

# ALLEN & OVERY

Daniel P. Cunningham

1221 Avenue of the Americas  
New York, NY 10020

Telephone: (212) 610 6300  
Direct Line: (212) 610 6427  
Fax: (212) 610 6399

[www.allenoverly.com](http://www.allenoverly.com)

Our Ref: NY:87887.1

July 15, 2003

International Swaps and Derivatives Association, Inc.  
360 Madison Avenue, 16th Floor  
New York, NY 10017  
U.S.A.

Ladies and Gentlemen,

## **2002 Master Agreement Protocol**

We have acted as your counsel as to matters of the laws of the State of New York in connection with the 2002 Master Agreement Protocol (the **Protocol**) that you (**ISDA**) are publishing today.

The Protocol has been developed to enable parties to an ISDA 2002 Master Agreement (a **2002 Master**) to confirm their intentions in respect of certain matters arising when that 2002 Master is used with certain other documents published before 2002 by ISDA (**Pre-2002 Documents**).

The Protocol provides a mechanism utilizing standardized counterparts to facilitate multiple bilateral agreements between Adhering Parties that certain amendments will be deemed to be made to one or more Pre-2002 Documents when those documents are used in connection with 2002 Masters, whether or not those 2002 Masters are yet in existence. By executing and delivering to ISDA an Adherence Letter on or before the Cut-off Date, a party may adhere to the Protocol, whether that party has already entered into a 2002 Master or anticipates entering into a 2002 Master in the future. The Adherence Letter must be substantially in the form attached as an exhibit to the Protocol, and it appoints ISDA as the relevant Adhering Party's agent for the limited purposes of the Protocol. In each Adherence Letter, a party may only elect one or more of the amendments contemplated in the Protocol. A party may not specify additional provisions, conditions or limitations in its Adherence Letter or otherwise.

In order to adhere to the Protocol, a party is required to deliver to ISDA both a manually signed original Adherence Letter and a conformed copy. ISDA intends to display electronically on its website a record, as well as a conformed copy, of each Adherence Letter it receives.

The elections that may be made are set out in the Annexes to the Protocol. Where two parties submit qualifying Adherence Letters, they agree that certain amendments will be deemed to be made to one or more Pre-2002 Documents when used in connection with a 2002 Master between them, whether or not that 2002 Master is in existence at that time. As between any two parties, the scope of any modification deemed to be made to such Pre-2002 Documents is determined by the elections made by both parties. If either party has

*The firm is a multinational partnership, including Members of the Bar of the State of New York, Solicitors of the Supreme Court of England and Wales, Members of the Bar of the Netherlands and Foreign Legal Consultants in the State of New York. A list of names of the partners and their professional qualifications is open to inspection at the above office.*

AMSTERDAM ANTWERP BANGKOK BEIJING BRATISLAVA BRUSSELS BUDAPEST DUBAI FRANKFURT HAMBURG HONG KONG LONDON  
LUXEMBOURG MADRID MILAN MOSCOW NEW YORK PARIS PRAGUE ROME SHANGHAI SINGAPORE TIRANA TOKYO TURIN WARSAW

# ALLEN & OVERY

To: International Swaps and Derivatives Association, Inc.

July 15, 2003

Page: 2

specified a preference that less than all the Annexes are applicable, only those amendments contained in the Annexes that both parties have specified as applicable will be deemed to be made. If both parties have specified a preference that all the Annexes are applicable, the amendments contained in each of the Annexes will be deemed to be made.

Adherence to the Protocol is open until the Cut-off Date. The Cut-off Date is March 1, 2004 or such later date designated by ISDA falling no later than June 1, 2004. ISDA may designate a date later than March 1, 2004 as the Cut-off Date by notice given no later than March 1, 2004 on its website (or by other suitable means) if it determines in its absolute discretion that market interest justifies such an extension to the adherence period. A party's adherence, once effective, is expressed in Section 5(c) of the Protocol to be irrevocable except that, by subsequently delivering a qualifying notice, the party may designate an Earlier Cut-off Date as the last date on which any counterparty may adhere to the Protocol in respect of any 2002 Master then or in future between them. If ISDA decides to designate a day later than March 1, 2004 as the Cut-off Date, a party may deliver notice to ISDA on or before March 12, 2004 designating March 1, 2004 as an Earlier Cut-off Date.

## Analysis

We believe that, in respect of any two Adhering Parties, the mechanism contemplated by the Protocol is supported by contractual principles whether the Adhering Parties have already entered into a 2002 Master or they do so in the future. In each case, the Adhering Parties agree that certain amendments will be deemed to be made to Pre-2002 Documents whether they are already being used in connection with a 2002 Master or are used in the future in connection with a 2002 Master. The difference is that, in the former case, helpful support for the mechanism contemplated by the Protocol is provided by the 2002 Master itself, since it expressly contemplates that it may be amended and supplemented from time to time. Its modular architecture provides an open-ended framework to facilitate the ongoing trading relationship of the parties. Section 9(b) of the 2002 Master provides that an amendment to, or modification of, the agreement may be made if it is in writing, and Section 9(e) contemplates amendments and modifications that are executed and delivered in counterparts.

