

Insight: Derivatives

September 2010

ISDA/IIFM launch Tahawwut Master Agreement

The intention of this briefing is to outline the key differences between the new ISDA/IIFM Tahawwut Master Agreement (the “**TMA**”) and the 2002 ISDA Master Agreement (“**2002 ISDA**”) on which it was based and selected provisions of the 1992 ISDA Master Agreement (Multicurrency – Cross Border) (the “1992 ISDA”), and to provide guidance on selected provisions of the TMA. Capitalised expressions used in this briefing, but not otherwise defined, shall have the meaning given to such expressions in the TMA.

Framework Agreement

As per the 1992 ISDA and the 2002 ISDA, the TMA is a master or framework agreement and does not, of itself, give rise to any enforceable obligations. On this point, the IIFM/ISDA Explanatory Memorandum relating to the ISDA/IIFM Tahawwut Master Agreement dated 1 March 2010 (the “**TMA Guide**”) provides:

“This Agreement is a Master Agreement or framework agreement which sets out terms upon which the parties can subsequently enter into risk management arrangements. Entering into the Master Agreement does not give rise to any transactions. After the parties have entered into the Master Agreement, they may subsequently enter into further arrangements which will be subject to and governed by the Master Agreement.”

The current version of the TMA is only designed to cover the commercial relationship between counterparties trading *Shari’ah* compliant swap transactions based generally on *murabaha*¹ transactions. There is still additional work to be done in developing *Shari’ah* compliant product specific templates and credit support documentation together with the commissioning of netting opinions in the relevant jurisdictions to address the close out mechanism of the TMA.

Summary of Key Changes

We set out below a brief overview of the main changes to the 2002 ISDA made by the TMA:

- (a) the introduction of a concept of future (non concluded) transactions;
- (b) the addition of new representations;
- (c) the amendment of the Events of Default and Termination Events to deal with future (non concluded) transactions;



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¹ *Murabaha* refers to a deferred payment financing arrangement. In a typical “*murabaha*” transaction, the financier buys an asset from the supplier, acquires title to the asset in question, and on sells it to the customer at a premium, typically repayable in instalments

- (d) the introduction of a split calculation of the amounts payable on close-out for *Shari'ah* compliance reasons;
- (e) amendments to the set-off clause and a deferral mechanism;
- (f) the choice of dispute resolution forums i.e. court proceedings or arbitration.

The above changes are discussed in more detail below.

“Transactions” and “Confirmations”

A significant change which the TMA makes to the 2002 ISDA is the way in which the TMA addresses what constitutes a “Transaction” and a “Confirmation”. Under the 2002 ISDA, a “Transaction” refers to a trade as documented under a particular confirmation e.g. an interest rate swap. Under the TMA however, as *Shari'ah* compliant transactions are likely to contain a series of separate commodity trades under a single derivative, the terminology has necessarily been altered.

There are two reasons for the change in terminology. First, under the TMA, each commodity trade is a financial transaction in itself. Second, it is important to be able to distinguish between a current trade and a trade that is scheduled to take place in the future. In other words, it is important to be able to refer to a trade whose terms are finalised and a trade whose terms are not finalised. The terms of trades which are scheduled to occur in the future cannot be finalised until shortly before each trade is made, since under *Shari'ah* it is not possible to directly use interest rates.² The ability of a party to agree to receive a future interest rate (whatever that might be) is removed. Instead a party has to wait until the date of the trade in order to work out what the final sum to be paid over will be.³ This is an important term of the contract, but which cannot be agreed upon in advance. In other words, the terms of any future sale of commodities cannot be concluded until a figure can be assigned to the final price of

the commodities. The TMA therefore distinguishes between trades whose terms are fully concluded and scheduled future trades whose terms are not yet fully concluded.

A commodity sale whose terms are concluded is referred to as a “**Transaction**” and the trade confirmation for a Transaction is referred to as a “**Confirmation**”. The TMA expressly contemplates the use of *murabaha* transactions as concluded transactions. The TMA introduces a concept of future (not yet concluded) transactions. A commodity sale which is due to occur at some point in the future and whose terms are as yet unknown, or a transaction which the party undertakes to the other party pursuant to its *wa'ad* (see further below) to enter into at a future date at the election of the other party, is referred to as a “**Designated Future transaction**” and the trade confirmation which will document the Designated Future transaction is referred to as a “**DFT Terms confirmation**”. Until they are actually entered into, Designated Future transactions do not constitute Transactions for the purposes of the TMA and are treated differently from concluded Transactions (in particular, upon close-out). In time, once entered into, Designated Future transactions and DFT Terms confirmations become Transactions and Confirmations. On this point, the TMA Guide provides⁴:

*“[The parties] may from time to time enter into one or more transactions (each a “**Transaction**”) that are or will be governed by this ISDA/IIFM Tahawwut Master Agreement, which includes the schedule (the “**Schedule**”), and the documents and other confirming evidence (each a “**Confirmation**”) exchanged between the parties or otherwise effective for the purpose of confirming or evidencing those Transactions. This ISDA/IIFM Tahawwut Master Agreement and the Schedule are together referred to as this “**Master Agreement**”.*

*In addition, the parties may from time to time agree (the documents and other confirming evidence exchanged between the parties or otherwise effective for the purpose of confirming or evidencing any such agreement being a “**DFT Terms confirmation**” and each such agreement being a “**DFT Terms Agreement**”) the terms of further transactions in each case being either (i) a transaction which, by such DFT Terms Agreement, the parties agree to enter into between them in the future under this Master Agreement or (ii) a transaction which, by such DFT Terms Agreement, one party (the first party) undertakes to the other (the second party) to enter into under this Master Agreement at the election of the second party at a future date (all of such further transactions being “**Designated Future transactions**”). Except as is expressly provided in this Master Agreement, Designated Future transactions shall not constitute Transactions for the purposes of this Master Agreement unless and until subsequently entered into, and when entered into they shall constitute Transactions, shall be confirmed by way of a Confirmation and shall cease to be Designated Future transactions.”*

The TMA also refers to the agreement under which the parties agree to enter into Designated Future transactions and DFT Terms confirmations as the “**DFT Terms Agreement**”. This is a potentially confusing term as it does not refer to an agreement due to come into being at some point in the future, rather it is an agreement made on day one which sets out the intention of the parties to enter into trades in the future.

