



NEWS RELEASE
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ISDA Welcomes the English Court of Appeal's Decision to Uphold ISDA Master Agreement in LBIE Judgment

LONDON, Tuesday, April 3, 2012 – The International Swaps and Derivatives Association, Inc. (ISDA) welcomes the Court of Appeal's judgment handed down today in the appeal case of *Lomas and others v JFB Firth Rixson, Inc and others*.

In the *Firth Rixson* case, four out-of-the-money corporate counterparties had declined to terminate their ISDA Master Agreements with Lehman Brothers International Europe (LBIE), relying on Section 2(a)(iii) of the ISDA Master Agreement not to make payments that they would, but for Section 2(a)(iii), have been required to make to LBIE. The case was appealed to the Court of Appeal, where it was joined with the appeals of three other cases that raised the same or related issues. The hearing of the appeals took place in December 2011.

Section 2(a)(iii) makes it a condition precedent to a party's payment obligations that no Event of Default or Potential Event of Default has occurred, and is continuing, with respect to the other party. It effectively "suspends" the Non-defaulting Party's obligations to protect it from the credit risk of performing its own obligations to a party that may be unable to perform its own.

In the original case, whilst confirming that Section 2(a)(iii) is "suspensive" in effect, Mr. Justice Briggs found that payments suspended under Section 2(a)(iii) are extinguished on the final payment date under the transaction. This surprising finding was at odds with the market's expectations and with the wording of the ISDA Master Agreement.

ISDA sought, and was granted permission, to intervene in the appeals to ensure that arguments reflecting the market's understanding of the construction of the agreement were made before the Court.

In a unanimous judgment, in which it essentially confirmed ISDA's position on all significant issues in the appeals, the Court of Appeal not only confirmed that Section 2(a)(iii) is suspensive, but also (by specific reference to ISDA's position) found that the suspension can be indefinite regardless of the final payment date of the transaction, thus clearly overruling Mr. Justice Briggs' finding that payment obligations suspended by Section 2(a)(iii) are extinguished on the last date for payment. As a consequence of this, it also overruled the troubling decision of Mr. Justice Flaux in the *Cosco* case that Transactions that have reached their final payment date before the Early Termination Date are excluded from the close-out calculation under the ISDA Master Agreement.

The Court of Appeal also affirmed the lower Court's rejection of the Administrators' argument that the operation of Section 2(a)(iii) should be interpreted as being subject to a limitation that it may only be relied upon for a "reasonable time", and confirmed, in the one of the four appeals in which the issues were raised, that Section 2(a)(iii) does not breach the anti-deprivation or *pari passu* principles of English insolvency law.

ISDA's General Counsel, David Geen, said: "We are delighted, but not surprised, that the Court of Appeal has really understood the meaning and purpose of the key provisions of the ISDA Master

Agreement and has unambiguously affirmed the positions that ISDA has consistently held. This judgment provides clarity and certainty to the derivatives market and vindicates ISDA's decision to participate in the appeals".

The appeal in *Firth Rixson* was joined with appeals in three other cases that raised the same or related issues: *Lehman Brothers Special Financing Inc. v Carlton Communications Limited*; *Pioneer Freight Futures Company Limited (in liquidation) v Cosco Bulk Carrier Company*; and *Britannia Bulk PLC (in liquidation) v Bulk Trading S.A.*

ISDA was represented by Antony Zacaroli QC and Jeremy Goldring, who were instructed by a team from Allen & Overy led by Marc Florent.

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About ISDA

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 815 member institutions from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

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