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Memorandum

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To International Swaps and Derivatives Association, Inc.

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Notices Under the ISDA Master Agreement in the Context of Covid-19

1 Introduction

In response to the current Covid-19 pandemic, authorities around the world are taking action to stop the spread of the virus. These measures include "lockdowns" (often with the force of law) that restrict individuals from leaving their homes, other than for a permitted purpose, and/or limit travel within particular areas or across national borders. This has resulted in the temporary closure of many offices, with employees now working from home.

This memorandum considers how, under both English and New York law, notices may be given under the ISDA 2002 Master Agreement (the "**2002 Agreement**") or the 1992 ISDA Master Agreement (Multicurrency – Cross Border) (the "**1992 Agreement**") in these circumstances. It also discusses whether, if none of the methods contemplated by Section 12(a) of the Agreement can be used, a different method can be used instead.

Terms defined in the 2002 Agreement or the 1992 Agreement (as applicable) have the same meanings in this memorandum. We have assumed that no amendments have been made to the relevant provisions in the published forms of those documents.

2 Section 12(a)

2.1 Text

Section 12(a) of the 2002 Agreement provides as follows:

> "Any notice or other communication in respect of this Agreement may be given in any manner described below (except that a notice or other communication under Section 5 or 6 may not be given by electronic messaging system or e-mail) to the address or number or in accordance with the electronic messaging system or e-mail details provided (see the Schedule)[1] and will be deemed effective as indicated:—

[1] In this memorandum we refer to the address or details contained in the Schedule to the relevant Agreement. However, pursuant to Section 12(b) of both forms of Agreement, addresses for communications may be changed by notice, in which case any reference to the address or details contained in the Schedule would be to the most recently notified details.

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

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

(v) if sent by electronic messaging system, on the date it is received; or

(vi) if sent by e-mail, on the date it is delivered,

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

The equivalent provision in the 1992 Agreement is very similar but there are two main differences. First, email is not listed as a separate method of giving notice and the words "or email" do not appear in the two places in which they appear in the 2002 Agreement. Secondly, it provides that a notice or other communication under Section 5 or 6 may not be given by "facsimile transmission or electronic messaging system" (underlined words included in the 1992 Agreement are not included in the text of the 2002 Agreement).

2.2 Effect

2.2.1 English law position

In *Greenclose Ltd v National Westminster Bank plc* [2014] 2 BCLC 486, the English High Court considered the effect of Section 12(a) in the context of a 1992 Agreement governed by English law. Andrews J held that:

(a) the methods of giving notice set out in Section 12(a) are mandatory, so that a notice will be valid only if it is given by one of the listed methods and sent to the address or number, set out in the Schedule to the relevant Agreement (for example, the reference to registered or certified mail (or airmail) excludes ordinary post);[2]

(b) it is not, however necessary for a notice to be addressed to or received by any individual that may be named in the Schedule as the intended addressee; and

(c) the phrase "electronic messaging system" does not include email and so notices given by email under Section 5 or 6 are not expressly prohibited (although, as email is not one of the listed methods, Section 12(a) does not permit notices to be given by email anyway).

[2] *Greenclose Ltd v National Westminster Bank plc* [2014] 2 BCLC 486, [118]. But cf *Yates Building Co Ltd v RJ Pulleyn & Sons (York) Ltd* [1976] 1 EGLR 157, in which the use of ordinary post was held to be permissible under another type of contract.

Although it is possible that, in a future case, the Court of Appeal might be persuaded to take a different view of the matter, at first instance at least the decision is likely to be followed. This is also the case in relation to a 2002 Master Agreement governed by English law, given the similarity in the wording of Section 12 under both versions of the Agreement.

2.2.2 New York law position

The position under New York law would be very similar to the position under English law. Although we are not aware of any decision of a New York state or federal court interpreting Section 12(a) of the Agreement, at least one federal court in California has held that the methods of giving notice set out in Section 12(a) are mandatory, so that a notice will be valid only if it is given by one of the listed methods. Specifically, in *Signal Hill Serv., Inc. v. Macquarie Bank Ltd.*, 2013 WL 12244056 (C.D. Cal. June 12, 2013), the court examined a 2002 Agreement governed by New York law and held that verbal notice was not valid thereunder, concluding that:

> it is clear that the word 'may' in [Section 12(a) of] the ISDA indicates that any of the *enumerated methods* of giving notice will be effective, not that *any* method of notice, enumerated or not, is permitted. Were this not the case, the provision would have no purpose, as it would identify specific methods of giving notice while permitting any type of notice.

