

DIRITTO DEL COMMERCIO INTERNAZIONALE

Fasc. 2

1993

(Estratto)

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CONSIDERAZIONI IN TEMA DI SWAPS



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1. Una premessa terminologica. — 2. Il nuovo contratto modello dell'*International Swap Dealers Association*.

Appendice: ISDA - *International Swap Dealers Association, Inc. - Master Agreement*.

1. Una premessa terminologica.

L'interesse della nostra dottrina per i contratti di *swap* è ancora frammentario⁽¹⁾ e permane una certa confusione terminologica sul

(¹) M. MORI, *Swap - una tecnica finanziaria per l'impresa*, Padova, 1990; R. AGOSTINELLI, *Swap contract: struttura e profili civilistici di una nuova tecnica finanziaria*, in *Quadrimestre*, 1991, p. 10; ID., *Struttura e funzione dei contratti di swap*, in *Banca borsa tit. cred.*, 1991, II, p. 437; ID., *I modelli ABI di interest rate e currency swap*, in *Banca borsa tit. cred.*, 1992, I, p. 262; F. CHIOMENTI, *Cambi di divise a termine*, in *Riv. dir. comm.*, 1987, I, p. 45; P. BERNARDINI, *Il rischio di cambio nei contratti internazionali*, in questa *Rivista*, 1989, p.10; L. RADICATI DI BROZOLO, *Il contratto modello di swap dell'International Swap Dealers Association*, *ibidem*, 1988, p. 539; DI STEFANO, *Il contratto di currency swap per la copertura dei rischi di valuta*, in *Consulenza*, 1988, 7, p. 651; MATTEUCCI, *Il contratto di swap*, in *Quaderni giuridici dell'impresa*, 1990, p. 27; F. CAPRIGLIONE, *Gli swaps come valori mobiliari*, in *Banca borsa tit. cred.*, 1991, I, p. 792; D. PREITE, *Recenti sviluppi in tema di contratti differenziali semplici (in particolare caps, floors, swaps, index futures)*, in questa *Rivista*, 1992, p. 171; M. IRRERA, *Domestic swap: un nuovo contratto atipico*, in *Foro pad.*, 1987, II, p. 121; B. INZITARI, *Swap (contratto di)*, in *Contratto e impresa*, 2, 1988, p. 598; R. CAVALLO BORGIA, *Nuove operazioni dirette all'eliminazione del rischio di cambio*, in *Contratto e impresa*, 1988, p. 393; F. CAPUTO NASSETTI, *Interest rate swaps e interest rate and currency swaps*, in questa *Rivista*, 1990, p. 675; ID., *Profili legali degli interest rate swaps e degli interest rate and currency swaps*, *ibidem*, 1992, p. 69; ID., *Un documento di lavoro per un contratto tipo italiano di swap*, *ibidem*, 1992, p. 95. Per quanto riguarda gli aspetti finanziari e contabili vedasi M. MORI, *op. cit.*; C. CORNINI, A. SCHIANCHI, *La nuova finanza*, Milano, 1987, p. 87 ss.; G. SZEGO, PARIS, ZAMBRUNO, *Mercati finanziari e attività bancaria internazionale*, Bologna, 1988, p. 249 ss.; GIRINO, VECCHIO, *Futures, swaps, options e commercial papers*, Milano, 1988; M. GABRIELLI, S. DE BUONO, *Capire la finanza*, Milano, 1987, p. 233 ss.; M. MONTI, M. ONADO, *Il mercato monetario e finanziario in Italia*, Bologna, 1989, p. 416 ss.; TARANTA, *La valutazione del rischio per gli swaps di interesse e di valuta e i ratios di adeguatezza del capitale delle banche*, in *Imprese e mercati*, agosto 1989, p. 286; A. CIRILLO, *Nifs, swaps, options*, Padova, 1990; C. VIOLA, *L'interest rate swap come strumento di gestione del rischio di interesse*, in *Quaderni AIAF* -

no talmente diffuse a livello internazionale che il termine è entrato — appunto per questa via 'tecnica' — a far parte del vocabolario di altri paesi. Non è difficile sentire coniugare in una qualsiasi sala cambi italiana il verbo « *swappare* » in tutti i suoi tempi e modi. Al pari dei termini *leasing*, *factoring*, *franchising*, il termine *swap* sembra destinato a divenire di uso corrente anche in Italia.

Veniamo ora alla individuazione, almeno sommaria, delle principali operazioni conosciute con il termine *swap*.

Due sono di gran lunga le più importanti: lo *swap* del mercato dei cambi ⁽⁴⁾ e lo *swap* del mercato degli interessi e delle divise.

Lo *swap* del mercato dei cambi consiste in una vendita a pronti di una divisa con contestuale riacquisto della stessa a termine ⁽⁵⁾. Una divisa si pone come merce e l'altra come prezzo. Trattasi sostanzialmente di un contratto di riporto di divise (da non confondersi con la semplice vendita a termine di divise).

Questa operazione trae origine dagli accordi — detti appunto *swap facilities* — stipulati dalle banche centrali al fine di consentire manovre di equilibrio della valuta nazionale o politiche monetarie. Un'operazione di *swap* può essere conclusa con diverse finalità: tra la banca centrale e le banche commerciali di uno stesso paese in presenza di saldi attivi o passivi della bilancia dei pagamenti oppure tra due banche centrali. Nel primo caso, quando la banca centrale vuole rastrellare liquidità dal sistema bancario e creare un incentivo per ridurre la posizione passiva nei confronti dell'estero, offre valuta estera alle banche contro moneta nazionale, impegnandosi a riacquistarla a termine ad un prezzo maggiorato; nel caso inverso di bilancia dei pagamenti negativa, la banca centrale può indurre le aziende di credito a ridurre le loro attività nette sull'estero, acquistando a pronti da esse divise estere al tasso di cambio corrente e impegnandosi a rivendere a termine divise della stessa specie ad un tasso di cambio inferiore. Nel secondo caso, quando una di esse cede all'altra un certo ammontare della propria valuta nazionale contro un equivalente ammontare di valuta dell'altra, in seguito ad accordi di cooperazione monetaria, volti a sostenere temporaneamente una determinata valuta sul mercato dei cambi ⁽⁶⁾.

