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1 April 2011

Dear Sirs,

The TBMA Cross Product Master Agreement (as modified by the EFET/IECA European Commodities Schedule), the EFET Cross Product Credit Support Annex thereto, the EFET Master Netting Agreement and the EFET Credit Support Annex thereto – The Netherlands

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1. SCOPE OF ROLE/DOCUMENTS EXAMINED

1.1 We have been requested, as legal advisers to the European Federation of Energy Traders ("**EFET**") in their instruction letter (the "**Instruction Letter**") sent to us by mail of 27 November 2010 to render an opinion in respect of the laws of The Netherlands ("**this jurisdiction**") as to the validity of:

(a) the Cross Product Master Agreement ("**Cross Product Master Agreement**") (version 1) published by The Bond Market Association in February 2000, as modified by version 1.0 of the European Commodities Schedule (the "**Schedule**") published on 23 June 2003 by EFET in conjunction with the International Energy Credit Association ("**IECA**") (the Cross Product Master Agreement as modified by the Schedule is referred to as the "**CPMA**")[1];

(b) the Cross-Product Credit Support Annex to the CPMA published by EFET in June 2003 (the "**CPCSA**")[2]; and

(c) the Master Netting Agreement (version 1.0, dated June 2010) as published by EFET (the "**EFET MNA**" and, together with the CPMA, the "**Master Agreements**")[3];

(d) the EFET Credit Support Annex to the EFET MNA published in February 2011 (the "**2011 CSA**" and, together with the CPCSA, the "**Credit Support Annexes**")

The Master Agreements and the Credit Support Annexes are together also referred to herein as the "**Agreements**".

1.2 This opinion is given only in respect of the Agreements in the form described above. The Schedule contains certain elections set out below which have been chosen by EFET to reflect what the Task Force considered to be 'default elections', together with selected Principal Agreements. These elections are

[1] The CPMA constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements (each a "**Principal Agreement**") falling within the scope of the CPMA. If so selected by the Parties in Section 10.6 of the Schedule, the CPMA provides that it forms together with all Principal Agreements and all transactions entered into thereunder a single agreement. Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all of its Principal Agreements (Section 2.1 of the CPMA). Settlement Amounts are determined for the terminated Principal Agreement (each a "**Closed-Out Agreement**") in accordance with their terms (Section 3.1 of the CPMA) and, to the extent necessary, converted into the Base Currency. If after termination both Parties owe one or more Settlement Amounts under two or more Closed-Out Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the "**Final Net Settlement Amount**") shall be owed by the Party with the larger aggregate obligation (Section 4 of the CPMA).

[2] The CPCSA supplements the CPMA. It provides for the transfer of full ownership in the collateral to the Transferee who acquires the right of complete and unrestricted use of the collateral (§ 7 of the CPCSA). Upon termination of the CPMA, any collateral provided but not yet re-transferred by the Parties is to be valued and included in the Final Net Settlement Amount to be determined pursuant to Section 4 of the CPMA (§ 11 of the CPCSA). One special feature of the CPCSA is the inclusion of Letter of Credits.

[3] The EFET MNA constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements (each a "**Netted Agreement**") falling within the scope of the MNA. The EFET MNA provides that it, all Netted Agreements and all transactions entered into thereunder form a single agreement (§ 2.3 of the EFET MNA). Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all transactions under all of its Netted Agreements (§ 4.1 of the EFET MNA). Settlement Amounts are determined for the terminated Netted Agreement (each a "**Closed-Out Agreement**") in accordance with their terms (§ 7.1 of the EFET MNA) and, to the extent necessary, converted into the Base Currency. If on the Early Termination Date both Parties owe one or more Settlement Amounts under two or more Closed-Out Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the "**Final Net Settlement Amount**") shall be owed by the Party with the larger aggregate obligation (§ 8.1 of the EFET MNA).

described below (together the "**Model CPMA**"). Where individual counterparties choose to move away from the Model CPMA in any way, they must satisfy themselves that their agreement is still valid and enforceable and this opinion shall not apply.

(a) Division 1, Part I, Section A – The Principal Agreements selected shall those included in Annex A to this opinion. Each of the underlying Principal Agreements is governed by either English or German law save in respect of the ZBT 2001 and the NBP Master, which shall be governed by Belgian and English law, respectively.

(b) Division 1, Part I, Section B – There shall be no Excluded Agreements.

(c) Division 1, Part I, Section C - Uncovered Transactions should be included but all such Uncovered Transactions will be long form confirmations incorporating, in substantially their original form, the terms and conditions of one of the Principal Agreements identified above save that an Uncovered Transaction shall also include confirmations incorporating the short term flat NBP 1997 trading terms and conditions which have not been amended and are therefore not subject to an NBP Master.

(d) Division 1, Part II, Section A - 'Close-Out Event' means any events that entitle close-out under the Principal Agreements. The parties may also agree to specify certain events as Close-Out Events, provided they use substantially the same wording as used in Section 5(a) ISDA Master Agreement or § 10.5 of the EFET Power Agreement.

(e) Division 1, Part II, Section B - 'Excluded Events' – the first three boxes will be checked.

(f) Division 1, Part II, Section C – Assume the box is checked and that the rewrite of this provision contained in the Schedule is operative.

(g) Division 1, Part III - Additional Acknowledgements and Representations – none.

(h) Division 1, Part VII - Assignment - no election, Section 7 applies but is amended as set out at (a) and (b) of the Election Sheet.

(i) Division 1, Part VIII - Sections 10.1, 10.2, 10.4, 10.5, 10.7, and 10.8 shall apply.[4]

(j) Division 1, Part X - no additional terms.

(k) Division 2 applies unamended.

1.3 Where an opinion or analysis is provided in this legal opinion, such opinion or analysis is based on the elections set out above.

1.4 For purposes of this opinion we have only considered the following counterparties under any of the Agreements, the Principal Agreements or the Netted Agreements:

(a) a party which is duly incorporated under Netherlands law as a public limited liability company *(naamloze vennootschap)* or a private limited liability company *(besloten vennootschap met beperkte aansprakelijkheid)* and which has its COMI in The Netherlands at all relevant times and not being any of the entities listed below (a "**Dutch Party**");

(b) an SE;

(c) a Foreign Company acting through one or more of its Dutch Branches;

(d) Partnerships;

(e) Dutch, EEA and Third Country Credit Institutions;

(f) Dutch, EEA and Third Country Insurance Companies;

(g) Investment Firms;

(h) Investment Funds;

(i) Municipalities;

(j) the following quasi-governmental entities: associations of local governments with legal entity status pursuant the "Wet gemeenschappelijke regelingen" ("**Local Government Entities**"); and

[4] It is noted that the election of Sections 10.3, 10.6 and 10.10 are not required for the close/out netting and set/off clauses to be effective. It should be determined in accordance with the governing law of the Model CPMA whether such Sections should be applied.

(k) any of the parties referred to in (a) to (h) above to the extent that they are publicly-owned entities;

such parties hereafter **together** referred to as the "**Counterparties**" and each a "**Counterparty**". For the avoidance of doubt, this opinion does not extend to:

(i) any individuals;

(ii) any collective investment schemes, companies or funds (regardless of their location or their governing law) other than Investment Funds;

(iii) any public law entities (such as the Dutch State, provinces etc) other than Municipalities and Local Government Entities;

(iv) any entities (public or private law) under the laws or Curaçao, St. Maarten, Bonaire, Saba, St. Eustatius or Aruba;

(v) any religious entities (*kerkgenootschappen*); and

(vi) any trusts.

1.5 In this opinion, unless otherwise specified:

(a) "**Automatic Termination**" shall have the meaning ascribed to it in Section 6.3 of the EFET MNA and Part II.B of the Schedule;

(b) references to a "**Clause**" or a "**Section**" or "**§**" are to a clause in any of the Agreements;

(c) references to "**BA**" are to the Dutch Bankruptcy Act (*Faillissementswet*);

(d) references to "**COMI**" are to the centre of main interests, as defined in article 3(1) of the EU Insolvency Regulation;[5]

(e) references to a "**Credit Institution**" are to a bank (*bank*) as defined in article 1:1 FMSA;

(f) references to the "**DCC**" are to the Dutch Civil Code (*Burgerlijk Wetboek*);

[5] In the case of a company or other legal person (in the absence of proof to the contrary), there is a rebuttable presumption that such centre is where the registered office of the company is located. This place must, of course, be within a Regulation State.

(g) references to "**DNB**" are to the Dutch Central Bank (*De Nederlandsche Bank N.V.*);

(h) references to the "**DPA**" are to the Dutch Data Protection Act (*Wet bescherming persoonsgegevens*);

(i) references to a "**Dutch Party**" are to the entities referred to in 1.4;

(j) references to a "**Dutch Credit Institution**" are to a company that is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) and has a license to engage in the business of a Credit Institution pursuant to article 2:12 of the FMSA;

(k) references to a "**Dutch Insurance Company**" are to a company that is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) with a license to engage in the business of an insurance company pursuant to article 2:31 of the FMSA;

(l) the "**EEA**" means the European Economic Area;

(m) a reference to an "**EEA Credit Institution**" is to an EEA undertaking which qualifies as a credit institution under EU Banking Co-ordination Directive (2006/48) (recast), but which is not a Dutch Credit Institution and which has obtained a banking license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) or branches established or located in this jurisdiction;

(n) a reference to an "**EEA Insurance Company**" is to Insurance Company duly incorporated or organised under the laws of a member state of the EEA, not being a Dutch Insurance Company and which has obtained an insurance license under its local laws equivalent to a license in this jurisdiction to operate as such and that has a branch (*bijkantoor*) or branches established or located in this jurisdiction;

(o) references to "**Emergency Measures**" are to the administration procedures (*noodregeling*) imposed by a Dutch Court pursuant to the FMSA in respect of certain Regulated Entities which are a substitute procedure to the BA's moratorium of payments (*surseance van betaling*);

(p) a reference to the "**EU Insolvency Regulation**" is to the EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, an EU Council Regulation which applies to all EU member states other than Denmark;

(q) a reference to the "**FMSA**" is to the Dutch Financial Markets Supervision Act (*Wet op het financieel toezicht*), together with all its implementing and subordinate decrees and regulations;

(r) references to a "**Foreign Company**" are to a company (other than on SE, an EEA Credit Institution, an EEA Insurance Company, a Third Country Credit Institution or a Third Country Insurance Company) incorporated with legal entity status under the laws of another jurisdiction, falling within the scope of the EU Insolvency Regulation and having a branch or branches established or located in this jurisdiction (each, a "**Dutch Branch**");

(s) "**Governing Law**" shall have the meaning described in paragraph 2.2(f);

(t) references to "**Insolvency**" and "**Insolvency Proceedings**" will be understood to refer to bankruptcy and moratorium and, in the case of Regulated Entities, to Emergency Measures;

(u) references to "**Insolvency Representative**" are to a liquidator (*curator*) during a bankruptcy (*faillissement*) or an administrator (*bewindvoerder*) during a moratorium of payments (*surseance van betaling*) in the sense of the BA or an administrator within the meaning of Emergency Measures;

(v) references to an "**Investment Firm**" are to an investment firm (*beleggingsonderneming*) as defined in article 1:1 FMSA that is duly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*); an Investment Firm may include a broker dealer;

(w) references to an "**Investment Fund**" means either (i) a custodian (*bewaarder*) represented by the manager (*beheerder*) both acting for the account of an investment fund (*beleggingsfonds a.k.a fonds voor gemene rekening*) or (ii) an investment company (*beleggingsmaatschappij*) represented by a manager (*beheerder*), all such custodians and managers in any case validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or a foundation (*stichting*);

(x) references to "**this jurisdiction**" and "**the Netherlands**" are to the part of the Kingdom of The Netherlands located in Continental Europe (excluding, for the avoidance of doubt, any overseas nations forming part of the Kingdom of the Netherlands such as Aruba, Curacao, and St Maarten and any overseas special municipalities such as Saba, St. Eustatius and Bonaire);

(y) references to a "**Municipality**" are to a municipality (*gemeente*) in this jurisdiction that is duly established under the *Gemeentewet* as a legal entity under public law (*publiekrechtelijke rechtspersoon*);

(z) "**Netted Agreements**" shall have the meaning described in paragraph 2.2(g);

(aa) references to the "**Netting Clause**" are either to Section 8 of the EFET MNA or to Section 4 of the CPMA or to all such sections as the context may require;

(bb) a reference to a "**Partnership**" is to either a Dutch general partnership (*vennootschap onder firma*) or a Dutch limited partnership (*commanditaire vennootschap*) in each case having its COMI in this jurisdiction;

(cc) references to a "**Party**" are to a party to the relevant Agreement;

(dd) "**Principal Agreements**" shall have the meaning described in paragraph 2.2(g);

(ee) a "**Regulated Entity**" has the meaning described in paragraph 4.1.5;

(ff) references to "**Regulation State**" are to The Netherlands and the other member states of the European Union (save for Denmark);

(gg) "**Rome I**" means Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations;

(hh) references to an "**SE**" are to a "*Societas Europaea*" established pursuant to EU Council Regulation No. 2157/2001 of 8 October 2001 on the

European Company Statute and which has its statutory seat and its COMI in The Netherlands at all relevant times;

(ii) references to the "**Termination Clause**" are to Section 4.1 of the EFET MNA and to Section 2.1 of the CPMA;

(jj) references to a "**Third Country Credit Institution**" are to a Dutch branch of a credit institution incorporated with limited liability status from a country that is not a member state of the EEA;

(kk) references to a "**Third Country Insurance Company**" are to a Dutch branch of an insurance company incorporated with limited liability status in a country that is not a member state of the EEA;

(ll) references to the "**Winding Up Directives**" are to the WUDCI and the WUDIU;

(mm) references to the "**WUDCI**" are to EU Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions; and

(nn) references to the "**WUDIU**" are to EU Directive 2001/17/EC on the Reorganisation and Winding Up of Insurance Undertakings.

Capitalised terms used herein without definition shall, unless the context otherwise requires, have the same meanings ascribed to them in the Agreements or the Principal Agreements (as defined herein). Headings are for ease of reference only and shall not affect the interpretation of this opinion.

1.6 Executive summary

On the basis of the terms of reference and the assumptions in paragraphs 1 and 2 respectively, and subject to the qualifications set out in paragraph 5, this is an executive summary of the opinion expressed in paragraph 4 *with regard to close-out netting only*. This executive summary does not form part of this opinion and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having any interpretative effect on the opinion expressed in paragraph 4, which is the only opinion which can be relied upon.

(a) Close out netting in a pre-insolvency situation is generally enforceable, see Part (B);

(b) Both clauses with regard to early termination by notice and clauses with regard to automatic termination, each in the event of Insolvency

Proceedings, will generally be upheld by the Netherlands courts, see paragraphs 4.5 and 4.6; specific considerations apply to certain types of Transactions, as explained in paragraph 4.5, which are within the scope of Articles 38 and 237 BA as these would be terminated by operation of law;

(c) Under the laws of this jurisdiction it is not necessary that (i) the individual Transactions, the relevant Principal or Netted Agreement and the relevant Master Agreement are part of a single agreement in order for netting under the Netting Clause to be effective or (ii) the Parties to agree to an automatic, rather than an optional, termination of Transactions. If Automatic Termination is selected to apply, such selection would be enforceable under the laws of this jurisdiction. Individual Transactions within the scope of articles 38 and 237 BA as referred to in the previous paragraph would still be terminated by operation of law. With respect to certain Counterparties Automatic Termination cannot be validly agreed.

(d) The determination of the Settlement Amounts and the Final Net Settlement Amount in accordance with the Agreements is generally enforceable in the event of Insolvency, see paragraph 4.7, but subject to specific considerations with regard to currency, date and interest as set out in paragraphs 4.7.2, 4.7.3 and 4.7.4;

(e) The Credit Support Annexes are also valid to the extent that they provide for the Base Currency Value of all the Eligible Credit Support provided under the relevant Credit Support Annex on the Determination Date to be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee.

(f) The analysis with regard to Insolvency set-off under the EU Insolvency Regulation and the Winding Up Directives is set out in paragraphs 4.8, 4.9 and 4.10;

(g) Specific issues with regard to close out netting in the event of Insolvency of specific Counterparties (other than Dutch Credit Institutions, and Dutch Insurance Companies) are set out in paragraph 4.11 and Annex C; please note the analysis with regard to Dutch finance companies in paragraph 4.9.4.

2. ASSUMPTIONS

In examining the Agreements and in giving this opinion, we have, with your permission, made the following assumptions.

2.1 Assumptions set out in the Instruction Letter

We have been requested to make the following assumptions for our legal opinion:

(a) On the basis of the terms and conditions of the relevant Master Agreement, the relevant underlying Netted Agreement or Principal Agreement (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Master Agreement and the relevant underlying Netted Agreement or Principal Agreement (if applicable) the Parties over time may enter into a number of transactions that are intended to be governed by the relevant Master Agreement either as transactions entered into under the relevant underlying Netted Agreement or Principal Agreement. The transactions entered into will include any or all of the transactions described in Annex B attached to this legal opinion (the "**Transactions**").

(b) Some of the Transactions provide for an exchange of cash by both counterparties and others provide for the physical delivery of shares, bonds or commodities (including emission rights) in exchange for cash.

(c) Each of the underlying Principal Agreements and Netted Agreements is valid, legally binding and enforceable in accordance with its own respective terms and conditions.

(d) Each Close-Out Event specified as applicable pursuant to the Election for Division 1, Part II, Section A of the model Schedule is an effective and valid Event of Default under the relevant underlying Principal Agreements or Netted Agreements.

(e) The relevant Agreements, Netted Agreements and Principal Agreements are entered into by two Parties, at least one of which is a Counterparty as mentioned in paragraph 1.4.

(f) **Insolvency Assumption**. For the purposes of addressing the insolvency related issues under Part (A) below, it is assumed that (i) the Master Agreements are governed either by a Governing Law or by the laws of this jurisdiction and (ii) after entering into transactions and prior to the maturity thereof, the Counterparty becomes the subject of Insolvency Proceedings under the insolvency laws of The Netherlands and, subsequent to the commencement of the Insolvency, either the Counterparty or the Insolvency Representative seeks to assume the confirmations representing profitable ("in the money") transactions for the insolvent Counterparty.

(g) **Credit Support Annexes Assumptions**. For the purposes of addressing the issues under Part (D) below, it is assumed that Eligible Credit Support provided under the Credit Support Annexes will only take the form of either cash (which is assumed to be denominated in freely convertible currency and to involve a bank transfer between the account of Party A as Transferor and Party B as Transferee, whereby the latter's account is under Party B's control and maintained in the jurisdiction of the relevant currency) or Letters of Credit. It is furthermore assumed that (i) Party A is at all times the Transferor under the Credit Support Annexes and (ii) the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral and (iii) Party A is a Counterparty established or incorporated under the laws of this jurisdiction. Party B as Transferee is holding the collateral and applying and using that collateral in a close-out netting event and is an entity incorporated or organized under the laws of a jurisdiction other than The Netherlands.