² Although interest rates such as LIBOR are not directly used in Islamic finance, there is often a need to hedge against changes in interest rates – for example, LIBOR rates may be used in calculating the premium payable in a finance lease transaction (“*Ijara*”) or in calculating the premium in a *murabaha* transaction

³ Consider also the floating leg of a vanilla profit rate swap documented using *Murabaha* contracts. The floating amount will only be known at the start of each calculation period for *Shari'ah* compliance reasons. Accordingly, the counterparties will agree to enter into a series of separate *Murabaha* contracts – each *Murabaha* contract relating to a separate calculation period

⁴ See the preamble to the TMA Guide

What is a wa'ad?

The TMA also introduces the concept of a *wa'ad*. A *wa'ad* is an undertaking by a party to enter into a future transaction at the election of the other party. The TMA contemplates two types of *wa'ads*: first, the *wa'ad* to enter into Designated Future transactions which will usually be contained in the DFT Terms confirmation; and, secondly, the *wa'ad* to enter into a *musawama*⁵ under TMA Section 2(e) upon the occurrence or effective designation of an early termination date. Pursuant to the terms of the TMA, at any time, only one of the parties will be able to exercise the *wa'ad* of the other party. The TMA Guide provides⁶:

"It is worth noting that the wa'ad of Party A to enter into a musawama is separate and distinct from the wa'ad of Party B to enter into a musawama and, in each case, the underlying asset, if the wa'ad is exercised, is different."

Future Transactions

As discussed above, an important change is the introduction of the concept of Designated Future transactions i.e. transactions that the parties will enter into the future, which impacts several sections of the TMA:

- (a) the events of default have been modified to account for the non-performance of future transactions (with a shorter grace period for failure to enter into a future transaction other than for other non-payment events of default),⁷

- (b) modifications have been made to the illegality/force majeure termination event affecting a party's ability to enter into future transactions⁸,
- (c) the Section 7 transfer provision has been expanded to include the right to receive the purchase price under a *musawama*⁹; and
- (d) the Section 6(h) set-off provision has been modified to allow the Non-defaulting Party or Non-affected Party, as applicable, to defer the payment of that part of any Early Termination Amount (in respect of concluded transactions) to the Defaulting Party or Affected Party, as applicable, that is equal to or less than any amount it may be owed in respect of future payments not yet crystallised under future transactions¹⁰.

Islamic Financing

A new definition of "Islamic Financing" has been included in the TMA as follows:

" "Islamic Financing" ¹² means any financing transaction or arrangement entered into which is expressed to be made in accordance with the principles and rules of the Shari'ah (but which, for the avoidance of doubt, may be governed by another system of law)."

Footnote 12 to the definition of Islamic Financing in the TMA provides:

"The purpose of including the term "Islamic Financing" (used in the definition of Specified Obligation) is so that financing type arrangements effected through Shari'ah compliant structures are covered by the standard cross-default Event of Default, if applicable."

Under the 2002 ISDA, a cross-default is only triggered in respect of borrowed money obligations¹¹. This clause has been amended in the TMA¹² to cover defaults under "Specified Obligations" which is defined in the TMA as extending to transactions having the commercial effect of a borrowing (including Islamic Financing Transactions), but is otherwise substantially the same provision as per the 2002 ISDA. This means, for example, that defaults under Islamic Financing transactions such as *sukuks* would be caught by the cross-default clause. It should be noted that the definition of "Specified Obligations" has not been modified to exclude conventional borrowed money obligations which will still trigger this Event of Default.

Early Termination under the TMA

The procedure for terminating Transactions under the TMA is substantially the same as under the 2002 ISDA¹³. However, the TMA splits the calculation of amounts payable following the occurrence of an Early Termination Date between concluded Transactions for which the assets have been fully delivered (which are defined in the TMA as "**Fully Delivered Terminated Transactions**")¹⁴ and concluded Transactions for which the assets have not yet been fully delivered (which are defined in the TMA as "**Non-Fully Delivered Terminated Transactions**")¹⁵ and Designated Future transactions¹⁶. Such amounts are then capable of being set-off under the TMA. The footnote to TMA Section 6 provides:

5 A *musawama* is a sale contract in which a commodity is traded without the cost price of the object being known to the purchaser

6 See paragraph 3.2 of the TMA Guide

7 See the new Event of Default added at TMA Section 5(a)(ii)(3) such that a failure to enter into a Designated Future transaction or any DFT Terms Agreement if such failure is not remedied on or before the first Local Business Day after notice of such failure is given to the relevant party. See also TMA Section 5(a)(ii)(l) and (2)

8 See TMA Section 5(b)(i)(1)(B) and TMA Section 5(b)(ii)(1)(B)

9 See TMA Section 7(c)

10 See TMA Section 6(h)

11 See the definition of Specified Indebtedness in the 2002 ISDA

12 See TMA Section 5(a)(vi)

13 See TMA Section 6(a) to (c)

14 See TMA Section 14 which defines a Fully Delivered Terminated transaction as meaning "with respect to any Early Termination Date, any Terminated Transaction under which all goods or assets fall to be delivered have been delivered, irrespective of whether any payments fall to be made"

15 See TMA Section 14 which defines a Non-Fully Delivered Terminated transaction as meaning "with respect to any Early Termination Date, any Terminated Transaction which is not a Fully Delivered Terminated Transaction"

16 See TMA Section 6(f)

“This Early Termination clause is the one through which net risk management is effected. It allows all Transactions and DFT Terms Agreements to be terminated. Broadly speaking, the Transactions (which are the concluded transactions) under which no deliveries remain to be made will be replaced by the obligation to pay an Early Termination Amount (See Sections 6(c)(ii) and 6(e)). In relation to the DFT Terms Agreements and Transactions under which deliveries remain to be made, the Relevant Index will be calculated and the wa’ad to enter into a musawama transaction will provide the mechanism for a net amount in respect of those DFT Terms Agreements and those Non-Fully Delivered Terminated Transactions to be paid (See Section 6(f)(v)). The intention is that where a payment is to be made by one party in respect of the concluded transactions and a payment is to be made by the other party in respect of the musawama entered into, those payments should be capable of being set off.”

The Fully Delivered Terminated Transactions category addresses the situation where the relevant asset has been delivered but the purchase price has not yet been paid. The Non-Fully Delivered Terminated Transactions category addresses the situation where the relevant asset has not yet been delivered. In the latter case, such a situation may arise, for example, where the commodities broker becomes insolvent.