⁽⁴⁾ In lingua italiana tale contratto viene definito come « pronti contro termine », ma il termine *swap* è entrato — grazie alla sua sinteticità — nel linguaggio in uso nelle sale cambi e tra gli operatori finanziari.

⁽⁵⁾ F. CAPUTO NASSETTI, *Profili*, cit., p. 39; M. MORI, *op. cit.*, p. 12. Circa la distinzione tra il mercato dei cambi e quello degli *interest rate swaps* e *interest rate and currency swaps* si veda BANCA DEI REGOLAMENTI INTERNAZIONALI, *Recent innovations in international banking*, 1986, p. 37.

⁽⁶⁾ AA.VV., *Dizionario di banca e di borsa*, Roma, voce « *accordo swap* », p. 16 e voce « *swap* », p. 1507.

Questa fattispecie di *swap* viene tuttora utilizzata, ma la tecnica è stata mutuata dagli operatori del mercato dei cambi ed è estremamente diffusa sia in termini di volumi che di soggetti utilizzatori (?). Dal punto di vista giuridico rimane comunque un unico contratto caratterizzato da una vendita di valuta estera con clausola di riacquisto a termine.

Lo *swap* del mercato degli interessi e delle divise raggruppa quelle operazioni conosciute come *interest rate swaps* (IRS), *interest rate and currency swaps* (IRCS) ecc... Una parte si obbliga, per esempio, a pagare annualmente il tasso fisso del 10% per cinque anni su un capitale di 100 ed in cambio l'altra parte si impegna a pagare semestralmente il tasso variabile stabilito di volta in volta in base a criteri concordati e calcolato sullo stesso capitale e per lo stesso periodo di cinque anni. Oppure una parte, Alfa, consegna un milione di dollari all'altra, Beta, la quale contestualmente consegna 500.000 sterline (assumendo un cambio 1 sterlina = 2 dollari) e si impegna a pagare \$ 100.000 dollari ogni anno per cinque anni ed a restituire un milione di dollari alla fine del quinto anno. Alfa si impegna a pagare 75.000 sterline ogni anno per cinque anni e a restituire 500.000 sterline alla fine del quinto anno (*).

All'interno di tale gruppo fiorisce una colorata terminologia che indica tipologie diverse della stessa forma contrattuale, la quale si adatta a numerose applicazioni pratiche. Basti citare — rimandando l'interessato lettore alla letteratura finanziaria in merito (°) — gli *asset swaps*, i *liability swaps*, gli *amortising swaps*, gli *step up swaps*, gli *zero coupon swaps*, gli *annuity swaps*, i *basic swaps*...

Trattasi in tutti i casi di contratti basati sulla stessa struttura legale che si manifesta con caratteristiche finanziarie diverse. Questa forma di *swap* si può definire come quel contratto in forza del quale le parti

(?) Il mercato dei cambi è il mercato che ha per oggetto la compravendita di divise. Nel 1992 ventisei banche centrali e autorità monetarie hanno effettuato un'indagine approfondita sulle transazioni in cambi nei rispettivi paesi. Uno degli aspetti di maggior rilievo che emerge da questa indagine è costituito dalle dimensioni del mercato. Al netto di tutte le duplicazioni si può stimare che il totale delle operazioni in cambi raggiunge un volume giornaliero di circa 880 miliardi di dollari, equivalente a quasi quaranta volte il valore medio giornaliero delle esportazioni mondiali di beni e servizi all'epoca dell'indagine. Il commercio con l'estero di per sé può spiegare solo modesta parte dell'attività complessiva sul mercato dei cambi. Il contributo preponderante deriva evidentemente dai flussi internazionali di capitali e dalle continue operazioni di copertura, arbitraggio e assunzione di posizioni collegate alle moderne strategie di gestione del rischio. L'indagine mostra che le operazioni a pronti sono tuttora preponderanti sul mercato dei cambi (BANCA INTERNAZIONALE DEI REGOLAMENTI, *Central bank survey of foreign exchange market activity in April 1992*, Basilea, 1993).

(*) Per una descrizione più completa delle varie forme tecniche in cui si può presentare questa fattispecie di *swap* si veda M. MORI, *op. cit.*, p. 37 ss.; F. CAPUTO NASSETTI, *Profili, cit.*, p. 19 ss.; C. CORNINI A. SCHIANCHI, *La nuova finanza, cit.*, pp. 87-113.

(°) M. MORI, *op. cit.*, p. 37 ss.

Il *domestic swap* e lo *swap* di interessi e divise (per comodità indicheremo quest'ultima d'ora in poi con IRS/IRCS), sono le fattispecie per le quali accade di assistere a confusioni, generalizzazioni inesatte ed applicazione delle caratteristiche di una fattispecie all'altra nei tentativi di trarre delle definizioni giuridiche esaustive. Trattasi a ben vedere di due contratti assai diversi non solo per le origini storiche e per i fini pratici che soddisfano, ma anche per la struttura operativa e legale. Il *domestic swap*, infatti, altro non è che un contratto di vendita a termine di divise caratterizzato da un patto compensativo in lire, mentre lo IRS/IRCS consiste — come detto in precedenza — nel contratto in forza del quale le parti si obbligano ad eseguire reciprocamente dei pagamenti il cui ammontare è determinato sulla base di parametri di riferimento diversi.

Dal punto di vista tecnico nel primo caso avremo un unico pagamento il cui ammontare è determinabile solo nel momento successivo dell'esecuzione della prestazione ed è incerto, al momento della conclusione del contratto, quale dei due contraenti sarà tenuto ad effettuarlo, mentre nel secondo la pluralità dei pagamenti⁽¹⁷⁾ è elemento tipico della fattispecie ed è determinato o determinabile l'ammontare delle prestazioni in capo a ciascun contraente.