However, if the Adhering Parties have not yet entered into a 2002 Master, there is nothing to prevent them from entering into a contract today that will, for all practical purposes, only have real effect in the future (that is, when they enter into a 2002 Master and use Pre-2002 Documents in conjunction with it). In the same way, there is nothing to prevent two parties to an existing 2002 Master from agreeing that where, in the future, they use Pre-2002 Documents in conjunction with it, certain amendments will apply. In each case, the parties are agreeing to a common set of terms or rules that will apply to all dealings between them unless they subsequently specifically agree otherwise.

We believe that support for the procedure contemplated by the Protocol can be found under at least two sets of contractual principles. First, we believe there is support under the traditional theory of offer and acceptance, at least as applied in cases involving groups of parties rather than just two parties. The delivery by a party of an Adherence Letter to ISDA can be viewed both as an effective offer to market participants who have yet to adhere to the Protocol and as an effective acceptance of the offers made by other market participants (if any) who have already adhered at that time, in each case on the terms and subject to the conditions of the Protocol and the Adherence Letters.

We believe there is also support for the Protocol in a line of cases where the courts have found there to be a contract between two parties apparently without relying on the theory of offer and acceptance. Like the Protocol, the factual scenarios considered by many of these cases did not involve the simple case of two parties dealing directly with each other face to face, but instead featured complicating factors, such as the

# ALLEN & OVERY

To: International Swaps and Derivatives Association, Inc.

July 15, 2003

Page: 3

involvement of a third party. Sometimes, the courts have found in these situations a contractual relationship through a mutual assent by the parties to certain terms, whether those terms are actively proposed by a third party and open for negotiation or simply standard terms that are non-negotiable. In a sense, Adhering Parties may be viewed as participants in a joint endeavor (notwithstanding that the Protocol contemplates that different parties may select different Annexes to apply), administered by a single agent (in this case, ISDA).

## Opinion

On the basis of the foregoing, and having regard to such legal considerations as we deem relevant and subject as set out below, we are of the opinion that:

- (a) the delivery to ISDA of an Adherence Letter before the Cut-off Date by each of two parties (i) that are then parties to a 2002 Master or (ii) that enter into a 2002 Master following their adherence, in each case on the terms set out in the Protocol, will be sufficient under the laws of the State of New York to effect an agreement between the parties that certain amendments will be deemed to be made, as contemplated by the Protocol, to one or more Pre-2002 Documents when used in connection with that 2002 Master;
- (b) adherence to the Protocol by two parties will result in such amendments to such Pre-2002 Documents only when used in connection with a 2002 Master and will not result in such amendments to or otherwise affect any Pre-2002 Documents when used with an agreement (whether then or in the future) in a form other than a 2002 Master;
- (c) where the parties have each specified in their Adherence Letters a preference that different Annexes are applicable, the amendments contained in the Annexes, if any, that both parties have specified as applicable will be deemed to be made;
- (d) each affected 2002 Master (including Transactions governed by that 2002 Master) and any related Credit Support Provisions, as deemed amended pursuant to the provisions of one or more Annexes specified by both parties as described in (c) above, will be enforceable as so amended (subject to applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium, and other similar laws affecting generally the enforcement of creditors' rights and to general principles of equity, regardless of whether such enforceability is considered in a proceeding in equity or at law); and
- (e) the limited ability of a party to revoke its adherence to the Protocol in accordance with the procedures set out in Section 5(c) of the Protocol would be recognized under the laws of the State of New York.

This opinion relates only to affected 2002 Masters governed by the laws of the State of New York and Pre-2002 Documents when used in connection with such a 2002 Master, is confined solely to the laws of the State of New York and is also subject to the following assumptions:

- (i) if then outstanding, each affected 2002 Master (including Transactions governed by that 2002 Master) and any related Credit Support Provisions have been duly authorized and executed by each party and constitute the legal, valid and binding obligation of each party to that 2002 Master;

# ALLEN & OVERY

To: International Swaps and Derivatives Association, Inc.

July 15, 2003

Page: 4

- (ii) each Adhering Party is able lawfully to adhere to the Protocol on the terms set out in the Protocol, and its adherence to the Protocol is duly authorized and each Adherence Letter and any Revocation Notice is duly executed and delivered;
- (iii) the Protocol reflects correctly the commercial intentions of each Adhering Party;
- (iv) each party has complied with the terms set out in the Protocol, including delivery of an Adherence Letter substantially in the form attached as an exhibit to the Protocol;
- (v) as between any two Adhering Parties, the later of them to adhere does so prior to the formal commencement of insolvency proceedings against either of them; and
- (vi) insofar as performance in any jurisdiction outside the State of New York is contemplated, such performance will not be illegal or invalid by virtue of the laws of that jurisdiction.

Capitalized terms used herein but not defined shall have the meanings given them in the Protocol.

This opinion is rendered solely to ISDA for distribution to its members and each other party adhering to the Protocol. This opinion may not be distributed to any other person without our prior written consent, except that we consent to ISDA including a copy of this opinion on the "2002 Master Agreement Protocol" section of its website for information purposes only. This opinion may also be shown by an ISDA member or another party adhering to the Protocol to a competent regulatory authority for such person for information purposes only, on the basis that we assume no responsibility to such authority or any other person as a result or otherwise.

Yours faithfully,