(h) **Multi-branch assumptions.** For the purposes of addressing the multi-branch issues in Part (C) 4.16, it is assumed that a Counterparty is established or incorporated in this jurisdiction but may have entered into one or more Principal Agreements, Netted Agreements or individual Transactions through branches or other duly registered offices in other jurisdictions. After entering into these transactions and prior to the maturity thereof, that Counterparty becomes the subject of Insolvency Proceedings under the laws of this jurisdiction. For the purposes of addressing the multi-branch issues in Part (C) 4.17, it is assumed that a counterparty is a Foreign Company, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution ("**Party F**") incorporated, organized or having its centre of main interest in a country ("**Country H**") other than The Netherlands and that it has entered into individual Transactions under some or all Netted Agreements or Principal Agreements both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of The Netherlands (the "**Dutch Branch**"). After entering into these transactions and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

(i) **Confirmation practices assumptions.** For the purposes of addressing certain of the issues in Part (F) below concerning confirmation practices, when entering into an individual Transaction, the Counterparties in each case (i) make oral reference to a Netted Agreement or a Principal Agreement when concluding the relevant individual Transaction over the phone or (ii) refer to a Netted Agreement or a Principal Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming individual Transactions (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission). In addition, Parties may or may not use matching systems (like the EFET Electronic Confirmation Matching System (EFET eCM), MarkitWire or DTC DS Match to electronically match and exchange Confirmations.

2.2 General Assumptions Necessary for Opinion

Furthermore, we have, with your permission, assumed:

(a) that each Party has the capacity, power (corporate, regulatory and otherwise) and authority under all applicable laws to enter into the Agreements, each Principal Agreement, each Netted Agreement and each Transaction and to perform its obligations thereunder and that each Party has taken all necessary steps validly and lawfully to enter into, execute, deliver and perform the Agreements, each Principal Agreement, each Netted Agreement and each Transaction and has duly authorized, executed and delivered the same;

(b) that each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required under all laws of any applicable jurisdiction (including The Netherlands) to enable it lawfully to enter into and perform its obligations under the Agreements, each Principal Agreement, each Netted Agreement and each Transaction and to ensure the legality, validity, admissibility in evidence or enforceability thereof;

(c) that each Party (excluding any Partnership but including each partner of a Partnership) is duly incorporated as a legal entity or duly formed as a

Partnership and validly existing and in good standing (where such concept is legally relevant to its capacity) under the laws of its jurisdiction of incorporation and of the jurisdiction of its place of business;

(d) the due compliance with all matters (including, without limitation, the obtaining of the necessary consents, licenses, approvals and authorisations, the making of the necessary filings, lodgments, registrations and notifications and the payment of stamp duties and other taxes) under any law other than that of this jurisdiction as may relate to or be required in respect of: (i) the Agreements, each Principal Agreement, each Netted Agreement and each Transaction, (ii) their lawful execution, (iii) the Parties thereto or other persons affected thereby, (iv) the performance or enforcement by or against the Parties or such other persons, or (v) the creation of valid and legally binding obligations of all Parties to the Agreements, each Principal Agreement, each Netted Agreement and each Transaction, enforceable against such Parties in accordance with their respective terms;

(e) that execution and performance of the Agreements, each Principal Agreement, each Netted Agreement and each Transaction are in each Party's corporate interest, and that they have been entered into *bona fide* commercial reasons and on arms' length terms;

(f) that, save as expressly stated otherwise in this Opinion, the Master Agreements are governed by the laws of England, Germany, New York, Belgium or any other jurisdiction except for The Netherlands; hereinafter (the "**Governing Law**");

(g) that the Master Agreements provide for the inclusion of some of all of the master agreements described as in Annex A (each such master agreement being a "**Netted Agreement**" or a "**Principal Agreement**") and that each Netted Agreement and each Principal Agreement is capable of being amended in the manner envisaged by the Master Agreements;

(h) that, for the purpose of any opinions regarding the Agreements, each Principal Agreement, each Netted Agreement and each Transaction thereunder where the governing law is not that of this jurisdiction, under such Governing Law and all other relevant laws (other than those of this jurisdiction):

(i) the Agreements, each Principal Agreement, each Netted Agreement and each Transaction create valid and legally binding obligations for both Parties enforceable in accordance with their terms; and

(ii) the choice of the Governing Law is a valid and binding selection; and

(iii) that each Principal Agreement, each Netted Agreement and each individual Transaction is, as a matter of their governing laws and the Governing Law, validly and effectively amended by, and made subject to, the relevant Master Agreement and are, as amended by such Master Agreement, valid and legally binding between the Parties thereto under all relevant laws; and

(iv) each Principal Agreement and each Netted Agreement is capable of being terminated, closed out and liquidated in the manner envisaged by the Master Agreements and capable of having a Settlement Amount determined;

(v) the submission by the Parties to the jurisdiction of the London Court of International Arbitration, the German Institute of Arbitration or any other arbitration institute or court, as the case may be with regard to the Agreements, the Principal Agreements or the Netted Agreements is legal, valid and binding upon the Parties;

and, without prejudice to our opinion under paragraph 4.33 and elsewhere below, that the courts of this jurisdiction will, in giving effect to the choice of law provisions in the Agreements, the Principal Agreements or the Netted Agreements apply the chosen law correctly;

(i) that the Agreements, the Principal Agreements, the Netted Agreements and the Transactions are not capable of being voided or otherwise held ineffective (in whole or in part) by reason of fraud, error, misrepresentation, undue influence, illegality or otherwise;

(j) that each Settlement Amount falling to be determined under a Principal Agreement or a Netted Agreement is duly determined in accordance with the provisions thereof;

(k) that under all relevant laws (excluding those of this jurisdiction) the close-out netting procedures incorporated in the Principal Agreements or the Netted Agreements are valid and enforceable in Insolvency Proceedings and that the obligation to pay the Settlement Amount calculated under each Principal Agreement or each Netted Agreement is legally binding and enforceable against the Parties under its governing law(s) and must be deemed to have originated prior to the Insolvency of the Parties under its governing law(s);

(l) that the obligations to pay the Settlement Amount pursuant to each Closed-Out Agreement are legally binding and enforceable and – under all relevant laws other than those of this jurisdiction - capable of being set-off under Section 4 of the Model CPMA or Section 8 of the EFET MNA and mutual between the Parties in the sense that they (a) arise between the Parties acting in the same capacity and as principals and not as agents, (b) are not assigned to one of the Parties by a third party and (c) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

(m) that the Agreements, each Principal Agreement, each Netted Agreement and each Transaction are entered into prior to the commencement of any Insolvency Proceedings in respect of either Party and, at the time at which the Agreements, each Principal Agreement and each Transaction are entered into, neither Party was aware that an Insolvency petition in respect of the other Party had been filed;

(n) that no further Transactions will be entered into and no further transfers of Eligible Credit Support will be made between the Parties on or after (i) the date of the Insolvency judgment of either Party (it being noted that under the laws of this jurisdiction a judgment by which an Insolvency is declared has retro-active effect until 00.00 hours of the day of such judgment), or (ii) the date one Party was aware that an Insolvency petition in respect of the other Party had been filed;

(o) that, without prejudice to paragraph 1.2 above or Part (G) below, none of the terms of the Agreements, the Netted Agreements or the Principal Agreements and the Transactions will be altered, varied, waived, discharged or superseded by virtue of any agreement between the Parties and that no supplemental terms and conditions are or will be agreed between the Parties that could affect or qualify our opinion as set out herein;

(p) that there is no other agreement, instrument or other arrangement between or affecting the Parties to the Agreements which conflicts with, overrides, modifies or supersedes the Agreements or any Netted Agreement or Principal Agreement;

(q) that (save in relation to any non-performance by one Party which leads to the taking of action by the other Party under the termination and close out provisions of the Agreements) each Party duly performs its obligations undertaken under the Agreements, each Principal Agreement and each Netted Agreement in accordance with their respective terms;

(r) that where a Counterparty:

   (i) is a Foreign Company: that each Dutch Branch will constitute an "establishment" within the meaning of article 2(h) of the EU Insolvency Regulation;

   (ii) is an EEA Credit Institution or an EEA Insurance Company, that each branch in this jurisdiction will meet all the requirements of the FMSA in order for that branch to be lawfully engaged in business in this jurisdiction;

   (iii) is a Third Country Credit Institution or a Third Country Insurance Company, that each branch in this jurisdiction will meet all the requirements of the FMSA in order for that branch to be lawfully engaged in business in this jurisdiction.

(s) that all Counterparties (except for those referred to in (r) above and any others to which the EU Insolvency Regulation does not apply) have their COMI in The Netherlands at all relevant times so as to permit main Insolvency Proceedings in respect of them to be opened by a Dutch court;

(t) that where the Counterparty is a Partnership, the Agreements, the Principal Agreements, the Netted Agreements and all Transaction have been validly entered into by a General Partner on behalf of a Partnership that is a general partnership *(vennootschap onder firma)* or by a Managing Partner on behalf of a Partnership that is a limited partnership *(commanditaire vennootschap)* and that the obligations of each Partnership to pay the Settlement Amounts are mutual between the Partnership and the other Party in the sense that they (a) arise between the Partnership and the other Party acting in the same capacity and as principals and not as agents, (b) are not assigned to one of the Parties by a third party and (c) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

2.3 **No Investigation of Assumptions**

Where an assumption is stated to be made in this opinion, we have not made any investigation or enquiry with respect to the matters that are the subject of such assumption and we express no views as to such matters.

3. **SCOPE OF REVIEW / MATTERS EXCLUDED**

3.1 As Dutch lawyers we are not qualified to assess the meaning and consequences of the terms of any of the Agreements under any law other than Netherlands law, in particular, we have made no investigation into any Governing Law as a basis for the Opinion expressed hereinafter and do not express or imply an opinion thereon. Accordingly, our review thereof has been limited to the terms of such documents as they appear on the face thereof without reference to the general body of law incorporated into or made applicable to such document by the choice of law clause contained therein.

3.2 For this Opinion we have not reviewed the terms of the Principal Agreements or the Netted Agreements or any Transaction and consequently no opinion is expressed in relation thereto. We also emphasise that a wide variety of Transactions can be entered into, to which special considerations may apply. For this opinion we have not reviewed the terms of any Transaction that may be concluded under any Principal Agreement and consequently no opinion is expressed in relation to the binding nature and enforceability of any specific Transaction.

Furthermore, it should be considered in relation to particular Transactions, such as *inter alia* weather transactions and weather options (as described in Annex A), whether these Transactions would qualify as prohibited gaming or wagering.

3.3 We opine only as to the validity and effectiveness of the specific provisions of the Agreements as stated in the Opinion below. We express no opinion as to the validity or enforceability of any document other than the Master Agreements and the Credit Support Annexes. With regard to the Credit Support Annexes our opinion is limited to the issues discussed in Part (D) below. The addressees of our Opinion should not rely on this legal opinion for a non-Model CPMA and satisfy themselves by obtaining supplemental opinions or otherwise that their particular form of the Agreements is still valid and enforceable.

3.4 We express no opinion and no opinion is given (or may be inferred or implied):

(a) as to any law other than to the laws of The Netherlands in force as at the date hereof as applied and interpreted according to present published case-law of the Netherlands courts, administrative rulings, and authoritative literature;

(b) that the future or continued performance of any of the obligations of the parties contemplated by the Agreements will not contravene such laws application or interpretation, if such laws, application or interpretation are altered in the future;

(c) with regard to the effect of any systems of law (other than the laws of The Netherlands) even in cases where, under Netherlands law, any foreign law falls to be applied and we assume that no such foreign law would affect or qualify our opinion as set out below;

(d) on the tax laws of The Netherlands or, except as stated otherwise, on international law, including (without limitation) the rules of or promulgated under or by any bi- or multilateral treaty or treaty organisation (unless implemented into the laws of The Netherlands) or on any anti-trust, insider dealing, market abuse or competition laws; or

(e) on any commercial, accounting, regulatory capital, capital adequacy or other non-legal matter or on the ability of any party to meet its financial or other obligations under the Agreements;

(f) as to any matters of fact or as to any competition law aspects raised by virtue of the publication of the Agreements;

(g) as to any person or entity other than the Counterparties;

(h) on the enforceability of any net amount payable under the Agreements *after giving effect to* the Netting Clause or any right of set off; this is because once an amount has been determined under the Netting Clause, the party to whom such amount is payable must seek to enforce that amount, whether by lodgment of a claim against the other party or otherwise and the ability to actually enforce payment of that amount will be dependent on the facts of the case.

3.5 It should be noted that only a few publicly reported cases have been decided by the European Court of Justice in relation to the EU Insolvency Regulation. For the purpose of interpreting the provisions of the EU Insolvency Regulation it is generally accepted that the report by Virgós and Schmit on the draft European Bankruptcy Convention of 22 September 1995 (which never actually entered into force, but contains virtually identical provisions as the EU Insolvency Regulation) is a valuable source. In drafting this opinion we have had regard to the Preamble to and the Virgós/Schmit Report, which are of persuasive and not determinative authority in interpreting the EU Insolvency Regulation.

3.6 There is no case law available on the question whether or not the close out provisions of the Termination Clause and the netting provisions of the Netting Clause can be validly invoked against an Insolvency Representative in Insolvency Proceedings. We understand, however, that your fundamental requirement is for the validity of those provisions of the Agreements to be substantiated by a written and reasoned opinion.

4. OPINION

Based upon and subject to the foregoing and to the further qualifications set out below and subject to any factual matters, documents or events not disclosed to us, having regard to such legal considerations as we deem relevant, we are on the date hereof of the following opinion.

(A) TERMINATION AND CLOSE-OUT IN THE CONTEXT OF INSOLVENCY

4.1 General Description of Dutch Insolvency Proceedings

4.1.1 Bankruptcy and moratorium

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency procedures to which a Counterparty, other than a Regulated Entity (as defined below), an EEA Credit Institution or an EEA Insurance Company, could become subject in The Netherlands are the following:

(i) bankruptcy (*faillissement*), as referred to in and governed by title I of the BA;

(ii) moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA.

It has been debated in legal literature whether a legal entity under public law (*publiekrechtelijke rechtspersoon*) such as a Municipality or a Local Government Entity can be declared Insolvent. Although this is not settled, it follows implicitly from case law that this should be the case and there are convincing arguments in favour of this. For the purpose of the analysis in this legal opinion we will take the view that, even though it is only a theoretical possibility, a Municipality and a Local Government Entity can become subject to Insolvency Proceedings.

4.1.2 Bankruptcy: general overview

Bankruptcy is a general attachment on (practically) all of the assets of a debtor, imposed by a judgment of the appropriate Dutch court (*Rechtbank*) for the benefit of the insolvent debtor's collective creditors. The objective of the bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the debtor's assets among its creditors. In practice, however, bankruptcy proceedings serve as an important instrument for the reorganisation and continuation of businesses in financial distress.

According to the BA, bankruptcy proceedings can be opened in respect of any debtor, natural or legal person, regardless of whether he carries on a business, practises an independent profession or not.

The BA does not provide for the consolidation of bankruptcy proceedings opened in respect of companies belonging to the same group. However, there are some examples of cases in which courts have allowed such consolidation.

If bankruptcy proceedings are declared, the Insolvent Party loses the right to manage and dispose of his assets with retroactive effect to 00.00 hrs. of the day the bankruptcy order is issued. The court appoints a liquidator (*curator)* who is charged with the management and realisation of the Insolvent Party's assets (including by means of a transfer of (part of) the business as a going concern). The liquidator acts under the general supervision of a supervisory judge (*rechter-commissaris*). For certain acts of the liquidator the law requires the (prior) authorisation of the supervisory judge, e.g. for conducting legal proceedings and for terminating employment and rental contracts. The estate is not liable for obligations incurred by the Insolvent Party after the bankruptcy adjudication, except to the extent that such obligations arise from transactions that are beneficial to the estate.

4.1.3 Moratorium of payments: general overview

Moratorium of payments is a court ordered general suspension of a debtor's payment obligations; its objective is to provide an instrument for the reorganisation and continuation of viable businesses in financial distress. It is available only at the request of the debtor and only has effect in respect of ordinary (non-secured and non-preferred) creditors. During the period for which the moratorium of payments has been granted, creditors with non-preferential claims cannot take recourse in respect of the debtor's assets.

Despite several amendments made over the years to increase the effectiveness of the moratorium of payments proceeding (e.g. the liberalisation of the conditions for the granting of a moratorium of payments and the introduction of the possibility of a composition) it has in practice never become a satisfactory instrument for the reorganisation of businesses in financial distress. Generally, it is a first step towards bankruptcy. Although in recent times there have been examples of successful moratorium of payments proceedings as far as reorganisation of businesses in financial distress is concerned, the bankruptcy proceeding in practice proves to be a more effective instrument.

Moratorium of payments proceedings can be opened in respect of natural persons carrying on a business or practising an independent profession and juristic persons. The moratorium of payments may be granted by the court for a maximum period of one and a half years and may be prolonged at the request of the debtor (if necessary more than once) with a maximum of one and a half years.

As a result of the granting of a moratorium of payments, the debtor can no longer manage and dispose of its assets without the co-operation or authorisation of a court appointed administrator. Likewise, the administrator cannot act without the co-operation or authorisation of the debtor (i.e. the management in the case of a company). It should be noted that moratorium of payments is also deemed to take effect retroactively from 0.00 hours on the day the judgment is rendered. In a moratorium of payments proceeding, the court may appoint a supervisory judge, whose role is limited to regulating certain procedural matters and advising the administrator upon his request.

4.1.4 Foreign Companies

In relation to a Foreign Company both of the Insolvency procedures described above can apply in respect of its Dutch Branches, subject to the provisions of the EU Insolvency Regulation. More specific information on Multi-Branch Parties can also be found in Part (C) below.

If a Foreign Company's COMI is located in one Regulation State[6], then, pursuant to article 3 EU Insolvency Regulation, insolvency proceedings may only be opened by the courts of that Regulation State and such proceedings will have universal effect throughout the other Regulation States, i.e. (i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands and (ii) they possibly affect all creditors, wherever they may be located (except as otherwise provided in the Insolvency Regulation). Consequently, the courts of another Regulation State:

(a) must recognize any insolvency proceedings opened by such courts as having effect also in their jurisdiction (i.e. such insolvency proceedings must be given effect by such courts) and the applicable law of such main insolvency proceedings will be the law of the Regulation State where the COMI is situated;

(b) may open "territorial proceedings" or, after the commencement of main proceedings "secondary proceedings" in the event that such a Foreign Company possesses an "establishment" in the territory of such other Regulation State. The applicable law of such territorial or secondary insolvency proceedings will be the law of that other Regulation State[7].