Un'altra fattispecie nota con il termine *swap* è quella utilizzata nel mercato del debito sovrano⁽¹⁸⁾. In questo mercato, che ha per oggetto la trattazione del debito dei paesi latino-americani, africani, alcuni paesi dell'Asia e dell'Europa dell'Est, i paesi debitori 'ricomprano' il proprio debito in cambio di investimenti nazionali. Trattasi di operazioni assai complesse e plurilaterali, normalmente regolate da leggi *ad hoc* emesse dai paesi debitori desiderosi di ridurre il loro indebitamento internazionale.

Queste operazioni, note come *debt-equity swaps* (scambio di debito con capitale azionario), possono avvenire con tecniche giuridiche diverse che vanno dalla remissione del debito insoluto a fronte del trasferimento di azioni, alla *datio in solutum* di azioni per estinguere un debito insoluto, alla cessione del credito insoluto, al conferimento azionario del debito insoluto ecc...

Il mercato del *debt-equity swap* è assai vasto sia in termini di volumi che di partecipanti, ma assai ristretto è il numero degli specialisti

(17) La pluralità di pagamenti consiste nel fatto che i pagamenti che almeno una parte deve all'altra non siano meno di due. Nella normalità dei casi si hanno due flussi di numerosi pagamenti.

(18) Per una trattazione esaustiva del mercato del debito sovrano vedasi E.C.G. DE FARIA, J.A. STOTT, N.J.C. BUCHANAN, *Price Waterhouse/Euromoney debt/equity swap guide*, Euromoney Publications Plc, Londra, 1988.

che sono in grado di organizzare tali operazioni facendo incontrare la domanda e l'offerta.

In questo caso è particolarmente evidente che il termine *swap* è utilizzato con una valenza diversa dalle fattispecie finora viste e non individua una fattispecie a sé, ma una tecnica finanziaria che si avvale di tradizionali forme giuridiche.

Un ulteriore esempio di *swap* è presente nel settore del *countertrade* ⁽¹⁹⁾ (il cui equivalente in italiano potrebbe essere scambi in compensazione), dove per *swap* si intende in senso lato un baratto tra merci. Un paese in via di sviluppo e privo di riserve valutarie cede ad un paese industrializzato materie prime in cambio di prodotti finiti che hanno un valore uguale a quello delle materie prime cedute. Anche in questo caso le operazioni sono assai complesse, spesso plurilaterali e possono concretarsi in una normale permuta o in più contratti tipici legati tra loro.

Da questa breve panoramica su alcune delle fattispecie più comuni di *swap* il termine ha assunto il significato di riporto (*swap* del mercato dei cambi), di contratto atipico di scambio (IRS/IRCS), di contratto a termine di divise qualificato (*domestic swap*), di una particolare tecnica finanziaria (*debt-equity swap*) ed, infine, di permuta (nel *countertrade*).

È necessario, pertanto, mantenere distinte le fattispecie — in particolare gli IRS/IRCS dai *domestic swaps* — e bisogna far grande attenzione per evitare di *sacra miscere profanis* (mischiare le cose sacre alle profane) ⁽²⁰⁾.

2. Il nuovo contratto modello dell'International Swap Dealers Association.

L'*International Swap Dealers Association* (ISDA) ⁽²¹⁾ nel giugno 1992 ha pubblicato un nuovo modello di contratto normativo che innova sostanzialmente la precedente versione ⁽²²⁾, la quale, peraltro, continua a rimanere utilizzabile.

⁽¹⁹⁾ Per una panoramica sugli scambi in compensazione si veda P. BERNARDINI, *Il countertrade: da strumento di politica commerciale a nuova tecnica del commercio internazionale*, in questa *Rivista*, 1987, pp. 99-126; A. FRIGNANI, *Il diritto del commercio internazionale*, Milano, 1986, pp. 185-196; M. ROWE, *Countertrade*, Euromoney Books Ltd, Londra, 1989.

⁽²⁰⁾ ORAZIO, *Epist.*, I, 16, 54.

⁽²¹⁾ Per una breve panoramica sull'ISDA vedasi F. CAPUTO NASSETTI, *Interest rate*, cit., p. 689.

⁽²²⁾ La versione di cui si parla è quella chiamata *Interest rate and currency exchange agreement*, nota come *master agreement* e pubblicata in questa *Rivista* con commento di L. RADICATI DI BROZOLO (1988, p. 539). Si tenga presente che l'ISDA

cambi, le opzioni sulle divise e sugli interessi, cosicché i vantaggi del *netting* possano essere estesi ad una vasta gamma di operazioni.

I benefici che ne deriverebbero per le banche — ed in seconda analisi anche per i loro clienti che potrebbero sostenere costi inferiori in quanto il costo in termini di capitale per le banche sarebbe minore — sarebbero considerevoli.

In questa direzione l'ISDA in passato si era già concretamente mossa con la creazione di due appendici — una per le opzioni sui tassi di interesse (*May 1989 Addendum to schedule to Interest rate and currency exchange agreement - interest rate caps, collars, and floors*) e l'altra per le opzioni sulle divise (*July 1990 Addendum to schedule to Interest rate and currency exchange agreement - options*) che le parti contraenti di un modello ISDA del 1987 potevano sottoscrivere ad integrazione del contratto. Questi tentativi, però, creavano non poche difficoltà. In particolare, essendo il modello del 1987 stato creato appositamente per gli *swaps*, emergevano, tra gli altri, problemi di compatibilità con le soluzioni ivi adottate in merito al calcolo degli ammontari dovuti in caso di risoluzione del contratto, soluzioni che mal si adattano ad altre fattispecie.