Id. at *21 (emphasis in original). Although other courts presented with this question could in theory reach a different conclusion, we expect that a New York state or federal court would follow similar reasoning as the court in *Signal Hill*.

2.3 Compliance with Section 12(a)

It should be noted that the mere fact that a party's office is closed does not necessarily mean that the listed methods of giving notice cannot be used. For example, a notice will be "delivered in person or by courier" if it is delivered to the address stated in the Schedule to the relevant Agreement, even if that office is closed. However, if the stated address refers to a particular floor of a building, putting the notice through a letterbox on the ground floor (or even handing it to a security guard there, if he or she has no authority to receive deliveries on behalf of the intended recipient) might not be sufficient to satisfy this requirement.

It should also be noted that, while a notice sent by fax will be effectively given only if it is received by a responsible employee of the recipient in legible form, the phrase "responsible employee" should include an employee in the recipient's fax room (or the equivalent). Under English law, it is not limited to employees who are responsible for dealing with the matters addressed by the notice (*LBI ehf v Raiffeisen Zentralbank Österreich* [2017] EWHC (Comm) 522, [11]). The same is likely to be true under New York law. Where the recipient's office is staffed, it may be possible to infer that it has been received by such an employee. Even if the office is closed, the same inference may be possible if the recipient has a system for automatically forwarding faxes electronically to the email account of a responsible employee. Otherwise, however, even if a fax can be transmitted, it may not be received by a responsible employee while the recipient's office is closed.

Finally, where certified or registered mail (or airmail) is used, provided that the notice is sent to the address specified in the Schedule, it is sufficient that delivery is attempted. It is not an

obstacle if delivery does not take place because, for example, it requires a signature and there is no one present at the recipient's office to provide one. This means that if using certified or registered mail (or airmail) continues to be available, the giving of notices using a method contemplated by Section 12(a) of the Agreement should still be possible.

3 Implied terms

3.1 The position where it is impossible to use any of the listed methods

3.1.1 Whether a term would be implied under English law

One of the questions that arises is whether, if it becomes impossible to use any of the listed methods of giving notice, a notice will be valid if it is given in some other way. Where the Agreement is governed by English law, this essentially turns on whether a term would be implied to this effect.

In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (PC), Lord Simon of Glaisdale summarised the law in this area as follows:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

The second and third of these conditions are strictly alternatives, in the sense that only one of them needs to be satisfied, although it has been said that "it would be a rare case where only one of those two requirements would be satisfied" (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, [21]).

The tests for implying a term into a contract are not easily satisfied. In the *Marks and Spencer* case referred to above, the Supreme Court emphasised that:

> "a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term".

Under the second limb of Lord Simon's test, it must be *necessary* to imply the term in order to give "business efficacy" to the contract. In the *Marks and Spencer* case, Lord Neuberger pointed out that this involves a value judgment:

> "it is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence".

Applying this to the notices provision under the ISDA Master Agreement, if it is genuinely impossible to use any of the listed methods, the contract would, in our view, lack commercial or practical coherence without an implied term permitting the use of another

method. Amongst other things, it would mean that an Early Termination Date could not be designated following the occurrence of an Event of Default or a Termination Event. A party could therefore find itself facing a counterparty that is in breach of its payment or delivery obligations, or is subject to insolvency proceedings, without being able to bring the relationship to an end.

In our opinion, the right to terminate following an Event of Default or a Termination Event is a fundamental part of the structure of the Agreement and one which goes to the heart of the parties' commercial relationship. If the termination provisions cannot be operated effectively, the parties' ability to address the risks targeted by the Events of Default and Termination Events will be significantly undermined. This concern is exacerbated by the fact that the transactions documented by the Agreement could be subject to rapid fluctuations in value, with the potential for a party's credit risk to rise significantly in a short space of time.

