2) if the parties want the provisions concerning "Default under Specified Transactions" to be activated immediately for Specified Transactions without an applicable notice requirement or grace period;

8. addressing the impact of relevant market or settlement disruption events (*e.g.*, events making delivery difficult or impractical) and providing for contingencies in the case of such events;

9. including an impossibility clause (*see* Section VIII below) as a Termination Event and making any necessary related changes and considering the relationship between an impossibility clause and any differing treatment agreed to by the parties for identifiable market disruption events;

10. modifying the definition of "Local Business Day" to address issues raised by transactions that settle by delivery (*e.g.*, defining Local Business Day in terms of trading days on the relevant commodity exchange);

11. expanding the definition of "Specified Transaction" to include transactions between the parties that settle by physical delivery and that are not currently encompassed by such definition;

12. electing Loss as a payment measure where transactions that settle by physical delivery will be included under a 1992 Agreement and it is thought that Market Quotation will be inadequate or inappropriate; and

13. if Market Quotation applies, providing for a means of calculating “Unpaid Amounts” in respect of transactions that settle by physical delivery apart from having a particular party determine an “Unpaid Amount” based on the fair market value of the relevant obligation “which was (or would have been but for Section 2(a)(iii)) required to be settled by delivery”.

Before documenting obligations that settle by physical delivery under the Agreement, parties should also note that certain tax issues raised by such obligations are not addressed in the 1992 Agreements and, accordingly, those issues should be addressed in the Schedule or the relevant Confirmation. Specifically parties should consider allocating the risk of any taxes (in addition to Indemnifiable Taxes) that may be payable in respect of such Transactions. *See* Section IV.C. above. In addition, parties should note that the various ISDA definitional booklets published before or at the time of the 1992 Agreements were generally designed with a view to the documentation of cash-settled derivative transactions; parties should therefore consider whether modifications are necessary to the relevant definitions.

THE DISCUSSION ABOVE SHOULD NOT BE VIEWED AS A COMPLETE OR MANDATORY LIST OF ALL AREAS OF THE 1992 AGREEMENTS REQUIRING MODIFICATION IN CONNECTION WITH THE DOCUMENTATION OF A TRANSACTION THAT SETTLES BY PHYSICAL DELIVERY. THE FACTS OF A PARTICULAR TRANSACTION MAY DICTATE THAT MODIFICATIONS IN ADDITION TO THOSE LISTED ABOVE ARE NECESSARY OR THAT CERTAIN OF SUCH MODIFICATIONS TO THE 1992 AGREEMENTS ARE NOT APPROPRIATE. ACCORDINGLY, PARTIES SHOULD CAREFULLY CONSIDER THE 1992 AGREEMENTS AND ANY NECESSARY MODIFICATIONS AND CONSULT WITH THEIR LEGAL ADVISERS BEFORE DOCUMENTING A TRANSACTION THAT SETTLES BY PHYSICAL DELIVERY UNDER A 1992 AGREEMENT. PARTIES SHOULD ALSO CONSULT WITH THEIR LEGAL ADVISERS AS TO THE TREATMENT OF TRANSACTIONS THAT SETTLE BY PHYSICAL DELIVERY UNDER APPLICABLE LAWS (INCLUDING, WITHOUT LIMITATION, SECURITIES LAWS AND INSOLVENCY LAWS) AND REGULATORY REQUIREMENTS.

VII. SEVERABILITY

Consideration was given to including a separate severability clause in the 1992 Agreements. After discussion, however, it was concluded that the 1992 Agreements should not contain a provision to the effect that the unenforceability, invalidity or illegality of one or more provisions in a 1992 Agreement will not affect the enforceability, validity or legality of the remaining provisions of such a 1992 Agreement. Participants in the working groups formed in connection with the development of the 1992 Agreements discussed at length issues concerning the inclusion of such a severability clause. Some market participants maintained that such a clause would improve the 1992 Agreements by addressing the potential for uncertain legal events. Other market participants suggested, however, that a

severability clause could be interpreted as being contrary to the view that a 1992 Agreement is a single agreement, which remains an important factor, insofar as the enforceability of close-out netting in an insolvency context is concerned, in many jurisdictions in which ISDA members and prominent end users are organized. Moreover, many market participants had strongly held views that a severability clause posed significant risks in the context of a contract such as the 1992 Agreements which provide for bilateral payment obligations; parties feared that a severability clause might be employed as a tool to enforce the payment obligations of one party in the case where payment obligations of a counterparty were declared unenforceable. Finally, other market participants suggested that a traditional severability clause linked to certain events of illegality could conflict with the Illegality Termination Event discussed in Section II.F.3.a. above. In light of the divergent views, it was determined that a severability clause should not be included in the 1992 Agreements and that the topic of a severability clause should be considered by the Crisis Management Working Group formed by ISDA.

VIII. IMPOSSIBILITY

The 1992 Agreements do not include a Termination Event for “Impossibility”, which, if included, could address the occurrence of a natural or man-made disaster, armed conflict, act of terrorism, riot, labor disruption, or any other circumstance beyond a party’s control which would make it impossible for a party or Credit Support Provider to perform its obligations under a 1992 Agreement or Credit Support Document, as the case may be. In connection with the development of the 1992 Agreements, some market participants suggested that such a Termination Event should be included in the 1992 Agreements on the grounds that events such as the invasion of Kuwait and the resulting impact on Kuwaiti dinar transactions can be expected to occur again and that the 1992 Agreements should provide for early termination or another appropriate adjustment in respect of any affected Transactions. Others argued that sufficient study had not been devoted to questions raised by the proposal or the appropriate substance of such a clause or that differing categories of events might require different consequences. Some maintained that the clause was not necessary because the potential application of, for example, the doctrine of impossibility or the laws of frustration to a 1992 Agreement provided adequate comfort. Because of the conflict between these two positions, it was determined that this issue should be considered by the Crisis Management Working Group formed by ISDA.

If, however, parties decide to include a Termination Event addressing Impossibility in a 1992 Agreement, the following, based on Section 5(b)(i) of the 1992 Agreements, is one possible approach for parties to consider for inclusion in the Schedule and modification of Section 5(b):

“(vi) *Impossibility*. Due to the occurrence of a natural or man-made disaster, armed conflict, act of terrorism, riot, labor disruption or any other circumstance beyond its control after the date on which a Transaction is entered into, it becomes impossible (other than as a result of its own misconduct⁵⁴) for such a party (which will be the Affected Party):

(1) to perform any absolute or contingent obligation, to make a payment or delivery or to receive a payment or delivery in respect of such Transaction or to comply with any other material provision of this Agreement relating to such Transaction; or

(2) to perform, or for any Credit Support Provider of such party to perform, any contingent or other obligation which the party (or such Credit Support Provider) has under any Credit Support Document relating to such Transaction.”

If parties choose to modify Section 5(b) of a 1992 Agreement to add Impossibility as a new Section 5(b)(vi) of the Multicurrency Master (Section 5(b)(iv) of the Local Currency Master), related modifications to the 1992 Agreements should then be considered for:

(i) Section 5(c) (to provide that if an Event of Default occurs and the same circumstances also trigger an Impossibility it will be treated as an Impossibility); (ii) Section 6(b)(ii) of the Multicurrency Master (to provide that, where an Impossibility occurs and there is only one Affected Party, the Affected Party must use all reasonable efforts to transfer to avoid an Impossibility Termination Event⁵⁵); (iii) Section 6(b)(iii) (Section 6(b)(ii) of the Local Currency Master) (to include the occurrence of an Impossibility where there are two Affected Parties); (iv) Section 6(b)(iv) of the Multicurrency Master (to include clause (2) of Impossibility within Section 6(b)(iv)(2)⁵⁶ and provide that either party may terminate in the case of an Impossibility); and (v) Section 14 (Section 12 of the Local Currency Master) (to modify the definition of “Affected Transactions” so that those Transactions affected by the occurrence of an Impossibility are Affected Transactions, to add a definition of “Impos-

⁵⁴ Parties should anticipate negotiation over this standard.

⁵⁵ A transfer requirement in the Multicurrency Master is not included in the Local Currency Master. For a discussion of the differences between the Local Currency Master and the Multicurrency Master, *see* Section I.A.1. above.

⁵⁶ An analogous modification to Section 6(b)(iii) of the Local Currency Master would be made to include within Section 6(b)(iii)(2) a reference to an Impossibility other than that referred to in Section 6(b)(ii) and provide that either party may terminate in the case of an Impossibility.

sibility” which provides that “Impossibility” has the meaning specified in Section 5(b)(vi) (Section 5(b)(iv) of the Local Currency Master) and to add a reference to “Impossibility” in the definition of “Termination Event”).