Early Termination of Fully Delivered Terminated Transactions and the Close-out Amount

As all amounts payable under a “Transaction” will be known at the time its terms are concluded, there is no need to include a mechanism in the documentation to assign a future value to it on close-out. Instead, TMA Section 6(d) simply brings

forward the date of payment of the purchase price of the assets in a manner similar to an acceleration under a loan facility¹⁷ so that, upon the occurrence or effective designation of an Early Termination Date, all payment obligations in respect of Fully Delivered Terminated Transactions for which the relevant assets sold have been fully delivered and which fall due after the Early Termination Date (assuming satisfaction of the conditions precedent contained in TMA Section 2(a)(iii)) are accelerated such that those amounts become due and payable on such Early Termination Date. The relevant party will then determine the “**Close-out Amount**” as the sum of the Termination Currency Equivalent of all payment due by one party on the Early Termination Date less the sum of the Termination Currency Equivalents of all payments due by the other party on such Early Termination Date¹⁸. The TMA Guide provides¹⁹:

“Section 6 provides how early termination is to be effected where it is applied following an Event of Default or Termination Event under Section 5.

Early termination operates separately in relation to Transactions and DFT Terms Agreements.

- (i) *Early termination of Fully Delivered Terminated Transactions: In the case of early terminated Transactions, under which all deliveries to be made have been made (called Fully Delivered Terminated Transactions) the Transactions which are early terminated are effectively accelerated e.g. if a Transaction is a murabaha under which an asset has been delivered but the purchase price (of say USD 1 million [Footnote: The purchase price in the murabaha would ordinarily be a combination of the cost price plus a profit element.]) has not been paid, then the USD 1 million purchase price*

becomes payable. All payments under such early terminated Transactions are aggregated to determine a Close-out Amount.

The calculation of the Close-out Amount also involves set-off because if, say, A owes B 100 under Transaction 1 and 70 under Transaction 2 and B owes A 90 under Transaction 3 and 90 under Transaction 4, the Close-out Amount is 10 owed by B to A. This net amount becomes payable by the relevant party to the other (subject as below).

Payment in respect of the early termination of such Transactions is therefore made through payment of the Close-out Amount and any unpaid amounts related to the Agreement.”

Whilst the Close-out Amount is also a term used in the 2002 ISDA its meaning in the TWA is very different.

It is important to note that this manner of close-out only applies to Fully Delivered Terminated Transactions and not Non-Fully Delivered Terminated Transactions and Designated Future transactions. Non-Fully Delivered Terminated Transactions and Designated Future transactions are closed-out in a different manner which is described further below.

Subjective valuation process

Many elements of the 2002 ISDA Close-out Amount definitions that referred to good faith and commercial reasonableness have been inserted in the operative text relating to the calculation of the Close-out Amount and the determination of the Relevant Index (see further below)²⁰. This makes the TMA Close-out Amount and Early Termination Amount valuation calculation quite subjective and the parties may wish to consider specific modifications depending upon the factual circumstances.

¹⁷ See TMA Section 6(d)

¹⁸ See TMA Section 6(d)(i) and (ii)(3)

¹⁹ See TMA paragraph 3.6(i)

²⁰ See, in particular, TMA Section 6(d)(ii)(3) and Section 6(f)(iii)

Early Termination of Non-Fully Delivered Terminated Transactions and Designated Future transactions

The close-out mechanism for Non-Fully Delivered Terminated Transactions and Designated Future transactions broadly follows that of the 1992 ISDA, in that it provides for the future value of these transactions to be calculated however there are certain important differences.

For each outstanding Designated Future transaction, a “**Relevant Index Amount**” is calculated²¹. The “**Relevant Index Amount**” is defined in the TMA as²²:

“Relevant Index Amount” means, with respect to each Terminated DFT Terms Agreement, each group of Terminated DFT Terms Agreements, each Non-Fully Delivered Terminated Transaction or each group of Non-Fully Delivered Terminated Transactions and a Relevant Index Determining Party:

- (a) *the Termination Currency Equivalent of the Market Quotation (whether positive or negative) for each such Terminated DFT Terms Agreement, group of Terminated DFT Terms Agreements, Non-Fully Delivered Terminated Transaction or group of Non-Fully Delivered Terminated Transactions for which a Market Quotation is determined; and*
- (b) *such party’s Loss (whether positive or negative and without reference to any Unpaid Amounts) for each such Terminated DFT Terms Agreement, group of Terminated DFT Terms Agreements, Non-Fully Delivered Terminated Transaction or group of Non-Fully Delivered Terminated Transactions for which a Market Quotation cannot be determined or*

would not (in the reasonable belief of the party making the determination) provide a commercially reasonable result.”

The methodology used to calculate the Relevant Index Amount is closely linked to the 1992 ISDA. The party who is to calculate the Relevant Index (the “**Relevant Index Determining Party**”), is required to obtain market quotations for replacement trades, as under the 1992 ISDA. If no market quotation can be determined, or if such quotation would not (in the reasonable belief of the party making the determination) provide a commercially reasonable result, the Relevant Index Determining Party is required to calculate its “**Loss**,” again as under a 1992 ISDA²³. This is a departure from the Close-out Amount concept contained in the 2002 ISDA as Market Quotation with a fallback to Loss was perceived as being more acceptable to *Shari’ah* scholars. “Loss” is defined in the TMA as²⁴:

““Loss” means, with respect to one or more Non-Fully Delivered Terminated Transactions or, as the case may be, one or more Terminated DFT Terms Agreements 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 a negative number) in connection with that Non-Fully Delivered Terminated Transaction or group of Non-Fully Delivered Terminated Transactions or Terminated DFT Terms Agreement or group of Terminated DFT Terms Agreements, as the case may be. 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 a Market Quotation has been determined for the payment or delivery. 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.”