Divenne evidente che la strada degli *addenda* per ampliare l'applicabilità del modello 1987 era di difficile percorribilità e, pertanto, l'ISDA decise di affrontare la redazione del nuovo modello che qui si commenta.

Veniamo ora ad un rapido esame delle principali novità.

Innanzitutto la struttura del modello è sostanzialmente cambiata in modo da riflettere il suo carattere omnicomprensivo di diverse operazioni, tra le quali gli *swaps* sono una delle tante.

L'art. 14, infatti, stabilisce che le operazioni oggetto del contratto sono *rate swap transaction, basis swap, forward rate transaction, commodity swap, commodity option, equity or equity index option, bond option, interest rate option, foreign exchange transaction, cap transaction, floor transaction, collar transaction, currency swap transaction, cross-currency rate swap transaction, currency option* e ogni altra operazione simile incluse le opzioni su qualsiasi delle operazioni sopra viste (per esempio *swap option*) e ogni combinazione delle operazioni sopra viste. L'articolo prevede, inoltre, una norma residuale in base alla quale anche altre fattispecie non comprese nell'elencazione *de qua* possono rientrare nell'ambito di applicazione del contratto se specificamente indicate dalle parti.

Un altro importante cambiamento consiste nel nuovo metodo di calcolo dell'ammontare dovuto in caso di risoluzione del contratto. Data la complessità del meccanismo ci limitiamo a segnalare che l'art.

6, lett. E, innova profondamente la controversa norma che in passato ha attirato numerose critiche a causa della sua imparzialità⁽²⁸⁾.

L'art. 5 è stato modificato in più punti al fine di estendere le varie ipotesi di inadempimento anche ai garanti delle parti (*credit support provider*).

Anche le norme per il trasferimento del contratto sono state riviste. In precedenza la cessione del contratto era consentita soltanto previo accordo delle parti e l'unica eccezione era nei casi di fusione o cessione di tutti i beni (*consolidation or amalgamation with, or merger into, or transfer of all or substantially all assets to, another entity*). Nel nuovo contratto tale eccezione è stata sottoposta al limite che la fusione o cessione dei beni non pregiudichi la posizione della controparte. Inoltre, è stata inserita la possibilità di trasferimento del contratto, senza il consenso della controparte, nel caso in cui questa sia inadempiente (art. 7).

Il *facsimile* è divenuto un valido mezzo di comunicazione previsto nel contratto (art. 12, lett. A, 3). A tale proposito è previsto che l'onere della prova della avvenuta ricezione sia in capo al mittente e che tale prova non possa esser data sulla base delle risultanze tecniche dell'apparecchio trasmittente. Il *facsimile*, in particolare, è stato introdotto per comunicare la conclusione di una operazione (art. 9, lett. E), variazioni di indirizzo (art. 12, lett. B) e modifiche al contratto (art. 9, lett. B). La novella ha così risolto numerosi dubbi relativi alla efficacia probatoria del moderno mezzo di comunicazione.

L'art. 9, lett. E, chiarisce che il momento della conclusione del contratto — qui inteso come una delle operazioni regolate dal modello ISDA '92 — è quello in cui le parti raggiungono l'accordo — anche verbale — sugli elementi essenziali dell'operazione (nella versione del 1987 il punto non è toccato).

Tra le numerose altre modifiche che sono state apportate — molte delle quali di natura prevalentemente tecnico finanziaria — citiamo la nuova definizione di 'giorno lavorativo', di 'tasso applicabile', di 'quotazione di mercato' e l'introduzione della possibilità di adempimento per consegna (tipico per alcune opzioni).

(28) S.K. HENDERSON, *Should swap termination payments be one way or two way?*, in *International financial law review*, 1990, p. 27.

ISDA
INTERNATIONAL SWAP DEALERS ASSOCIATION, INC.
MASTER AGREEMENT (*)

Dated as of

..... and

have entered and/or anticipate entering into one or more transactions (each a "Transaction") that are or will be governed by this *Master Agreement*, which includes the schedule (the "Schedule"), and the documents and other confirming evidence (each a "Confirmation") exchanged between the parties confirming those Transactions.

Accordingly, the parties agree as follows:

1. *Interpretation.*

(a) *Definitions.* The terms defined in Section 14 and in the Schedule will have the meanings therein specified for the purpose of this *Master Agreement*.

(b) *Inconsistency.* In the event of any inconsistency between the provisions of the Schedule and the other provisions of this *Master Agreement*, the Schedule will prevail. In the event of any inconsistency between the provisions of any Confirmation and this *Master Agreement* (including the Schedule), such Confirmation will prevail for the purpose of the relevant Transaction.

(c) *Single Agreement.* All Transactions are entered into in reliance on the fact that this *Master Agreement* and all Confirmations form a single agreement between the parties (collectively referred to as this "Agreement"), and the parties would not otherwise enter into any Transactions.

2. *Obligations.*

(a) *General Conditions.*

(i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

(ii) Payments under this Agreement will be made on the due date for value on that date in the place of the account specified in the relevant Confirmation or otherwise pursuant to this Agreement, in freely transferable funds and in the

(*) Marked to show changes from the 1987 Interest Rate and Currency Exchange Agreement.

manner customary for payments in the required currency. *Where settlement is by delivery (that is, other than by payment), such delivery will be made for receipt on the due date in the manner customary for the relevant obligation unless otherwise specified in the relevant Confirmation or elsewhere in this Agreement.*

(iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing, (2) *the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred or been effectively designated and* (3) each other applicable condition precedent specified in this Agreement.

(b) *Change of Account.* Either party may change its account for receiving a payment or delivery by giving notice to the other party at least five Local Business Days prior to the scheduled date for the payment or delivery to which such change applies unless such other party gives timely notice of a reasonable objection to such change.

(c) *Netting.* If on any date amounts would otherwise be payable:

(i) in the same currency; and

(ii) in respect of the same Transaction,

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.