Also, in considering Impossibility parties may wish to consider product-specific issues in determining the scope of such a Termination Event and should consider the relationship between Impossibility and any treatment agreed to with respect to identifiable market or settlement disruption events.

IX. NEW OPERATIONAL TECHNOLOGIES

As discussed in Sections II.J. and II.M. above, ISDA has attempted to address changes in operational technologies since the publication of the 1987 Agreement by providing in Section 12 of the Multicurrency Master (Section 10 of the Local Currency Master) for certain notices by facsimile transmission and electronic messaging systems and recognizing in Sections 9(b) and (e) of the Multicurrency Master (Sections 8(b) and (e) of the Local Currency Master) that amendments to a 1992 Agreement and Confirmations with respect to a 1992 Agreement may occur by exchanging writings via facsimile transmission or exchanging electronic messages on an electronic messaging system. The use of these new technologies raises certain legal and operational issues that market participants should carefully consider. For example, in Section XI.B. and Section XII certain issues under the applicable New York statute of frauds and under English law, respectively, relevant to these new technologies are identified and discussed. This Section also identifies and discusses two significant issues for the consideration of parties who use certain new operational technologies.

A. Consent to Recording

Many individual transactions in the marketplace are first arranged and agreed to in a telephone conversation that is recorded. In some jurisdictions it may be that, prior to recording any conversation, a consent must be obtained from the party to be recorded and each employee of that party to be recorded; applicable law in those jurisdictions will dictate the required form and content of any such consent. A provision for consent to recording was not included in the 1992 Agreements because of the varied approaches in the United States, England and other jurisdictions to this question of required consent. Also, such a provision was not included in the 1992 Agreements because the practice of recording telephone conversations appeared to be less common in countries other than the United States and England. However, if parties conclude that a particular jurisdiction requires such a consent of a party and its personnel, market participants may find the following provision helpful for inclusion in a Schedule:

“Each party (i) consents to the recording of the telephone conversations of trading and marketing personnel of the parties and their Affiliates in connection with this Agreement or any potential Transaction and (ii) agrees to obtain any necessary consent of, and give notice of such recording to, such personnel of it and its Affiliates.”

In addition, any time parties are using tape recordings as the basis for a Confirmation, such parties should carefully consider any applicable statute of frauds, relevant requirements in respect of the admissibility of evidence and other legal requirements, even if they later plan to exchange written documentation reflecting the terms of the relevant Transaction (*see, e.g.*, Sections XI.B. and XII below).

B. Electronic Messaging Systems—Confirmations

As discussed in Sections II.J. and II.M. above, the 1992 Agreements contemplate that parties may document their Confirmations by exchanging electronic messages on an electronic messaging system selected by the parties. The electronic messaging system selected is likely to limit the information that can be included in a particular message. For example, it is possible that parties will not be able to include a provision in an electronic message to the effect that (i) the electronic message constitutes a “Confirmation” as referred to in the particular 1992 Agreement, (ii) the definitions and provisions contained in the relevant definitional booklet are incorporated into the Confirmation and, in the event of any inconsistency between those definitions and provisions and the Confirmation, the Confirmation will govern or (iii) the relevant Confirmation supplements, forms part of, and is subject to, the relevant 1992 Agreement. *See, e.g.*, Exhibit I to the 1991 Definitions. Accordingly, parties must specify this information elsewhere in the documentation governing the contractual relationship between the parties in order for the ISDA architecture to be effectively implemented. Parties should therefore consider the inclusion of the following provision in Part 5 of their Schedule to the Multicurrency Master (Part 4 of the Local Currency Master) for Transactions to be confirmed by means of an electronic messaging system:

“*Electronic Confirmations.* Where a Transaction is confirmed by means of an electronic messaging system that the parties have elected to use to confirm such Transaction (i) such confirmation will constitute a ‘Confirmation’ as referred to in this Agreement even where not so specified in the confirmation, (ii) such Confirmation will supplement, form part of, and be subject to this Agreement and all provisions in this Agreement will govern the Confirmation except as modified therein and (iii) either (A) the definitions and provisions contained in the 1992 ISDA FX and Currency Option Definitions (as published by the International Swap Dealers Association, Inc.) will be incorporated into the Confirmation if the Transaction is an FX Transaction or Currency Option or (B) the [insert title of relevant ISDA publication] Definitions (as published by the International Swap Dealers Association, Inc.) will be incorporated into the Confirmation if the Transaction is [insert type of transaction]. In the event of any inconsistency between the Definitions applicable pursuant to clause (iii) of this subsection and this Agreement, the Confirmation will prevail for the purpose of the relevant Transaction.”

This additional provision is most likely to be necessary when documenting foreign exchange transactions and currency options because of the wider usage of electronic messaging systems in those markets.

This type of potential modification to the Schedule was anticipated in the last sentence of Section 9(e)(ii) of the Multicurrency Master (Section 8(e)(ii) of the Local Currency Master) which provides that “[t]he parties will specify. . . [in a Confirmation] or *through another effective* means that any such counterpart, telex or electronic message constitutes a Confirmation” (emphasis added). In connection with this addition to the Schedule, parties will have to define each transaction-type (*e.g.*, define “FX Transaction” and “Currency Option” as defined in the 1992 ISDA FX and Currency Option Definitions) in the Schedule so that a determination can be made as to which definitional booklet applies to a particular Transaction between the parties. Although it may not be possible under a particular electronic messaging system, parties will facilitate such a determination by also identifying the transaction-type in the electronic message. Also, if the terminology of a particular messaging system differs materially from the corresponding defined terms published by ISDA, the parties may wish to agree contractually to a reconciliation of such terms in the Schedule.

X. NETTING-BY-NOVATION

The 1992 Agreements can accommodate the documentation of “FX Transactions” and “Currency Options” (each as defined in the FX and Currency Option Definitions). As part of the inclusion of FX Transactions and Currency Options within its 1992 documentation architecture, ISDA has published the FX and Currency Option Definitions (*see* Section I.A.3.b. above) and made certain modifications to the 1987 Agreement such as the modifications in respect of “Loss” discussed in Section II.G.3. above. In addition, some market participants may advocate the modification of the first paragraph of Section 2(c) of a 1992 Agreement and other necessary changes in order to implement a more expanded netting-by-novation approach. If parties conclude after consultation with their legal and other advisers and a review of their operational capabilities that such an approach to netting is appropriate, parties may find that the netting-by-novation provisions contained in Section 3 of the International Foreign Exchange Netting and Close-Out Master Agreement, appropriately modified for the 1992 Agreements, provide a helpful starting point for the integration of foreign exchange netting-by-novation into a 1992 Agreement. For Currency Options, some market participants may advocate an approach to netting based upon discharge and termination of offsetting option positions in those circumstances where directly offsetting option positions exist. If parties conclude after consultation with their legal and other advisers that this approach to netting is appropriate, parties may find that the provisions concerning option discharge and termination set forth in Section 6 of the International Currency Options Market Master Agreement (and explained in the related user’s guide), appropriately modified for the 1992 Agreements, provide a helpful starting point for the integration of option discharge and termination into a 1992 Agreement. Netting of premium payments in respect of Currency Options, another type of netting advocated by certain participants in the market for FX Transactions and Currency Options, may be accomplished by the parties through an appropriate election in the Schedule as is contemplated by Section 2(c) of the 1992 Agreements. For a discussion of Section 2(c) of the 1992 Agreements, *see* Section II.C.3. above.