We recognise that the Agreement contains various provisions that mitigate this risk. In particular, Section 2(a)(iii) suspends a party's payment and delivery obligations while an Event of Default or Potential Event of Default is continuing with respect to the other party. However, during the period of suspension, the Non-defaulting Party continues to be exposed to a potentially increasing credit risk as it will be required to perform if the other party remedies the Event of Default or Potential Event of Default. Section 2(a)(iii) is therefore not an adequate substitute for the right to designate an Early Termination Date.

There are other provisions in the Agreement that effectively become inoperable if notice cannot be given. For example, Section 6(b) of the 2002 Agreement provides that, if a Tax Event occurs and there is one Affected Party, that party must notify the other party accordingly and use all reasonable efforts to remedy the problem by transferring the Affected Transactions to another Office or Affiliate. If it is unable to do so, it must notify the other party, whereupon the latter becomes entitled to effect such a transfer. The operation of these provisions therefore expressly depends on notice being given by one party to the other.

Another example is Section 6(b)(2) of the 2002 Agreement, which provides that, if an Illegality or a Force Majeure Event has occurred and is continuing at the end of any applicable Waiting Period, either party may (by giving notice to the other) designate an Early Termination Date in respect of some or all of the Affected Transactions. If notice cannot be given, the commercial purpose of these provisions (to enable the Affected Transactions to be terminated) will be undermined. Section 6(b)(2) goes on to say that, if one party terminates *some* of the Affected Transactions, the other party may then terminate the rest. This is designed to prevent a party from "cherry picking" between different Affected Transactions. If one party is able to give a notice but not the other, the risk of cherry picking arises, leaving that other party without an effective remedy.

There are also many circumstances in which notices will be required pursuant to the terms of Transactions that are governed by the Agreement. Some of these will contain separate notice provisions (for example, options can typically be exercised by telephone) but, in the case of others, the position will be regulated by Section 12(a) of the Agreement.

These examples illustrate the fact that the ability of the parties to give notices to each other is a key aspect of the parties' relationship. The Agreement is structured on the basis that it will be possible to do so. Although it may be technically possible for it to be performed without an implied term (for example, without the ability to terminate), as noted above, the test for an implied term is not one of absolute necessity but is judged by reference to business efficacy, an assessment which requires a value judgment. We therefore consider the test to be satisfied.

In view of the problems that would arise if notices cannot be given, we also think it is probably the case that, if the parties had been asked at the time of contracting whether, if none of the listed methods could be used, it would be permissible for a notice to be given in some other way, they would have answered that this was clearly intended, without it having to be spelled out. On that basis, the term can be said to so obvious that it goes without saying. Even if this is not correct, however, it does not affect our conclusion since, as noted above, conditions 2 and 3 of the test outlined above are alternatives to each other.

In reaching this conclusion we recognise that the Agreement is a very carefully drafted contract in which the words used "have been selected after considerable thought and with the benefit of the input and continuing review of users of the standard forms and of knowledge of the market" (*Re Lehman Brothers International (Europe) (No.8)* [2017] 2 All ER (Comm) 275, [48]). It has been said that the Agreement "should, as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand" (*Lomas v JFB Firth Rixson Inc* [2012] 2 BCLC 120, [53]). These considerations also suggest that there may be a more limited role for implied terms to play than in an agreement that is drafted with less precision or with forms of agreement that are not designed to be used by many market participants. However, the circumstances currently under consideration (where it is impossible to use any of the listed methods of service, including certified or registered mail) are truly exceptional and could not reasonably have been expected to be catered for, even in the most precisely drafted contract. They represent a paradigm example of a situation in which there is a lacuna in the express terms. In our view, therefore, the considerations outlined in this paragraph do not in any way undermine the conclusion we have reached.

3.1.2 Whether a term would be implied under New York law

Where the giving of notice in strict compliance with Section 12(a) is impossible, New York law is also likely to imply that notice by other means is sufficient.

On the one hand, the *Signal Hill* decision above would seem to make such an argument more difficult. Moreover, as is the case under English law, courts are generally reluctant to imply terms in a contract and will generally only do so where the contract is ambiguous and the term "'may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent.'" *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 122 (2d Cir. 2014) (citations omitted).