[6] The EU Insolvency Regulation is not applicable to insolvency proceedings where the Foreign Company's COMI is situated outside a Regulation State and therefore it does not govern (i) the consequences of the opening of an insolvency proceeding concerning such a debtor in such a Regulation State, and (ii) the consequences of the opening of an insolvency proceeding in non Regulation States.

[7] However, territorial or secondary insolvency proceedings are limited in scope to the Foreign Company's assets in that Regulation State and so will not extend beyond the Regulation State where they are opened. Furthermore, under article 3(3) EU Insolvency Regulation, secondary proceedings are limited to winding-up proceedings. Generally, secondary insolvency proceedings will be opened following the opening of main insolvency proceedings, but there are exceptions to this principle as set out in article 3(4) EU Insolvency Regulation. Although the EU Insolvency Regulation does allow the process of liquidation in the secondary proceedings to be stayed at the request of the liquidator in the main proceedings, this remains subject to such liquidator taking any suitable measure to guarantee the interests of the creditors in the secondary proceedings. In this regard we would refer you to article 33 EU Insolvency Regulation.

Thus, if a Foreign Company:

(i) is declared insolvent in accordance with the EU Insolvency Regulation in a Regulation State where its COMI is situated, the enforceability of the Netting Clause must in our view be determined in accordance with the law of such Regulation State;

(ii) has a Dutch Branch, the Dutch courts would be competent to open territorial or secondary Insolvency Proceedings pursuant to the EU Insolvency Regulation in respect of the assets of that Dutch Branch.

In the absence of a Dutch Branch, the mere fact that certain assets and liabilities of a Foreign Company are located in this jurisdiction, does not give the courts of The Netherlands jurisdiction to declare Insolvency Proceedings with regard to that Foreign Company, whether or not initiated by local creditors. Netherlands courts only have jurisdiction to open Insolvency Proceedings against legal entities having their COMI in The Netherlands and against any legal entity (other than an EEA Credit Institution or an EEA Insurance Company) that carries on business or professional activities *through a branch office in The Netherlands*.

4.1.5 **Regulated Entities**

The BA is applicable to Dutch Credit Institutions and Dutch Insurance Companies as well as to Dutch branches of Third Country Credit Institutions and of Third Country Insurance Companies. However, the FMSA provides a substitute procedure to the BA's moratorium of payments (*surseance van betaling*) in respect of:

(a) Dutch Credit Institutions and Dutch Insurance Companies;

(b) Dutch branches of Third Country Credit Institutions and of Third Country Insurance Companies;

(c) Dutch companies that engage in the business of a Credit Institution in breach of the FMSA,

together: "**Regulated Entities**".

In relation to these Regulated Entities, the FMSA provides (i) that DNB may petition a Dutch court for the application of Emergency Measures to such a Regulated Entity and (ii) that, upon a petition by a third party for the bankruptcy of such a Regulated Entity, no decision shall be taken by the court until DNB shall have had an opportunity to express its views on the matter (and then petition such court for the application of Emergency Measures). In relation to a Third Country Credit Institution and a Third Country Insurance Company, Emergency Measures only encompass the business activities conducted from the branch(es) located in this jurisdiction.

Emergency Measures are comparable to a moratorium of payments and a number of the BA's provisions apply thereto mutatis mutandis; the court appoints one or more administrators in order to restore order to the business of the Regulated Entity and these administrators do not require the cooperation of the Regulated Entity's management in taking the decisions which they consider in the interests of creditors. At any time during Emergency Measures, the court may authorise the administrators to transfer the Regulated Entity's business in whole or in part to another institution or to wind it up and may issue a bankruptcy order in respect of the Regulated Entity. Emergency Measures under the FMSA do not materially affect the analysis set out in this legal opinion.

4.1.6 **EEA Credit Institutions & EEA Insurance Companies**

In relation to an EEA Credit Institution or an EEA Insurance Company, no Insolvency Proceedings can be imposed by the courts of this jurisdiction. Reorganisation or liquidation measures with regard to such institutions can only be taken by the authorities of their home member state. Such measures shall include all assets and EU branches of that EEA Credit Institution or that EEA Insurance Company and must be recognised in The Netherlands and territorial or secondary proceedings cannot be opened in respect of the branches in this jurisdiction of such an EEA Credit Institution or EEA Insurance Company. Where any EEA Credit Institution or EEA Insurance Company is subject to insolvency proceedings in another Member State in accordance with (the rules implementing) the WUDCI or the WUDIU, the issue of enforceability of the Netting Clause in insolvency situations must in our view be determined in accordance with the paragraphs 4.9 and 4.10 (replacing all references to Dutch Insolvency Law by references to the local insolvency law of the relevant Member State).

4.2 **Splitting-up or segregation/Netting Pools**

There are no rules under Dutch Insolvency law that would lead to a splitting-up or segregation of the portfolio of Transactions under the relevant Netted Agreement or Principal Agreement into two or more "netting pools". It is possible however that certain individual Transactions are subject to automatic termination by force of law (see paragraph 4.5 below), while others can still be terminated by notice after the judgment declaring the commencement of Insolvency Proceedings. Equally, in the special situation outlined in 4.11 below above, termination of certain individual Transactions may not be possible, while other individual Transactions can be terminated (automatically or by notice).

4.3 **Publicly Available Information on Insolvency Proceedings**

Other than published court judgements and the abbreviated publication thereof in the Official State Gazette (*Staatscourant*), there is no easily accessible and conclusive evidence available in this jurisdiction with respect to Insolvency of Counterparties. In addition, an application for bankruptcy or moratorium of payments is generally not known to the public. Despite not determining this conclusively, the following searches and enquiries evidence to a large extent whether a Counterparty is declared bankrupt, has been granted a moratorium of payments or whether Emergency Measures have been imposed:

(a) an online search can be performed with the Central Insolvency Register (*Centraal Insolventieregister*) referred to in articles 19a and 222b of the BA[8] which can show that a Counterparty has been declared bankrupt or granted a moratorium of payments.

(b) the office of the Civil Law Sector (*Sector Civiel Recht*) of the competent court of first instance (*rechtbank*) can confirm by telephone whether in respect of a Counterparty any Emergency Measures have been imposed.

(c) the competent Chamber of Commerce[9] (the "**Chamber**") can confirm by telephone that:

[8] www.insolventies.rechtspraak.nl

[9] The various chambers of commerce (*kamers van koophandel*) in this jurisdiction maintain a trade register from which information can be derived with regard to *inter alia* incorporation of a Party, its branches, authorised representatives, etc. It is advised to retrieve such information by requesting an extract from the trade register with regard to such Party.

The relevant chamber of commerce also registers (i) a voluntary winding-up resolution of a Party registered with that chamber, (ii) whether that chamber has itself taken any steps to dissolve such Party, (iii) any order placing

(i) a Counterparty has registered a voluntary winding-up resolution;

(ii) such Chamber is itself taking any steps to have a Counterparty dissolved;

(iii) it has registered an order placing any assets of a Counterparty under administration (*onderbewindstelling*); and

(iv) there is a registration of any order by the Court of first instance for the dissolution (*ontbinding en vereffening*) of a Counterparty.

For the avoidance of doubt, here is no formal register of judgments, declarations or orders as referred to in (ii), (iii) or (iv) above.

(v) The office of the Civil Law Sector of the relevant court of first instance can confirm by telephone that in respect of none of a Counterparty EU Insolvency Procedures have been registered in the EU Insolvency Register (EU Insolventieregister) referred to in article 19b of the Bankruptcy Act maintained with such court.

4.4 Safe harbour for derivatives?

Dutch Insolvency law does not provide for "safe harbour" provisions for certain types of derivatives from which Transactions could benefit. However, it does create two pitfalls that could affect the early termination of certain Transactions:

(i) for those Transactions that are subject to articles 38/237 BA (see our analysis in paragraph 4.5 below), the effect could be that with effect from 0.00 hours on the date of the Insolvency Judgement all such outstanding Transactions with a delivery and settlement date after the date of Insolvency are terminated by operation of law;

(ii) it is generally held that an option qualifies under the laws of this jurisdiction as an irrevocable offer to enter into an agreement, i.e. in the case of an option the irrevocable offer to buy a certain quantity of underlying against a certain pre-agreed price, the strike price. The acceptance of such offer is considered to occur upon the exercise of the

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any assets of such Party under administration (*onder bewindstelling*); and (iv) any order by the relevant court of first instance (*Rechtbank*) for the dissolution (*ontbinding en vereffening*) of such Party. It is advisable to enquire after such registrations, however, any such enquiries do not determine conclusively whether or not the matters or events enquired after have occurred or not. There is no formal register of orders as referred to in (ii), (iii) and (iv) above and therefore any searches made may not be conclusive.

option. As a result of the fixation principle as referred to in paragraph 4.7.3 the rights of creditors are unalterably fixed as of the date of the Insolvency judgement. This implies inter alia that in the event of Insolvency of a Counterparty that is an option seller, the acceptance of the offer to enter into an agreement is not binding the Insolvent Party's estate. For such binding effect of the exercise of an option such as an option after the date of Insolvency of that Counterparty, the cooperation of the Insolvency Representative is required.

4.5 Early termination by notice

*In this paragraph we discuss the issue whether, assuming the Parties have not specified that Automatic Termination applies, the Termination Clauses of the EFET MNA or the Model CPMA permitting the other Party (the "**Terminating Party**" or "**Closing-Out Party**") to terminate by notice (as described in Section 5.1 of the EFET MNA or Section 2.2 of the Model CPMA) the Netted Agreements or Principal Agreements including all Transactions upon the occurrence of a Close-Out Event are enforceable under the laws of this jurisdiction.*

4.5.1 Recognition of Termination by notice

Netherlands contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective in Dutch law governed agreements. Netherlands Insolvency rules in principle do not affect these termination clauses.

However, there are two provisions in the Bankruptcy Act, articles 38 and 237 BA, which may cause the mandatory *automatic* termination of all outstanding Transactions as of the date of the Insolvency judgment in respect of an Insolvent Party. Article 237 BA applies equally in the event Emergency Measures are imposed on a Regulated Entity (Article 3:177(1) of the FMSA). Articles 38 and 237 deal with forward contracts for the future delivery of commodities, which commodities are traded on a public exchange (i.e. the forward contract itself could be OTC) and which contracts have a settlement date falling after the Insolvency judgment. With effect from 0.00 hours on the date of such judgment *all* outstanding forward transactions falling within articles 38 or 237 BA are terminated by operation of law. The parties' mutual and unperformed settlement and delivery obligations are extinguished automatically with effect from 0.00 hours on the date of the Insolvency judgment. The rationale of these articles is to create certainty with respect to executory contracts containing speculative elements but relating to commodities having a readily ascertainable market price. Therefore, it may not be required that the commodities having such a market price are actually traded on an exchange.

If a Netherlands court would apply articles 38 and 237 BA to Transactions (with maturity dates after the Insolvency judgment) through analogous interpretation, the only practical consequence would be that the non-defaulting party would have no freedom to terminate such Transactions *after* the Insolvency judgment, because the Transactions will have already been automatically terminated with effect from such judgment by operation of Netherlands Insolvency law. The main risk constituted by articles 38 and 237 BA is that the date of the Insolvency judgment will be imposed by the court for Transactions for which under the terms of the relevant Master Agreement, Principal Agreement or Netted Agreement a valuation date would apply which is *after* the date of the Insolvency judgment.

Otherwise, the legal consequences when applying either articles 38 and 237 BA or the relevant provisions of the Master Agreements are essentially the same: the relevant Transactions will be terminated and the mutual obligations converted into an obligation for one of the parties to pay damages. Articles 38 and 237 BA do not provide for the manner in which such damages should be calculated, but, on the basis of the legislative history of these articles, it seems likely that the parties can validly agree on a method of calculating damages when entering into the Master Agreements, the Principal Agreements or the Netted Agreements.

We note that only those Transactions which are actually outstanding as of the day of the Insolvency judgment could be affected by articles 38 and 237 BA.

Subject to the considerations with regard to articles 38 and 237 BA we are of the opinion that clauses in the Master Agreements permitting the Terminating Party to terminate all the underlying Principal Agreements, Netted Agreements and all the Transactions entered into thereunder upon the Insolvency of a Party are enforceable under the laws of this jurisdiction.

4.5.2 *Single Agreement?*

It is not required for the enforceability in this jurisdiction of the Termination Clause of the Master Agreements, or to ensure that Close-Out applies to all Transactions, or to safeguard the ability to calculate a net amount that the "single agreement" principle (as provided for in § 2.3 of the EFET MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) is included in such Master Agreements.

4.6 Automatic Termination

In this paragraph we discuss whether, assuming the Parties have elected Automatic Termination (as defined in § 6.3 of the EFET, MNA or Part II.B of the Schedule) to apply, the Termination Clauses of the relevant Master Agreement terminating the Netted Agreements or the Principal Agreements including all Transactions upon the occurrence of a Close-Out Event (described in § 6.3 of the EFET MNA or Part II.A of the Schedule) enforceable under the laws of this jurisdiction.

4.6.1 Recognition of Automatic Termination

Under Netherlands law the main principle is that, unless provided otherwise, the commencement of Insolvency Proceedings does not in itself affect existing contracts, in the sense that such proceedings do not change the terms thereof. Automatic close out clauses therefore remain intact.

There is no published case-law directly in point on the effectiveness of automatic close out clauses, which may be operating immediately prior to or upon the Insolvency of one of the Parties. These clauses are likely to qualify as dissolving conditions in respect of the Parties' scheduled future obligations. Under Netherlands contract law any future contingency can be made a dissolving condition, unless it violates a statutory provision or public policy. We are not aware of any basis upon which automatic close out clauses could violate such provision or public policy. Furthermore, Netherlands contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. In addition thereto, with respect to certain futures contracts, Netherlands Insolvency law itself provides for automatic termination in the event of bankruptcy (article 38/237 BA) of one of the Parties (see paragraph 4.5.1 above).

On the basis of the arguments set out above, we believe that the Termination Clauses as referred in § 6.3 of the EFET MNA or Part II.A of the Schedule automatically terminating all the underlying Principal Agreements, all the Netted Agreements and all Transactions entered into thereunder, upon the occurrence of a Close-Out Event in respect of a Counterparty are enforceable under the laws of this jurisdiction and should be upheld by the Dutch courts. Please refer to paragraph 4.12 for a particular risk in electing Automatic Termination when dealing with Regulated Entities and to paragraph 4.11 for a particular prohibition event in case of Delivery Agreements.

4.6.2 ***Single Agreement Concept?***

It is not required for the enforceability in this jurisdiction of the automatic termination clauses in the Master Agreements, or to ensure that Close-Out applies to all Transactions, or to safeguard the ability to calculate a net amount that the "single agreement" principle (as provided for in § 2.3 of the EFET MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) is included in such Master Agreements.

4.7 Determination of Settlement Amounts, Net Set-Off Amount and Final Net Settlement Amount

In this paragraph we discuss whether the Netting Clauses in the Master Agreements providing for the aggregation, netting or offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount are enforceable under the laws of this jurisdiction.

4.7.1 Determination of the Final Net Settlement Amount

The determination of the amount due for all Closed-Out Agreements in accordance with the Netting Clauses could, depending on the characterisation under the Governing Laws, be treated by the Netherlands courts either

(i) as an agreed procedure – not involving the legal device of set-off – for arriving at a single net amount representing a Party's damages on Close Out of the relevant Principal Agreements or Netted Agreements; or

(ii) as a contractual set-off of the mutual claims (representing losses and gains) resulting for both Parties from the Settlement Amounts due between them[10] pursuant to the Close Out of the various Principal Agreements or Netted Agreements.

As to (i):

Under the laws of this jurisdiction there is no rule of law that, as a matter of principle, invalidates a calculation of damages that is valid under the Governing Law. Netherlands law allows parties to stipulate in advance how damages will be calculated in case of early termination of certain or all transactions, due to breach or otherwise. In a Netherlands Insolvency, the Insolvency Representative is bound by such agreements. However, it is conceivable that the Netherlands courts would test whether mandatory Insolvency set-off provisions are compatible with (i.e. achieve a result similar to) the determination of the Final Net Settlement Amount as set out in the Netting Clauses (see below).

As to (ii):

The netting and set-off as envisaged in the Netting Clauses does not appear to lead to a result contrary to mandatory Netherlands Insolvency set-off provisions. In the event that a creditor of an insolvent debtor is also the latter's debtor, the Bankruptcy Act (article 53 for bankruptcy and article 234 for moratorium (which through article 74 paragraph 3 of the FMSA also applies to Emergency Measures) allows this creditor/debtor to plead a set-off provided that his claim(s) and his obligations (expressed in the same currency or "generic consideration"):

(a) have come into existence before the date of the Insolvency; *or*

(b) resulted directly from (one or more) transactions with the bankrupt entered into prior to the Insolvency judgment.

Insolvency set-off is therefore allowed if the cross-claims have "pre-insolvency roots". This requirement is mandatory and cannot be excluded by contract or otherwise. Because article 53/234 BA presupposes that each creditor of an insolvent party may regard his obligations to the

[10] Under Section 3 of the Model CPMA and Section 7 of the EFET MNA, the Settlement Amount for each Principal Agreement and each Netted Agreement shall be determined in accordance with the terms of the Closed Out Agreement. Since we have assumed that the close-out netting procedures incorporated in each of the Principal Agreements and each of the Netted Agreements are valid and enforceable in Insolvency Proceedings and the obligation to pay the Settlement Amount under each Principal Agreement is legally binding and enforceable against the Parties under its Governing Law, we will not deal with issues related thereto in this Opinion.

insolvent party as security for the payment of his claims, it is the prevailing view that all contractual set-off arrangements can be enforced in Insolvency, provided that (a) claim and counterclaim have "pre-insolvency roots" and (b) there is "mutuality", i.e. debtor and creditor under the cross-claims must be the same persons or entities and (c) the claim and counterclaim are expressed in the same currency or "generic consideration". To the extent that either the claim or the counterclaim do not result from pre-insolvency transactions or there is no such mutuality or single currency, a contractual set-off will not be effective in Insolvency. For the purpose of this opinion, we have assumed that there will be mutuality between the Parties.[11]

The general principles outlined above, lead to the conclusion that (subject to our observations in paragraphs 4.7.2, 4.7.3 and 4.7.4 below) the set-off provisions of Section 4 will be recognised and are enforceable in Insolvency Proceedings, provided that the obligations to pay the Settlement Amounts have “pre-insolvency roots”.

Furthermore, for set-off to be effective, it is not necessary under the laws of the Netherlands to file, register or otherwise record in any public office or elsewhere the claim and counterclaim or to comply with any other formality in the Netherlands in relation thereto.

4.7.2 **Currency**

In this subparagraph we discuss whether the insolvent Counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or the Schedule) is enforceable under the laws of this jurisdiction.