XI. LOCAL LAW ISSUES—UNITED STATES AND NEW YORK⁵⁷

This Section provides a general description of certain local law issues under the laws of the United States and the State of New York that may be relevant to the documentation of derivative transactions under the 1992 ISDA standard documentation. **THIS SECTION IS NOT A DISCUSSION OF ALL LOCAL LAW ISSUES THAT PARTIES SHOULD CONSIDER IN CONNECTION WITH ENTERING INTO OR DOCUMENTING A PARTICULAR DERIVATIVE TRANSACTION AND IS ONLY CURRENT AS OF THE PUBLICATION DATE OF THIS USER’S GUIDE. PARTIES SHOULD THEREFORE CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE AS TO RELEVANT LOCAL LAW ISSUES (INCLUDING, WITHOUT LIMITATION, ISSUES RELATING TO TAX, REGULATION AND INSOLVENCY) UNDER THE LAWS OF THE UNITED STATES, THE STATE OF NEW YORK OR ANY OTHER RELEVANT JURISDICTION PRIOR TO USING ANY ISDA STANDARD DOCUMENTATION.**

A. Uniform Commercial Code (Article 2)

In view of recent cases in New York and the potentially broad product coverage of the 1992 Agreements, market participants may wish to consider the applicability of Article 2 of the New York Uniform Commercial Code (“UCC”) to certain Transactions under a 1992 Agreement.⁵⁸

Two New York courts have considered whether the UCC applies to foreign exchange transactions. In *Intershoe Inc. v. Bankers Trust Co.*, 77 N.Y.2d 517, 521 (N.Y. 1991), the Court of Appeals (the highest state court in New York) held that the UCC applied to “foreign currency transactions” in a case concerning a foreign exchange transaction involving the exchange of Italian lire for U.S. dollars. In addition, in *Saboundjian v. Bank of Audi (USA)*, 556 N.Y.S.2d 258, 261 n.2 (N.Y. App. Div. 1990), the intermediate level New York court stated that “[t]he [UCC] is applicable to foreign exchange transactions, since the [UCC] excludes money only when it is a medium of payment, not when treated as a commodity”. See also *United Equities Co. v. First Nat’l City Bank*, 383 N.Y.S.2d 6 (N.Y. App. Div. 1976), *aff’d*, 395 N.Y.S.2d 640 (N.Y. 1977) (intermediate level court applied UCC to decide claim for breach of Japanese yen forward exchange contract).

The *Saboundjian* court labelled the subject transaction a “foreign exchange transaction”; however, the *Intershoe* court, in considering a foreign exchange transaction, referred to such transaction as a “foreign currency futures transaction”, 77 N.Y.2d at 519,

⁵⁷ This Section discusses certain issues under the laws of the United States and the State of New York not identified elsewhere in this User’s Guide.

⁵⁸ This Section does not address the circumstances under which Article 8 or Article 9 of the UCC could apply to Transactions under a 1992 Agreement or to related collateral arrangements.

and a “foreign currency transaction”, 77 N.Y.2d at 521. This suggests that the *Intershoe* court either carelessly labelled the transaction or reasoned that the UCC applies to foreign exchange transactions, as well as other foreign currency transactions. If the latter is the case, then strong precedent exists for holding currency swaps subject to the UCC since they would appear to fit the category of “foreign currency transactions”. If the former is the case, then precedent, however unintended, exists for the same proposition.

Logically, one might ask whether a currency swap, like a foreign exchange transaction, is a purchase or sale of money as a commodity. A foreign exchange transaction contemplates a one-time exchange of one currency for another currency. A currency swap adds multiple settlement dates, the exchange of periodic payments and, in some cases, the exchange of principal. Despite these differences, there is not a persuasive reason to conclude that a foreign exchange transaction is a purchase or sale of money and that a currency swap is not.

Therefore, the decisions of the New York courts that a foreign exchange transaction is governed by the UCC and the intentional or unintentional use by the *Intershoe* court of the term “foreign currency transaction” suggest that the UCC might well be held to govern currency swaps. *See also Koreag, Controle et Revision S.A. v. Refco F/X Associates, Inc.*, 961 F.2d 341, 355 (2d Cir. 1992) (“currency exchange contract” subject to UCC).

The precedent for applying the UCC to certain transactions (*i.e.*, foreign exchange transactions) and the possibility that it may apply to others (*e.g.*, currency swaps) means that, where the parties have otherwise effectively specified the law of New York as the law applicable to a 1992 Agreement, the UCC should apply if that 1992 Agreement governs Transactions within the ambit of the UCC.⁵⁹ Where the parties have otherwise effectively specified English law as the law applicable to a 1992 Agreement and a dispute with respect to that 1992 Agreement is being adjudicated in a New York court, it is also possible that the court, in considering certain threshold issues relating to that dispute and the validity of the contract, would apply the UCC (as it would the common law) to such questions as whether the statute of frauds (UCC § 2-201) has been complied with and whether the contract is unconscionable (UCC § 2-302), and to certain “procedural” issues, such as whether the applicable statute of limitations has been met (UCC § 2-725), before applying English law to the dispute.

Whether the UCC applies to a transaction could affect the outcome of a dispute between parties to a 1992 Agreement. For example, in *Koreag* the U.S. Court of Appeals considered two groups of “currency exchange” agreements in which Refco F/X Associates, Inc. (“Refco”) wired United States dollars and other currencies to an account of Mebco Bank, S.A. (“Mebco”), an insolvent Swiss bank for which *Koreag, Controle et Revision*

⁵⁹ It is not clear whether a court would apply the UCC to all, part or none of a 1992 Agreement under which there is documented transaction-types subject to the UCC and transaction-types not subject to the UCC.

S.A. (“Koreag”) later was appointed liquidator in a Swiss insolvency proceeding, in anticipation of receiving a commensurate amount of other currencies and U.S. dollars, respectively, from Mebco. Refco, however, did not receive the U.S. dollars and other currencies it bargained for. In the resulting dispute, the court applied the UCC, in a manner consistent with the *Intershoe* court, on the grounds that “[i]n a currency exchange contract . . . the money is not the *medium* of exchange, but rather the *object* of the exchange”. *Koreag*, 961 F.2d at 355 (emphasis in original). In setting forth the framework for its analysis under the UCC, the court first concluded that a party acts as both a buyer and a seller in a currency exchange contract, specifically both parties are sellers of the currency they transfer and buyers of the currency they receive. *Id.* Accordingly, because the court viewed Refco as a seller under one group of agreements and a buyer under the other, and because the remedies under the UCC of a buyer and seller differed substantively for purposes of *Koreag*, Refco was successful in its claim with respect to one group of agreements and not as successful with respect to the other. The *Koreag* decision thus illustrates how application of the UCC could impact market participants engaging in derivative transactions subject to the UCC. *See also* Section XI.B. below.

As in the case of the common law and its potential interstitial application, parties who are concerned with the application of a particular provision of the UCC to Transactions under a 1992 Agreement may consider including a provision in that 1992 Agreement to address those concerns. For example, if parties were concerned about the interstitial application of UCC § 2-609, they could include a provision in their Schedule disclaiming the application of that provision to Transactions under that 1992 Agreement.⁶⁰ This disclaimer should probably also refer to any equivalent common law right, because, once the UCC is disclaimed and thus not applicable, common law could apply. For example, the parties could agree that, notwithstanding UCC § 2-609 or any equivalent provision at common law, the only conditions precedent to performance are those listed in Section 2(a)(iii). However, certain provisions of the UCC cannot be varied by agreement. *See, e.g.*, UCC § 1-102. Also, in the case of UCC § 2-609, any disclaimer of a provision of the UCC should also disclaim equivalent rights at common law.

MARKET PARTICIPANTS SHOULD NOTE THAT THIS SECTION IS ONLY INTENDED TO BE A GENERAL ILLUSTRATION OF THE POTENTIAL APPLICATION OF THE UCC TO CERTAIN DERIVATIVE TRANSACTIONS THAT CAN BE DOCUMENTED UNDER A 1992 AGREEMENT. AS IN THE CASE OF THE COMMON LAW, PARTIES SHOULD CONSIDER WITH THEIR LEGAL ADVISERS HOW THE VARIOUS PROVISIONS OF THE UCC COULD IMPACT

⁶⁰ UCC § 2-609 permits a party with “reasonable grounds for insecurity” concerning the performance of the other party to a contract to demand in writing “adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he had not already received the agreed return”. Section 2(a) of the 1992 Agreements may, however, effectively disaffirm UCC § 2-609 by delineating conditions precedent to performance.

UPON CONTRACTUAL RELATIONSHIPS TO BE DOCUMENTED UNDER ISDA DOCUMENTATION PRIOR TO ENTERING INTO ANY SUCH CONTRACTUAL RELATIONSHIP.

