
CONTRACT PROVISIONS IN THE 2002 ISDA MASTER AGREEMENT

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GINGER PRICE, ENERGY CONTRACT MANAGEMENT



NAPCO

International Swaps and Derivatives Association (ISDA)

- Originally created in 1985
- Association of derivative market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks
- Members also include exchanges, intermediaries, clearing houses and repositories
- Over 900 members from 69 countries
- Membership based association
- Website: www.isda.org

International Swaps and Derivatives Association (ISDA)

- Mission Statement:

“ISDA fosters safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products.”

- Fulfills mission by being:

- The Prominent Voice of the Global Derivatives Market
- An Advocate for Effective Risk and Capital Management
- The Source for Global Industry Standards in Documentation
- A Strong Proponent for a Safe, Efficient Market Infrastructure for Derivatives Trading, Clearing and Reporting

* International Swaps and Derivatives Association (2019). Retrieved from <https://www.isda.org/mission-statement/>

2002 ISDA Master Agreement

- Second edition to the ISDA Master Agreement; first version published in 1992
- Used to document transactions between parties in different jurisdictions and/or transactions involving different currencies (Multicurrency – Cross Border)
- Adds several new provisions, including:
 - Close-out Amount (replaces Market Quotation and Loss in the 1992 ISDA Master Agreement)
 - A set-off provision in Section 6(f)
 - Force Majeure Termination Event in Section 5(b)(ii)
 - Consolidated interest and compensation provisions in Section 9

* International Swaps and Derivatives Association (2019). Retrieved from <https://www.isda.org/book/2002-isda-master-agreement-english/>

2002 ISDA Master Agreement

- Several provisions from 1992 are amended including the shortening of grace periods associated with some of the Events of Default in Section 5(a)
- Originally intended for use by financial institutions involved in the financial derivatives market opposed to energy commodity participants with physical delivery
- Can be used in conjunction with:
 - 1994 ISDA Credit Support Annex
 - ISDA North American Power Annex
 - ISDA North American Gas Annex
 - And others
- Available online for a fee at: <https://www.isda.org/book/2002-isda-master-agreement-english/>

Section 5 - Events of Default and Termination Events

Events of Default

- (i) Failure to Pay or Deliver – by the party
- (ii) Breach of Agreement; Repudiation of Agreement – by the party
- (iii) Credit Support Default – by the party or any Credit Support Provider of such party
- (iv) Misrepresentation – by the party or any Credit Support Provider of such party

Section 5 - Events of Default and Termination Events

Events of Default (continued)

- (v) Default Under Specified Transaction – the party, any Credit Support Provider of such party or any applicable Specified Entity of such party
 - “Specified Transaction” can be modified in the Schedule
 - 2002 ISDA Master Agreement definition of Specified Transaction covers any previous or future transactions between the parties, any Credit Support Provider or Specified Entity typically done under the ISDA (i.e. financial derivative transactions)
 - Parties can modify to include:
 - Physical commodity transactions
 - Any contract or transaction between the parties (or any Credit Support Provider or Specified Entity)

Section 5 - Events of Default and Termination Events

Events of Default (continued)

- (vi) Cross-Default – such party, any Credit Support Provider of such party or any applicable Specified Entity of such party (individually or collectively)
 - Section 5(a)(vi)(1) – Indebtedness Cross-Default
 - Section 5(a)(vi)(2) – Transactional Cross-Default
 - Parties to define Threshold Amount in Schedule
- (vii) Bankruptcy – the party, any Credit Support Provider of such party or any applicable Specified Entity of such party
- (viii) Merger without Assumption – party or any Credit Support Provider of such party

Section 5 - Events of Default and Termination Events

Termination Events

- (i) Illegality – the party or, if applicable, any Credit Support Provider of such party
- (ii) Force Majeure Event – such party or any Credit Support Provider of such party
- (iii) Tax Event – the party
- (iv) Tax Event Upon Merger – party or any Credit Support Provider of such party
- (v) Credit Event Upon Merger – the party, any Credit Support Provider of such party or any applicable Specified Entity of such party
- (vi) Additional Termination Event – as specified in the Schedule

Section 6 – Early Termination; Close-out Netting

Right to Terminate Following Event of Default

- If an Event of Default has occurred and is continuing:
 - Non-defaulting Party to give notice within 20 days to Defaulting Party specifying the Event of Default
 - Designate an Early Termination Date for all outstanding transactions
- If the Event of Default is cured before an Early Termination Date is declared, the Non-defaulting Party loses its right to terminate
- The Defaulting Party cannot cure the default once a Early Termination Date is declared by the Non-defaulting Party

Section 6 – Early Termination; Close-out Netting

Automatic Early Termination

- Election made in Schedule
- Applies to Events of Defaults in Bankruptcy, specifically Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8)
- Provides for automatically establishing an Early Termination Date immediately upon the occurrence of such event
- Bypasses the requirement of Non-defaulting Party to provide notice establishing the Early Termination Date
- US law allows post-petition terminations, however, non-US law may not