Although the concept of Market Quotation and Loss are largely based on the 1992 ISDA, unlike the 1992 ISDA, Loss does not, for *Shari’ah* compliance reasons, specifically refer to loss of bargain, cost of funding or losses or costs incurred as a result of terminating, liquidating, obtaining or re-establishing any hedge or related trading position. This raises the possibility that the measure of damages calculated in respect of the same economic transaction documented, on the one hand, under a 1992 ISDA and, on the other hand, under the TMA may be different as a party seeking to recover “Loss” under the TMA will have to demonstrate that such “Loss” fell within the types of damages recoverable under the rule in *Hadley v Baxendale (1854) 9 Exch 341*²⁵. This introduces an element of basis risk. Further, if a hedging transaction to the TMA was documented under a different master agreement, the measure of damages could be different as such related transactions will be closed out using a different methodology. The TMA also removes the credit-worthiness of the determining party when requesting quotations whereas the 2002 ISDA, in certain circumstances²⁶, requires that the credit-worthiness of the requesting party is taken into account, which further raises the possibility of different results.

21 See TMA Section 6(f)

22 See TMA Section 14

23 See the TMA Section 14 definition of “Relevant Index Amount”

24 See TMA Section 14

25 The rule in *Hadley v Baxendale* is that a claimant may either recover damages for breach of contract where the damage is “such as may fairly and reasonably be considered either as arising naturally i.e. according to the usual course of things from such breach of contract itself” (the first limb) or “such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it” (the second limb). The practical difference between the first and second limb is that the second limb requires a claimant to prove special knowledge of the loss claimed whereas the first limb does not. See also *Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48*.

26 See the 2002 ISDA definition of Close-out Amount and Section 6(e)(ii)(3)(Mid-Market Events).

The aggregate of each Relevant Index Amount is then calculated and a final figure for payment reached, which is referred to as the “**Relevant Index**.” The terminology used here slightly overcomplicates matters as there is no “index” as such. The term “index” implies that there is some kind of statistical measure which is calculated independently and is available for reference. This is not the case and it makes more sense to think of the “index” simply as an “amount” which needs to be calculated on close-out. The TMA Guide provides²⁷:

“Early termination of DFT Terms Agreements and Non-Fully Delivered Terminated Transactions: If there are early terminated DFT Terms Agreements or early terminated Transactions under which not all deliveries have yet been made (called Non-Fully Delivered Terminated Transactions), an index is calculated. Broadly speaking, the relevant Index represents the replacement cost of all the early terminated DFT Terms Agreements and all the early terminated Non-Fully Delivered Terminated Transactions. Again there is set-off built into the calculation so that the result is the net replacement cost. So, if the net replacement cost of all the early terminated DFT Terms Agreements and all the early terminated Non-Fully Delivered Terminated Transactions would be a cost to the calculating party (i.e. the calculating party would have to make a net payment to the market in order to replace all the early terminated DFT Terms Agreements and all the early terminated Non-Fully Delivered Terminated Transactions), then the Relevant Index is positive. In such case, the amount of the index is the net replacement cost of the early terminated DFT Terms Agreement and the early terminated Non-Fully Delivered Terminated Transactions.

[The footnote to the above paragraph provides:

“In the context of early termination following an event of default, the non-defaulting party is usually the calculating party. So in that context, where the non-defaulting party would incur a net replacement cost (i.e. the non-defaulting party will have to pay the market), that will give a positive index. If the non-defaulting party would make a gain, then the index would be negative and the musawama mechanism described later in the Explanatory Memorandum is intended to operate in such circumstances so as to enable the defaulting party to be paid the gain.”]

If the calculating party would in fact make a gain on a net basis i.e. the market would make a net payment to the calculating party to replace the early terminated DFT Terms Agreements and the early terminated Non-Fully Delivered Terminated Transactions, then the Relevant Index will be negative. In this case, the amount of the index will be the net amount which the market would pay the calculating party, expressed as a negative number (e.g. if the market would pay the calculating party a net 50, the index will be -50).

Payment in respect of the early termination of DFT Terms Agreements and the early termination of the Non-Fully Delivered Terminated Transactions is conditional upon entry into a musawama transaction between the parties. If the Relevant Index is positive (i.e. there would be a net replacement cost payable to the calculating party), the calculating party is entitled to exercise the other party’s wa’ad and require the other party to enter into a musawama. This is the wa’ad contained in Section 2(e) of the Master Agreement. The musawama entered into will involve the sale by the calculating party to the other party of a specified quantity of a specified asset at

a price which will equal the cost of the asset plus the positive Relevant Index amount. The type of asset and its quantity will be agreed at the outset between the parties and specified in the Schedule to their agreement. By specifying the asset and its quantity, the intention is to reduce the uncertainty that would otherwise occur if the asset and quantity were left to be selected at the time the musawama is entered into.

If the Relevant Index is negative, the party which is not the calculating party may exercise the calculating party’s wa’ad to enter into the musawama and sell to the calculating party a specified quantity of a specified asset at cost plus the absolute value of the negative Relevant Index value.

Where there has been an Event of Default, the person calculating the Index will be the non-defaulting party. However, the net replacement cost may be a cost for the non-defaulting party or a gain for the non-defaulting party. Therefore, the person exercising the wa’ad may be the non-defaulting party or the defaulting party, depending on whether the index is positive or negative.”

Contractually achieving close-out

As we have seen, Designated Future transactions are a way of referring to “Transactions” that are scheduled to take place in the future. They are asset trades which the parties have expressed an intention to enter into, but their terms are not yet fully determined and on their own they are not legally binding contracts. This would present a difficulty on close-out. As the parties would not be legally bound to enter into the remaining asset trades, there would be no legal basis on close-out for the party which is “in-the-money” to demand compensation for the replacement value of the swap.

²⁷ See paragraph 3.6(ii).

A further contractual obligation is needed in order to achieve close-out, and bind the parties to making a payment for the replacement costs of the swap. Hence at TMA Section 6(f)(v), the parties agree that the party which is "out-of-the-money" on the swap will purchase "Designated Assets" from the party which is "in-the-money" at a price which reflects the close-out value of the future trades under the swap. "**Designated Assets**"; and the related expression "**Designated Quantity**" are defined in the TMA as²⁸:

"Designated Assets" means the Designated Quantity of the type of Shari'ah compliant assets selected for the purposes of Section 6(f)(v) by agreement between the parties and specified in the Schedule."