B. Statute of Frauds

Market participants frequently begin a derivative transaction that they intend to document under a 1992 Master Agreement with a telephone call during which the basic economic terms of the transaction are established, together with any requirements for credit support (*e.g.*, collateral, letter of credit or guarantee). Although the parties usually intend to be bound by the terms of this oral agreement, they may not be able to prove their agreement because of the statute of frauds as found in either New York's General Obligations Law (the "GOL") or the UCC. While interest rate swaps and certain other derivative products likely remain subject to the requirements found in the GOL, recent case law has confirmed that foreign exchange transactions are subject to the requirements set forth in the statute of frauds contained in the UCC, as discussed in Section XI.A. above. *See Intershoe*, 77 N.Y.2d at 521.⁶¹

1. General Obligations Law. The GOL imposes a writing requirement for all agreements not performable within one year, which may be satisfied by a signed telex or other signed correspondence, including, in all likelihood, a facsimile transmission. The GOL requires that such writing contain all "material" terms and be signed at the end. A properly prepared writing should be enforceable against the party issuing it. To be enforceable against the recipient, however, the recipient generally must respond by indicating its acceptance of the terms specified. For a more detailed analysis of the relevant provisions of the GOL, *see* the memorandum prepared by Cravath, Swaine & Moore for ISDA dated March 6, 1992, entitled "Interest Rate Swaps and Currency Swaps: Required Documentation Under New York Law" (which is available to ISDA members from the executive offices of ISDA). Parties should also carefully consider with their legal advisers the treatment under the GOL of transactions entered into through operational technologies now commonly used in the marketplace such as electronic messaging systems and tape recordings.

2. UCC. As previously stated, the court in *Intershoe* held that foreign exchange transactions are subject to the UCC's statute of frauds requirements. As noted in Section XI.A. above, this suggests that other derivative products, such as currency and cross-currency swaps, may also be subject to these requirements. The UCC imposes a writing requirement on a sale of goods (*i.e.*, the purchase of money/currency as a commodity) over \$500. A writing which satisfies the GOL will also satisfy the UCC, since the UCC requires only a quantity term and may be subscribed to anywhere on the writing.

⁶¹ Draft legislation recently prepared and submitted by a working group in New York would change the framework of analysis in this Section XI.B. This draft legislation is available for review from the executive offices of ISDA.

A properly prepared writing should be enforceable against the party issuing it, but the recipient must respond to the writing indicating its acceptance in order for it to be bound by the writing. The UCC, however, creates an exception for “merchants” likely to be applicable to swap dealers. The merchant exception exempts certain oral contracts from the UCC’s statute of frauds and binds the recipient of a sufficient writing if (i) the contract is between merchants, (ii) the writing is received within a reasonable time and (iii) the party receiving it has reason to know of its contents and fails to object within 10 days after it is received. For a more detailed analysis of the above issues, *see* the memorandum for ISDA dated March 6, 1992, referred to immediately above. Parties should also carefully consider with their legal advisers the treatment under the UCC of transactions entered into through operational technologies now commonly used in the marketplace such as electronic messaging systems and tape recordings.

C. Credit Support Document (U.S. Bankruptcy Code § 546(g))

Certain provisions in the 1990 amendments to the U.S. Bankruptcy Code are not completely clear as to their application to agreements relating to “swap agreements” (as defined in the U.S. Bankruptcy Code). In particular, the 1990 amendments provide that a transfer “under a swap agreement, made by or to a swap participant, in connection with a swap agreement”, cannot be reclaimed by a bankruptcy trustee, unless such transfer is made with actual intent to hinder or defraud creditors. U.S. Bankruptcy Code § 546(g). However, because this provision refers only to transfers “under a swap agreement” it arguably may not cover transfers under a separate Credit Support Document.⁶² To protect against this risk when the bankruptcy of a counterparty would be subject to the U.S. Bankruptcy Code, parties should consider, when practicable, including a Credit Support Document “within” their 1992 Agreement as an annex or appendix or by incorporation. If parties choose to incorporate a Credit Support Document by reference, they should take care so as not to incorporate provisions that conflict with their 1992 Agreement.

D. U.S. Federal Commodities Laws

There are various issues under the U.S. Federal commodities laws that some market participants should consider prior to entering into a 1992 Agreement or certain Transactions. Three areas that could require documentation beyond that contained in the 1992 Agreements arise under the “trade option exemption” (the “Trade Option Exemption”) in regulations promulgated under the U.S. Commodity Exchange Act (the “CEA”), 17 C.F.R. § 32.4(a), regulations promulgated under the Futures Trading Practices Act of 1992 (the “FTPA”) by the Commodity Futures Trading Commission (the “CFTC”) and the “swap policy statement” (the “Swap Policy Statement”) approved by the CFTC, 54 Fed. Reg. 30694 (July 21, 1989).

⁶² The legislative history to the 1990 amendments to the U.S. Bankruptcy Code includes statements that this provision was intended to protect not only periodic and termination payments, but also collateral transfers.

1. Trade Option Exemption. Section 2(a)(1)(A) of the CEA generally confers on the CFTC exclusive jurisdiction over commodity options. The term “commodity” is broadly defined to include a variety of enumerated farm products, as well as “all other goods and articles . . . and all services, rights and interests in which contracts for future delivery are presently or in the future dealt in”. CEA § 2(a)(1)(A). Commodity option transactions are prohibited by CFTC regulation from trading over-the-counter unless they constitute options on swaps falling within the “safe harbor” from CFTC regulation set forth in the Swap Policy Statement discussed in Section XI.D.3. below, are exempted from the CEA pursuant to authority granted to the CFTC under the FTPA discussed in Section XI.D.2. below or qualify for the Trade Option Exemption set forth in Rule 32.4(a) under the CEA. 17 C.F.R. § 32.4(a); 54 Fed. Reg. 30694 n.16.

The Trade Option Exemption permits a party to offer (either as buyer or seller) an option to “a producer, processor, or commercial user of, or a merchant handling, the commodity” that is the subject of the option, so long as the offeree is entering into the option “solely for purposes related to its business as such”. 17 C.F.R. § 32.4(a). Thus, a party may enter into an over-the-counter option so long as the offeree is an end user of the “commodity” (*i.e.*, the relevant index or the underlying commodity) linked to the transaction underlying the option and the option itself relates to the offeree’s “business”.⁶³ Accordingly, a party offering such an option may wish to modify Section 3 of the 1992 Agreements so as to obtain a specific representation to this effect from its counterparty.

2. Futures Trading Practices Act—CFTC Exemption for Swap Agreements. The FTPA and regulations promulgated under the FTPA by the CFTC should impact the decision-making process, in certain instances, of those parties who add representations to Section 3 of the 1992 Agreements because of concerns as to the application of the U.S. Federal commodities laws to a particular contractual relationship. The FTPA, among other things, provides the CFTC with the authority to exempt from the CEA futures contracts and transactions that may have futures-like elements, including “swap agreements” (as defined

⁶³ However, the Trade Option Exemption does not exempt transactions from the CFTC fraud rules and does not apply to certain commodities, primarily farm products, enumerated in 17 C.F.R. § 32.2. The CFTC has proposed an amendment to the Trade Option Exemption to permit trade options, and other options determined not to be contrary to the public interest, on such agricultural commodities. *See* 56 Fed. Reg. 43560 (1991). Options on securities and securities indices are outside the purview of the CFTC as a result of the 1982 jurisdictional accord between the Securities and Exchange Commission and the CFTC. *See* CEA § 2(a)(1)(B). Also, swap options providing for physical settlement may be covered by the grant of exemptive authority by the CFTC pursuant to the FTPA discussed in Section XI.D.2. below and/or may be covered by the Swap Policy Statement discussed in Section XI.D.3. below (56 Fed. Reg. 30694 n.16). Depending on the nature of a cash-settled swap option, such swap option may fall within the Swap Policy Statement, the grant of exemptive authority by the CFTC pursuant to the FTPA or the Trade Option Exemption or may not be covered by any of the aforementioned.

in Section 101 of the U.S. Bankruptcy Code). On January 14, 1993, the CFTC adopted regulations that exempt swap agreements from regulation under the CEA if the following requirements are met:

a. the relevant swap agreement is entered into between “eligible swap participants”, which includes (i) entities having total assets in excess of \$10 million; (ii) entities having a net worth of \$1,000,000 that either enter the relevant swap agreement (A) in connection with their business or (B) to manage the risk of an asset or liability owned or incurred in the conduct of their business (or reasonably likely to be so owned or incurred); or (iii) individuals having total assets in excess of \$10 million;

b. the relevant swap agreement is not part of a fungible class of agreements that are standardized as to their material economic terms;

c. the creditworthiness of any party having an actual or potential obligation under a swap agreement would be a material consideration in entering into, or determining the terms (including pricing or credit enhancement terms) of the relevant swap agreement; and

d. the swap agreement is not entered into and traded on or through a “multilateral transaction execution facility”;

provided that clauses b. and d. do not preclude any bilateral or multilateral arrangement for the netting of payment obligations or payments resulting from swap agreements.