Section 6 – Early Termination; Close-out Netting

Right to Terminate Following Termination Event

- Different actions for different Termination Events
- Tax Events provide for ability to Transfer to avoid termination
- CEUM and ATE are similar to an Event of Default; if a Termination Event has occurred and is continuing:
 - Affected Party to give notice within 20 days to Defaulting Party specifying the Event of Default
 - Designate an Early Termination Date for all Affected Transactions
- Illegality and FM are subject to a Waiting Period; 3 days and 8 days respectively

Section 6 – Early Termination; Close-out Netting

Close-out Netting

- Determined by Determining Party for any group of Terminated Transactions
- Calculation of losses or gains of Determining Party for Terminated Transactions
- May consider the following information in calculation:
 - Quotations supplied by one or more third parties
 - Relevant market data – relevant rates, prices, yields, curves, etc.
 - Internal sources (including Determining Party's Affiliates) of the above information
- Inclusion of loss or costs incurred in connection with terminating, liquidating or re-establishing hedges associated with Terminated Transactions

Section 3(e) & (f) – Payer/Payee Tax Representation

Part 2 of the Schedule – Tax Representations

- Parties to specify company type
 - Corporation
 - Foreign corporation
 - LLC
 - Others
- Different tax liabilities
- Tax treaties

Section 4(a)(i) and (ii) – Furnish Specified Information

Part 3 of the Schedule – Agreement to Deliver Documents

- Tax documentation
- Authority to enter into Agreement, Transactions and perform
- Evidence of signature authority
- Credit Support Documentation
- Financial Statements
 - Annual
 - Semi-annual
 - Quarterly
 - Other

Section 12 - Notices

Part 4 of the Schedule – Miscellaneous

- Effectiveness of notice differs
 - Writing, delivered in person or by courier – date delivered
 - Telex – date of recipient’s answerback
 - Facsimile – date received
 - Certified or registered mail – date delivered or delivery is attempted
 - Electronic message system – date received
 - E-mail – date delivered
- Section 5 (Events of Default or Termination Events) or Section 6 (Early Termination) may not be given by electronic messaging system or e-mail
 - Can be modified in Schedule
 - Effectiveness of notice and bankruptcy

Part 4 of the Schedule – Miscellaneous

- Process Agent – Section 13(c)
- Offices – Section 10(a)
- Multibranch Party – Section 10(b)
- Calculation Agent
 - Party responsible for calculating (netted) payment amounts
- Credit Support Documents
 - Credit Support Annex
 - Parental Guaranties
 - Letters of Credit
 - Other

Part 4 of the Schedule – Miscellaneous

- Credit Support Provider
- Governing Law – Section 13
 - New York
 - Texas
 - Non-US law
 - Other
- Jurisdiction
- Waiver of Jury Trial

Part 4 of the Schedule – Miscellaneous

Netting of Payments – Section 2(c)

- Same Transaction Payment Netting – ISDA Standard
 - Same currency
 - Same Transaction
- Multiple Transaction Payment Netting – two or more Transactions
 - Election made in Schedule – “Multiple Transaction Payment Netting” applies
 - Payable on same date in the same currency
- Cross-commodity Payment Netting
 - Parties can build in Schedule if physical annexes are included

Part 4 of the Schedule – Miscellaneous

Potential Event of Default

- Any event which, with the giving of notice or the lapse of time or both, would constitute an Event of Default
- Used in:
 - Section 2(a)(iii) (General Conditions – Payments)
 - 3(b) (Representations - Absence of Certain Events)
 - 9(h)(3)(B) (Interest on Deferred Payments)
- May be incorporated into Schedule in various provisions

Section 7 – Transfer

- Neither party may transfer the Agreement or obligation under the Agreement without prior written consent of the other party, except:
 - Pursuant to a consolidation or amalgamation, merger, or transfer of assets, to another entity
 - All or any part of an Early Termination Amount payable to it
- Common modifications:
 - Transfer allowed to creditworthy entities
 - Transfer allowed to Affiliates
 - Affiliate of equal or greater creditworthiness
 - Affiliate guaranteed by party or its Credit Support Provider



ISDA Commodity Definitions

- 2006 ISDA Definitions
- 2005 ISDA Commodity Definitions

Interactive Session

- 2002 ISDA Master Agreement Schedule with proposed language for group discussion
- Five Mock Companies:
 - Conglomerated Global Commodities, LLC
 - Main Street Utilities Trading, Inc.
 - Merchant Generation Holdings, LLC
 - Risk Reward Strategies, LLC
 - The City of Greenacre, California

Special Note: The Schedule to the 2002 ISDA Master Agreement with proposed language is provided to facilitate discussion only and not intended as suggested language for industry documents.