In the event of Insolvency of a Party in this jurisdiction, any amount payable by the Insolvent Party should be filed with the Insolvency Representative in its equivalent in Euro (converted at the exchange rate prevailing on the date of the Insolvency judgment). This is a result of the application of article 133 and/or 260 BA. It is not possible to obtain a payment from the Insolvency Representative in a currency other than the lawful currency of the Netherlands. The BA is unclear as to whether an official exchange rate is to be used, or a rate determined by the Closing

[11] We note that as a result of assignment under Section 7 of the Model CPMA the mutuality required for set off could be jeopardised if not all (rights arising under all) Principal Agreements and the Model CPMA are assigned to the same person.

Out Party in accordance with Section 3.2 of the CPMA or Section 7.2 of the EFET MNA. Therefore, the provisions in the Agreement for the time and rate of conversion of the Settlement Amount into the Base Currency may, in Insolvency Proceedings in this jurisdiction, be superseded by a conversion, or conversions, at the time and rate specified by the Insolvency Representative.

On the basis of articles 53/234 BA in combination with articles 133/260 BA, it *could* be argued that in case of Insolvency Proceedings in this jurisdiction, the calculation to be effected pursuant to the Section 4 of the Model CPMA should be made in Euro instead of any other Base Currency. On the basis of this argument, any claims of the Non-Defaulting Party on the Insolvent Party would by operation of law be converted in Euro whereas any claims of the latter on the former would remain in the Base Currency[12]. If the Base Currency is not the Euro, this could theoretically have the result that such claims cannot be set off, since the requirement that such claims should correspond to each other is not met.

In our view however the insolvency set-off of articles 53/234 BA would operate, in effect, outside the Insolvent estate and therefore would not cause the monetary claims which are the subject of such set-off to be "admitted" in the Insolvency Proceedings, thereby causing section 133/260 BA to be applicable.

Furthermore, in our view:

- the contractual arrangements providing for conversion of other currencies into the Base Currency would be binding upon the Insolvency Representative, that representative in this respect being in the same contractual position as the Insolvent Party
- the only consequence of articles 133/260 BA is that the amount resulting from the Section 4 of the Model CPMA, if any such amount is owed by the Insolvent Party, must be converted in Euro at the market rate of exchange prevailing on the date of Insolvency judgment, in order to be admitted in the Insolvency Proceedings.

In other words, we think that it is, as a matter of Netherlands insolvency

[12] It should be noted that articles 133 and/or 260 BA only refers to claims to be "verified" by the Insolvency Representative, i.e. claims of the creditors of the Insolvent Party. With regard to claims of the Insolvent Party itself it is therefore not entirely clear whether the mechanism of articles 133 and/or 260 BA applies.

law, unlikely that the application of a Base Currency other than Euro (*e.g.*, USD) would frustrate the operation of the Netting Clauses.

4.7.3 **Date of Calculation under Netting Clauses**

All calculations under Sections 3 and 4 of the CPMA and Sections 7 and 8 of the EFET MNA of the Master Agreements may have to be made by reference to a date not later than the date on which the Insolvency Proceedings were declared[13]. Although there is no express provision in the BA stating this, it is held that as a general rule an Insolvency judgment fixes the rights of the creditors unalterably as of its date. Any amount by which any Settlement Amount, any Net Set-Off Amounts and/or any Final Net Settlement Amount increased between the Insolvency judgment date and the later date by reference to which calculation was made, may not be recoverable (or indeed included in the netting, aggregation and set-off process contemplated under the Master Agreements).

4.7.4 **Accrual of interest**

By virtue of article 128 BA interest accruing after the date on which Insolvency is declared cannot be claimed as an insolvency claim, unless the claim on the Insolvent Party is secured by a right of pledge or mortgage. Therefore, Section 4.5 of the CPMA and Section 8.4 of the EFET MNA with regard to interest accruing on the Settlement Amounts, Net Set-off Amounts and Final Net Settlement Amount may not be enforceable in the event of an Insolvency of a Counterparty.

Although article 53 BA does not provide for the applicability of this provision *per analogiam* on set-off, there is a remote risk that the claim for interest accruing after the date of the Insolvency judgment may not be capable of being taken into account for set-off purposes. This could mean that there is a risk that if interest, accrued after the date on which Insolvency is declared, is included in the netting, aggregation or set-off as referred to in the Netting Clauses, the claim for such post Insolvency interest may not be capable of being taken into account for set-off purposes.

[13] This is a result of the so-called *fixation principle*. Although there is no express provision in the Bankruptcy Act stating this (see however e.g. Supreme Court 18 December 1987 NJ 1988, 340), it is held that as a general rule the insolvency judgment fixes the rights of the creditors unalterably as of the bankruptcy date. Please note that in our opinion this fixation principle does *not* prevent a Party to give a notice of termination after the bankruptcy date.

The better view, however, is that (a) insolvency set-off governed by articles 53/234 BA operates, in effect, outside the Insolvent estate and therefore would not cause the monetary claims which are the subject of such set-off to be "admitted" in the Insolvency Proceedings, thereby causing section 128/260 BA to be applicable and (b) the only consequence of articles 128/260 BA is that the net amount resulting from the set-off, if any such amount is owed by the Insolvent Counterparty, will not be capable of accruing interest after the date of the Insolvency judgment, in order to be admitted in the Insolvency Proceedings

4.8 Effect of the EU Insolvency Regulation

4.8.1 Scope

Where a Party is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking ("**Excluded Entities**"), and its COMI is in a Regulation State, the EU Insolvency Regulation will apply. Therefore, the EU Insolvency Regulation is applicable to:

- a Counterparty whose COMI is situated in The Netherlands (unless it is an Excluded Entity); and
- a Counterparty which is a Foreign Company whose COMI is situated in another Regulation State in the event that "territorial" or "secondary proceedings" are opened in respect of its branches in this jurisdiction;

but not to:

- Insolvency Proceedings in this jurisdiction involving Dutch Banks, Dutch Insurance Companies, Third Country Credit Institutions or Third Country Insurance Companies; or
- reorganisation or liquidation measures (as referred to in the Winding-up Directive) taken by the home Member State of an EEA Credit Institution or EEA Insurance Company in respect of that EEA Credit Institution or EEA Insurance Company.

4.8.2 Treatment as Set-Off

In the event that the EU Insolvency Regulation applies to Insolvency Proceedings in this jurisdiction and the Netting Clauses would be treated as contractual set-off arrangements by the courts in this jurisdiction, a set-off is permitted in each of the two following situations:

(a) if it is permitted under Dutch law (art. 4.2(d) of the EU Insolvency Regulation); or

(b) if it is permitted by the Governing Law that is applicable to the insolvent debtor's claim (art. 6.1 of the EU Insolvency Regulation) even if not permitted under Dutch law.

Consequently, in principle the Insolvency laws of this jurisdiction would determine whether a set-off is permitted, and if not, such a set-off may still be valid if permitted under the Governing Law even if Netherlands insolvency law would not allow a set-off as may be agreed between the Parties to the Model CPMA. Thus, a set-off which is not possible due the Dutch law restrictions mentioned in subparagraph 4.7 above, may still be accepted by the courts of this jurisdiction if it is permitted under the Governing Law. Otherwise, we express no views as to validity of the close- out netting and/or set off provisions.

Although the EU Insolvency Regulation does not apply to Excluded Entities, the possibility exists that its set-off rules as explained above, will nevertheless be applied to a Dutch court to such institutions (other than Regulated Entities to which special rules apply, see also paragraph 4.9 and 4.10 below). The reasoning which leads us to believe that insolvency set-off rules of the Governing Law could be relevant is as follows. One of the rules of the EU Insolvency Regulation (on voidable preference (*actio pauliana*) has been adopted by the Supreme Court (*Hoge Raad*) as a rule of Dutch private international law. This leads us to believe that (irrespective of whether the parties would formally be within the scope of the EU Insolvency Regulation) Netherlands courts may adopt other rules (e.g. on insolvency set-off) of the EU Insolvency Regulation as well. This would mean that a set-off not permitted by Netherlands Insolvency rules, but permitted under the insolvency law of the Governing Law, would be upheld, even if the Insolvent Party would be an Excluded Entity (other than a Regulated Entity) as referred to above to which the EU Insolvency Regulation is not applicable.

4.8.3 **Treatment as Set-Off Uncertain**

However, the courts of this jurisdiction may not apply articles 4.2(d) and 6.1 of the EU Insolvency Regulation to the Netting Clauses, particularly if they take the view that they include features other than set-off[14], *i.e.* a method of valuation of Transactions as well as the termination of Transactions (see paragraph 4.7.1(i) above). If this interpretation is followed, articles 4.2(d) and 6.1 of the EU Insolvency Regulation will not be applicable to the Netting Clauses and the general rule of article 4 of the EU Insolvency Regulation will apply, which means that Dutch Insolvency law shall apply to the effectiveness of these provisions.

We express no opinion on whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close-out netting for the purposes of the EU Insolvency Regulation. We also express no view as to whether the EU Insolvency Regulation would "validate" an invalid netting term under one of the Principal Agreements or Netted Agreements.

4.9 Effect of the WUDCI

4.9.1 Scope

In accordance with the WUDCI, Dutch law provides that the insolvency netting and set-off rules:

- of Netherlands law will be applied by the Dutch courts to Transactions under the Agreements with Insolvent Parties that are Dutch Credit Institutions; and
- of the laws of the home Member State of an EEA Credit Institution will be applied by the Dutch courts to Transactions under the Agreements with Insolvent Parties that are EEA Credit Institutions. These laws will in principle govern the effects on such Transactions of any reorganisation or liquidation measures (which measures will by law encompass that EEA Credit Institution's branches in this jurisdiction; articles 3:239 and 3:240 FMSA).

The following analysis will only deal with the first situation, i.e. that Insolvency Proceedings are commenced in this jurisdiction in respect of a Regulated Entity and that therefore Netherlands Insolvency rules determine the effects of such Insolvency Proceedings on the Model CPMA.

[14] This interpretation is supported by the fact that other EU legislation contains specific rules with respect to netting provisions (*e.g.*, Article 9 of the EU Insolvency Regulation and Article 25 of the WUDCI).

4.9.2 Treatment as Set-Off

If the netting provision would qualify as a set-off arrangement within the meaning of Article 23 of the WUDCI, then in the event Insolvency Proceedings are commenced in this jurisdiction in respect of a Dutch Credit Institution, a set-off is permitted in each of the two following situations:

(a) if it is permitted under Dutch Insolvency law (Article 10.2(c) of the WUDCI); or

(b) if it is permitted by the law applicable to the Regulated Entity's claim (Article 23 of the WUDCI, Article 3:243 FMSA and Article 212(w) BA). This means that a set-off will be allowed if and to the extent that it is permitted under the law which governs such Dutch Credit Institution's claim under the relevant Master Agreement, Principal Agreement or Netted Agreement, even if Dutch Insolvency law would not allow a set-off as contemplated by the Netting Clause.

4.9.3 Treatment as Netting

However, if the Netting Clause would be regarded as a "netting agreement" within the meaning of Article 25 of the WUDCI, then in the event Insolvency Proceedings are commenced in respect of a Dutch Credit Institution, the effectiveness of the Netting Clause shall be determined solely by the Governing Law[15] .

Article 25 WUDCI refers to the *lex contractus* as "solely" governing a netting agreement, which implies that the insolvency rules of the governing law of the relevant Master Agreement, Principal Agreement or Netted Agreement exclusively determine the validity and effectiveness of a netting agreement in the insolvency of a Dutch Credit Institution.

[15] Article 25 WUDCI has been implemented in Article 212ff of the Bankruptcy Act (for bankruptcy) and Article 3:252 FMSA (for Emergency Measures). Unfortunately, in both Articles a "netting agreement" is defined by reference to netting of payment or transfer orders in the context of payment or clearing systems designated in accordance with the EU Directive on the Limitations of Systems Risk in Payment and Securities Settlement Systems (the "**EU Settlement Finality Directive**") and it can therefore be argued that The Netherlands has incorrectly implemented the WUDCI in this respect. Only if the Dutch courts would interpret Article 212ff of the Bankruptcy Act and Article 3:252 FMSA in accordance with the WUDCI, would the effectiveness of the Netting Clause be determined solely by the governing law of the relevant Master Agreement, Principal Agreement or Netted Agreement.

Therefore, the restrictions outlined in paragraph 4.7 would then not apply.

We express no view as to whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close out netting for the purposes of the WUDCI.

4.9.4 **Dutch finance companies**

The position of Regulated Entities that are Dutch companies engaging in financial activities that bring them within the FMSA's definition of a Credit Institution (which means that they have raised repayable funds from others than professional market parties or within a closed circle (both within the meaning of the FMSA)) is mostly like that of a Dutch Credit Institution. If they do not comply with the conditions for being exempt under the FMSA (article 3:2 FMSA), they can become subject to Emergency Measures and they cannot be granted a moratorium of payments by the courts (article 214 BA). Oddly, neither the EU Insolvency Regulation nor the rules implementing the WUDCI appear to apply to their Insolvency Proceedings.

4.10 **Effect of the WUDIU**

In accordance with article 9 of the WUDIU the laws of this jurisdiction provide that the laws of the home EU Member State will be applied in the event of insolvency of an EEA Insurance Company, even if such insurance company has branches in another EU Member State, including in this jurisdiction. Therefore, the laws of this jurisdiction will be applied by the Dutch courts in the event of an Insolvency of a Dutch Insurance Company.

The same rules with regard to Insolvency set-off as are discussed in subparagraph 4.9.2 above also apply under the implementation of the WUDIU in the FMSA to Dutch Insurance Companies and Third Country Insurance Companies. This follows from article 3:243 FMSA for Emergency Measures and article 213r BA for bankruptcy. There is no separate rule of law in the WUDIU and in this jurisdiction with regard to netting arrangements entered into by Dutch Insurance Companies that is equivalent to article 25 WUDCI.

4.11 **Termination and Close-Out Rights in Insolvency of Certain Counterparties**

In this paragraph we specify, if and as applicable, the degree to which termination and close-out rights in insolvency in this jurisdiction are dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, we discuss whether these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status.

Our general opinions in paragraph 4.8 above relating to Insolvency apply to Counterparties being Dutch Parties. Special regimes applicable to the insolvency of Dutch Credit Institutions and certain Dutch finance companies are dealt with in paragraph 4.9 above whilst those applicable to the insolvency of Dutch Insurance Companies are dealt with in paragraph 4.10. For considerations in respect of other types of Counterparties, please refer to Annex C.

Special regimes exist in the physical energy market in respect of customers taking physical delivery on a continuous basis and in respect of licensed electricity companies:

(i) There is a risk that certain Transactions that qualify as Delivery Agreements may not be capable of being terminated. Article 37b (for bankruptcy) and Article 237b (for moratorium of payments) BA stipulate that in agreements for the continuous physical delivery of gas, water, electricity or heating needed for a customer's primary living needs or for the continuity of his/her business (each a "**Delivery Agreement**") early termination clauses triggered by (a request petitioning) Insolvency Proceedings or the levying of an attachment may only be invoked against customers who or which are subject to Insolvency Proceedings with the consent of the Insolvency Representative. Article 237b BA applies equally in the event that Emergency Measures are imposed (Article 3:177(1) FMSA). Therefore, insofar as any Transactions under a Principal Agreement or a Netted Agreement could be treated as Delivery Agreements where the Insolvent Party is the party taking delivery of gas, water, electricity or heating, early termination clauses triggered by (a request petitioning) Insolvency Proceedings or attachment may only be invoked with the consent of the Insolvency Representative. Consequently, for such physically settled energy Transactions, both automatic and optional termination clauses may not be enforceable in Insolvency Proceedings.

(ii) Dutch electricity companies that are licensed under the Electricity Act are subject to certain restrictions[16] in relation to their purchase

[16] Pursuant to the Decree on Ensured Delivery Electricity Act (*Besluit leveringszekerheid Elektriciteitswet 1998*).

agreements (*inkoopcontracten*) with their suppliers insofar as these relate to their delivery of electricity to low-volume users (i.e.: consumers). Such licensed electricity companies are not permitted to include in such purchase agreements any clauses providing for automatic termination or for deferral of obligations if their Insolvency is petitioned or Insolvency Proceedings are opened against them. Therefore, with regard to such licensed electricity companies and insofar as an individual Transaction would qualify as a purchase agreement as referred to above, the Automatic Termination provisions of the Master Agreements, the Principal Agreements and the Netted Agreements will not be enforceable.

4.12 **Election of Automatic Termination clause**

In this paragraph we discuss whether it is recommended to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the EFET MNA) or similar event. If yes, please specify such event or events and indicate whether it would be necessary or advisable to specify, or to refrain from specifying, a certain grace period to provide for optimal timing of such termination under local law? If you are recommending that a grace period be made applicable, what, in your best estimation is the minimum reasonable period of time required by a party whose creditor(s) have instituted an unsubstantiated or otherwise clearly frivolous involuntary bankruptcy proceeding against it in the insolvency courts of your jurisdiction to have that proceeding dismissed or otherwise terminated? If you are recommending that Automatic Termination be made applicable in respect of parties subject to the insolvency laws of your jurisdiction, what is the optimal timing for that Automatic Termination to take effect? In this event, please supply specific recommended language for purposes of customizing the Automatic Termination provisions to implement such optimal termination timing.

Whether or not to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment and to modify the scope of this clause depends on a number of factors.

There are two main risks involved in not using Automatic Termination:

(i) *Firstly*, individual Transactions which are outstanding as of the day of the insolvency judgment and which are within the scope of article 38 BA (see paragraph 4.5) would be terminated by operation of law regardless of whether Automatic Termination applied or not. In our view, parties who do not apply Automatic Termination are more likely to overlook the fact that they need to take prompt action to cope with the potentially harmful effects of this article from the Bankruptcy Act.

(ii) *Secondly*, for all outstanding individual Transactions at the time of the Insolvency judgment – irrespective of whether they are within the scope of article 38 BA – the 'fixation principle' enshrined in case law on the Bankruptcy Act (see paragraph 4.7.3 above) could entail that the enforceability of the Netting Clause may be subject to the limitation that all calculations must be made by reference to a date not later than the date of the insolvency judgment. This means, *inter alia*, that the computation of the Settlement Amounts and the Final Net Settlement Amount calculated in accordance with the Netting Clause will have to be made on the basis of the rates prevailing on the date of the insolvency judgment. The result would be that the amount by which the net amount owing to the Non-Defaulting Party increased between the judgment date and the later date by reference to which the calculation was made becomes irrecoverable. When Automatic Termination is applied, we presume that all calculations in respect of the Settlement Amounts and the Final Net Settlement Amount will by virtue of the relevant Master Agreement have to be made by reference to the day of the occurrence of the Close-Out Event, while not electing Automatic Termination would give the Non-Defaulting Party the freedom to terminate by notice at the date of the insolvency judgment or at a later date which could give rise to the mistaken belief that by having the option of giving notice against a later date, the Non-Defaulting Party would be entitled to calculate the Settlement Amounts and the Final Net Settlement Amount by reference to rates and values applicable at such later date (e.g. at the time it concludes a replacement transaction).