As recently affirmed by the New York Court of Appeals, "'[u]nless statutory language or public policy dictates otherwise, the terms of a written agreement define the rights and obligations of the parties.'" *BDC Fin. L.L.C. v. Barclays Bank PLC*, 25 N.Y.3d 37, 43

(2015) (citation omitted). Courts are therefore "properly hesitant, under the guise of judicial construction, to imply additional requirements to relieve a party from asserted disadvantage flowing from the terms actually used," particularly where the language chosen by the parties contains "no inherent ambiguity or uncertainty" and where language regarding the term sought to be implied "was readily available had it been the intention of the parties to include this added stipulation." *Collard v. Inc. Vill. of Flower Hill*, 52 N.Y.2d 594, 603–04 (1981) (citation omitted); *see also Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("'[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'") (citation omitted).

Under these principles, it could be argued that, had the parties to the Agreement desired to allow for notices to be served in ways other than those specifically enumerated in Section 12(a)(i)–(vi), they could have simply included language to that effect in the Agreement. *See Lawless v. Hartford Fin. Servs. Grp. Inc.*, 2010 WL 5014390, at *7 (E.D.N.Y. Dec. 3, 2010) ("When a contract is silent where otherwise it has spoken, that silence is logically presumed to be intentional.") (citation omitted).

However, courts have upheld a notice that deviated slightly from the terms of an agreement. *See e.g.*, *Rockland Exposition, Inc. v. All. of Auto. Serv. Providers of New Jersey*, 706 F. Supp. 2d 350, 360 (S.D.N.Y. 2009) (notice sent by regular mail, when the contract required it be sent by registered mail, was nevertheless sufficient where counterparty acknowledged receiving it). Generally, under New York law, "[s]trict compliance with contract notice provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation." *J.C. Studios, LLC v. Telenext Media, Inc.*, 932 N.Y.S.2d 760 (Sup. Ct. 2011) (citations omitted); *see also Suarez v. Ingalls*, 723 N.Y.S.2d 380, 381 (N.Y. App. Div. 2001) (same).

In addition, a "'contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.'" *Lanmark Grp., Inc. v. New York City Sch. Const. Auth.*, 50 N.Y.S.3d 349, 351 (N.Y. App. Div. 2017) (citation omitted); *see C.P. Apparel Mfg. Corp. v. Microfibres, Inc.*, 210 F. Supp. 2d 272, 275–76 (S.D.N.Y. 2000) (the interpretation of contract that "simply makes no commercial sense" was rejected). The goal of the court is ultimately to determine the intent of the parties, giving a practical interpretation to the language employed and the parties' reasonable expectations. *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 6 N.Y.S.3d 7, 11–12 (N.Y. App. Div. 2015). Moreover, "[a] contract should be read as a fully integrated whole, with no provision rendered meaningless." *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 601 (2017) (citation omitted).

For the reasons discussed in paragraph 3.1.1 above, there are many provisions of the Agreement that would effectively be rendered meaningless if Section 12(a) is interpreted as precluding any means of notice other than those specifically enumerated. Such a result would arguably be, if not absurd, at least "commercially unreasonable or contrary to the reasonable expectations of the parties." Moreover, a court generally can supply a term that is "reasonable in the circumstances" where "[t]he parties to an agreement . . . entirely fail to foresee the situation which later arises and gives rise to a dispute," which

would arguably be the case where the giving of notice by all means contemplated in the Agreement is impossible. *See* Restatement (Second) of Contracts § 204 & cmt. b (1981). Thus, where strict compliance with Section 12(a) is impossible but "actual notice" can be achieved, a court would likely find such notice effective.

Even if an alternative method of delivery is possible, however, it will be necessary to show that the notice was received by the counterparty. If the counterparty denies receiving notice, and the notifying party cannot demonstrate that notice was received, a court is unlikely to find the notice effective. *See Passavant Mem'l Area Hosp. Ass'n v. Lancaster Pollard & Co.*, 2012 WL 1119402, at *5 (C.D. Ill. Apr. 3, 2012) (court did not need to consider whether a notice was effective under the Agreement because "Lehman denied ever receiving the faxed notices from Passavant," and thus the complaint "plausibly allege[d] that the notice to Lehman was not effective under any circumstances"); *Fortune Limousine Serv., Inc. v. Nextel Commc'ns*, 826 N.Y.S.2d 392, 395 (N.Y. App. Div. 2006) (plaintiff's failure to allege form of notification of right to exercise purchase option precluded a breach of contract claim, where the defendant claimed no notice was ever received); *2039 Jericho Tpk. Corp. v. Caglayan*, 64 A.D.3d 609, 610, 882 N.Y.S.2d 311 (2009) (a notice was not effective where the defendant testified that he never received letter allegedly delivered by plaintiffs). By contrast, if it can be shown that the counterparty has in fact received notice, the court may find notice to be sufficient. *See Juleah Co., L.P. v. Greenpoint-Goldman Corp.*, 853 N.Y.S.2d 313, 315 (2008) (a notice was effective where actual receipt was demonstrated and defendant raised no objection as to the form of notice).