"Designated Quantity" means the quantity of assets selected for the purposes of Section 6(f)(v) by agreement between the parties and specified in the Schedule."

and the footnote to the definition of Designated Assets provides:

"To avoid uncertainty regarding the asset which will be the subject of the musawama, the parties must agree, in the Schedule, the type and quantity of the Designated Assets to be purchased under the musawama. It is anticipated that parties will limit the quantity of the Designated Asset to a nominal value in order that inflated/impractical amounts of commodities are not required to be purchased under the musawama. As an alternative to agreeing a single Designated Asset and a single Designated Quantity, the parties may, if they prefer, agree a list of Designated Assets and their respective Designated Quantities, leaving the selection of which out of this list of Designated Assets is to be purchased to be determined by the Exercising Party at the time the wa'ad to enter into the musawama is exercised."

This agreement is done by way of the wa'ad to enter into a musawama at TMA Section 6(f)(v), which is, in other words, an undertaking to enter into an asset trade upon close-out in order to effect the payment of the Relevant Index²⁹. The TMA Guide provides as follows³⁰:

"Payment in respect of the early termination of DFT Terms Agreements and the early termination of the Non-Fully Delivered Terminated Transactions is conditional upon entry into a musawama transaction between the parties. If the Relevant Index is positive (i.e. there would be a net replacement cost payable to the calculating party), the calculating party is entitled to exercise the other party's wa'ad and require the other party to enter into a musawama. This is the wa'ad contained in Section 2(e) of the Master Agreement. The musawama entered into will involve the sale by the calculating party to the other party of a specified quantity of a specified asset at a price which will equal the cost of the asset plus the positive Relevant Index amount. The type of asset and its quantity will be agreed at the outset between the parties and specified in the Schedule to their agreement. By specifying the asset and its quantity, the intention is to reduce the uncertainty that would otherwise occur if the asset and quantity were left to be selected at the time the musawama is entered into.

If the Relevant Index is negative, the party which is not the calculating party may exercise the calculating party's wa'ad to enter into the musawama and sell to the calculating party a specified quantity of a specified asset at cost plus the absolute value of the negative Relevant Index value.

Where there has been an Event of Default, the person calculating the Index will be the non-defaulting party. However, the net replacement cost may be a cost for the non-defaulting party or a gain for

the non-defaulting party. Therefore, the person exercising the wa'ad may be the non-defaulting party or the defaulting party, depending on whether the index is positive or negative.

Where the party entitled to exercise the wa'ad is the defaulting party, it needs to be recognised that if the defaulting party has become subject to insolvency proceedings, then, as a practical matter, its insolvency officer may need some time before he is able to assess and understand the position of the defaulting party and then authorise it to take any action such as exercising the wa'ad of the counterparty and entering into a musawama. In order to accommodate this, the Agreement allows each party up to a year in which to exercise the other party's wa'ad.

Where a Close-out Amount (i.e. the amount payable in respect of the early termination of Fully Delivered Terminated Transactions) is payable by a party but that party will be the payee (as seller) under the musawama if the wa'ad is exercised (i.e. in relation to the early terminated DFT Terms Agreements and the early terminated Non-Fully Delivered Terminated Transactions, it is the one that will receive payment), that party is allowed to wait up to a year (or earlier exercise of the wa'ad) before it pays the Close-out Amount, so that it can set-off its payment in respect of the Close-out Amount against what the other party will pay it under the musawama, to give an overall net payment."

Where a party fails or is unwilling to comply with its obligation to purchase the Designated Assets, the party who exercised the wa'ad is discharged from its obligation to deliver the Designated Assets and is entitled, by way of liquidated damages, to payment of an amount equal to the value of the Relevant Index, thus crystallising an amount equal to the mark to market value of Non-Fully Delivered

²⁸ See TMA Section 14

²⁹ See also TMA Section 2(e)

³⁰ See paragraph 3.6(ii)

Terminated Transactions and Designated Future transactions. In theory, the end result should be an amount economically similar to that which would apply under the 2002 ISDA.³¹

What is a Non-Fully Delivered Terminated Transaction?

Whilst the term “Fully Delivered Terminated Transaction” is clearly defined³², the term “Non-Fully Delivered Terminated Transaction” is defined as any “Terminated Transaction” which is not a “Fully Delivered Terminated Transaction”³³. However there is a degree of ambiguity to this latter definition. It could refer to a Terminated Transaction (a) where the purchase price has been paid but the asset not delivered, (b) where the purchase price has not been paid (assuming it is not due and payable) and the asset not delivered or (c) where the purchase price has not been paid (but is due and payable) and the asset has not been delivered. It is understood that the term “Non-Fully Delivered Terminated Transaction” is intended to cover (a) and (c), but not (b) which will fall to be treated as a DFT Terms Agreement.

Set-off of the Early Termination Amount and the Relevant Index

TMA Section 6(h) makes substantial changes to the way the 1992 ISDA and 2002 ISDA close out netting provisions work. Under the 1992 ISDA and 2002 ISDA, a single net sum is payable following the occurrence of an Early Termination Date³⁴. However, the TMA uses contractual set-off, as opposed to close-out netting, to set-off the Early Termination Amount, Positive Indexed Value or Negative Indexed Value, as applicable, payable by one party (X) to the other party (Y) against the Early Termination Amount, Positive Indexed Value or Negative Indexed Value, as applicable, payable by

party (Y) to party (X), as applicable, to reach a final aggregate sum which is payable by one party to the other (which final aggregate sum is in fact not given a name). “**Positive Indexed Value**”, “**Negative Indexed Value**”, and the related expression “**Exercising Party**”, are defined as³⁵:

“**Positive Indexed Value**” means, where the value of the Relevant Index is a positive number and in relation to the Designated Assets, the sum of (i) the market value of such Designated Assets, as determined by the Exercising Party acting in good faith and in a commercially reasonable manner, (ii) the value of the Relevant Index and (iii) any value added tax, sales tax or other similar tax required by applicable law to be charged in respect of the sale of the Designated Assets.

“**Negative Indexed Value**” means, where the value of the Relevant Index is a negative number and in relation to the Designated Assets, the sum of (i) the market value of such Designated Assets, as determined by the Exercising Party acting in good faith and in a commercially reasonable manner, (ii) the absolute value of the value of the Relevant Index and (iii) any value added tax, sales tax or other similar tax required by applicable law to be charged in respect of the sale of the Designated Assets.

“**Exercising Party**” means the party which, by notice given pursuant to Section 6(f)(v), required the other party to purchase the Designated Assets.”