There are two main risks involved in using Automatic Termination:

(i) *Firstly*, the Non-Defaulting Party would not necessarily be apprised immediately of any petition seeking an insolvency judgment or indeed any such judgment regarding the Counterparty, which entails the risk that individual Transactions, Principal Agreements, Netted Agreements or Master Agreements will have terminated without the its knowledge.

(ii) *Secondly*, the defaults triggering Automatic Termination are so widely drafted that they would include "silent administration" (*stille curatele*), which is a form of emergency administratorship applicable to Regulated Entities in The Netherlands, and of which the regulated entity's counterparties would not normally be apprised (see paragraph 5(f) below). This would entail the risk that the Non-Defaulting Party might be approached by the administrator with the claim that all Transactions had terminated weeks or months ago, without having had an opportunity to mitigate its damages or to unwind related transactions such as hedges.

Whether or not one selects Automatic Termination is therefore not driven by the need to preserve close-out netting rights in relation to Counterparties, but more by the assessment of the relative weight given to the risks outlined above.

As regards suggested changes to the Winding-up, Insolvency or Attachment language, please refer to paragraph 4.28.2.

(B) TERMINATION AND CLOSE-OUT BASED ON NON-INSOLVENCY RELATED MATERIAL REASONS

This Part (B) deals with the following issues:

(i) *Whether the provisions in § 8 of the EFET MNA and Section 4 of the Model CPMA providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount are enforceable under the laws of this jurisdiction.*

(ii) *Whether the laws of this jurisdiction recognize that the Close-Out applies to all transactions and whether the single agreement concept (as provided for in § 2.3 of the EFET MNA and, if so selected in Section 10.6 of the Schedule, in the Model CPMA) is necessary in order to preserve the enforceability of the termination right and the ability to calculate a net amount.*

(iii) *Whether the Counterparty's obligation to pay the Final Net Settlement Amount in Euro, USD or GBP (as agreed between the Parties in the Election Sheet or the Schedule) is enforceable under the laws of this jurisdiction.*

(iv) *Whether the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out the Netted Agreements or Principal Agreements including all transactions are enforceable in accordance with the terms of the EFET MNA or the Model CPMA?*

4.13 Pre-Insolvency Termination and Close-Out under the Master Agreements

4.13.1 Recognition of Choice Of Law

(a) *Law Applicable to Termination and Close-Out Provisions.*

Pursuant to article 12 of Rome I, the law determined to be applicable to a contract on the basis of Rome I will govern the interpretation and performance of the contract as well as the consequences of nullity or a breach of contract (including the assessment of damages and termination) and the statutory limitations on bringing suit for a breach. With respect to the Master Agreements this entails that in principle the Governing Law governs the remedies provided to the Parties pursuant thereto[17]. Therefore, if these remedies (including the early termination and close-out netting provisions) are enforceable in accordance with the terms of the Master Agreements under their Governing Law, this will in principle be recognised as valid and enforceable by the courts of The Netherlands.

However, the Governing Law will not govern every aspect of the Master Agreements and the relations of the Parties thereunder. Dutch Insolvency law will govern the question whether these provisions for the calculation of damages (assuming their validity and effectiveness under the Governing Law) will be enforceable against the insolvent estate in the event of Insolvency being declared in this jurisdiction. In the event of Insolvency of a Party in The Netherlands, the contractual calculation of damages arrangements under the Master Agreement may only be recognised within the limits of Dutch Insolvency set-off.

(a) *Law applicable to set-off*

Although there is no statutory provision or Supreme Court case law confirming this, where both claim and counterclaim are governed by the same law, this law should, in our opinion, govern the set-off between these claims. As far as claims arising under the same transaction (or Master Agreement) are concerned this follows from Article 12(1)(d) of Rome I, which provides that the proper law of a transaction governs "*the various ways of extinguishing obligations*".

In our view (although there is no treaty or statutory provision or case law confirming this), it would likewise follow in the event that the Principal

[17] Subject to certain mandatory rules or rules of international public policy. The relevant provisions of the Master Agreements do not conflict with any such mandatory rules or rules of international public policy.

Agreements or the Netted Agreements happen to be governed by different laws, that the law by which the relevant Master Agreement is expressed to be governed should properly determine whether the Settlement Amounts determined under the separate Principal Agreements may be offset according to the provisions of the Master Agreement.

Therefore, outside the context of Insolvency Proceedings, the question whether the Parties are entitled to exercise the contractual rights of set-off provided by the relevant Master Agreement (other than by reason of Insolvency) in respect of claims arising between them pursuant to such Master Agreement would be determined exclusively by the Governing Law as the proper law of such Master Agreement.

4.14 **Pre-Insolvency Termination and Close-Out if Master Agreements governed by the laws of The Netherlands**

4.14.1 **Pre-Insolvency Close Out**

There is no published case-law of the Dutch courts directly dealing with the effectiveness of early termination and close out netting clauses, whether inside or outside the context of Insolvency Proceedings. These clauses are likely to qualify as dissolving conditions in respect of the Parties' scheduled future obligations, i.e. the occurrence of certain events will constitute a condition for dissolution of the contract. Under Netherlands contract law any future contingency can be made a dissolving condition, unless it violates a statutory provision or public policy. Furthermore, Netherlands contract law recognises rescission or termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective.

The determination of the Settlement Amount due for each Closed-Out Agreement in accordance with the relevant Master Agreement could be treated by the Netherlands courts either (i) as an agreed procedure – not involving the legal device of set-off – for arriving at an amount representing a party's damages on Close Out of certain or all Transactions under the relevant Principal Agreement or Netted Agreement, or (ii) as a contractual set-off of the mutual claims (representing losses and gains) resulting for both parties from individual terminated Transactions pursuant to the relevant Principal Agreement or Netted Agreement.

As regards (i): Netherlands law allows parties to stipulate in advance how damages will be calculated in case of early termination of certain or all transactions, due to breach or otherwise.

As regards (ii): see paragraph 4.14.2 below.

4.14.2 **Pre-Insolvency set off**

The statutory provisions in this jurisdiction concerning set-off are of a non-mandatory nature. Article 6:127 of the DCC provides that where two parties are each others' mutual creditor and debtor, each of these parties can, *by means of a declaration to the other*, in principle set off the mutual claims up to the amount which they have in common. Outside Insolvency (in addition to the requirement that there should be a declaration by the party invoking set-off, there being no requirement as to the form of such declaration, provided that the message has reached the other party) the following requirements apply to set-off:

(i) the parties have to be each others' mutual creditor and debtor and are acting in the same capacities;

(ii) the mutual claims should correspond to each other (i.e. in case of monetary claims, the claims should as a general rule be expressed in the same currency);

(iii) the party invoking set-off is entitled to pay his debt (e.g. the debt has matured or may be prepaid); and

(iv) the counter-claim of the party invoking set-off is enforceable.

Since the provisions of article 6:127 CC are of a non-mandatory nature, parties may agree on a set-off arrangement which is broader than as set out therein, e.g. the set-off of obligations of multiple parties even if between such multiple parties the mutuality of claim and counterclaim is lacking.

Despite the requirement set out in paragraph (1) above, set-off by a debtor is allowed of (i) claims that are transferred under Section 7 Model CPMA by the debtor´s creditor to a third party with (ii) counterclaims such debtor may have on the original creditor, provided such counterclaims arise under the same contractual relationship as the transferred claim or such counterclaims were already due and payable before the transfer. Therefore, if a Party would transfer its rights under a Principal Agreement to another party, the other Party could still invoke set-off of counterclaims that have risen under that Principal Agreement, regardless of the transfer.[18]

Single Agreement Concept? It is not required for the enforceability in this jurisdiction of the Termination Clause of the Master Agreements, or to ensure that Close-Out applies to all Transactions, or to safeguard the ability to calculate a net amount to include the "single agreement" principle (as provided for in § 2.3 of the EFET MNA and, if so selected in Section 10.6 of the Schedule, in the CPMA) into such Master Agreements. Also, all or some individual Transactions may be terminated if a Material Reason occurs.

(C) MULTI-BRANCH PARTIES

4.15 Netherlands Multibranch Party

In this paragraph we will discuss whether there would be any change in our conclusions expressed in Part (A) above concerning the enforceability of the Termination and Netting Clauses under the Master Agreements (given the assumption in paragraph 2.1(h) above) based upon the fact that Party A is a Counterparty having its COMI in this jurisdiction and has conducted business under some or all of the Netted Agreements or Principal Agreements on a multibranch basis (i.e. through its offices in The Netherlands as well as through one or more branches located abroad) prior to its insolvency? Also, would the EFET MNA and, if so selected in Section 10.6 of the Schedule, the CPMA be treated as a single unified agreement by the Insolvency Representative under the laws of The Netherlands, regardless of the treatment of the EFET MNA or the CPMA or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?

We do not consider that the use of a Master Agreement with offices of the Dutch Party in a number of different jurisdictions, including some where netting may not be effective (e.g. where an insolvency official in those jurisdictions may be entitled to "cherry-pick" obligations), would jeopardise the effectiveness of close-out netting and set-off of obligations as explained in Part (A) in Insolvency Proceedings commenced in this jurisdiction.

Furthermore, where a Party is incorporated under the laws of - and has its COMI

[18] This follows from article 6:130 CC, which does not apply in the event of Insolvency.

in - this jurisdiction and has offices in a number of other jurisdictions an Insolvency Representative is required in Insolvency Proceedings conducted under the laws of this jurisdiction to include obligations arising from all transactions (regardless of the office from which they were entered into) in the calculation of amounts owed to and from the Insolvent Party and would (subject to our observations in paragraphs 4.5, 4.6 and 4.7 above) be bound by the provisions of the Model CPMA and the EFET MNA in accordance with their respective terms.

Pursuant to article 3 of the EU Insolvency Regulation, insolvency proceedings may be opened by the courts of the Regulation State where a debtor has its COMI. Such proceedings have universal effect throughout the other Regulation States, i.e.

(i) they encompass all the debtor's assets situated in such other Regulation States, including The Netherlands; and

(ii) they possibly affect all creditors, wherever they may be located, unless a "secondary insolvency proceeding" is opened in another Regulation State (except as otherwise provided in the EU Insolvency Regulation).

The "single agreement" concept is also not relevant for this paragraph of our Opinion.

4.16 **Foreign Multibranch Party**

4.16.1 *In this paragraph we discuss whether separate proceedings could be brought in this jurisdiction with respect to assets and liabilities of the branch located in this jurisdiction of a Foreign Company upon the commencement of insolvency proceedings against such Foreign Company in that Foreign Company's own jurisdiction. Our discussion will include (i) how the relevant authorities in this jurisdiction would treat the proceedings in an outside jurisdiction by, for example, deferring to them so that the assets and liabilities of the branch would be treated as part of the proceedings against the Foreign Company and (ii) whether or not in our opinion local creditors of the branch would be able to initiate separate proceedings in this jurisdiction even if the relevant authorities did not do so;*

As mentioned in paragraph 4.8 above, Netherlands courts only have jurisdiction to open Insolvency Proceedings against any foreign legal entity (other than an EEA Credit Institution or an EEA Insurance Company) that carries on business or professional activities *through a branch office in The Netherlands*. Therefore one must distinguish between the following situations:

COMI in a Regulation State / establishment in The Netherlands: if a Foreign Company maintains an "*establishment*" (as defined in the EU Insolvency Regulation) within the territory of a Regulation State other than the Regulation State in which its COMI is located, the courts of that other Regulation State will have jurisdiction to open so-called "secondary insolvency proceedings" against such company. The applicable law with respect to such secondary insolvency proceedings will be the law of that other Regulation State (Article 3(2) EU Insolvency Regulation). However, such secondary proceedings are territorial in scope, meaning that the effect of these proceedings will be restricted to the Foreign Company's assets located in the territory of the Regulation State where the secondary proceedings have been opened; it should be noted that the determination of the "location" of a contract is not free from doubt[19].

If no territorial insolvency proceedings are opened in this jurisdiction, the courts of this jurisdiction will recognise the effects of the insolvency proceedings opened in the insolvent party's home jurisdiction, also in relation to the assets and liabilities of the Dutch branch. These effects will also be recognised, when territorial insolvency proceedings have been opened in this jurisdiction, in relation to any assets located outside this jurisdiction (the location of assets does not depend for these purposes on whether they are allocable to the business of the Dutch branch, but on certain objective tests such as the physical location of tangible property or the place of principal establishment of the debtor of a claim).

Foreign Company is an EEA Credit Institution/ EEA Insurance Company: In relation to such institutions, neither bankruptcy nor moratorium nor Emergency Measures can be imposed in this jurisdiction. Reorganisation or liquidation measures with regard to such institutions should be taken by the authorities of the home member state in respect of that institution. Such measures shall include all assets and EU branches of that institution and must be recognised in The Netherlands.

Foreign Company with COMI outside Regulation States: The EU Insolvency Regulation is not applicable to insolvency proceedings where the Foreign Company's COMI is situated outside the jurisdiction of the Regulation States (recital 14 of the EU Insolvency Regulation), so that it does not govern:

(a) the consequences of the opening of an insolvency proceeding in a

[19] Art. 3.2 and 27 of the EU Insolvency Regulation.

Regulation State concerning a Party whose COMI is situated outside the Regulation States, and

(b) the consequences of the opening of an insolvency proceeding in third party states (*i.e.* Denmark and any other States).

To what extent foreign insolvency proceedings of foreign companies whose COMI is situated outside the Regulation States are recognised in The Netherlands, is unclear. It appears from Supreme Court case law that, absent international treaty provisions to the contrary, such foreign insolvency proceedings in principle have no extra-territorial effect in this jurisdiction.

This means:

- that the foreign general attachment of the insolvent Foreign Company's estate (or similar effects, such as the transfer of the estate to a receiver in bankruptcy) does not include the assets of the debtor that are situated in The Netherlands;
- that, in principle, the legal effects of insolvency proceedings under foreign insolvency laws cannot be invoked in The Netherlands;
- that creditors of the Foreign Company can petition the Dutch courts to open Insolvency Proceedings in respect of that Foreign Company's Dutch branch office (article 2(4) BA).

Although Netherlands international insolvency law is based on the territorial effect of foreign insolvency proceedings, this does not mean that these proceedings do not receive any recognition at all. The foreign receiver generally has *locus standi* in The Netherlands. The powers granted to a liquidator by the foreign *lex concursus* should therefore in principle be recognised in The Netherlands. Also in other respects foreign insolvencies can have legal consequences in The Netherlands. It could be argued that the legal consequences created by the foreign insolvency law can be recognised in The Netherlands, as long as (i) they are not closely connected with the fact that the foreign insolvency must be regarded as a general attachment on the insolvent company's assets for the benefit of all his creditors, and (ii) this does not lead to unsatisfied creditors no longer having recourse in respect of assets of the insolvent company that are situated in The Netherlands.

4.16.2 *In this subparagraph we discuss the question whether, if separate proceedings are brought in this jurisdiction with respect to the assets and liabilities of the Dutch Branch, the Insolvency Representative or the*

Dutch courts would include Party F's position under the Netted Agreements or Principal Agreements, in whole or in part, among the assets of the Dutch Branch and, if so, whether the Insolvency Representative or the Dutch courts would recognize the close-out netting provisions of the relevant Master Agreement in accordance with their terms? In particular, could the situation arise that an Insolvency Representative or court (considering a single Master Agreement) would require a counterparty of the Dutch Branch of Party F to pay the mark-to-market value of transactions entered into with the Dutch Branch to the Insolvency Representative of the Dutch Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other transactions with Party F under the same Master Agreement (assuming that close-out netting under the Master Agreement would be enforced in accordance with its terms in the insolvency proceedings for Party F in Country H)?

Under Dutch law, a branch is not considered to have legal personality. Hence, the Foreign Company and not its Dutch Branch will at all times remain the counterparty under the relevant Master Agreement. Because the "mutuality requirement" is fulfilled in this scenario, set off can take place, however, in respect of the claims between the Non-Defaulting Party and the Foreign Company only. This remains true regardless of the fact that the Dutch Branch could be considered an "establishment" under the EU Insolvency Regulation and on the basis thereof territorial insolvency proceedings have been initiated in The Netherlands. The latter is only relevant because at first instance the *lex concursus* (*i.e.* Dutch set-off provisions) determines whether set-off is allowed or not. As explained in paragraph 4.7 above, Dutch set-off provisions, are in general however creditor-friendly and should thus in such situation not give rise to any problems, in particular not where mutuality exists.

One of the main principles of Netherlands international Insolvency law is that, as far as Insolvency Proceedings commenced in The Netherlands are concerned, the Netherlands proceedings have "universal effect", which (*inter alia*) means that they aspire to comprise all assets of the Insolvent Foreign Company, including those situated abroad (without prejudice to the sovereignty of another state). To the extent that the EU Insolvency Regulation applies, the Insolvency Proceedings in this jurisdiction will have:

- *universal effect* in all other Regulation States (subject to secondary proceedings being opened elsewhere) if the Foreign Company's Dutch branch qualifies as its COMI; and

- *territorial effect* if that COMI is located in another Regulation State, meaning that the effects of a secondary insolvency proceeding in this jurisdiction will be confined to the assets of the Dutch branch located in The Netherlands.

In the latter case it is uncertain whether all Principal Agreements, all Netted Agreements and all Transactions will be comprised in a Dutch Insolvency, save that the analysis of set-off under the EU Insolvency Regulation (Part (A), paragraph 4.8 above) does not appear to be any different. In our view this means that:

1. the Insolvency Representative in charge of territorial proceedings in respect of the Dutch Branch, and the Dutch courts, will need to give effect to the close-out and netting provisions of the Master Agreements in the manner indicated in Part (A) above, without distinguishing between those Netted Agreements or Principal Agreements that are allocable to the Dutch branch and those that are not;

2. if the Final Net Settlement Amount resulting from that process is payable by Party F, the other Party can file proof of such claim both in the main insolvency proceedings and in the secondary Dutch proceedings;

3. if the Final Net Settlement Amount resulting from that process is payable to Party F, that claim will be part of the assets to be collected by the Dutch Insolvency Representative if the other Party (which owes this Final Net Settlement Amount) has its COMI in this jurisdiction.

(D) COLLATERAL

4.17 Governing Law Aspects

In this paragraph we discuss which law, according to Dutch private international law, governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the Credit Support Annexes.

With regard to Letters of Credit, there is no "transfer of ownership" properly speaking and therefore the question does not arise. The Letter of Credit will be governed by the chosen law applicable to it. On the basis that a Letter of Credit is issued in favour of a Party and cannot be transferred, any questions relating to a "transfer" of a Letter of Credit are not relevant. Therefore, in this legal opinion we shall not address the "transfer" of Letters of Credit and where applicable Eligible Credit Support shall be read as "Cash".