As a result of these regulations and specific language in the CFTC release relating to such regulations, market participants may wish to consider obtaining a representation from their counterparties providing comfort that such counterparties are “eligible swap participants” for purposes of the regulations and would be well-advised to conduct appropriate due diligence with respect to this representation. Furthermore, a party might request a representation that the relevant agreement is a “swap agreement” as defined in the regulations (which definition is not drafted in the regulations directly to include subsequent amendments to the definition of “swap agreement” contained in the U.S. Bankruptcy Code).

Parties should also note that the regulations and the FTPA do not render the Swap Policy Statement (discussed immediately below) irrelevant since the exercise of exemptive authority by the CFTC does not apply to the terms of the jurisdictional accord between the Securities and Exchange Commission and the CFTC set forth in Section 2(a)(1)(B) of the CEA. Accordingly, parties may still find need to rely on the terms of the Swap Policy Statement for securities-based swaps, as well as for other types of swap transactions. For a more detailed analysis of the regulations promulgated by the CFTC under the FTPA, *see* the memorandum prepared by Cravath, Swaine & Moore dated January 19, 1993, entitled

CFTC Exemptions for Swap Agreements and Hybrid Instruments (which is available to ISDA members from the executive offices of ISDA).

3. Swap Policy Statement. On July 17, 1989, the CFTC approved the Swap Policy Statement which establishes a non-exclusive safe harbor for certain types of swap transactions that will not be subject to CFTC regulation. To fall within the Swap Policy Statement's "safe harbor" a swap transaction must (i) be individually tailored in its material terms, (ii) create performance obligations that are terminable, absent default, only with the consent of the counterparty and be entered into with the expectation of performance, (iii) reflect individualized credit risk, (iv) be undertaken in connection with each party's line of business and (v) not be marketed to the public. In response to the Swap Policy Statement, some market participants have concluded that Section 3 of the 1992 Agreements should be amended to add a representation applicable to both parties to the effect that the relevant 1992 Agreement and each Transaction under it are being entered into in connection with each party's line of business.⁶⁴

XII. LOCAL LAW ISSUES—ENGLAND⁶⁵

This Section provides a general description of certain local law issues under the laws of England that may be relevant to the documentation of derivative transactions under the 1992 ISDA standard documentation. **THIS SECTION IS NOT A DISCUSSION OF ALL LOCAL LAW ISSUES THAT PARTIES SHOULD CONSIDER IN CONNECTION WITH ENTERING INTO OR DOCUMENTING A PARTICULAR DERIVATIVE TRANSACTION AND IS ONLY CURRENT AS OF THE PUBLICATION DATE OF THIS USER'S GUIDE. PARTIES SHOULD THEREFORE CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE AS TO RELEVANT LOCAL LAW ISSUES (INCLUDING, WITHOUT LIMITATION, ISSUES RELATING TO TAX, REGULATION AND INSOLVENCY) UNDER THE LAWS OF ENGLAND OR ANY OTHER RELEVANT JURISDICTION PRIOR TO USING ANY ISDA STANDARD DOCUMENTATION.**

A. Form of Contract

There is no English law requirement that a contract for an interest rate or currency swap or similar transaction takes any particular form (however, statutory exceptions may apply to a Credit Support Document — for example, a guarantee must be supported by signed written evidence). An oral contract for such a transaction — *i.e.*, one made over the telephone — is sufficient. Nevertheless, as a result of Section 9 of the Multicurrency Master

⁶⁴ Some parties choose to rely on the representation contained in Section 3(a)(iii) of the 1992 Agreements concerning compliance with laws rather than add a specially-tailored representation with respect to the Swap Policy Statement.

⁶⁵ This Section discusses certain issues under the laws of England not identified elsewhere in this User's Guide.

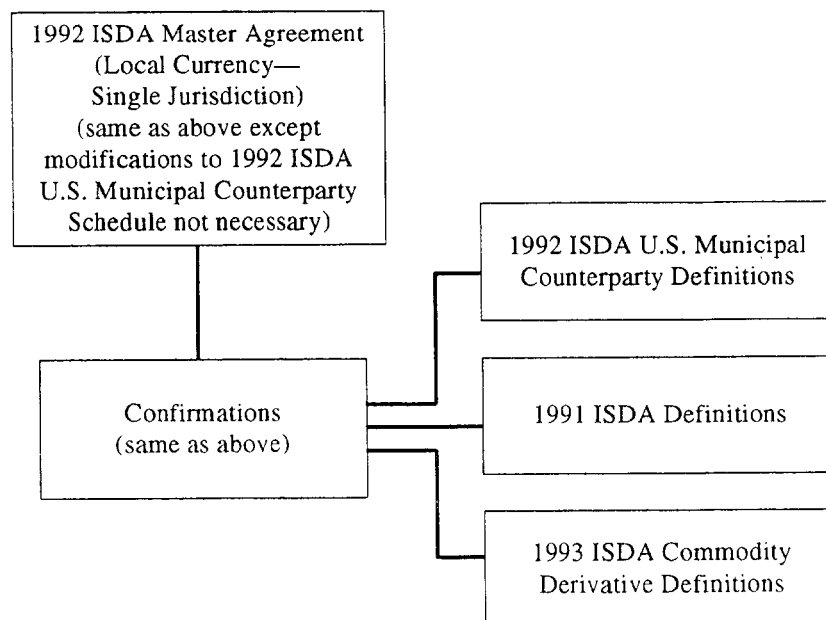
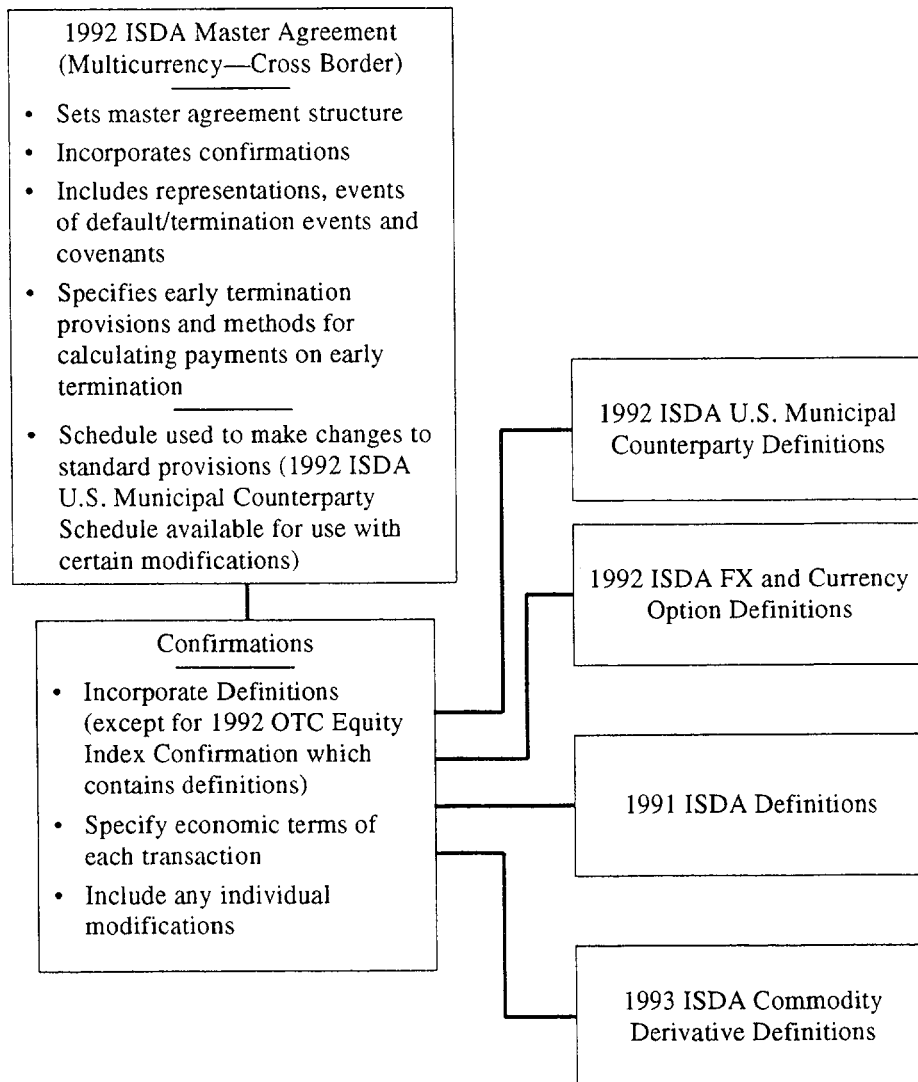
(Section 8 of the Local Currency Master), the 1992 Agreements contemplate that a Transaction will be confirmed in a certain way, which involves either a document or other specified confirming evidence. For a further analysis and a description of some practical implications of the form of a swap contract, *see* the memorandum prepared by Linklaters & Paines for ISDA dated December 21, 1992 (which is available to ISDA members from the executive offices of ISDA). Parties should also carefully consider with their legal advisers the treatment under English law of transactions entered into through operational technologies now commonly used in the marketplace, such as electronic messaging systems.