This is different from the position where notice is given by certified or registered mail in accordance with Section 12(a). Section 12(a)(iv) provides that notice is effective "if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date it is delivered *or its delivery is attempted*" (emphasis added). A contract "that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Glob. Reinsurance Corp. of Am. v. Century Indem. Co.*, 30 N.Y.3d 508, 519 (2017) (citation omitted). Therefore, where notice is given pursuant to Section 12(a)(iv), a party cannot argue that it was ineffective because it was not "actually received," since the plain language of the contract permits attempted delivery. It is generally only where notice is attempted by means *not expressly provided for in the contract* that the counterparty can allege that notice was ineffective because it was not "actually received".

3.1.3 Content of the implied term

In our opinion, the term that would be implied in this case (under either English or New York law) would be that, where it is impossible to use any of the methods listed in Section 12(a), a notice will also be effective if it is in writing and given by some other method that actually communicates the contents of the notice to someone with authority to receive notices of the relevant type. The other method used could involve a different delivery mechanism or sending the notice to a different address or (except where expressly prohibited) fax or telex number of the counterparty, provided that this communicates the information to someone with authority to receive it. This is in contrast with the position under Section 12(a), where a notice will be *deemed* to be effective in certain circumstances even if its contents are not communicated to an authorised person. Where

Section 12(a) does not apply, the deeming provision will not do so either and so actual notice will be required.

Sending the notice to one of the counterparty's representatives or advisers (such as the counterparty's external legal counsel) is unlikely to be sufficient unless the representative or adviser has authority to receive it on behalf of the counterparty. In the circumstances under consideration, this is unlikely to be the case. However, if the representative or adviser passes the notice on to the counterparty, so that it is received by someone with the appropriate authority, the position may be different. It should be borne in mind, however, that a notice that purports to designate an Early Termination Date will be ineffective if it designates a day before the notice becomes effective. Unless the date designated is expressed to be the date on which the notice becomes effective,[3] the time at which the notice is received may therefore be critical.

The conclusion that an alternative delivery method can be used is, however, subject to an important proviso. As noted above, Section 12(a) of the 2002 Agreement states that "a notice or other communication under Section 5 or 6 may not be given by electronic messaging system or e-mail". This is material because, as explained above, under English law, any implied term must not contradict an express term of the contract. Similarly, under New York law, as discussed above, courts cannot excise terms or distort the meaning of terms used in the contract.

The provision reads:

> "Any notice or other communication in respect of this Agreement may be given in any manner described below (except that a notice or other communication under Section 5 or 6 may not be given by electronic messaging system or e-mail) to the address or number or in accordance with the electronic messaging system or e-mail details provided".

The words in parentheses provide an exception to the *manner* in which notices may be given. The provision draws a distinction between the *manner* of giving a notice or other communication and the *address or number* that is to be used for this purpose. The "manner" in question is therefore the use of electronic messaging system or email, not the sending of an electronic message or email to the address or number specified in the Schedule.[4]

This suggests that, under both English and New York law-governed 2002 Agreements, the prohibition on the use of an electronic messaging system or email applies generally, including by a means not contemplated by Section 12(a) pursuant to an implied term. As noted above, by contrast, the 1992 Agreement contains an exclusion for notices under Section 5 and 6 given by electronic messaging system (or fax), but the exclusion does not extend to email. Although it is arguable that such an exclusion should be implied by analogy with electronic messaging systems (since emails did not exist when the 1992 Agreement was published), our preferred view is that notices under Section 5 or 6 of the

[3] Designating the Early Termination Date in this way could, however, create practical difficulties because it may be difficult to ascertain which date to use for the purpose of determining any amount that is payable under Section 6(e) of the Agreement. It may also be difficult to ensure that any hedges are unwound on the Early Termination Date.