The creation of security over contractual rights against the account bank in respect of cash collateral is governed by the law applicable to the obligation to transfer or charge the cash. The laws governing the contractual claims in respect of cash collateral determine whether they are capable of being transferred or charged.

Where the cash collateral is simply transferred pursuant to a contractual arrangement to the effect that the Counterparty transfers cash from its own account to that of the Transferee and that in case of the Counterparty's default the Counterparty's claim for repayment of the transferred cash is set-off against the Transferee's claims under the relevant Master Agreement, as seems to be the case under the § 11of the CPCSA and § 12 of the 2011 CSA, the law applicable to this contractual arrangement applies. In respect of cash collateral transferred under the Credit Support Annexes this leads to the conclusion that the Governing Law is applicable.

4.18 Recharacterisation Risk

Here we discuss whether the laws of this jurisdiction would characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that any such transfer would be re-characterized as creating a security interest.

4.18.1 Pre-Insolvency: recharacterisation of transfer of cash as Eligible Credit Support

With reference to 4.18, assuming that the governing law of the applicable Master Agreement and Credit Support Annex (if not Dutch law) characterises a transfer of Cash as Eligible Credit Support as effecting an unconditional transfer of "ownership", such characterisation will be recognised by the courts of this jurisdiction.

Under the laws of this jurisdiction the transfer of Cash as Eligible Credit Support will be characterised as the payment of a bail sum (*waarborgsom*)[20]. Therefore, a transfer of Cash as Eligible Credit Support under a Credit Support Annex (where the credit support is paid to the Transferee and not to any third party) constitutes an unconditional transfer of ownership of such Cash, which will not be recharacterised as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in such Cash.

For the sake of completeness, we note that if the Eligible Credit Support is located (i.e. repayable) in a jurisdiction other than this jurisdiction (e.g. the jurisdiction of the Transferee) the laws of that other jurisdiction should be examined to ensure that the transfer would not be recharacterised since there is a risk that the courts of this jurisdiction would apply the law of the jurisdiction where the assets are situated to the question of the proper characterisation of a transfer of Eligible Credit Support.

[20] Although there is no express basis for this in statutory law or case law there is ample reason to assume that the payment of a bail sum by a debtor to its creditor for its present or future claims would be permitted under Netherlands law. We base our view, *inter alia*, on the legislative history of the DCC, dealing with the possibility of depositing (other than by way of a pledge) a sum of money with one's creditor, against which recourse can be taken by the creditor in case of default. In the DCC's legislative history the question is discussed whether "the payment of a bail sum constitutes a pledge consisting of money". According to the legislator this will depend on the intention of the parties. It is conceivable - according to the legislator - that the party having asked and obtained a sum of money to serve as collateral simply becomes the debtor for repayment thereof. In particular where the recipient is obliged to pay interest (see § 9 of the CPCSA and § 9 of the 2011 CSA), indicating that he is entitled to use the money and is therefore not under a duty to segregate the money from his other assets, this would suggest (according to the legislative history) that the parties must have intended a "bail sum". Thus, in the legislative history the possibility of the "bail sum", as an alternative means of obtaining security over money, albeit with the debtor taking credit risk on the creditor, has been recognised. Since the recipient of the bail sum will become the debtor for repayment thereof, it may set-off its repayment obligation against any obligation the transferor of such bail sum owes to it.

4.18.2 **Recharacterisation of transfer of Eligible Credit Support in Insolvency: Dutch Insolvent Transferor**

The same analysis as set out in paragraph 4.18.1 with regard to recharacterisation of an outright transfer of Eligible Credit Support consisting of Cash applies in the event of Insolvency of a Dutch Transferor. The Dutch Insolvent Transferor's Insolvency Representative will have a claim for repayment of such Cash against the Transferee.

4.18.3 **Recharacterisation of transfer of Eligible Credit Support in Insolvency: Insolvent Dutch Transferee**

The same analysis as set out in paragraph 4.18.1 with regard to recharacterisation of an outright transfer of Eligible Credit Support consisting of Cash applies in the event of Insolvency of a Dutch Transferee. The Transferor of such Cash will have a claim for repayment against the Insolvent Dutch Transferee. The Credit Support Annex will be effective to the extent that it provides that the value of the Collateral provided and not yet transferred is to be included as an "other amounts payable" (owing to the Transferor) in the calculation of the net amount payable under the Netting Clause, subject to the limitations arising from Netherlands insolvency law (as outlined in Part (A) above).

4.19 **Perfection Requirements**

In this paragraph we discuss whether, assuming that the Transferee receives absolute ownership in the collateral, it will need to take any action (e.g. any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) thereafter as a matter of Dutch law to enforce or continue such ownership interest.

Assuming the Transferee receives absolute ownership interest in the Eligible Credit Support and subject to the observations in paragraph 4.17 and 4.18 above, there will be no need as a matter of Dutch law to take any subsequent action (e.g. any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental judicial, regulatory or other order, consent or approval or any procedures) to ensure that the Transferee's title in the Eligible Credit Support continues or to enforce such ownership interest.

4.20 **Substitution Rights**

In this paragraph we deal with the question whether there is any effect, under *the laws of this jurisdiction, of the right to substitute collateral pursuant to § 6 of each Credit Support Annex and whether the presence or absence of consent to substitution by the Transferee has any bearing on this point.*

The right of a Transferor incorporated or otherwise organized under this jurisdiction to exchange Eligible Credit Support pursuant to Section 6 of each Credit Support Annex is valid and legally binding and enforceable in accordance with its terms. As Section 6 of each Credit Support Annex presupposes that the Transferee approves such exchange, such exchange shall only be valid if such approval is given by the Transferee.

4.21 **Final Net Settlement Amount**

We will now deal with the issue whether, assuming that Section 4 of the CPMA and § 8 of the EFET MNA which governs the Transferee's right in relation to the transferred Eligible Credit Support upon termination of the relevant Master Agreement together with § 11 of the CPCSA and § 12 of the 2011 CSA, respectively) is valid and enforceable under the laws of this jurisdiction insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of Transactions, § 11 of the CPCSA and § 12 of the 2011 CSA are also valid to the extent that they provide for the value of the collateral provided and not yet transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the CPMA or § 8 of the EFET MNA, as the case may be.

Yes, based on the assumption that Section 4 of the CPMA and § 8 of the EFET MNA are valid and enforceable in this jurisdiction insofar as they relate to the determination of a Final Net Settlement Amount payable by either Party on the termination of Transactions, § 11 of the CPCSA and § 12 of the 2011 CSA are also valid to the extent that they provide for the Base Currency Value of all the Eligible Credit Support provided under the relevant Credit Support Annex on the Determination Date to be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee.

Nevertheless, as mentioned in paragraph 4.7.3, all calculations under the relevant provisions may have to be made by reference to a date not later than the date on which the Insolvency Proceedings were declared.

4.22 **Enforceability in Insolvency**

In this paragraph the question whether the rights of the Transferee are enforceable in accordance with the terms of the relevant Master Agreement and *related Credit Support Annex, irrespective of the insolvency of the Transferor (if the latter is a Counterparty) under the laws of this jurisdiction, is dealt with.*

The enforceability of the Agreements and the Credit Support Annexes is discussed elsewhere in this opinion. Please refer to the relevant sections.

4.23 Suspect periods and voidable preference

Will Party A (or its Insolvency Representative) be able to recover any transfer of Eligible Credit Support provided to Party B during a certain "suspect period" preceding the date of the insolvency? If such a period exists, does the substitution of Eligible Credit Support by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the relevant Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?

4.23.1 General Voidable Preference Regime

Under Dutch law every creditor, but in Insolvency only the Insolvency Representative, has the right (the so-called ***Actio Pauliana***) to nullify (by simple declaration) a transaction entered into by the debtor (in this case Party A) with a third party (in this case Party B) provided that:

(i) the transaction was entered into by the Party A *voluntarily* (i.e. in the absence of a legal or contractual obligation); **and**

(ii) the transaction was *prejudicial* to the recourse possibilities some or all of Party A's creditors (i.e. if the transaction leads to a reduction in the assets available for recourse by its creditors); **and**

(iii) *at the time of the transaction* both Parties knew or ought to have known of the fact that the transaction would have such prejudicial effect; **or**

(iv) in the event that the transaction is for nil consideration (i.e. gifts and other gratuitous dispositions), *at the time of the transaction*, Party A knew (or ought to have known) of the prejudicial effect, regardless of whether Party B shared such knowledge; as presumably the Credit Support Annexes, the Master Agreements and any Transactions are entered into on commercially acceptable terms, this should not be relevant.

As regards (iii): the mere fact that the parties knew that there was a *possibility* that the transaction could be prejudicial to the recourse possibilities of the company's other creditors, is not sufficient.

Therefore, only if both Parties knew or ought to have known on the moment that the Credit Support Annex, the Master Agreement, the Principal Agreements, the Netted Agreements or any Transaction were entered into, that this would have a prejudicial effect on the recourse possibilities of other creditors of Party A, is there a risk of voidable preference.

4.23.2 **Burden of proof**

The burden of proof of all of the above elements rests upon the creditor who wishes to nullify the transaction, although a reversal of this burden in respect of the "knowledge requirement" (under (iii) and (iv) above) is provided in law if the voluntary transaction took place less than one year before the creditor invokes the *Actio Pauliana* or - as the case may be - one year prior to Party A's Insolvency, <u>and</u> falls within one or more of the statutory categories of "suspect" transactions. Such suspect transactions include:

(i) payments of or providing collateral for debts that are not yet due and payable;

(ii) transactions by the debtor (if a company) with or for the benefit of a group company; and

(iii) transactions at an undervalue.

Apart from the reversal of the burden of proof for suspect transactions entered into one year prior to invoking the *Actio Pauliana* or - as the case may be - one year prior to Party A's Insolvency, there are no "suspect periods" in relation to the *Actio Pauliana* or otherwise under Dutch law.

4.23.3 **Limitation period**

Voidable preference has a limitation period of three years *from* the date on which a prejudiced creditor *discovered* the detrimental effect of the transaction.

4.23.4 **Analysis**

Eligible Credit Support that consists of Letters of Credit issued by a third-party credit institution cannot be recovered by an insolvency official of Party A and is therefore not taken into account in this section of our opinion.

In order to assess the potential impact of the *Actio Pauliana*, one must carefully distinguish between (i) the creation of a contractual obligation for Party A to post Eligible Credit Support and (ii) the actual transfers thereof. The reason for this lies in paragraph 4.23.1(i) above: only voluntary transactions can be nullified. This means that where Party A's assumption of a contractual obligation to transfer Eligible Credit Support cannot be challenged, then *any subsequent transfers of collateral* by Party A will also be "safe" (subject to paragraph 4.23.5), because they can then be characterised as involuntary transactions (i.e. transactions for which a contractual obligation exists). Therefore, in this opinion we will focus on Party A's assumption of a contractual obligation to post Eligible Credit Support.

It is likely that the creation under the relevant Credit Support Annex of the obligation to transfer Eligible Credit Support by Party A could be considered as a *voluntary act* (unless the Governing Law analysis is different). If the relevant Credit Support Annex was entered into within one year before the relevant creditor invokes the Actio Pauliana, the Credit Support Annex may be considered a "suspect" transaction under 4.23.2.(1) or (2) above, depending on how much over collateralization is achieved. It is unlikely that entering into the Credit Support Annex would be considered as a 'transaction for a nil consideration' (see paragraph 4.23.1(iv) above), and therefore only issues 4.23.1(ii) and (iii) above should be considered.

As to issue 4.23.1(ii): clearly if Party A remains solvent (i.e. able to pay its debts and does not provide insufficient recourse to its creditors as a result of entering into the Credit Support Annex), then a creditor would not be able to nullify the collateral posted because the requirement under 4.23.1(ii) above will not be satisfied.

Although an *Actio Pauliana* can be brought if the debtor is still solvent, according to authoritative literature, it is a *conditio sine qua non* for any successful *Actio Pauliana* that the debtor has become unable to pay its debts as they fall due. Only then it will become apparent that there is insufficient recourse available to the debtor's creditors. If Party A continues to be able to pay its debts, the risk of a preference challenge being made on the basis of the mere fact that it has reduced the recourse available to its other creditors by posting collateral, should be regarded as remote.

As to issue 4.23.1(iii): unless the assumption of the obligation to transfer collateral took place within one year before the creditor challenges it, the creditor will need to show that Party A was aware or ought to have been aware of the fact that assuming the obligation to provide collateral would have the effect that such prejudicial effect would arise (the real or constructive knowledge of the mere possibility that such detrimental effects might arise being insufficient). If an objective financial analysis of Party A's position can only lead to the conclusion that no prejudice to Party A's other creditors should occur, then this will be Party A's best defence.

4.23.5 **Additional claw back risk**

In addition to the *Actio Pauliana* described above, in Insolvency Proceedings the Insolvency Representative has the power (under article 47 BA) to invoke the nullity and claw back any contractually required collateral transfers made by Party A before the date of the Insolvency Judgment in the event that:

(a) Party B knew, at the time of such transfer that a petition for Party A's Insolvency had been filed with the court; or

(b) such transfer resulted from concerted action of Party A and Party B aimed at preferring the latter to the detriment of Party A's other creditors.

Accordingly, to the extent that it can be demonstrated that an obligatory legal act performed by Party A prior to becoming subject to Insolvency Proceedings in order to satisfy or extinguish an obligation under the Agreements (including but not limited to the obligations to make a transfer of Eligible Credit Support; each such legal act and extinguishment of debt hereinafter referred to as "**Obligation Performance**"):

(i) occurred at the moment that Party B knew that a request for Insolvency of Party A had been filed; or

(ii) was the result of collusion between the two Parties as referred to under (b) above,

such Obligation Performance could be nullified.

4.23.6 **Impact of Governing Law**

Under the EU Insolvency Regulation, the WUDCI (implemented in articles 3:240 and 3:244 of the FMSA (as regards Emergency Measures) and in article 212t and 212x BA (as regards bankruptcy)) and the WUDIU (implemented in articles 3:240 and 3:244 of the FMSA (as regards Emergency Measures) and articles 213o and 213s BA (as regards bankruptcy)), the law applicable to Insolvency Proceedings shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors. Accordingly, the Dutch rules with regard to voidable preference shall apply in the event of Insolvency Proceedings in this jurisdiction including the Insolvency Representative's authority to nullify legal acts entered into prior to Insolvency on the basis of *Actio Pauliana*.

However, under the EU Insolvency Regulation,[21] the WUDCI[22] and the WUDIU,[23] in order to protect the Insolvent Party's counterparty, a claim by the Insolvency Representative for nullification on the basis of voidable preference will only be successful if it would *also* be possible under the insolvency rules of the law of another Member State governing the preferential transaction itself, in this case the Governing Law.

This means that the requirements for nullification of both the BA and of the Governing Law (as the governing law of the Credit Support Annex) should be satisfied. If it is not possible under such Governing Law for a local insolvency representative to set aside the Credit Support Annex, then the Insolvency Representative could not do so either and all transfers of Eligible Credit Support would be treated as involuntary transactions.

This is subject to the additional clawback risk set out in paragraph 4.23.5

[21]Article 13.

[22]Article 30(1), implemented as article 3:251 of the FMSA (as regards Emergency Measures) and article 212ee BA (as regards bankruptcy of a Regulated Entity).

[23]Article 24 implemented as article 3:251 of the FMSA (as regards Emergency Measures) and article 213z BA (as regards bankruptcy of a Dutch Insurance Company).

above, however, only if those transfers of collateral would also be subject to such risk under the Governing Law.

4.23.7 **Substitution of Collateral**

Any obligation on Party A to accept substitution of Eligible Collateral by Party B under the Credit Support Annex should follow from the contractual obligations set out therein. If on the basis of the analysis in this paragraph 4.23 the Credit Support Annex cannot be nullified because of voidable preference, then the exchange of Eligible Collateral should not be subject to such voidable preference risk either. However, some degree of risk is constituted by the additional claw back powers outlined in 4.23.5 above, unless avoidance would not be possible under the insolvency rules of the Governing Law (paragraph 4.23.6).

Please note that where under the applicable Governing Law such a substitution would be treated as the creation of *new security interests,* this could have an impact on general bankruptcy issues, in particular the voidness of post-Insolvency dispositions by Party A and the voidability of preferential transactions.

4.23.8 **Transfer of additional Eligible Credit Support**

In case of transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the Credit Support Annex, the same analysis as set out in relation to the substitution of Eligible Collateral in paragraph 4.23.7 above will apply. If under the relevant Credit Support Annex Party A is obliged to transfer additional Eligible Credit Support to Party B, this will constitutes a prior legal and contractual obligation to transfer and, therefore, the transfer of additional Eligible Credit Support will not be voluntary as described in paragraph 4.23.1(i) above.

4.24 **Other requirements for the effectiveness of the Credit Support Annexes in this jurisdiction**

In this paragraph we will answer the query whether the Credit Support Annexes are in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to Party B and whether there are other requirements to be observed in jurisdiction in order to ensure validity of such transfer of Eligible Credit Support by Party A.

The Credit Support Annexes are in an appropriate form to be effective in the manner set out in this opinion. There are no other relevant requirements necessitated by the laws of this jurisdiction.

The Credit Support Annexes supplement, amend, form part of and are subject to the relevant Master Agreement. Therefore, the same analysis as set out in Part (A) above applies to the enforceability of the Credit Support Annexes in the event of Insolvency.

4.25 **Other recommendations**

Do you have other specific recommendations on the subject of collateral that you would like the EFET members to consider?

There are no other material issues relevant to the questions on the subject of collateral set out above which we wish to draw to your attention.

(E) GENERAL ENFORCEABILITY

Is this Part (E) we deal with the questions (i) whether the Agreements are enforceable under the laws of The Netherlands in accordance with their terms and (ii) whether there are any provisions that may infringe upon the ordre public in The Netherlands and that may be challenged by the Dutch courts irrespective of the law that governs the Agreements and (iii) whether we have other recommendations going to the topic of general legal enforceability that we would like EFET members to consider.

4.26 **Validity under Governing Law**

Subject to the assumptions set out in this legal opinion and to our opinion, analysis and observations set out in paragraphs 4.1 through 4.25 included, if an Agreement is governed by a Governing Law (and assuming of course their validity under that Governing Law), that Agreement will be recognised as valid and enforceable by the courts of The Netherlands and the choice of Governing Law will be recognised. We are not aware of any Clauses in the Agreements that may conflict with any overriding mandatory rules (*bepalingen van bijzonder dwingend recht*) or infringe upon the *ordre public* (public policy) in this jurisdiction, irrespective of the Governing Law.

4.27 **Validity under Netherlands law**

If an Agreement were to be governed by the laws of this jurisdiction, it would be valid and legally binding and enforceable against the Parties in accordance with its terms save as set out elsewhere in this Opinion.