The parties may elect in respect of two or more Transactions that a net amount will be determined in respect of all amounts payable on the same date in the same currency in respect of such Transactions, regardless of whether such amounts are payable in respect of the same Transaction. *The election may be made in the Schedule or a Confirmation by specifying that subparagraph (ii) above will not apply to the Transactions identified as being subject to the election, together with the starting date (in which case subparagraph (ii) above will not, or will cease to, apply to such Transactions from such date). This election may be made separately for different groups of Transactions and will apply separately to each pairing of Offices through which the parties make and receive payments or deliveries.*

(d) *Deduction or Withholding for Tax.*

(i) *Gross-Up.* All payments under this Agreement will be made without any deduction or withholding for or on account of any Tax unless such deduction or withholding is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, then in effect. If a party is so required to deduct or withhold, then that party ("X") will:

(1) promptly notify the other party ("Y") of such requirement;

(2) pay to the relevant authorities the full amount required to be deducted or withheld (including the full amount required to be deducted or withheld from any additional amount paid by X to Y under this Section 2(d)) promptly upon the

earlier of determining that such deduction or withholding is required or receiving notice that such amount has been assessed against Y;

(3) promptly forward to Y an official receipt (or a certified copy), or other documentation reasonably acceptable to Y, evidencing such payment to such authorities; and

(4) if such Tax is an Indemnifiable Tax, pay to Y, in addition to the payment to which Y is otherwise entitled under this Agreement, such additional amount as is necessary to ensure that the net amount actually received by Y (free and clear of Indemnifiable Taxes, whether assessed against X or Y) will equal the full amount Y would have received had no such deduction or withholding been required. However, X will not be required to pay any additional amount to Y to the extent that it would not be required to be paid but for:

(A) the failure by Y to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d); or

(B) the failure of a representation made by Y pursuant to Section 3(f) to be accurate and true unless such failure would not have occurred but for (I) any action taken by a taxing authority, or brought in a court of competent jurisdiction, on or after the date on which a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (II) a Change in Tax Law.

(ii) *Liability.* If:

(1) X is required by any applicable law, as modified by the practice of any relevant governmental revenue authority, to make any deduction or withholding in respect of which X would not be required to pay an additional amount to Y under Section 2(d)(i)(4);

(2) X does not so deduct or withhold; and

(3) a liability resulting from such Tax is assessed directly against X,

then, except to the extent Y has satisfied or then satisfies the liability resulting from such Tax, Y will promptly pay to X the amount of such liability (including any related liability for interest, but including any related liability for penalties only if Y has failed to comply with or perform any agreement contained in Section 4(a)(i), 4(a)(iii) or 4(d)).

(e) *Default Interest; Other Amounts.* Prior to the occurrence or effective designation of an Early Termination Date in respect of the relevant Transaction, a party that defaults in the performance of any payment obligation will, to the extent permitted by law and subject to Section 6(c), be required to pay interest (before as well as after judgment) on the overdue amount to other party on demand in the same currency as such overdue amount, for the period from (and including) the original due date for payment to (but excluding) the date of actual payment, at the Default Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed. If, prior to the occurrence or effective designation of an Early Termination Date in respect of the relevant Transaction, a party defaults in the performance of any obligation required to be settled by delivery, it will compensate the other party on demand if and to the extent provided for in the relevant Confirmation or elsewhere in this Agreement.

3. *Representations.*

Each party represents to the other party (which representations will be deemed to be repeated by each party on each date on which a Transaction is entered into and, in the case of the representations in Section 3(f), at all times until the termination of this Agreement) that:

(a) *Basic Representations.*

(i) *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;

(ii) *Powers.* It has the power to execute this Agreement and any other documentation relating to this Agreement *to which it is a party, to deliver this Agreement and any other documentation relating to this Agreement* that it is required by this Agreement to deliver and to perform its obligations under this Agreement and any obligations it has under any Credit Support Document to which it is a party and has taken all necessary action to authorise such execution, delivery and performance;

(iii) *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;

(iv) *Consents.* All governmental and other consents that are required to have been obtained by it with respect to this Agreement or any Credit Support Document to which it is a party have been obtained and are in full force and effect and all conditions of any such consents have been complied with; and

(v) *Obligations Binding.* Its obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations, enforceable in accordance with their 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)).

(b) *Absence of Certain Events.* No Event of Default or Potential Event of Default or, to its knowledge, Termination Event with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any Credit Support Document to which it is a party.

(c) *Absence of Litigation.* There is not pending or, to its knowledge, threatened against it or any of its Affiliates any action, suit or proceeding at law or in equity or before any court, tribunal, governmental body, agency or official or any arbitrator that is likely to affect the legality, validity or enforceability against it of this Agreement or any Credit Support Document to which it is a party or its ability to perform its obligations under this Agreement or such Credit Support Document.

(d) *Accuracy of Specified Information.* All applicable information that is furnished in writing by or on behalf of it to the other party and is identified for the

faults under a Specified Transaction and, after giving effect to any applicable notice requirement or grace period, there occurs a liquidation of, an acceleration of obligations under, or an early termination of, that Specified Transaction, (2) defaults, after giving effect to any applicable notice requirement or grace period, in making any payment or delivery due on the last payment, delivery or exchange date of, or any payment on early termination of, a Specified Transaction (or such default continues for at least three Local Business Days if there is no applicable notice requirement or grace period) or (3) disaffirms, disclaims, repudiates or rejects, in whole or in part, a Specified Transaction (or such action is taken by any person or entity appointed or empowered to operate it or act on its behalf);

(vi) *Cross Default*. If "Cross default" is specified in the Schedule as applying to the party, the occurrence or existence of (1) a default, event of default or other similar condition or event (however described) in respect of such party, any Credit Support Provider of such party or any applicable Specified Entity of such party under one or more agreements or instruments relating to Specified Indebtedness of any of them (individually or collectively) in an aggregate amount of not less than the applicable Threshold Amount (as specified in the Schedule) which has resulted in such Specified Indebtedness becoming, or becoming capable at such time of being declared, due and payable under such agreements or instruments, before it would otherwise have been due and payable or (2) a default by such party, such Credit Support Provider or such Specified Entity (individually or collectively) in making one or more payments on the due date thereof in an aggregate amount of not less than the applicable Threshold Amount under such agreements or instruments (after giving effect to any applicable notice requirement or grace period);