[4] It could be argued that the exclusion is only intended to ensure that there is no provision that deems an electronic message or email to be effectively delivered, and so require actual notice to have occurred. However, in our opinion, this is not the effect of the language used for the reasons set out above.

1992 Agreement may be given by email as long as they are actually communicated to someone with the appropriate authority.

3.2 The position where the listed methods are impractical or inconvenient

3.2.1 The English law position

Rather than being impossible, the use of the listed methods of giving notice may be impractical or inconvenient. For example, it may be difficult to find a courier who is willing to deliver a notice or there may be postal delays which make it difficult to be sure when a notice will be delivered (or its delivery will be attempted). Alternatively, a party's security policies may not permit employees who are working from home to print out documents at home. In our opinion, however, this is not sufficient to justify the implication of a term permitting an alternative method to be used.

As explained in paragraph 3.1.1 above, a term will be implied under English law only if it is *necessary* to give business efficacy to the contract or the term is so obvious that it goes without saying. It is not sufficient that it would be a fair one to include. Where it is possible to operate the mechanics of the ISDA Master Agreement on the basis of the methods set out in Section 12(a), the parties will be expected to do so, even if this is extremely inconvenient or gives rise to commercial difficulties. For example, the fact that the notice may take a long time to arrive, if certified or registered mail has to be used, is immaterial. It is equally immaterial that it may be hard to predict when the notice will arrive (so that, in the case of a notice designating an Early Termination Date, which must fall on or after the date on which the notice becomes effective, it may be difficult to decide what date to specify). These matters fall far short of causing the contract to lack commercial or practical coherence.

The only qualification we would add is that there may be circumstances in which it is technically feasible to use a particular notice method but, for all practical purposes, it should be regarded as unavailable. This will be the case, for example, if deliveries by certified or registered mail have been suspended indefinitely, even if any backlogs are expected to be cleared at some indeterminate time in the future (*i.e.*, once the relevant lockdown has been lifted). It is possible that the same conclusion will apply if there is a prolonged delay but this will depend on the circumstances.

3.2.2 The New York law position

The same result would probably follow under New York law. As explained above, courts are generally reluctant to imply terms in a contract, and the court in *Signal Hill* held that "any of the enumerated methods of giving notice [under Section 12(a)] will be effective, not that any method of notice, enumerated or not, is permitted." Thus, where compliance with Section 12(a) is possible, even though it may be more difficult than under ordinary circumstances, a court is likely to require the party attempting to give notice to follow the terms of Section 12(a).

4 Conclusions

We can summarise our conclusions as follows:

(a) If it is impossible to give a notice under either the 1992 Agreement or the 2002 Agreement by any of the methods listed in Section 12(a), the court is likely to imply a

term permitting an alternative method to be used. This is the case under both English and New York law.

(b) It may be impossible to use any of the listed methods for a notice under Section 5 or 6 of the Agreement if, for example, (i) it is unlawful for anyone to enter the area in which the intended recipient's office is located, (ii) no telex or (in the case of the 2002 Agreement) fax number has been included in the relevant Schedule (or the numbers supplied do not work), and (iii) certified or registered mail to the intended recipient's address has been suspended indefinitely.

(c) Under the 2002 Agreement, however, notices under Section 5 or 6 of the Agreement may not be given by electronic messaging service or email and this probably remains the case where reliance is placed on an implied term. This is the case under both English and New York law.

(d) Any notice pursuant to such an implied term must be given to a representative of the recipient who has authority to receive notices of that type (for example, an individual who is responsible for managing the parties' business relationship).

(e) A term permitting an alternative method to be used is very unlikely to be implied merely on the ground that each of the listed methods is inconvenient or impractical.

5 Reliance

This memorandum is addressed to ISDA for its benefit and the benefit of its members in relation to the giving of notices under the Agreement. No person may rely on this memorandum for any purpose without our prior written consent. This memorandum may, however, be shown by ISDA or its members to their professional advisors and to an affiliate, a competent regulatory or supervisory authority for such ISDA member for the purposes of information only, on the basis that we assume no responsibility to such authority or any other person as a result, or otherwise.