4.28 Amendments

4.28.1 The EFET members may consider the following change to the EFET MNA, when governed by Dutch law: the EFET MNA provides in §11 for payment netting (*ie*, on an on-going basis, the payment on a net basis of amounts that fall due on the same date and in the same currency between the parties) "if this §11.1 is made operative by the Parties in the Election Sheet". Under Dutch law payment netting applies by default unless the parties expressly provide otherwise. In order to give effect to the apparent intent of §11, the following sentence should be added at the end of the paragraph: "If not so specified, payments shall be made on a gross basis and without set-off, without prejudice to §7 (*Determination and Settlement of Settlement Amounts*) and §8 (*Netting-Off of Settlement Amounts; Accrual of Interest*)".

4.28.2 The EFET members may also consider the following changes to the EFET MNA when dealing with Parties incorporated in The Netherlands or with an establishment in The Netherlands, irrespective of the governing law of the EFET MNA:

(a) Dutch law allows third-party creditors to launch proceedings seeking the bankruptcy or liquidation of a debtor. These proceedings may ultimately be dismissed, and may occasionally be frivolous; some considerable time may also elapse until the courts make a final decision on the claim. It is therefore not advisable in our view to provide, as does §3.1(C)(III)(d) of the EFET MNA, that the mere institution against a party of proceedings seeking a judgment of insolvency should constitute a material reason for early termination. This provision may more appropriately be worded as follows: "institutes ~~or has instituted against it~~ a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or is subject to any such judgment or relief ~~a petition is presented for its winding-up or liquidation and, if specified in the Election Sheet, is not withdrawn, dismissed, discharged, stayed or restrained within such period as specified in the Election Sheet~~".

(b) The "Amalgamation/Merger" item in the definition of "Material Adverse Change" in §3.1(C)(VI)(a)(ix) of the EFET MNA fails to catch demergers. That paragraph could usefully be expanded as follows: "If the other Party or its Credit Support Provider undergoes a change of control, consolidates or amalgamates with, or merges or demerges with or into, or transfers all or substantially all its assets to, or reorganises, incorporates, reincorporates, or reconstitutes into or as, another Entity, or another Entity transfers all or substantially all its assets to, or reorganises, merges, demerges, incorporates, reincorporates, or reconstitutes into or as, such other Party or its Credit Support Provider and [...]".

4.28.3 On a point of detail, we note that the definitions of "Credit Support Document" in Division 1, Part VIII of the Schedule to the CPMA exclude "any guarantee by a third party of a Party's obligations". Under the laws of this jurisdiction third parties can provide asset security without necessarily also providing a guarantee; the apparent intent of the clause would be better served by saying "any guarantee or security by a third party of a Party's obligations".

4.28.4 In respect of substitution of Eligible Credit Support, please see our recommendation in paragraph 4.31.2.

(F) CONFIRMATION PRACTICES

This Part (F) discusses (1) the formal requirements and procedure in the formation of a legally binding and enforceable transaction and its inclusion in the Netted Agreement or Principal Agreement and the related Master Agreement and (2) the formal requirements a confirmation should comply with under the procedural laws of The Netherlands in order to be sufficient for all purposes to evidence a binding transaction and its inclusion in the agreements mentioned under (1).

4.29 Formal requirements regarding entering into legally binding individual Transactions

4.29.1 ***Taped oral agreements***

Under the laws of this jurisdiction parties are generally speaking free to choose the manner in which they conclude an agreement. An agreement will be validly entered into if the offer of one party to enter into a specific agreement is accepted by the other party to which the offer is directed. The acceptance of the offer should be based on the same conditions as the offer is made. An acceptance of the offer subject to deviating conditions is considered to constitute a new (counter-)offer. Oral and written agreements are equally binding. It may, however, be more difficult to prove the contents of an oral agreement as opposed to a written agreement. A taped conversation can be used as evidence of the existence and terms of the orally entered into agreement. There are no specific rules with regard to evidence to be provided. Evidence can be provided in various forms, e.g. written documents such as notes or memoranda, oral evidence such as testimonies or taped conversations, or even circumstantial evidence; it is up to the courts to decide whether the proof is acceptable.

4.29.2 ***Electronically transmitted confirmation***

The electronic transmission of the Confirmation of an individual Transaction (such as using the EFET eCM System) would be acceptable under the laws of this jurisdiction. As set out in the previous paragraphs, there are no specific rules with regard to evidence that an agreement exists.

4.29.3 ***Is there a signature requirement?***

There is no specific requirement that a signature is required to enter into a valid agreement; oral and written agreements are equally valid. However, to prove that both parties have agreed to enter into the relevant agreement, a signature showing such agreement is helpful.

4.29.4 ***Timing***

As mentioned in paragraph 4.29.1 above, an agreement is deemed to be concluded when a legally binding offer has been unconditionally accepted by the offeree. Therefore, an individual Transaction will be deemed to be entered into on the moment such acceptance takes place. If the individual Transaction is entered into orally and later confirmed in writing, the individual Transaction has been agreed at the moment of the oral acceptance.

4.29.5 ***Incorrect terms in a Confirmation***

If a Confirmation includes incorrect terms, which are not in compliance with the agreement made between the Parties on the relevant individual Transaction, the Party that does not agree with such terms should notify the other Party without delay. If a Party does not object at all against such incorrect terms or only at a much later stage, it will become difficult in practice to prove that there is no mutual agreement on the conditions of the relevant transaction.

4.29.6 ***Use of telephone recordings***

In The Netherlands, the processing of personal data, such as recording telephone conversations, is governed by the DPA, which implemented the EU Data Protection Directive (95/46/EC). The term "personal data" covers all data relating to identified or identifiable natural persons ("data subjects"). This term therefore also covers data relating to contact persons within legal entities, however it does not include any legal entities themselves. In respect to these data subjects the following analysis applies.

Irrespective of the chosen governing law of the relevant agreement, the DPA applies if:

(a) the processing takes place by an establishment of the data controller (i.e. the entity determining the means and purposes of the processing) which is located in The Netherlands; or

(b) the processing by a data controller located outside the EEA if use is made of automated or non-automated means situated in The Netherlands, unless these means are used only for transit purposes.

If the processing is carried out by an establishment of the data controller in another country within the EEA, the data protection laws of that EEA country will apply rather than the DPA.

Under the DPA, the recording of telephone conversations for evidential purposes is generally allowed. There should be a legitimate basis justifying the processing. This basis can for example consist of (i) consent from the data subject but also (ii) the legitimate business interests of the data controller, unless the (privacy) interests of the data subject should be deemed to prevail over such business interests. With respect to the proposed recording, processing basis (ii) can in our view be relied on. Consequently, there is no requirement to obtain consent from the data subject. In fact, it is advisable not to obtain consents, as consents can be withheld or withdrawn at any time, after which recording would no longer be allowed.

Notwithstanding the above, the DPA provides that data subjects in principle have the right to be informed of at least (i) who will process their data and (ii) for which purposes the processing will take place. This information could be given by providing a privacy policy to each data subject setting out this information. Furthermore, the Dutch Data Protection Commission (*College bescherming persoonsgegevens*) has suggested in informal guidance on its website that in respect of telephone conversations this can be achieved by including a beep at the beginning of the recordings.

4.29.7 ***Electronic exchange of data to enter into individual Transactions***

We understand that automated computer systems have been established to compare key commercial terms of an individual transaction to be entered into under the Agreements, the Principal Agreements and the Netted Agreements, such as price, quantity, delivery point and schedule, in a process known as electronic confirmation matching. This process enables both Parties to input the key terms of an individual Transaction and quickly determine whether or not there is a discrepancy between them.

As set out in paragraph 4.29.1 above, there are no specific rules with regard to evidence to be provided on the terms and the entry into of an individual Transaction. Evidence can be provided in various forms. If the Parties agree to the procedure of entering into of an individual Transaction by the electronic exchange of data, there is no rule of law in this jurisdiction that prohibits this.

4.30 **Confirmation Practices**

4.30.1 The Parties enter into an individual Transaction orally, such as over the telephone, or otherwise (e.g., through a electronic trading or matching system), and make reference to it being an individual Transaction for the purpose of the relevant Principal Agreement or Netted Agreement between the Parties.

If in the relevant Principal Agreement or Netted Agreement it is agreed that the provisions of such agreement constitute an integral part of each individual Transaction and if the Parties designate an individual transaction as being an individual Transaction within the meaning of the relevant Principal Agreement or Netted Agreement, such individual Transaction will be subject to the terms thereof.

4.30.2 The Parties orally enter into an individual Transaction without any reference to the relevant Principal Agreement or Netted Agreement between them, but subsequently confirm the individual Transaction in writing, via telex, facsimile, SWIFT, or other means of electronic transmission by using one of the sample Confirmations attached to the relevant Principal Agreement or Netted Agreement or by otherwise referring to the individual Transaction as a individual Transaction for the purposes of the relevant Principal Agreement or Netted Agreement between the Parties.

As at the moment of orally entering into the individual Transaction no reference in relation to that individual Transaction is made to the terms of the relevant Principal Agreement or Netted Agreement, and therefore the individual Transaction is in principle not subject to the terms of the relevant Principal Agreement or Netted Agreement. Once the Confirmation with reference to the applicability of the relevant Principal Agreement or Netted Agreement is accepted by the other Party, the individual Transaction will become subject to the relevant Principal Agreement or Netted Agreement. It is noted, however, that if it has become common practice for the Parties to enter orally into transactions without reference to the relevant Principal Agreement or Netted Agreement and subsequently send a Confirmation designating such transactions as Individual Transactions subject to the relevant Principal Agreement or Netted Agreement, it may be argued that the relevant transaction is already subject to the terms of the relevant Principal Agreement or Netted Agreement from the moment it was orally entered into, as this follows from the intentions of the Parties, based on their common practice.

(G) CORE PROVISIONS

This Part (G) is based on the same additional assumptions as Parts (A) and (B) and discusses whether any of the elections contemplated by the Master Agreements or the Credit Support Annexes change the substance of our conclusions reached under Part (A). I or Part (B) . As far as the Credit Support Annexes are concerned, we will discuss the effect of electing to allow substitution with or without consent.

4.31 Elections contemplated by the Agreements

4.31.1 *Elections contemplated by the Agreements*

In paragraph 1.2 above we have indicated which elections in the Model CPMA we have based our opinion on. The standard elections contemplated in the Election Sheet pertaining to the Schedule (the "**Election Sheet**") will not change the substance of our opinions with respect to Enforceability of Close-out Netting (under Part (A) above). For the avoidance of doubt, any additional provisions that are inserted in Part II of the Election Sheet can, however, change the substance of those opinions and are therefore outside the scope of this opinion. Please also refer to paragraph 4.32.2, in which amendments to the core provisions are addressed. As to the "Automatic Termination" election, please refer to paragraph 4.13 above. For the rest, the elections contemplated by the Agreements are not of such a nature as to modify our conclusions reached under Parts (A) or (B) above.

4.31.2 *Credit Support Annexes*

The standard specifications contemplated in § 14 of the CPCSA or § 15 of the 2011 CSA (except for election 14 (*Additional provisions*) which falls outside the scope of this Opinion) will not change the substance of our opinions with respect to Enforceability of Close-out Netting (under Part (A) above).

You requested us to elaborate specifically on the effects of electing to allow substitution with or without consent. In this respect, we note that any obligation on the Dutch Party to accept substitution of Eligible Credit Support or Eligible Collateral by the other Party under the relevant Credit Support Annex should follow from the contractual obligations in such document in order to minimize the risk of voidable preference outlined in paragraph 4.23.7 above. Hence, we advise to insert an additional provision to this effect in § 14 of the CPCSA and § 15 of the 2011 CSA which provides that, contrary to what is stated in § 6, the substitution or exchange of Eligible Credit Support and/or Eligible Collateral is not subject to the Transferee's approval. Please refer also to paragraph 4.23 above.

Please note that where under the applicable Governing Law the exchange would be regarded as the creation of new security interests, this could have an impact on general bankruptcy issues, in particular the voidness of post-Insolvency dispositions by the Counterparty and the voidability of preferential transactions.

4.32 **Core Provisions**

4.32.1 ***Core provisions***

The following Clauses are considered to be "Core Provisions", meaning that such core provisions may not be amended without affecting the conclusions reached in section (A) (*Enforceability of Close-Out Netting*) of this legal opinion:

(a) Section 1 of the CPMA;

(b) §§3 to 8 of the EFET MNA, and Sections 2 to 4 of the CPMA,

including any definitions used in these Core Provisions. Please note that this does not imply that any other amendment would not affect our opinion as set out herein. Any amendment to the Agreements should be carefully considered and appropriate legal advice should be taken to assess the consequences of such impact.

(H) GOVERNING LAW, ARBITRATION AND JURISDICTION

In this Section (H) we discuss the issue whether – assuming the Agreements and the Principal and Netted Agreements are subject to a Governing Law - the Parties' agreement on the governing law, submission to arbitration or jurisdiction (Section 12 of the EFET MNA and Section 6 of the Model CPMA) would be upheld in The Netherlands.

4.33 **Choice of law**

This paragraph considers whether there are any applicable limitations on the courts in this jurisdiction with regard to upholding a choice of a Governing Law and submission to the jurisdiction of local courts.

As regards the contractual obligations arising under or pursuant to the Master Agreements, the choice of law provision of Section 6 of the Model CPMA and Section 12 of the EFET MNA will be recognised in this jurisdiction and the Governing Law would accordingly be applied by the Dutch courts if the Agreement or any claim thereunder comes under their jurisdiction upon proper proof of the substantive rules of the Governing Law.

When applying the Governing Law as the laws governing the Master Agreement, the competent courts of the Netherlands may or shall act as follows as a result of Rome I:

(i) they may give effect to the overriding mandatory provisions (i.e. provisions the respect for which is regarded as crucial for a country for safeguarding its public interests, such as its political, social or economic organisation), to such an extent that they are applicable to any situation falling within their scope, irrespective of the Governing Law, of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful (article 9(3) Rome I)[24];

(ii) they will apply the overriding mandatory provisions of the law of The Netherlands (article 9(2) Rome I)[25];

(iii) they may refuse to apply the Governing Law if such application is manifestly incompatible with the public policy of the Netherlands (article 21 Rome I)[26]; and

(iv) they shall regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (article 12 (2) Rome I).

4.34 **Submission to Jurisdiction**

4.34.1 The submission by the Parties under any of the Agreements to the exclusive jurisdiction of (i) the English courts in case the laws of England apply to the relevant Agreement or (ii) the courts of Frankfurt/Main in case the laws of Germany apply to the relevant Agreement, or (iii) of the London Court of International Arbitration, the German Institute of Arbitration or any other arbitration institute or court, as the case may be with regard to the Agreements, the Principal Agreements or the Netted Agreements, each with regard to any

[24]Where the dispute is solely over the contractual aspects of a transaction of a commercial or financial nature, Dutch courts have so far refused to give such overriding effect to certain mandatory rules, even in cases where there seemed to be every opportunity to do so. For this reason we consider the risk of mandatory rules of foreign jurisdictions be applied by Dutch courts to be remote.

[25]The prevailing attitude in Dutch case law is that only Dutch rules which are of a "public law nature" (e.g. exchange control regulations, banking regulations, competition rules) are mandatory rules which are capable of overriding the chosen law.

[26] From case law it appears that the test for manifest incompatibility with public policy will only be met in extraordinary circumstances, such as where the application of foreign law would violate fundamental principles of Dutch law or contravene international law.

proceedings arising out of or in relation to the relevant Agreement(s) is legal, valid and binding upon such Parties.

4.34.2 A Dutch court would declare itself not competent (*onbevoegd*) in the event that a Party to the relevant Agreement containing such an exclusive choice of forum clause or choice of arbitration clause attempted to sue the other Party before the courts of The Netherlands. As to arbitration, The Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and arbitration clauses are upheld, and arbitral awards are enforced, in accordance with that Convention.

4.34.3 Notwithstanding the submission to the exclusive jurisdiction of the courts referred to in paragraph 4.34.1., however, a Netherlands court would assume jurisdiction:

(i) if the defendant enters an appearance and does not contest the jurisdiction prior to defences relating to the merits and, in the event that Section 1 of Title 1 of Book 1 Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) applies, there is a reasonable ground for jurisdiction of such Netherlands court;

(ii) pursuant to Article 254 Netherlands Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) in urgent matters, when, in view of the interests of the parties, provisional measures are required;

(iii) in the context of an attachment against a Party or any of its assets located in the Netherlands.

(I) OTHER PROVISIONS

Here we discuss whether we have other recommendations that we would like EFET member companies to consider (for example to fully optimize the Agreements for a specific purpose such as to support limited trading between two entities both organized and doing business solely in this jurisdiction).

Please refer to paragraphs 4.28 and 4.31.2 above. Otherwise, we have no other recommendations we would like EFET member companies to consider within the context of the matters dealt with in this opinion.

5. QUALIFICATIONS

The opinion expressed below is subject to the following observations:

(a) by *"duly authorised, executed and delivered"* we mean that there must be nothing specific to the Agreements, to any payments made by or to either of the Parties (such as, without limitation, lack of capacity, lack of authorisation, lack of corporate benefit, failure to comply with any applicable regulatory requirements, illegality under any law applicable to either of the Parties, or voidable preference or transaction at an undervalue) which could render the Agreements invalid or unenforceable or which could result in that Agreements or payment being set aside or otherwise declared null, void or voidable whether or not on the insolvency of either of the Parties;

(b) the terms *"enforceable"*, *"enforceability"*, *"valid"*, *"binding"* and *"effective"*, where used in this opinion, mean that the obligations assumed by the Parties under, and the relevant provisions of, the Agreements are of a type which Netherlands law generally enforces or recognises; it being understood that enforcement before the courts of the Netherlands will in any event be subject to the degree to which the relevant obligations are enforceable under their governing law (if other than the laws of this jurisdiction), the nature of the remedies available in such courts (the power to order specific performance or to grant injunctive relief being at the court's discretion), the acceptance by such courts of jurisdiction, the effect of provisions imposing prescription or limitation periods (within which suits, actions or proceedings must be brought), the availability of defences such as fraud, duress, misrepresentation, undue influence, error, set-off (unless validly waived), abatement (i.e. the discretion to decrease the amount of agreed damages, indemnities or penalties) and counter-claim and to the effect on sanctions legislation;

(c) any enforcement of the Agreements and of any foreign judgments in The Netherlands will be subject to the rules of civil procedure as applied by the courts of The Netherlands; such courts have powers to mitigate the amount of damages, indemnities or penalties provided for in the Agreement (including any agreed costs payable in respect of litigation or collection), to the extent it regards them as manifestly excessive and, if so requested, to make an award in a foreign currency; such courts may also refuse to give effect to any provision in an agreement which would involve the enforcement of foreign revenue or penal laws; enforcement of a judgment for a sum of money expressed in foreign currency against the Dutch Counterparty's assets located in The Netherlands would be executed, however, in terms of Euro and the applicable rate of exchange would be that prevailing on the date of payment; service of process for any proceedings before the courts of The Netherlands must be performed in accordance with Dutch laws of civil procedure; the taking of concurrent proceedings in more than one jurisdiction in which the Brussels I Regulation is applicable may - notwithstanding the terms of the Agreements - be precluded by one of the provisions of Section 9 (*Related Actions*) of that Regulation and the Dutch courts may be obliged to decline jurisdiction as a result thereof; as regards jurisdiction generally, the courts of The Netherlands have powers to stay proceedings if concurrent proceedings are brought elsewhere; finally, the ability of any party to assume control over another party's proceedings before the courts of The Netherlands may be limited by Dutch rules of civil procedure;

(d) where any Party is vested with a discretion or may determine a matter, Netherlands law may require that such a discretion is exercised or such determination is made reasonably. Any provision in the Agreements providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto. A Netherlands court may regard any calculation, termination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified.