(vii) *Bankruptcy*. The party, any Credit Support Provider of such party or any applicable Specified Entity of such party:

(1) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (B) is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof; (5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; (7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains pos-

session, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days thereafter; (8) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) (inclusive); or (9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts; or

(viii) *Merger Without Assumption.* The party or any Credit Support Provider of such party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer:

(1) the resulting, surviving or transferee entity fails to assume all the obligations of such party or such Credit Support Provider under this Agreement or any Credit Support Document to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other party to this Agreement; or

(2) the benefits of any Credit Support Document fail to extend (without the consent of the other party) to the performance by such resulting, surviving or transferee entity of its obligations under this Agreement.

(b) *Termination Events.* The occurrence at any time with respect to a party or, if applicable, any Credit Support Provider of such party or any Specified Entity of such party of any event specified below constitutes an Illegality if the event is specified in (i) below, a Tax Event if the event is specified in (ii) below or a Tax Event Upon Merger if the event is specified in (iii) below, and, if specified to be applicable, a Credit Event Upon Merger if the event is specified pursuant to (iv) below or an Additional Termination Event if the event is specified pursuant to (v) below:

(i) *Illegality.* Due to the adoption of, or any change in, any applicable law after the date on which a Transaction is entered into, or due to the promulgation of, or any change in, the interpretation by any court, tribunal or regulatory authority with competent jurisdiction of any applicable law after such date, it becomes unlawful (other than as a result of a breach by the party of Section 4(b)) for such 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;

(ii) *Tax event.* Due to (x) any action taken by a taxing authority, or brought in a court of competent jurisdiction, on or after the date on which a Transaction is entered into (regardless of whether such action is taken or brought with respect to a party to this Agreement) or (y) a Change in Tax Law, the party (which will be the Affected Party) will, or there is a substantial likelihood that it will, on the next succeeding Scheduled Payment Date (1) be required to pay to the other party an additional amount in respect of an Indemnifiable Tax under

than 20 days notice to the other party and provided that the relevant Termination Event is then continuing, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions.

(c) *Effect of Designation.*

(i) If notice designating an Early Termination Date is given under Section 6(a) or (b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is *then* continuing.

(ii) Upon the *occurrence or* effective designation on of an Early Termination Date, no further payments *or deliveries* under Section 2(a)(i) or 2(e) in respect of the Terminated Transactions will *be required to be made*, but without prejudice to the other provisions of this Agreement. *The amount, if any, payable in respect of an Early Termination Date shall be determined pursuant to Section 6(e).*

(d) *Calculations.*

(i) *Statement.* On or as soon as reasonably practicable following the occurrence of an Early Termination Date, each party will make the calculations on its part, *if any*, contemplated by Section 6(e) and will provide to the other party a statement (1) showing, in reasonable detail, such calculations (including all relevant quotations *and specifying any amount payable under Section 6(e)*) and (2) giving details of the relevant account to which any amount payable to it is to be paid. In the absence of written confirmation from the source of a quotation obtained in determining a Market Quotation, the records of the party obtaining such quotation will be conclusive evidence of the existence and accuracy of such quotation.

(ii) *Payment Date.* An amount calculated as being *due in respect of any Early Termination Date* under Section 6(e) will be *payable* on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default) and on the day which is two *Local Business Days* after the day on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under applicable law) interest thereon (*before as well as after judgment*) in the Termination Currency, from (and including) the relevant Early Termination Date to (but excluding) the date *such amount is paid, at the Applicable Rate.* *Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.*

(e) *Payments on Early Termination.* If an Early Termination Date occurs, the following provisions shall apply based on the parties' election in the Schedule of a payment measure, either "Market Quotation" or "Loss", and a payment method, either the "First Method" or the "Second Method". If the parties fail to designate a payment measure or payment method in the Schedule, it will be deemed that "Market Quotation" or the "Second Method", as the case may be, shall apply. *The amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any Set-off.*

(i) Events of Default. *If the Early Termination Date results from an Event of Default:*

(1) First method and Market Quotation. *If the First Method and Market Quotation apply, the Defaulting Party will pay to the Non-defaulting Party the excess, if a positive number, of (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party over (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party.*

(2) First Method and Loss. *If the First Method and Loss apply, the Defaulting Party will pay to the Non-defaulting party, if a positive number, the Non-defaulting Party's Loss in respect of this Agreement.*

(3) Second Method and Market Quotation. *If the Second Method and Market Quotation apply, an amount will be payable equal to (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the Termination Currency Equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (B) the Termination Currency Equivalent of the Unpaid Amounts owing to the Defaulting Party. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay absolute value of that amount to the Defaulting Party.*

(4) Second Method and Loss. *If the Second Method and Loss apply, an amount will be payable equal to the Non-defaulting Party's Loss in respect of this Agreement. If that amount is a positive number, the Defaulting Party will pay it to the non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party.*

(ii) Termination Events. *If the Early Termination Date results from a Termination Event:*

(1) One Affected Party. *If there is one Affected Party, the amount payable will be determined in accordance with Section 6(e)(i)(3), if Market Quotation applies, or Section 6(e)(i)(4), if Loss applies, except that, in either case, references to the Defaulting Party and to the Non-defaulting Party will be deemed to be references to the Affected Party and the party which is not the Affected Party, respectively, and, if Loss applies and fewer than all the Transactions are being terminated, Loss shall be calculated in respect of all Terminated Transactions.*

(2) Two Affected Parties. *If there are two Affected Parties:*

(A) *if Market Quotation applies, each party will determine a Settlement Amount in respect of the Terminated Transactions, and an amount will be payable equal to (I) the sum of (a) one-half of the difference between the Settlement Amount of the party with the higher Settlement Amount ("X") and the Settlement Amount of the party with the lower Settlement Amount ("Y") and (b) the Termination Currency Equivalent of the Unpaid Amounts owing to X less (II) the Termination Currency Equivalent of the Unpaid Amounts owing to Y; and*

(B) *if Loss applies, each party will determine its Loss in respect of this Agreement (or, if fewer than all the Transactions are being terminated, in respect*

of all Terminated Transactions) and an amount will be payable equal to one-half of the difference between the Loss of the party with the higher Loss ("X") and the Loss of the party with the lower Loss ("Y").