B. Recorded Conversations

Many swap dealers in England adopt the practice of taping telephone conversations during which dealings on swaps and similar transactions take place. The tape recordings may be referred to by the parties to a transaction if there is a subsequent disagreement as to the terms of the transaction agreed over the telephone. However, the use to which such tape recordings may be put in court proceedings in England to prove a fact stated in the conversation is limited. In particular, use of the tape recordings may only be made where either the speaker knew he was being recorded, or the speaker did not know but another party to the conversation who did know about the recording gives oral evidence of what the speaker said. Parties may wish to consider ways in which they can, in the 1992 Agreements or otherwise, increase the likelihood that both individuals to a telephone conversation being recorded know that the recording is taking place. For a further discussion of recorded conversations, *see* the memorandum for ISDA dated December 21, 1992, referred to immediately above, and Section IX.A. above.

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1992 ISDA DOCUMENTATION ARCHITECTURE



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FORM OF AMENDMENT TO THE INTEREST RATE AND CURRENCY EXCHANGE AGREEMENT/ INTEREST RATE SWAP AGREEMENT^{*1}

dated as of

..... and

have previously entered into that certain Interest Rate and Currency Exchange Agreement/Interest Rate Swap Agreement */ dated as of, 19... (the “Old Agreement”). The parties have now agreed to amend the Old Agreement by this Amendment (this “Amendment”).

Accordingly, the parties agree as follows: –

1. Amendment and Restatement of the Old Agreement

Upon execution of this Amendment by both parties, the Old Agreement shall be and hereby is amended and restated in the form of Annex A² hereto (the “Amended and Restated Agreement”) along with the Confirmations (as defined in the Old Agreement) relating thereto as modified by this Amendment. As used in the Old Agreement (including any Confirmation (as defined in the Old Agreement) relating thereto), as amended and restated by this Amendment, the terms “Interest Rate and Currency Exchange Agreement”/“Interest Rate Swap Agreement”*, “Rate Swap Agreement”, “this Rate Swap Agreement” “Swap Agreement”, “this Swap Agreement”, “Agreement”, “this Agreement”, “herein”, “hereinafter”, “hereof”, “hereto” and other words of similar import shall mean the Amended and Restated Agreement, unless the context otherwise specifically requires.

* Delete as applicable.

¹ PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING THIS FORM OF AMENDMENT. BECAUSE OF THE VARIED DOCUMENTATION STRUCTURES IN THE MARKETPLACE, MODIFICATIONS TO THIS FORM OF AMENDMENT MAY BE NECESSARY OR AN ENTIRELY DIFFERENT FORM OF AMENDMENT MAY BE APPROPRIATE. FOR EXAMPLE, THIS FORM OF AMENDMENT DOES NOT ADDRESS ANY MODIFICATIONS TO CREDIT SUPPORT DOCUMENTS NECESSITATED BY CONVERSION TO A 1992 ISDA MASTER AGREEMENT.

² It is contemplated that Annex A will include the appropriate version of the 1992 ISDA Master Agreement, including the Schedule thereto.

2. Representations

Each party represents to the other party that:—

- (a) **Status.** It is duly organised and validly existing under the laws of the jurisdiction of its organisation or incorporation and, if relevant under such laws, in good standing;
- (b) **Powers.** It has the power to execute and deliver this Amendment and to perform its obligations under this Amendment and has taken all necessary action to authorise such execution, delivery and performance;
- (c) **No Violation or Conflict.** Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets;
- (d) **Consents.** All governmental and other consents that are required to have been obtained by it with respect to this Amendment have been obtained and are in full force and effect and all conditions of any such consents have been complied with; and
- (e) **Obligations Binding.** Its obligations under this Amendment constitute its legal, valid and binding obligations, enforceable in accordance with its respective terms (subject to applicable bankruptcy, reorganisation, insolvency, moratorium or similar laws affecting creditors’ rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).

3. Miscellaneous

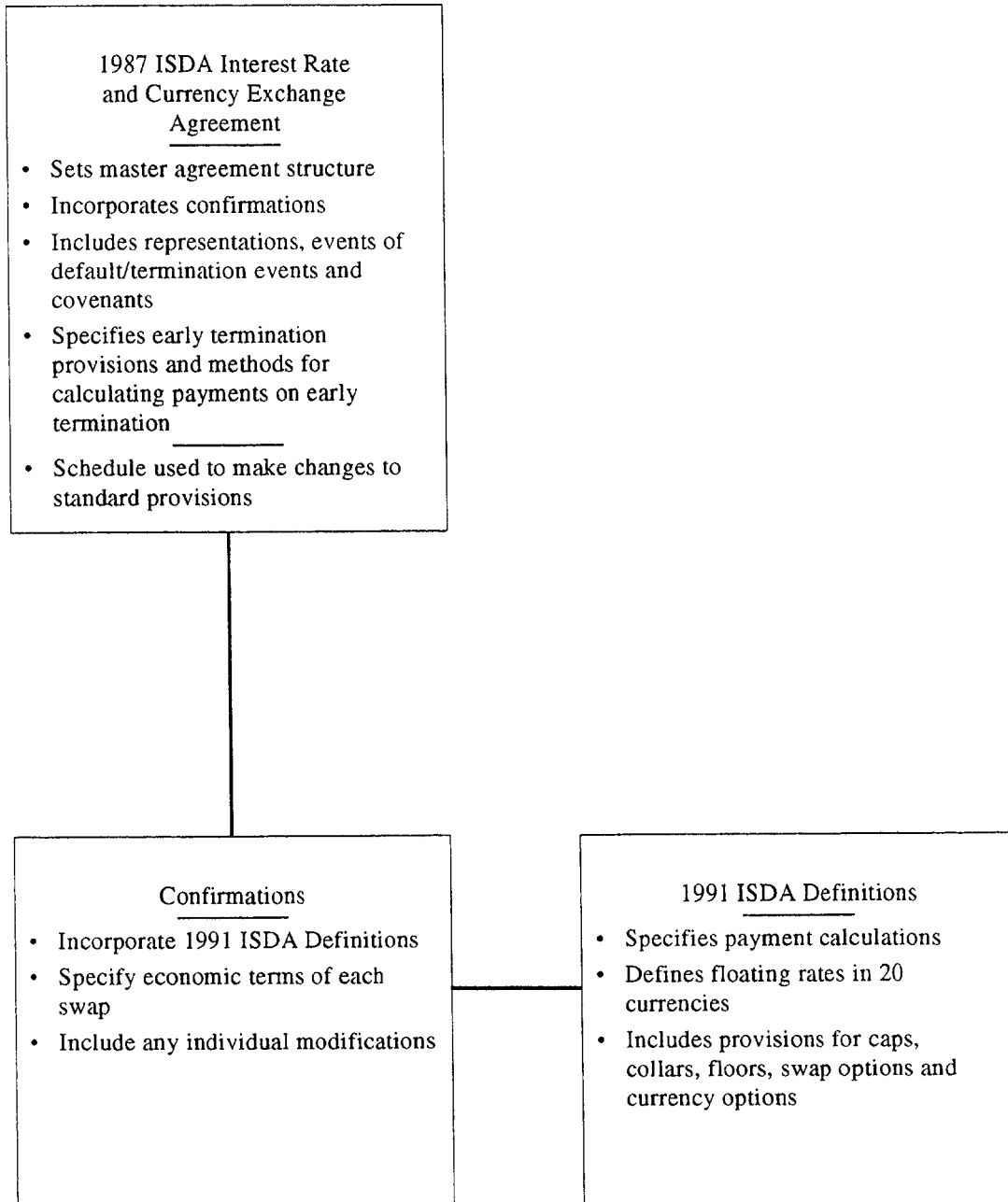
- (a) **Entire Agreement.** This Amendment constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings (except as otherwise provided herein) with respect thereto.
- (b) **Amendments.** No amendment, modification or waiver in respect of this Amendment will be effective unless in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties.
- (c) **Counterparts.** This Amendment may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.
- (d) **Headings.** The headings used in this Amendment are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Amendment.
- (e) **Governing Law.** This Amendment will be governed by and construed in accordance with English law/the laws of the State of New York (without reference to choice of law doctrine).*

IN WITNESS WHEREOF the parties have executed this Amendment on the respective dates specified below with effect from the date specified on the first page of this Amendment.