(e) where both Parties to the relevant Agreement are incorporated in this jurisdiction the following should be noted. The rules of Rome I apply to "contractual obligations in any situation involving a choice between the laws of different countries" (Article 1(1) of Rome I), *i.e.* to contractual obligations which have an 'international character'. Article 3(3) of the Rome Convention provides that in situations where except for a choice-of-law and/or a jurisdiction or arbitration clause "*all the other elements relevant to the situation at the time of the choice are connected with one country only*", a choice-of-law cannot prejudice the mandatory rules of the law of that country. In our view, the question whether or not a contract has an international character cannot always be answered exclusively on the basis of the factual (geographical) connecting factors which the contract has with one or more countries. In particular, contracts that concern a certain sector of international economic activity (so-called "international market" contracts) may have to be qualified as truly international contracts, so as to enable the parties to designate themselves the law governing their contract. This may also be the case where the choice of a certain foreign law (i.e. English law or German law) is, to a significant extent, international market practice or where the contract is embedded in a larger transaction. This view is in accordance with the authoritative conclusion by *Advocate-General Strikwerda* before HR 26 May 1989 NJ 1992, 105 NILR 1991, 408 (Zerstegen-Van der Horst B.V. v. Norfolk Line B.V.) and in accordance with the prevailing view in legal writing (*Vonken* 2002 (T&C Vermogensrecht), p. 1720). We believe that it is likely that a Netherlands court would for this reason qualify the Agreements as "international market contracts" and can also be regarded as being international because the choice of English or German law which is, to a significant extent, international market practice, even in the event that two Dutch parties would enter into such Agreements in which they make a choice for English or German law, but in the absence of case law this is not certain.

(f) if the DNB finds that a Dutch finance company as referred to in paragraph 4.1.5(c) and 4.9.4 does not comply with the FMSA or if it finds that Dutch Credit Institution or a Dutch Insurance Company does not comply with the solvency, liquidity and administrative directives ("*richtlijnen*") issued by it pursuant to the FMSA, or if there are other indications of a development which in the judgment of the DNB endangers or could endanger the solvency or liquidity of such a Dutch Credit Institution or a Dutch Insurance Company, then the DNB can determine, pursuant to the FMSA, that as of a certain moment in time, all or certain bodies of the Dutch finance company, Dutch Credit Institution or a Dutch Insurance Company can only exercise their powers with the approval of one or more persons (known as silent administrators, "*stille curatoren*") designated by the DNB. Pursuant to the FMSA, the Dutch finance company, Dutch Credit Institution or the Dutch Insurance Company can challenge the validity of any act performed without such approval, if the counterparty to that act *knew that no such approval was given, or could not have been ignorant thereof.* The designation as referred to and accordingly the necessity of the approval referred to is not necessarily published. It is likely that without a publication or without it being otherwise obvious to the counterparty that the person or persons was/were designated as referred to, the relevant counterparty will not know, nor ought to have known, that the approval referred to was required.

(g) With reference to opinion paragraph 4.34, it should be noted that with respect to disputes regarding verification of claims against a Party that is subject to Insolvency Proceedings in this jurisdiction, the court of The Netherlands which has declared the Insolvency Proceedings has exclusive jurisdiction.

(h) If the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the courts of this jurisdiction may recognise the extinction of those claims or liabilities

Reliance

This opinion:

(a) expresses and describes Netherlands legal concepts in English and not in their original Netherlands terms; consequently, this opinion is issued and may only be relied upon on the express condition that it shall be governed by and that all words and expressions used herein shall be construed and interpreted in accordance with the laws of the Netherlands;

(b) is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions, is for their sole benefit and may not be relied upon by, or disclosed to, any other person, entity or corporation whatsoever without EFET's and our joint prior written approval, save for disclosure by EFET members to (but not reliance by) the appropriate regulatory authorities.

Yours faithfully,

F.G.B. Graaf
(advocaat)
Clifford Chance LLP

ANNEX A
MASTER AGREEMENTS COVERED BY THE EFET MASTER NETTING AGREEMENT OR THE TBMA CROSS PRODUCT MASTER AGREEMENT

Energy Trading Master Agreements

- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2000), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2003), sponsored by the European Federation of Energy Traders (EFET)
- UK Grid Trade Master Agreement (version June 2004), sponsored by the Futures and Options Association (FOA)
- NBP Amendment Agreement for natural gas settled through the National Balancing Point (NBP) based on the Short Term Flat NBP Trading Terms and Conditions 1997
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2004
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2001
- International Emissions Trading Master Agreement (version 2010/2011), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2008), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2005), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2002), sponsored by the International Emissions Trading Association (IETA)
- US Master Power Purchase & Sale Agreement (version 2000), sponsored by the Edison Electric Institute

- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2002), sponsored by the North American Energy Standards Board, Inc (NAESB)
- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2006), sponsored by the North American Energy Standards Board, Inc (NAESB)
- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2005), sponsored by GasEDI
- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2000), sponsored by GasEDI

Derivatives Master Agreements

- Financial Energy Master Agreement (version 2000), sponsored by the Nordic Association of Energy Traders (NAET)
- ISDA 2002 Master Agreement, sponsored by the International Swaps and Derivatives Association, Inc.
- 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the International Swaps and Derivatives Association, Inc.
- 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), sponsored by the International Swaps and Derivatives Association, Inc.
- 1987 Interest Rate and Currency Exchange Agreement, sponsored by the International Swaps and Derivatives Association, Inc.
- Australian version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border)
- German Rahmenvertrag für Finanztermingeschäfte (version 2001), sponsored by the German Banker's Association
- German Rahmenvertrag für Finanztermingeschäfte (version 1994), sponsored by the German Banker's Association
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 1994), sponsored by the Schweizerische Bankiervereinigung

- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version July 2007), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre AFB Relative Aux Operations Sur Instruments Financiers à Terme (version), sponsored by the Association Française des Banques (AFB)
- Spanish Contrato Marco De Operaciones Financieras (versión 1997), sponsored by the Asociación Española de Banca Privada (AEB)
- Dutch Raamovereenkomst voor Financiële Derivaten (RFD), sponsored by the Nederlandse Vereniging van Banken (NVB)
- Japanese Bond Option Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Mexican Contrato Marco para Operaciones Financieras Derividas
- Mexican Contrato Normativo para la realización de las operaciones de Intercambio
- Mexican Master Agreement for Entering into Dollar against Mexican Peso Forward Transactions
- US Master Securities Forward Agreement (version 1996), sponsored by The Bond Market Association (TBMA)
- US Master OTC Options Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US OTC Option Transactions – U.S. Treasury Securities Master Dealer Agreement (version August 1989), sponsored by the Public Securities Association (PSA)
- UK International Currency Options Market Agreement (ICOM) sponsored by the British Bankers' Association (BBA)
- UK Foreign Exchange and Options Master Agreement (FEOMA), sponsored by the British Bankers' Association (BBA)
- UK International Foreign Exchange Master Agreement (IFEMA), sponsored by the British Bankers' Association (BBA)

- The 1994 International Bullion Master Agreement (IBMA) (version June 1994), sponsored by the London Bullion Market Association and the Foreign Exchange Committee
- European Master Agreement for Financial Transactions (EMA) (edition January 2004), sponsored by the Banking Federation of the European Union (FBE)
- European Master Agreement for Financial Transactions (EMA) (edition January 2001), sponsored by the Banking Federation of the European Union (FBE)

Securities Lending Master Agreements

- Global Master Securities Lending Agreement (GMSLA) (version 2010), sponsored by the International Securities Lending Association (ISLA)
- Global Master Securities Lending Agreement (GMSLA) (version 2000), sponsored by the International Securities Lending Association (ISLA)
- Master Equity & Fixed Interest Stock Lending Agreement (MEFISLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Master Gilt Edged Stock Lending Agreement (GESLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version 1995), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version October 1994), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version February 1994), sponsored by the International Securities Lending Association (ISLA)
- US Master Securities Loan Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US Master Securities Loan Agreement (version May 1993), sponsored by the Public Securities Association (PSA)
- Canadian Securities Loan Agreement, sponsored by the Investment Dealers Association of Canada (IDAC)
- German Rahmenvertrag für Wertpapierleihgeschäfte
- German Rahmenvertrag für Wertpapierdarlehen (version 1999)
- French Contract Cadre de Prêts des Titres (version 2007), sponsored by the Association Francaise des Professionnels des Titres (AFTI)

- French Contract Cadre de Prêts des Titres (version), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- Australian Master Securities Lending Agreement (version November 2003), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version December 2002), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version April 1997), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- New Zealand Master Repurchase Securities Lending Agreement
- Japanese Basis Agreement Concerning Stock Lending Transactions, sponsored by the Japan Securities Dealers Association (JSDA)

Repurchase Master Agreements

- Global Master Repurchase Agreement (GMRA) (version October 2000), sponsored by The Bond Market Association (TBMA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA) (version November 1992)
- US Master Repurchase Agreement (MRA) (version September 1996), sponsored by The Bond Market Association (TBMA)
- US Master Repurchase Agreement (MRA) (version 1987)
- Canadian Repurchase/Reverse Repurchase Transaction Agreement
- Australian version of the Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of Global Master Repurchase Agreement (GMRA) (version 1995)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2005)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2002)

- German Rahmenvertrag für echte Pensionsgeschäfte (version 1997)
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2007), sponsored by the Fédération bancaire française (FBF) [FBF07 REPO]
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2003), sponsored by the Fédération bancaire française (FBF)
- French Convention-cadre Relative Aux Opérations de Pensions Livriée, sponsored by the Association du Forex et des Trésoriers de Banque (AFTB
- Japanese Bond Lending Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Japanese Basic Agreement Concerning Gensaki Transactions of Bonds, Japan Securities Dealers Association (JSDA)

ANNEX B
TRANSACTIONS UNDER NETTED AGREEMENTS OR PRINCIPAL AGREEMENTS

1. Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

2. Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

3. Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

4. Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

5. Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be cash settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

6. For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, (or in the case of reference prices not expressed in Ounces, the relevant Units of silver, platinum or palladium).

7. Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

8. Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

9. Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate or floating commodity price payer on the cap and the other party is the floating rate or floating commodity price payer on the floor.

10. Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

11. Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

12. Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts

of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

13. Contingent Credit Default Swap. A Credit Default Swap Transaction in which the credit protection seller pays an amount determined by reference to the value of a hypothetical swap transaction.

14. Credit Default Swap Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to enter into a Credit Default Swap.

15. Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) or Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

16. Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

17. Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

18. Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and/or final exchanges of amounts corresponding to the notional amounts.

19. Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

20. Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

21. Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

22. Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

23. Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a

price for the same quantity of shares of an issuer to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

24. Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in case of a call) or is less than (in case of a put) a specified strike price.

25. Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) shares of an issuer or a basket of shares of several issuers at a specified strike price. The option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

26. Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

27. Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in case of a commodity floor).

28. Foreign Exchange Transaction. A transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

29. Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

30. Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

31. Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

32. Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

33. Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

34. Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional and national area.

35. Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

36. Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower´s obligation to replace the securities at a defined date with identical securities.

37. Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against

the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

38. Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

39. Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

40. A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

41. Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

ANNEX C

Termination and Close-Out Rights un respect of Certain Counterparties

1.1.1 *Partnerships*

(a) *Overview of partnership concept*

In this jurisdiction a general partnership *(vennootschap onder firma)* is a partnership created for engaging in a business under a common name. Unless the partnership agreement provides otherwise, each partner (a "**General Partner**") has authority to act on behalf of the general partnership. This authority includes the right to require the performance of all contracts entered into for and on behalf of the general partnership by any General Partner. General Partners are jointly and severally liable for all the obligations of the general partnership towards third parties.

A limited partnership *(commanditaire vennootschap)* is a partnership created for engaging in business and in which one or more of the partners agree to manage the business (the "**Managing Partners**") while one or more other partners agree to abstain from involvement in the management and to contribute money or property on the condition that the liability for the partnership's losses is limited to the value of their contribution (the "**Limited Partners**"). Managing Partners are jointly and severally liable for all the obligations of the Limited Partnership towards third parties.

General partnerships and limited partnerships are not separate legal entities under Netherlands law but may be subject to Insolvency Proceedings.

(b) *Partnerships and Insolvency / Set-Off*

The same analysis as set out above in paragraph 4.3.3 applies *mutatis mutandis* to Partnerships, subject to the following observations.

The Insolvency of a General Partner, Managing Partner or Limited Partner will not automatically result in the Insolvency of the Partnership itself. The Insolvency of such a partner will in principle result in the dissolution (*ontbinding*) of the relevant Partnership. However, partnership agreements often contain a continuation arrangement (*voortzettingsregeling*) to avoid automatic dissolution of the Partnership as a whole in the Insolvency of one of the partners. If this is the case, the enforceability of the Termination Clause and the Netting Clause vis-à-vis the relevant Partnership will in principle remain unaffected in the event of Insolvency of a partner.

However, as set out in paragraph [ ], a Dutch court may test whether mandatory Insolvency set-off provisions are compatible with the Netting Clause. One of the requirements of Dutch Insolvency set-off under articles 53/234 BA is the requirement of "mutuality". Insolvency set-off will be allowed if the partner that is a Party to the relevant Master Agreement will also remain a Party thereto after its Insolvency or the Insolvency of one or more of the other partners to the relevant Partnership. Set-off will, however, not be possible where new partners are admitted to the Partnership or existing partners withdraw from that Partnership to the extent that this would result in such partners becoming also a Party to the relevant Master Agreement. Claims arising under individual Transactions entered into before the appointment of a new partner can thus not be set-off with claims accruing under Individual Transactions entered into after such appointment. Leaving partners will continue to be liable for the Partnership debts existing at the time of their withdrawal from the Partnership but will not be liable for claims incurred after their departure.

In exceptional circumstances, the changing of partners could lead to the dissolution of the original Partnership and the creation of a new Partnership. It is generally held in legal writing that this will only be the case where the original partners have unequivocally stated their intention to this effect, in particular by publication of the dissolution in the commercial register of the chamber of commerce with which the Partnership is registered. If dissolution of the Partnership takes place, no Insolvency set-off will be allowed of claims arising under Individual Transactions entered into by the original Partnership and claims arising under Individual Transactions entered into by the new Partnership, as the required mutuality will be lacking.

It should be noted that the Partnership's assets will continue to be available for recourse for the partnership's creditors, also when the new partner has acquired an interest in the partnership fund and is not externally liable for all Partnership debts.

With regard to a limited partnership (*commanditaire vennootschap*) it is noted that any change with regard to a Limited Partner should not affect the analysis on enforceability of the Netting Clause. Such Limited Partner is generally not a contracting party to any agreement and also not liable vis-à-vis the creditors of the limited partnership.

1.1.2 *Credit Institutions and Insurance Companies*

As Regulated Entities, special Dutch Insolvency provisions apply to credit institutions and insurance companies. Please refer to paragraphs 4.1.5 and 4.1.6.

1.1.3 *Investment Firms*

No special Dutch Insolvency provisions apply to Dutch investment service providers or Dutch investment firms. However, although the EU Insolvency Regulation does not apply to investment undertakings holding funds or securities for third parties or collective investment undertakings, the possibility exists that its set-off rules as explained above, will nevertheless be applied to a Dutch court to such institutions.

1.1.4 *Investment Funds*

No special Dutch Insolvency provisions apply to Dutch investment fund management companies. However, although the EU Insolvency Regulation does not apply to investment undertakings holding funds or securities for third parties or collective investment undertakings, the possibility exists that its set-off rules as explained above, will nevertheless be applied to a Dutch court to such institutions.

1.1.5 *Municipalities*

(a) *Restrictions to municipalities entering into Individual Transactions*

With regard to municipalities and other non-central governmental authorities we note that such governmental authorities can only act as a Counterparty if the individual Transactions (i) are of a "prudent" nature (*i.e.* for hedging purposes and never for speculative purposes) and (ii) will not result in excessive risks. The Counterparties should *inter alia* qualify as EU licensed financial institutions with certain financial ratings (at least AA-minus rating and from a country with at least an AA rating), in the absence of which approval of the relevant authority is required.

(b) *Municipalities and Insolvency*

Article 2:1 in combination with Article 2:5 CC provides that a municipality possesses legal personality and that, therefore, they are equivalent to a natural person as regards the law of property, rights and interests. This means that in principle one has a right of recourse for claims against municipalities. Municipalities do not enjoy any right of immunity from legal proceedings. To the extent that any assets owned by the municipalities have a public utility function, seizure of these assets is prohibited by virtue of Articles 436 and 703 of the Dutch Code of Civil Procedure.

Dutch Insolvency law does not explicitly rule out the possibility that a municipality can be declared Insolvent, in which case the Insolvency Procedures as set out in paragraph 4.3 would apply to the municipality. However, as a result of the Financial-Ratio Act (*Financiële-verhoudingswet*), the risk of a municipality becoming subject to Insolvency Proceedings is only theoretical.

Article 12 of the Financial-Ratio Act entitles a municipality with a "material and structural deficit" in its financial means, causing the municipality not to be able to fulfil its necessary requirements (*noodzakelijke behoeften*), to apply for financial support by the Dutch State.

Such financial support may be granted if the income the municipality generates itself out of taxes, retributions, levies etc is at a "reasonable level".

Decrees based on the Financial-Ratio Act contain objective criteria to assess whether a "material and structural deficit" exists and whether the income the municipality generates itself is at a "reasonable level".

In practice State support is always granted to municipalities meeting these requirements. When State support is granted the municipality is placed under increased supervision to improve its financial position.

As Article 12 of the Financial-Ratio Act provides a municipality the ability to apply for additional funding from the Dutch central government if it runs into financial difficulties to prevent it from becoming Insolvent, Article 12 provides additional comfort that the municipality will be reinstated in a position, in which it will be able to repay its debts.

1.1.6 *Associations of Local Government*

No special Dutch Insolvency provisions apply to associations of local government (*gemeenschappelijke regelingen*).

1.1.7 ***Publicly-owned Corporations***

No special Dutch Insolvency provisions apply to Dutch publicly-owned corporations (other than those that are credit institutions or insurers).

1.1.8 ***Quasi Governmental Entities***

No special Dutch Insolvency provisions apply to Dutch quasi-governmental entities.