If the amount payable is a positive number, Y will pay it to X; if it is a negative number, X will pay the absolute value of that amount to Y.

(iii) *Adjustment for Bankruptcy.* In circumstances where an Early Termination Date occurs because "Automatic Early Termination" applies in respect of a party, the amount determined under this Section 6(e) will be subject to such adjustments as are appropriate and permitted by law to reflect any payments or deliveries made by one party to the other under this Agreement (and retained by such other party) during the period from the relevant Early Termination Date to the date for payment determined under Section (6)(d)(ii).

(iv) *Pre-Estimate.* The parties agree that if Market Quotation applies an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks and except as otherwise provided in this Agreement neither party will be entitled to recover any additional damages as a consequence of such losses.

7. Transfer.

Subject to Section 6(b)(ii), neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party except that:

(a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and

(b) a party may make such a transfer of all or any part of its interest in any amount payable to it from a Defaulting Party under Section 6(e).

Any purported transfer that is not in compliance with this Section will be void.

8. Contractual Currency.

(a) *Payment in the Contractual Currency.* Each payment under this Agreement will be made in the relevant currency specified in this Agreement for that payment (the "Contractual Currency"). To the extent permitted by applicable law, any obligation to make payments under this Agreement in the Contractual Currency will not be discharged or satisfied by any tender in any currency other than the Contractual Currency, except to the extent such tender results in the actual receipt by the party to which payment is owed, acting in a reasonable manner and in good faith in converting the currency so tendered into the Contractual Currency, of the full amount in the Contractual Currency of all amounts payable in respect of this Agreement. If for any reason the amount in the Contractual Currency so received falls short of the amount in the Contractual Currency payable in respect of this Agreement, the party required to make the payment will, to the extent permitted by applicable law, immediately pay such additional

amount in the Contractual Currency as may be necessary to compensate for the shortfall. If for any reason the amount in the Contractual Currency so received exceeds the amount in the Contractual Currency *payable* in respect of this Agreement, the party receiving the payment will refund promptly the amount of such excess.

(b) *Judgments*. To the extent permitted by applicable law, if any judgment or order expressed in a currency other than the Contractual Currency is rendered (i) for the payment of any amount owing in respect of this Agreement, (ii) for the payment of any amount relating to any early termination in respect of this Agreement or (iii) in respect of a judgment or order of another court for the payment of any amount described in (i) or (ii) above, the party seeking recovery, after recovery in full of the aggregate amount to which such party is entitled pursuant to the judgment or order, will be entitled to receive immediately from the other party the amount of any shortfall of the Contractual Currency received by such party as a consequence of sums paid in such other currency and will refund promptly to the other party any excess of the Contractual Currency received by such party as a consequence of sums paid in such other currency if such shortfall or such excess arises or results from any variation between the rate of exchange at which the Contractual Currency is converted into the currency of the judgment or order for the purposes of such judgment or order and the rate of exchange at which such party is able, acting in a reasonable manner and in good faith in converting the currency received into the Contractual Currency, to purchase the Contractual Currency with the amount of the currency of the judgment or order actually received by such party. The term "rate of exchange" includes, without limitation, any premiums and costs of exchange payable in connection with the purchase of or conversion into the Contractual Currency.

(c) *Separate Indemnities*. To the extent permitted by applicable law, these indemnities constitute separate and independent obligations from the other obligations in this Agreement, will be enforceable as separate and independent causes of action, will apply notwithstanding any indulgence granted by the party to which any payment is owed and will not be affected by judgment being obtained or claim or proof being made for any other sums payable in respect of this Agreement.

(d) *Evidence of Loss*. For the purpose of this Section 8, it will be sufficient for a party to demonstrate that it would have suffered a loss had an actual exchange or purchase been made.

9. *Miscellaneous*.

(a) *Entire Agreement*. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto.

(b) *Amendments*. No amendment, modification or waiver in respect of this Agreement will be effective unless in writing (*including a writing evidenced by a facsimile transmission*) and executed by each of the parties or confirmed by an exchange of telexes or *electronic messages on an electronic messaging system*.

(c) *Survival of Obligations*. *Without prejudice to Sections 2(a)(iii) and*

6(c)(ii), the obligations of the parties under this Agreement will survive the termination of any Transaction.

(d) *Remedies Cumulative.* Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.

(e) *Counterparts and Confirmations.*

(i) This Agreement (and each amendment, modification and waiver in respect of it) may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

(ii) *The parties intend that they are legally bound by the terms of each Transaction from the moment they agree to those terms (whether orally or otherwise). A Confirmation shall be entered into as soon as practicable and may be executed and delivered in counterparts (including by facsimile transmission) or be created by an exchange of telexes or by an exchange of electronic messages on an electronic messaging system, which in each case will be sufficient for all purposes to evidence a binding supplement to this Agreement. The parties will specify therein or through another effective means that any such counterpart telex or electronic message constitutes a Confirmation.*

(f) *No Waiver of Rights.* A failure or delay in exercising any right, power or privilege in respect of this Agreement will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

(g) *Headings.* The headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement.