..... (Name of Party) (Name of Party)
By:	By:
Name: Title: Date:	Name: Title: Date:

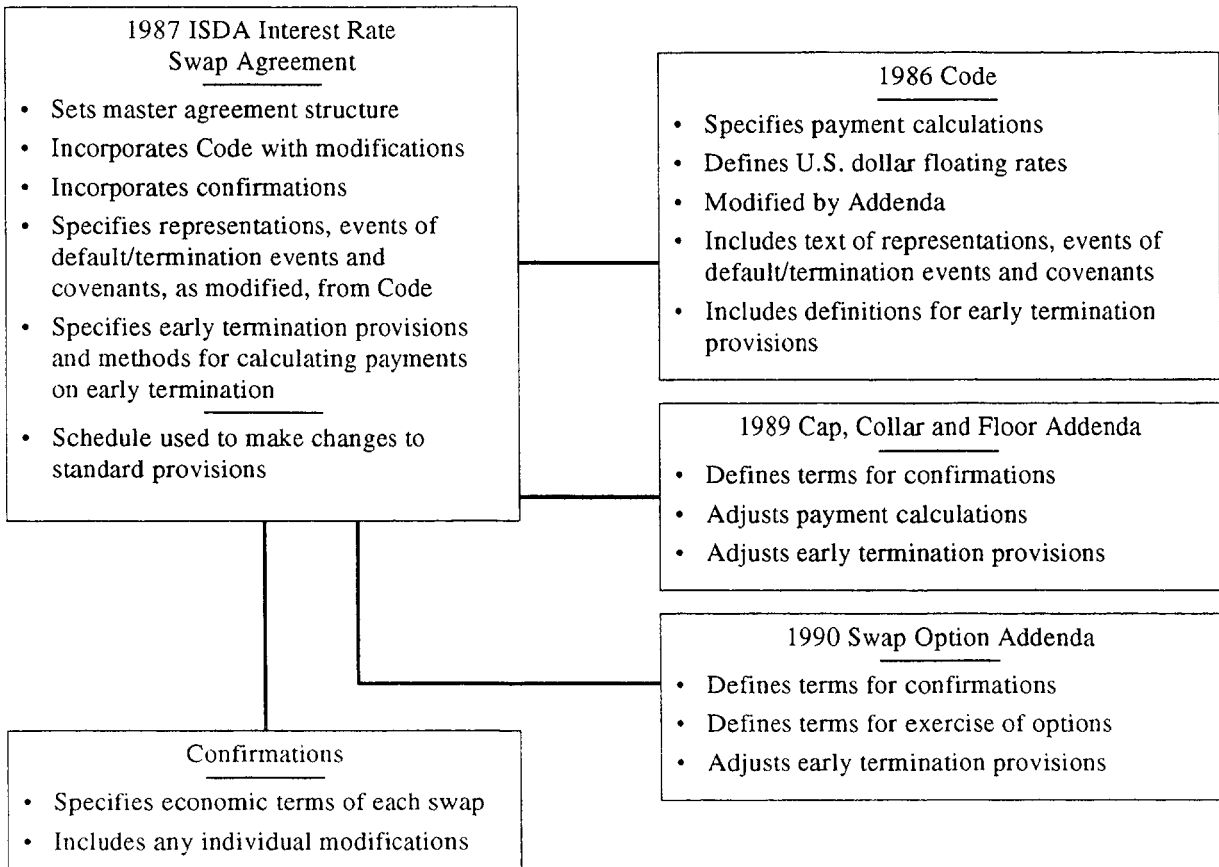
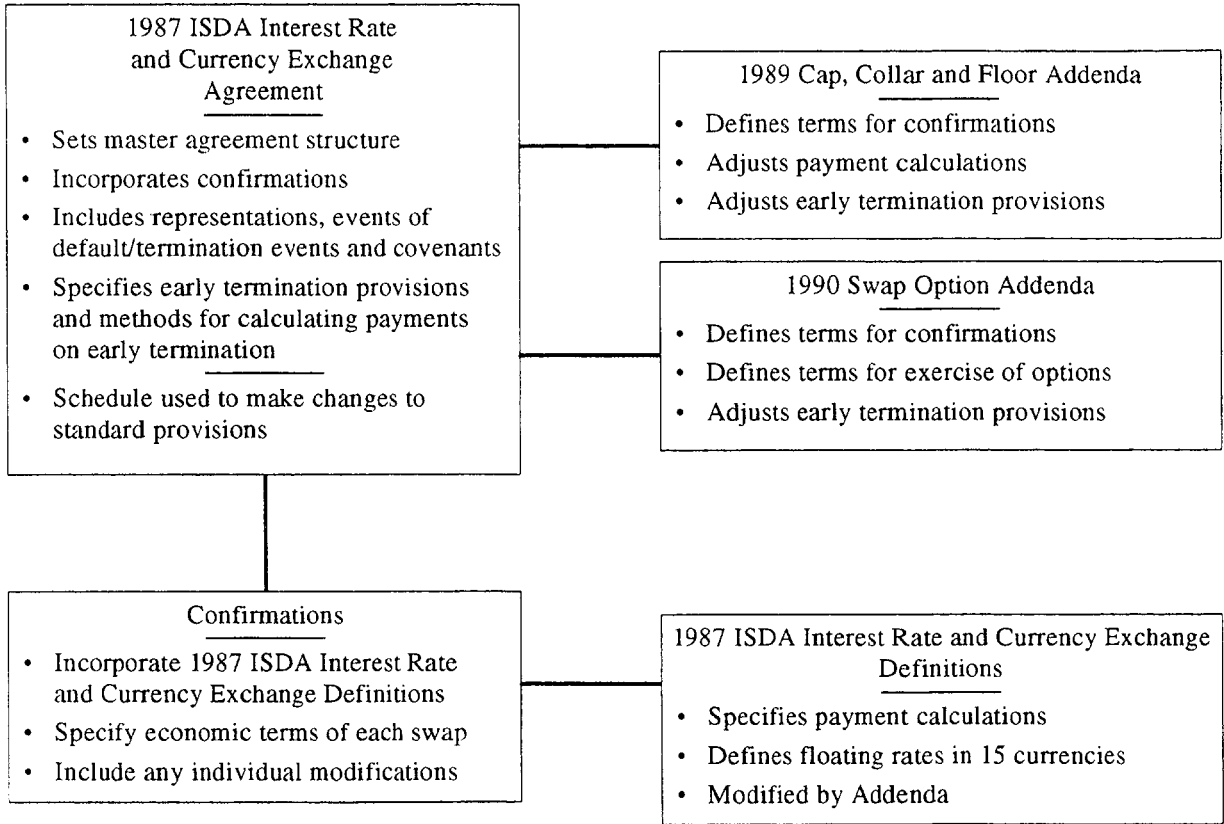
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1991 ISDA DOCUMENTATION ARCHITECTURE



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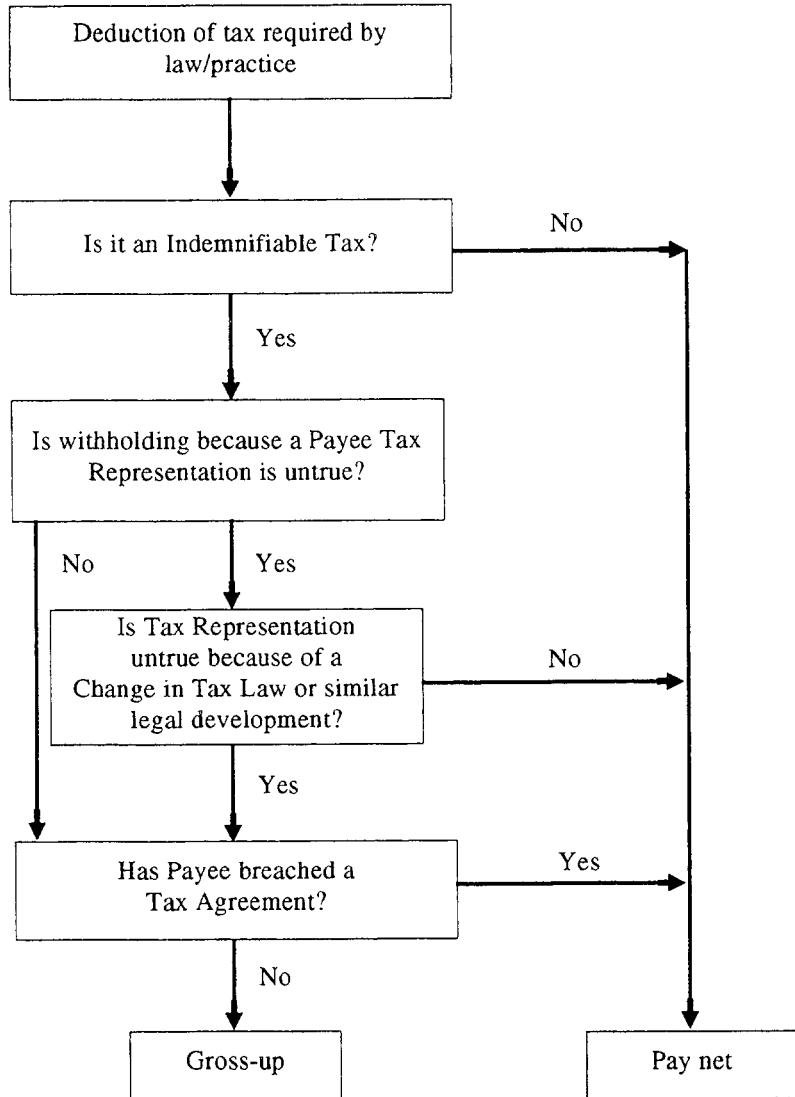
PRE-1991 ISDA DOCUMENTATION ARCHITECTURE



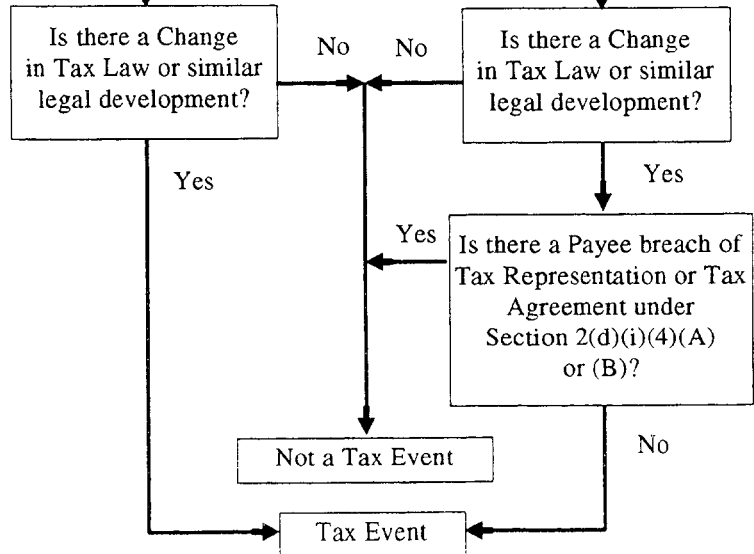
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**1992 ISDA MASTER AGREEMENT (MULTICURRENCY—
CROSS BORDER) GROSS-UP/TAX EVENT PROVISIONS**

Gross-up
Provisions:



Tax Event
Provisions:

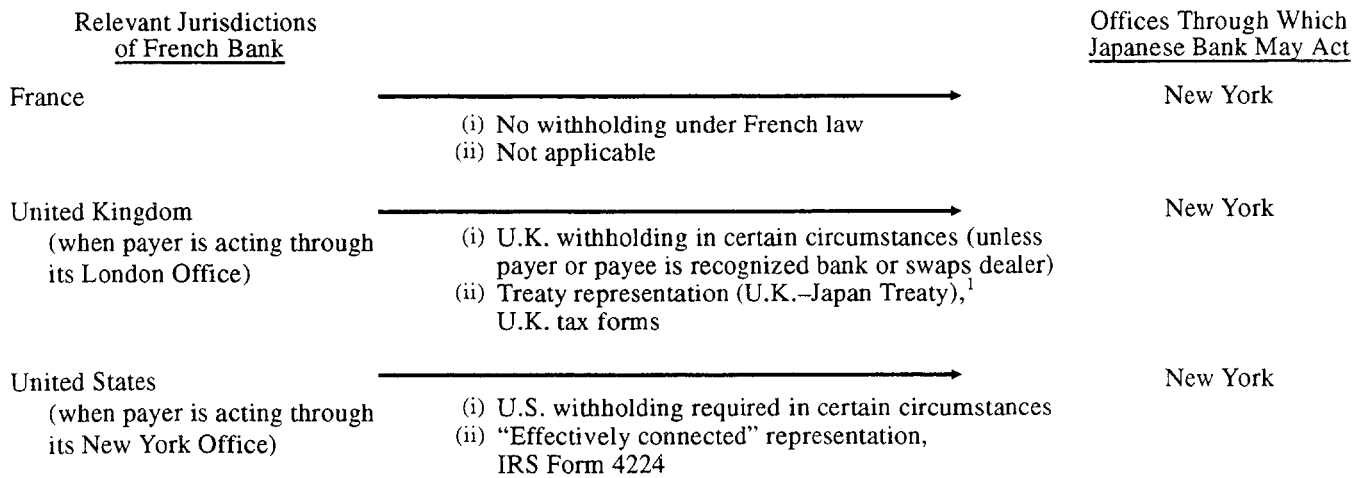
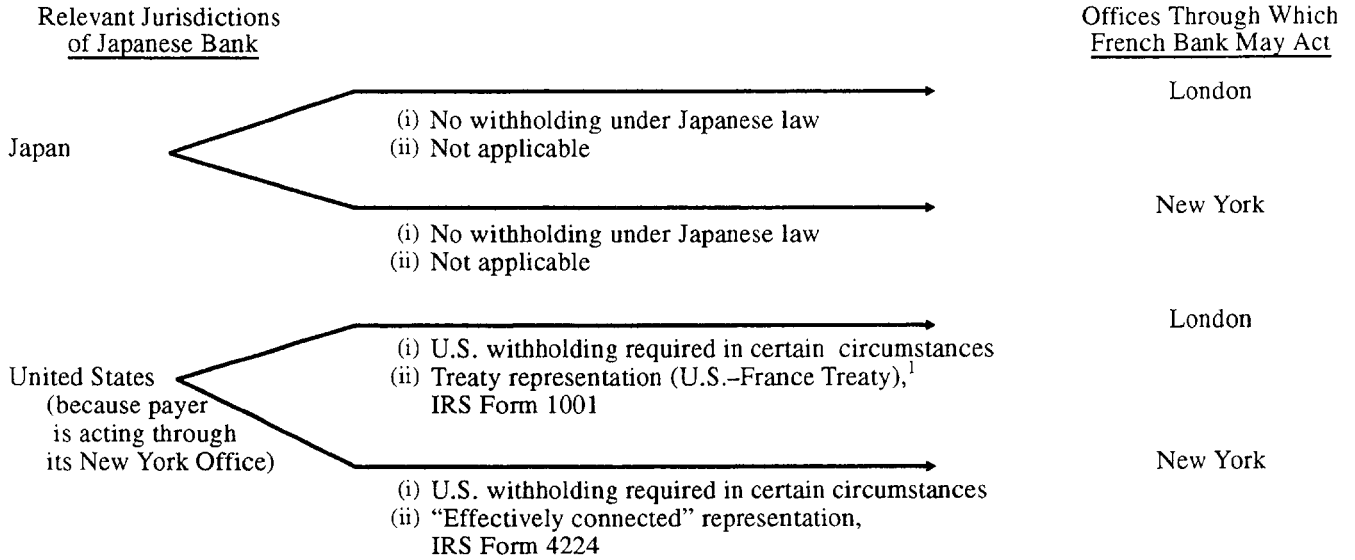


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MULTIPLE RELEVANT JURISDICTIONS; MULTIBRANCH PARTIES

Illustration of example set forth in Section IV.A.2.d.

- (i) Is any withholding tax imposed by the payer's Relevant Jurisdiction?
- (ii) Payee tax representations and forms requested to determine availability of exemption



¹ When payment is made from the New York Office of the Japanese Bank to the London Office of the French Bank, the Specified Treaty would be the U.S.–France Treaty, because the jurisdiction that would otherwise impose withholding tax is the U.S. and the country of residence of the payee is France. The Specified Treaty would, however, be the U.K.–Japan Treaty in the case of payments made by the French Bank through its London Office to the New York Office of the Japanese Bank, because the jurisdiction that would otherwise impose withholding tax is the U.K. and the country of residence of the payee is Japan.

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