Payment netting does still feature at TMA Section 2(c), but it is restricted to the netting of payments as between “Transactions”, and as such would not take into account payment of the Relevant Index. Netting of future transactions is not

expressly contemplated by the TMA and there is no express provision which makes the TMA a cross product master netting agreement. Parties will need to consider carefully the insolvency implications of netting amounts due under concluded Transactions against amounts due in respect of future transactions and netting cash claims against delivery obligations.

It is worth noting that the 2002 ISDA set-off provision is typically disapplied in structured finance and project finance transactions, but payment netting allowed. Given the different role of the set-off provision in the TMA, its total disapplication would have unintended results in the event of early termination of a Transaction or (non concluded) transaction governed by the TMA.

One consequence of the TMA is that there is no single net sum payable under the TMA if it covers both Fully Delivered Terminated Transactions and Non-Fully Deliverable Terminated Transactions and Designated Future transactions. Under the 1992 ISDA and the 2002 ISDA, a single net sum is payable following the occurrence of an Early Termination Date³⁶. The TMA provides for two separate payment amounts: first, the Close-out Amount in respect of Fully Delivered Termination Transactions; and, secondly, the Positive Indexed Value or Negative Indexed Value, as applicable, in respect of Designated Future transactions and Non-Fully Delivered Transactions.

Further, TMA Section 6(e)(ii) provides that, in circumstances where both parties are to calculate the Close-out Amount (i.e. where there are two affected parties or burdened parties), both parties separately calculate the Close-out Amount and the Close-out Amount payable under the TMA is based on those separate calculations. However, there is no provision to split the difference

³¹ Although note the discussion of basic risk under the heading Early Termination of Non-Fully Delivered Terminated Transactions and Designated Future transactions above.

³² See TMA Section 14

³³ See TMA Section 14

³⁴ This net obligation is said to be a mere accounting (based on a flawed asset analysis) supported by the obiter dicta of Lord Hoffman in *Morris v Agrichemicals* [1996] BCC 204 (Court of Appeal); 1997 4 All ER 568 (House of Lords) and not the result of a set-off of claims determined in respect of the relevant terminated transactions.

³⁵ See TMA Section 14

³⁶ This net obligation is said to be a mere accounting (based on a flawed asset analysis) supported by the obiter dicta of Lord Hoffman in *Morris v Agrichemicals* [1996] BCC 204 (Court of Appeal); 1997 4 All ER 568 (House of Lords) and not the result of a set-off of claims determined in respect of the relevant terminated transactions.

between the Close-out Amounts calculated separately by each party unlike the corresponding provision in TMA Section 6(f) (v)(I)(C) for determination of the Relevant Index in relation to Designated Future transactions and Non-Fully Delivered Terminated Transactions which does include that language³⁷.

New Representations under the TMA

There are several new representations under the TMA, which relate to a party's satisfaction as to compliance with *Shari'ah* and non-reliance.

At TMA Section 3(h), each party represents that it has made its own investigation into and satisfied itself that the Agreement, each Transaction, DFT Terms Agreement and Designated Future transaction are compliant with *Shari'ah* (which includes obtaining a *fatwa* from its *Shari'ah* board where relevant).

Although, IIFM's *Shari'ah* Advisory Panel has approved the TMA, counterparties are responsible, with their own *Shari'ah* board or adviser, for ensuring the *Shari'ah* compliance of the TMA and any related transactions. The introductory page to the TMA expressly provides:

"Users of this document should note that, when entering into Transactions or DFT Terms Agreements under this ISDA/IIFM Tahawwut Master Agreement or into credit support arrangements in relation to it, they must first take all action required to satisfy themselves as to the Shari'ah compliance of such Transactions, DFT Terms Agreements or credit support arrangements, as the case may be, and of the Shari'ah compliance of such Transactions, DFT Terms Agreements or credit support arrangements, as the case may be, when

taken together with the ISDA/IIFM Tahawwut Master Agreement. Users making any amendment or addition to this ISDA/IIFM Tahawwut Master Agreement (whether through Part 6 of the Schedule or otherwise) should also first take all action required to satisfy themselves as to the Shari'ah compliance of such amendment or addition and of the ISDA/IIFM Tahawwut Master Agreement incorporating such amendment or addition."

Additional areas where *Shari'ah* compliance concerns may arise include related hedging transactions as well as events of default under TMA Section 5(a)(v) (*Default Under Specified Transaction*) and TMA Section 5(a) (vi) (*Cross-Default*) as such provisions may relate to transactions that are not *Shari'ah* compliant.

A new TMA Section 3(i) requires each party to state that it has not relied on the other party or any documents prepared by, on behalf of or at the request of the other party as to its satisfaction that the Agreement, each Transaction, DFT Terms Agreement and Designated Future transaction are compliant with *Shari'ah*. In addition the consents representation at TMA Section 3(a)(iv) has been extended to take account of *Shari'ah* fatwas issued by *Shari'ah* boards³⁸.

The 2002 ISDA representation at Section 3(g), that each party is acting as principal and not via an agent, has been extended to take into account that counterparties will often appoint an agent to perform the sourcing and sale of the assets under each Transaction. Language has been included to the effect that where a counterparty is acting via an agent, the counterparty nevertheless remains fully liable for the obligations in respect of the Transaction or DFT Terms Agreement which have been delegated.

It should also be noted that representations under the TMA are repeated more frequently than under the 2002 ISDA. Under the 2002 ISDA, the standard position is for representations to be made by each party only at the start of each Transaction (with the exception of the 3(f) payee tax representation which is repeated at all times). Under the TMA, the representations are repeated each time that a Transaction or a DFT Terms Agreement is entered into. Each party will therefore make the full set of representations on day one when the DFT Terms Agreement is signed and then repeat them on each payment date³⁹.

Shari'ah Compliance

These new representations, which minimise each party's ability to raise arguments based on non-compliance with *Shari'ah*, act together with other provisions of the TMA which also seek to reduce the complicated matter of whether or not a trade is *Shari'ah* compliant from an English law perspective. In addition, the TMA Guide notes⁴⁰:

"Scope of Shari'ah Review and Guidelines

The IIFM Shari'ah Advisory Panel has been requested to consider only the Master Agreement itself, not any Transactions, DFC Terms Agreement or Designated Future transactions nor any amendments or additions to the Master Agreement. In order to assist market participation, the IIFM Shari'ah Advisory Panel has indicated the following guidelines regarding Shari'ah compliance:

- (i) *Transactions should only be entered into for the purpose of hedging the actual risks of the relevant party.*
- (ii) *Transactions should not be entered into for purposes of speculation i.e. actual settlements of assets and payments must take place. Cash settlement should relate to actual transactions involving a deliverable asset.*

³⁷ This would appear to be a drafting oversight.