10. *Offices; Multibranch Parties.*

(a) *If Section 10(a) is specified in the Schedule as applying, each party that enters into a Transaction through an Office other than its head or home office represents to the other party that, notwithstanding the place of booking office or jurisdiction of incorporation or organisation of such party, the obligations of such party are the same as if it had entered into the Transaction through its head or home office. This representation will be deemed to be repeated by such party on each date on which a Transaction is entered into.*

(b) *Neither party may change the Office through which it makes and receives payments or deliveries for the purpose of a Transaction without the prior written consent of the other party.*

(c) *If a party is specified as a Multibranch Party in the Schedule, such Multibranch Party may make and receive payments or deliveries under any Transaction through any office listed in the Schedule, and the Office through which it makes and receives payments or deliveries with respect to a Transaction will be specified in the relevant Confirmation.*

11. Expenses.

Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement or any Credit Support Document to which the Defaulting Party is a party or by reason of the early termination of any Transaction, including, but not limited to, costs of collection.

12. Notices.

(a) *Effectiveness.* Any notice or other communication in respect of this Agreement may be given in any manner set forth below (except that a notice or other communication under Section 5 or 6 may not be given by facsimile transmission or electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided (see the Schedule) and will be deemed effective as indicated:

(i) if in writing and delivered in person or by courier, on the date it is delivered;

(ii) if sent by telex, on the date the recipient's answerback is received;

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

(iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or

(v) if sent by electronic messaging system, on the date that electronic message is received,

unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Local Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Local Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Local Business Day.

(b) *Change of Addresses.* Either party may by notice to the other change the address telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.

13. Governing Law and Jurisdiction.

(a) *Governing Law.* This Agreement will be governed by and construed in accordance with the law specified in the Schedule.

(b) *Jurisdiction.* With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:

(i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York; and

(ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such

"Local Business Day" means, subject to the Schedule, a day on which commercial banks are open for business (including dealings in foreign exchange and foreign currency deposits) (a) in relation to any obligation under Section 2(a)(i), in the place(s) specified in the relevant Confirmation or, if not so specified, as otherwise agreed by the parties in writing or determined pursuant to provisions contained, or incorporated by reference, in this Agreement, (b) in relation to any other payment, in the place where the relevant account is located and, if different, in the principal financial centre, if any, of the currency of such payment, (c) in relation to any notice or other communication, including notice contemplated under Section 5(a)(i), in the city specified in the address for notice provided by the recipient and, in the case of a notice contemplated by Section 2(b), in the place where the relevant new account is to be located and (d) in relation to Section 5(a)(v)(2), in the relevant locations for performance with respect to such Specified Transaction.

"Loss" means, with respect to this Agreement or one or more Terminated Transactions, as the case may be, and a party, the Termination Currency Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as negative number) in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or reestablishing any hedge or related trading position (or any gain resulting from any of them). Loss includes losses and costs (or gains) in respect of any payment or delivery required to have been made (assuming satisfaction of each applicable condition precedent) on or before the relevant Early Termination Date and not made, except, so as to avoid duplication, if Section 6(e)(i)(1) or (3) or 6(e)(ii)(A) applies. Loss does not include a party's legal fees and out-of-pocket expenses referred to under Section 11. A party will determine its Loss as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets.

"Market Quotation" means, with respect to one or more Terminated Transactions and a party making the determination, an amount determined on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as a positive number) in consideration of an agreement between such party (taking into account any existing Credit Support Document with respect to the obligations of such party) and the quoting Reference Market-marker to enter into a transaction (the "Replacement Transaction") that would have the effect of preserving for such party the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) by the parties under Section 2(a)(i) in respect of such Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that

date. For this purpose, Unpaid Amounts in respect of the Terminated Transaction or group of Terminated Transactions are to be excluded but without limitation, any payment or delivery that would but for the relevant Early Termination Date, have been required (assuming satisfaction of each applicable condition precedent) after that Early Termination Date is to be included. The Replacement Transaction would be subject to such documentation as such party and the Reference Market-maker may, in good faith, agree. The party making the determination (or its agent) will request each Reference Market-maker to provide its quotation to the extent *reasonably practicable* as of the same day and time (without regard to different time zones) on or as soon as *reasonably practicable* after the relevant Early Termination Date. The day and time as of which those quotation are to be obtained will be *selected in good faith* by the party obliged to make a determination under Section 6(e), and if each party is so obliged, after consultation with the other. If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one quotation has the same highest value or lowest value, then one of such quotations shall be disregarded. If fewer than three quotations are provided, it will be deemed that the Market Quotation in respect of such Terminated Transaction or group of Terminated Transaction or group of Terminated Transactions cannot be determined.

“*Non-default Rate*” means a rate per annum equal to the cost (without proof or evidence of any actual cost) to the Non-defaulting Party (as certified by it) if it were to find the relevant amount.

“*Non-defaulting Party*” has the meaning specified in Section 6(a).

“*Office*” means a branch or office of a party, which may be such party’s head or home office.

“*Potential Event of Default*” means any event which, with the giving of notice or the lapse of time or both, would constitute an Event of Default.

“*Reference Market-makers*” means four leading dealers in the relevant market selected by the party determining a Market Quotation in good faith (a) from among dealers of the highest credit standing which satisfy all the criteria that such party generally at the time in deciding whether to offer or to make an extension of credit and (b) to the extent practicable, from among such dealers having an office in the same city.

“*Relevant Jurisdiction*” means, with respect to a party, the jurisdictions (a) in which the party is incorporated, organised, managed and controlled or considered to have its seat, (b) where an Office through which the party is acting for purposes of this Agreement is located, (c) in which the party executes this Agreement and (d) in relation to any payment, from or through which such payment is made.

“*Scheduled Payment Date*” means a date on which a payment or delivery is to be made under Section 2(a)(i) with respect to a Transaction.

it shall be the average of the Termination Currency Equivalents of the fair market values reasonably determined by both parties.

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

..... (Name of Party) (Name of Party)

By: By:
Name: Name:
Title: Title:
Date: Date: