

IASB Presentation-comments by Professor Hudson

(1) There are shortcomings with a Master Agreement approach:

- It does not provide for the whole of the contract: instead the parties to an ISDA Master Agreement are expected to append further terms and provisions to a Schedule to the Master Agreement, which can have the effect of altering the agreement radically from the standard language.
- It provides only for dealings between companies and not other types of entity.
- It sets out a consensus position across a marketplace but does not necessarily meet the particular needs of particular cases.
- It encourages parties not to consider the particular needs of their transaction if there is a standard agreement available.
- It is nevertheless a private contract between private parties and therefore may be sculpted in ways which were not intended by those who drafted the standard form of the agreement.

The concomitant advantage of a Master Agreement approach is that it tends to commodify legal risk so that at least it can be known that most market counterparties are contracting on broadly similar bases.

(2) The Master Agreement approach does not cater fully for the following types of legal issue relating to the parties' security:

- Guarding against the failure of the contract and the rights of the parties to restitution thereafter.
- The "credit support" rights of the parties, for example the ISDA Credit Support Deed contains wording which is considered problematic by many property lawyers.
- Collateralisation, even after the implementation of a Directive across the EU, still creates many difficult problems of property and commercial law.

(3) More generally it should be recalled that Master Agreements are predicated primarily on concepts of New York Law and English Law, with the result that

- Those common law systems are capable of generating some subtle but significant alterations in the understanding of those concepts over time through court judgments.
- Similarly, consensus market views of the law in particular contexts may not necessarily be sanctioned by courts in the long-run (as with the local authority swaps cases in England).
- Many transactions are not documented at all and therefore doctrines which require a specific contractual term may not apply.

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