³⁸ See the phrase "and other consents (including obtaining any declaration, pronouncement, opinion or other attestation referred to in Section 3(h) below)"

³⁹ See the introductory paragraph to TMA Section 3

⁴⁰ See paragraph 2. Islamic financing transactions typically avoid "riba" (the charging of interest), "gharar" (unavoidable uncertainty) or "maysir" (gambling or speculation"),

(iii) *The asset must be halal.*

(iv) *No interest (whether called interest or an alternative name but which represents interest) is to be chargeable under a Transaction."*

The recent case of *The Investment Dar Company v Blom Developments Bank*⁴¹ recently found that the question of whether or not a contract was *Shari'ah* compliant amounted to a "triable issue" and so worthy of further consideration by a court. This decision raised some concerns amongst Islamic finance participants, although the case was procedural only and made no final determination of the issues⁴². However, notwithstanding TMA Sections 1(d), 3(a)(iv), 3(h) and 3(i), one additional matter that parties may wish to include in the Schedule to the TMA as a consequence of this decision is a provision whereby each party agrees that it will not seek to challenge the enforceability of the TMA in the future by reason of non-compliance with *Shari'ah* principles⁴³.

The first step to minimise uncertainty about the interpretation of *Shari'ah* is seen at Section 1(d), which explicitly excludes *Shari'ah* from the definition of "**laws**". The footnote to the definition of "**laws**" in the TMA provides⁴⁴:

"The term "law" does not include the principles of the Shari'ah (see Section 1(d)). Accordingly, in this Agreement, "unlawful" means contrary to law as opposed to contrary to Shari'ah."

This means that the traditional representations as to legality would not address whether or not a party is satisfied of its own accord that a transaction is *Shari'ah* compliant, however we have seen that separate new representations have been added to address this.⁴⁵ TMA Section 1(d) also means that the termination event for illegality at TMA Section 5(b)(i) or tax event – change of tax law in TMA Section 5(b)(iii) cannot be used to terminate a transaction if it is found not to be *Shari'ah* compliant, nor will a counterparty's undertaking at TMA Section 4(c) to comply with applicable laws, include compliance with the principles of *Shari'ah*.

From an English law perspective, it is not advisable to broaden the scope of the definition of "laws" to incorporate *Shari'ah*, as this broadens the scope for challenge⁴⁶. It may be however that certain counterparties' constitutions require a greater degree of commitment to the principles of *Shari'ah* than the TMA allows for and this should be carefully considered on a case by case basis.

References to taking into account the creditworthiness of a party in the context of obtaining quotations have also been removed.⁴⁷

In relation to transfers pursuant to TMA Section 7, the footnote provides:

"Any party effecting a transfer which it requires to be Shari'ah compliant should establish whether the price at which it transfers satisfies Shari'ah requirements, in particular whether the transfer is required to be at par."

Events of Default

The TMA includes certain new Events of Default. A new Section is included at 5(a)(ii) (3), which allows a party to terminate if its counterparty fails to enter into a Designated Future transaction, if such failure is not remedied on or before the first Local Business Day after notice of such failure is given to the counterparty.

The definition of Specified Transaction has been broadened to take into account *Shari'ah* compliant transactions and so as a result, the Event of Default for a default under a Specified Transaction at Section 5(a) (v) is also extended in scope to cover *Shari'ah* compliant transactions. It should be noted however that the definition of Specified Transaction has not been modified to exclude conventional financings and so they will still trigger this Event of Default.

41 *The Investment Dar Company K.S.C.C. v Blom Developments Bank S.A.L.* [2009] All ER (D) 145

42 One of the principal arguments was whether The Investment Dar Company lacked capacity to enter into the relevant *Wakala* transaction on the basis that its constitutional documents prohibited non *Shari'ah* compliant activities and the relevant *Wakala* transaction was, in fact, a disguised interest bearing deposit. The Investment Dar Company alleged that the relevant *Wakala* transaction was beyond its constitutional powers and therefore void. For a summary judgment application, the claimant must show that the defendant has no real prospect of defending the claim and there is no other compelling reason for a trial. The court does not consider the full facts of the matter and only considers whether the defendant has an arguable defence to the claim and, if so, the court will order a full trial of the claim. The court agreed that this *ultra vires* defence was at least arguable and therefore that a triable issue did exist. On the summary judgment application, the court did not consider the presented expert evidence on *Shari'ah* law. A finding that a triable issue exists does not mean that such an *ultra vires* defence will be successful at the later full trial. Indeed, the court expressed the view that this "defence was a lawyer's construct and the court should approach it with appropriate scepticism for that reason, especially as the *Shari'ah* committee apparently approved of this transaction. I agree that the court should approach the matter with some circumspection..."

43 This is intended to create an estopped under English law. See also *Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain E.C. 2004 EWCA Cir 19*.

44 See TMA Section 14

45 See TMA Section 3(a)(iv), 3(h) and 3(i)

46 See also *Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain E.C. 2004 EWCA Cir 19* in which the governing law clause provided "Subject to the principles of the Glorious *Shari'ah*, the Agreement shall be governed by and construed in accordance with the laws of England." The general reference to *Shari'ah* did not identify which aspects of *Shari'ah* law were to be incorporated into the contract. Such a reference was contradictory to the choice of English law and therefore meaningless.

47 Note the discussion of basic risk under the heading Early Termination of Non-Fully Delivered Terminated Transactions and Designated Future transactions above

Under the 2002 ISDA, a cross-default is only triggered in respect of borrowed money obligations. This clause has been amended in the TMA⁴⁸ to cover defaults under transactions having the commercial effect of a borrowing (including Islamic Financing transactions). This means, for example, that defaults under Islamic Financing transactions such as *sukuks* would be caught by the cross-default Event of Default clause.

Transfers

Section 6(b)(ii) has been amended such that instead of requiring a party to transfer its rights and obligations to another office or an affiliate, it now requires a party to “re designate” such rights and obligations to another office. The reason behind this is likely to be because some *Shari’ah* boards will associate novation of trades with the transfer of debt, which is prohibited under *Shari’ah*.

Practically speaking, the transfer of rights and obligations would usually involve the use of a novation agreement in order to legally effect the transfer. The “re designation” procedure under the IIFM seems to involve no such legal documentation but rather seems to imply that the relevant back offices should simply internally rebook the trade. The parties will need to consider what level of documentation they are happy with to constitute an effective “re designation”.

Interest

Whilst certain *Shari’ah* scholars are comfortable with including provisions to compensate a counterparty for its cost of funds, Section 9(h) (*Interest*) has been deleted and in its place a clause has been added stating that no interest will be payable in connection with the TMA⁴⁹. Parties will have to decide to what extent they are comfortable with including any equivalent provisions. The related concepts of “Applicable Close Out Rate,” “Applicable Deferral Date,” “Default Rate” and “Non Default Rate” have also been removed.

The TMA does not make clear how the time value of money is addressed where amounts are deferred. First, there can be a delay in obtaining payment of early termination amounts and unpaid amounts as well as the deferral of payments during the waiting period for force majeure or illegality. Secondly, the set-off provision⁵⁰ contemplates delay as a result of the deferral of performance of future agreements since the Non-defaulting Party or Non-affected Party, as applicable, is able to defer payment of an Early Termination Payment to the Defaulting Party or Affected Party, as applicable, for up to one year in circumstances where claims in respect of future transactions have not yet crystallised⁵¹. This allows the Non-defaulting Party or Non-affected Party, as applicable, to set-off any crystallised claims for monies due to the Non-defaulting Party or Non-affected Party, as applicable, in respect of the future transactions against any Early Termination Amount payable by the Non-defaulting Party or Non-affected Party, as applicable, to the Defaulting Party or Affected Party as applicable, in respect of Fully Delivered Terminated Transactions.⁵²

The absence of interest may affect the parties’ behaviour in a default situation. For example, a Defaulting Party may raise potential legal objections and otherwise frustrate or delay the early termination amount payment process since no default interest is payable. Although the TMA does not provide for the Non-defaulting Party to recover any funding costs it may incur as a result of any late payment or delivery, the possibility of non-payment leading to an Event of Default under the TMA is a potential deterrent to such behaviour.

The Close-out Mechanism and Insolvent Counterparties

Concerns have been raised that by including a provision requiring the parties to enter into an asset trade after an event of default has occurred, such a provision may become subject to mandatory insolvency provisions.

From an English law perspective, however, such concerns may not be warranted. English insolvency law allows a company to continue trading post-insolvency⁵³, however any close-out payment would require the consent of the relevant administrator or liquidator.

English law does provide powers to an administrator or liquidator to apply to the court to set aside certain transactions which were entered into before insolvency proceedings are commenced, but it seems unlikely that these powers would become relevant in the context of the termination of a bona fide swap transaction documented between arms length parties under the TMA. These powers address situations where the transaction was entered into at an undervalue⁵⁴ or at a preference⁵⁵ to other creditors or where the transaction defrauds creditors⁵⁶ or otherwise constitutes an

48 See TMA Section 5(a)(vi).

49 See TMA Section 9(h)

50 See TMA Section 6(h)

51 One will need to check whether such a deferral right is enforceable under the insolvency laws of the jurisdiction applicable to the Defaulting Party.

52 See TMA Section 6(h)(ii). If this were not the case, the Non-defaulting Party or Non-affected Party, as applicable, would be required to pay away the Early Termination Amount before any reciprocal payment (in respect of future non concluded transactions) that would be otherwise due to the Non-defaulting Party or Non-affected Party, as applicable, had crystallised

53 See Schedule B1, paragraphs 70-72 and Schedule 4, Part II paragraph 5 of the Insolvency Act 1986 (as amended)

54 See section 238 of the Insolvency Act 1986 (as amended)

55 See section 239 of the Insolvency Act 1986 (as amended)

56 See section 423 of the Insolvency Act 1986 (as amended)

extortionate credit transaction⁵⁷. However none of these powers appears to pose a threat to the TMA's close-out mechanism in the context of a bona fide commercial swap transaction documented between arms length parties under the TMA.

Part of the confusion surrounding this provision may be due to the fact that the TMA prescribes that a new transaction should take place, and that the whole range of associated activities will be conducted (i.e. that the commodities will be sourced by a broker, sold to the solvent counterparty and onsold to the insolvent counterparty). The question arises: can an insolvent counterparty be expected to perform all of these functions? The answer is that it most likely cannot, however this is anticipated from the outset: it is not necessary that the full asset trade be performed. The TMA Guide provides⁵⁸:

"Where the party entitled to exercise the wa'ad is the defaulting party, it needs to be recognised that if the defaulting party has become subject to insolvency proceedings, then, as a practical matter, its insolvency officer may need some time before he is able to assess and understand the position of the defaulting party and then authorise it to take any action such as exercising the wa'ad of the counterparty and entering into a musawama. In order to accommodate this, the Agreement allows each party up to a year in which to exercise the other party's wa'ad."

What is important is that an enforceable legal obligation arises from the close-out mechanism. This is achieved and the end result is a claim in law in liquidated damages for the value of the Relevant Index⁵⁹. In theory, the end result should be economically similar to that which would have otherwise applied under the 1992 ISDA and the 2002 ISDA.⁶⁰

Dispute Resolution⁶¹

The parties may elect whether disputes should be resolved by court proceedings or arbitration.⁶² For enforcement purposes, arbitration may be preferable for counterparties located in the Middle East.⁶³

Conclusion

The TMA is an important step towards the standardisation of documentation in the *Shari'ah* compliant derivatives market. As has been noted, it may be unlikely that the TMA could be used as a base for *Shari'ah* compliant credit default swaps. In addition, no *Shari'ah* compliant collateral documentation exists as yet, however it is possible to refer to Credit Support Documents in the Schedule and given the likely use of this document with *murabaha* based financings, this may be sufficient in most cases.

57 See section 244 of the Insolvency Act 1986 (as amended)

58 See paragraph 3.6

59 See TMA Section 6(f)(v)(2)

60 Although note the discussion under the heading Early Termination of Fully Delivered Terminated Transactions and the Close-out Amount

61 See TMA Section 13

62 See TMA Section 13(b) and (c)

63 This needs to be considered on a case by case basis

