Legal Opinion

for

EFET

European Federation of Energy Traders

regarding

The Enforceability
of the
EFET Master Netting Agreement (Version 1.0/June, 2010)

and

the Cross Product Master Agreement (Version 1), published by The Bond Market Association ("TBMA") in February 2000
under
Austrian Law

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This legal opinion (the "**Opinion**") refers to specific questions raised in respect to:

(i) the enforceability of close-out netting provisions of the EFET Master Netting Agreement (Version 1.0, published June 2010) (the "**MNA**"); and the Cross Product Master Agreement (Version 1), published by The Bond Market Association ("TBMA") in February 2000 (the "**CPMA**");
(ii) the validity and enforceability of collateral provided under the EFET Cross Product Credit Support Annex to the CPMA (Version 1.0, published 23 June 2003) (the "**CPCSA**"); and the EFET Credit Support Annex to the MNA (Version 1.0, published February 2011);
(iii) the general validity and enforceability of the MNA and the CPMA (the "General Enforceability");
(iv) in general terms and conditions that have to be met for transactions to fall within the scope of the netting provisions of the relevant MNA and the CPMA and for Confirmations or other non-written documentation to be eligible for evidencing a valid transaction (the "Confirmation Practices");
(v) the validity and enforceability of the MNA and the CPMA and how this may be affected when certain "core" provisions are modified by the parties (the "Core Provisions");
(vi) the enforceability of elections made with respect to governing law, arbitration and/or jurisdiction (the "Governing Law, Arbitration and Jurisdiction"); and
(vii) the existence of specific licensing requirements or currency exchange control laws that might impact transactions under the relevant MNA and CPMA (the "Regulatory Regime").

This legal opinion is strictly limited to the issues addressed herein and speaks only as of its date. We do not undertake to inform you of any changes which may hereafter come to our attention, unless expressly instructed to do so.

The competent courts of Austria shall have the exclusive jurisdiction over all disputes arising out of or in connection with the Opinion.

The Opinion is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET`s opinion service, is for their sole benefit and may not be relied upon or disclosed to, any other person, entity or corporation whatsoever without EFET´s prior written approval, but may be made available by EFET members to the appropriate regulatory authorities.

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I. INTRODUCTION

A. Instructions by EFET/Internal Organization

We have been instructed by EFET to review and express an opinion on the issues specified above whereby the following documentation was provided for our review:

(i) EFET Master Netting Agreement (Version 1.0, published June 2010);

(ii) Cross Product Master Agreement (Version 1), published by The Bond Market Association ("TBMA") in February 2000;

(iii) EFET/IECA Commodities Schedule to the Cross Product Master Agreement (Version 1.0. published 23 June 2003);

(iv) EFET Cross Product Credit Support Annex to the Cross Product Master Agreement (Version 1.0, published 23 June 2003);

(v) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0, published February 2011)

B. Limitations

This Opinion is based on and limited to such officially issued and duly published laws, decrees, decisions, regulations and executive orders issued by any Austrian governmental authority and such officially issued and duly published applicable laws of the European Union having direct effect vis-a-vis the parties to the MNA and the CPMA, as applied by Austrian courts as of the date of this Opinion, all of which are collectively referred to herein as "Austrian Law".

Our opinions expressed in this Opinion are limited to the above listed documents and are not to be construed to extend to any other document of a similar nature issued and endorsed by EFET. The scope of this Opinion is determined by EFET's instruction letter of 15 November 2010, a copy of which is attached hereto as Annex 2.

Given the fact that the MNA and the CPMA have been drafted in a way to enable the parties to be as flexible as possible and given that the MNA and the CPMA may widely be amended and specified by selecting from the optional provisions and otherwise inserting specifically negotiated changes in the Election Sheet, it is impossible to render an exhaustive and final legal opinion that would cover all possible elections and all possible constellations of elections made in the election sheet. This Opinion must, therefore, be strictly limited to the issues addressed herein which we have reviewed in accordance with your instructions and which we have deemed important and necessary to fit the purpose of this Opinion regarding the standard form of the MNA and the CPMA. This Opinion does not substitute the independent review of any individually negotiated EFET documentation.

Taking into account the above considerations particular attention has been drawn to any public policy provisions under Austrian Law - in particular insolvency related matters - which apply irrespective of the choice of law, while other Austrian Law issues have been limited to the extent we deemed appropriate and suitable for the purposes of this legal opinion.

C. General Assumptions

Further to the above limitations, any conclusions expressed in this Opinion are subject to the following assumptions:

(i) that the MNA and the CPMA are, as may be applicable, in accordance with an election made by the Parties thereto governed by Austrian Law;

(ii) that two counterparties enter into the MNA and the CPMA and at least one of the counterparties is incorporated or organized or has its centre of main interest in Austria ("Party A");

(iii) that Party A is (a) a corporation (e.g. a limited liability company, stock corporation), (b) a partnership (e.g. general or limited partnership), (c) a bank/credit institution, (d) an investment services provider/investment firm, (e) an insurance company, (f) an investment fund management company, (g) a municipality or county, (h) an association of local government, (i) a publicly owned corporation or quasi-governmental entity, or (j) a branch established in Austria of a corporation (including a bank, a securities trader, an insurance company or other financial institution) incorporated outside Austria, and not a natural person and not a consumer;

(iv) that the MNA and/or CPMA are enforceable under the laws of any relevant jurisdiction (other than Austrian Law) and each counterparty has duly authorized, executed and delivered and has the capacity to enter into, each document;

(v) the relevant MNA and/or or CPMA provides for the inclusion of some or all of the master agreements covered by the EFET Master Netting Agreement or the TBMA Cross Product Master Agreement, each such master agreement being a "Netted Agreement" or "Principal Agreement";

(vi) on the basis of the terms and conditions of the MNA, the CPMA and other relevant factors, and acting in a manner consistent with the intentions stated in the MNA and the CPMA, the counterparties over time enter into a number of transactions which include some or all of the transactions described in Annex 1 of this Opinion.

(vii) 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.

Additional assumptions regarding certain specific issues may be set out in the relevant section of this Opinion.

D. Exekutive Summary

This section provides an overview of the main conclusions of the Opinion based on the assumptions set out under Article C above and is for your convenience only.

This summary should be read, interpreted and understood only in conjunction with the detailed analysis in Part II of the Opinion.

As a matter of Austrian Law, the close-out netting provisions of the Model MNA would be, in principle and subject to the restrictions described in Section II. A, valid and binding prior to as well as subsequent to the opening of Insolvency Proceedings against an Austrian Party.

As a matter of Austrian Law, the termination of the Model MNA upon the occurrence of a Close-Out Event is, in principle and subject to the restrictions described in Section II. B, legal, valid and binding irrespective of whether Insolvency Proceedings have been opened. Whether automatic early termination is recommendable depends on the type of Insolvency Proceedings and the type of Transactions to be terminated as described in more detail in Section II. B below.

There would be no change in the conclusions reached under Sections II. A and B based upon the fact that Party A has conducted business under the MNA or the CPMA on a multibranch basis prior to its insolvency.

The Opinion further describes in Section II. D Austrian laws that govern the transfer of ownership, it is furthermore concluded, that the CPCSA is in an appropriate form to create the intended outright transfer of ownership in the collateral to a Party.

II. OPINIONS

A. Enforceability of Close-Out Netting

1. Brief general discussion of Austrian insolvency laws

1.1 Insolvency

1.1.1 Insolvency Reform 2010

On July 1, 2010, the new Austrian Insolvency Act has entered into force by means of the Insolvency Reform Act 2010 ("IRÄG 2010")[1]. The amendments initiated by the new Act apply to all insolvency proceedings that are newly opened or resumed after June 30, 2010.

The former Austrian Insolvency Law (prior to the IRÄG 2010) provided for two types of insolvency proceedings:

(i) bankruptcy proceedings (*Konkursverfahren*); and

(ii) judicial composition proceedings (*Ausgleichsverfahren*).

Bankruptcy proceedings were governed by the Bankruptcy Act[2] *("Bankruptcy Act", Konkursordnung, KO)* and judicial composition proceedings were subject to the Judicial Composition Act[3] *("Judicial Composition Act", Ausgleichsordnung, AO).*

Pursuant to the IRÄG 2010, the former Bankruptcy Act has been renamed Insolvency Act *("Insolvency Act", Insolvenzordnung, IO)*, while the former Judicial Composition Act has been repealed. However, certain regulations from the Judicial Composition Act have been incorporated in the Insolvency Act. The goal of the reform was to create a uniform set of insolvency proceedings and to promote the concept of rehabilitation through insolvency proceedings. As a unique term for both the former bankruptcy proceeding and the former judicial composition proceeding, the general term "insolvency proceeding" has been introduced by the IRÄG 2010.

The Insolvency Act distinguishes between recapitalization proceedings (*Sanierungsverfahren*) and bankruptcy proceedings (*Konkursverfahren*). If the debtor itself files the application for the opening of the proceeding and, at the same time, submits a finalized recapitalization plan (*Sanierungsplan*), the insolvency proceeding is opened as recapitalization proceeding. Provided that the debtor does not submit a finalized recapitalization plan along with the opening of the proceeding, the insolvency proceeding is then called bankruptcy proceeding. The term insolvency proceeding therefore serves as an umbrella term for the two types of proceedings. During the bankruptcy proceeding, the debtor is entitled to file an application for the finalization of a recapitalization plan[4].

Creditors with unsecured claims have to vote on the recapitalization plan; following their approval, the insolvency court (*Insolvenzgericht*) has to confirm this recapitalization plan. For a valid acceptation of the recapitalization plan by the creditors, the following majorities need to be reached:

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[1] Insolvenzrechtsänderungsgesetz 2010, Federal Law Gazette I No. 29/2010 renaming (inter alia) the Bankruptcy Act to Insolvency Act, and repealing the Judicial Composition Act, as amended by Federal Law Gazette I No. 111/2010 ("*Budgetbegleitgesetz*")

[2] Konkursordnung (KO), Imperial Law Gazette, RGBl number 337/1914, as amended by Federal Law Gazette I, No. 75/2009 (the Bankruptcy Act).

[3] Ausgleichsordnung (AO), Federal Law Gazette, No. 221/1934, as amended by Federal Law Gazette, BGBl I No. 75/2009 (the Judicial Composition Act).

[4] Formerly regulated in Sections 140 - 156 Bankruptcy Act as compulsory settlement (*Zwangsausgleich*).

Simple majority per capita of all creditors present at the vote; <u>and</u> simple majority per amount of all determined unsecured claims of all creditors[5] present at the vote.

1.1.2 The concept of "Insolvency"

A pre-condition for the opening of insolvency proceedings under Austrian Law is either

(i) insolvency (*Zahlungsunfähigkeit)*, i.e. the debtor is not able to meet its due and payable payment obligations in due time; or

(ii) over-indebtedness (*Überschuldung*)[6], i.e. the debtor's liabilities exceed the debtor's assets (whereby this insolvency criteria is, in essence, applicable only to limited liability partnerships and corporations).

1.1.3 Filings for opening of proceedings

Insolvency proceedings are initiated by filing of an application for the opening of such proceedings (*Insolvenzeröffnung*) with the competent insolvency court (*Insolvenzgericht*)[7]. An application for the opening of insolvency proceedings may be filed either by the debtor himself or by a creditor.

Any debtor in distress (in the case of a legal entity its managing directors/members of the management board) is under a statutory obligation to file an application for the opening of insolvency proceedings without undue delay, however not later than 60 days upon occurrence of insolvency. Failure to comply with this obligation exposes the obliged persons to personal liability for any resulting damages towards the creditors under civil law and may (if additional requirements are met) lead to criminal prosecution. The application does not need to be substantiated with respect to creditors and/or outstanding debts.

Any creditor is entitled (but not obliged) to apply for the opening of insolvency proceedings with respect to any of its debtors provided that the creditor is able to substantiate that the debtor is insolvent and that it has a claim against the debtor. While insolvency proceedings are opened without delay when the debtor itself files an application, a hearing with the debtor is usually conducted when a creditor files the application for the opening of insolvency proceedings.

Upon the filing of such application by the debtor or by a creditor the competent insolvency court will decide by court order on the opening of insolvency proceedings (*Insolvenzeröffnung*). An exception to the general obligation of the insolvency court to open the proceedings when the conditions for such opening are given applies in the event that the court determines that the assets of the insolvent debtor do not suffice to cover the costs of the proceedings or in the event that there are no assets at all.

Hence, there is a distinction in time between (i) the filing of the application for the opening of insolvency proceedings, (ii) the decision of the insolvency court to actually open insolvency proceedings, (*Insolvenzeröffnungsbeschluss*), and (iii) the decision of the insolvency court for terminating insolvency proceedings (*Insolvenzaufhebung*). The decision of the insolvency court to open insolvency proceedings is the decisive legal act upon which the debtor will be deemed to be formally insolvent.

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[5] The former ¾ majority has been replaced by a simple majority by the IRÄG 2010.

[6] For over-indebtedness within the meaning of the Insolvency Act the mere excess of the creditor's liabilities over its assets is not sufficient. In addition to the mere calculatory over-indebtedness a negative outlook for the debtor's business needs to be established. As long as one can reasonably rely on a positive development of the debtors business there is no over-indebtedness within the meaning of the Austrian insolvency laws. For various decisions in this respect see *Mohr*, KO[10] 2006, § 67 KO.

[7] In the former Bankruptcy Act and Judicial Composition Act the bankruptcy court and the judicial composition court had been the same authority, the difference was that they acted under a separate form of proceedings.

In the event of an obviously unsubstantiated or obviously abusive application for the opening of insolvency proceedings, the court has to reject the application immediately and without hearing (Section 70 Paragraph 2 Insolvency Act).

The opening of insolvency proceedings upon a filing by the debtor shall occur "immediately" (Section 69 Paragraph 1 Insolvency Act; "*sofort*") and upon a filing by a creditor "without delay", when the requirements for substantiated filing are met (Section 70 Paragraph 1 Insolvency Act "unverzüglich"). While none of these terms permits an exact specification of the time period for a decision by the insolvency court, such a decision has to be rendered during a few working days from the date of the filing.

Certain special rules apply in the case of corporations which are credit institutions. A credit institution may be subjected to a bank supervision proceeding (*Geschäftsaufsicht*), which qualifies as a reorganisation measure within the meaning of Article 2 of Directive 2001/24/EC[8]. These rules have not been changed by the IRÄG 2010. For a discussion of the peculiarities of such proceedings regarding credit institutions please see Section II.J of this Opinion.

1.2 Business reorganisation

The Insolvency Law Amendment Act 1997[9] introduced the Business Reorganisation Act (*Unternehmensreorganisationsgesetz*)[10].

Businesses that are only in temporary financial difficulties, but are still solvent at that time, should, according to the purpose of the Business Reorganisation Act, be entitled to carry out their activities after having undergone reorganisation proceedings. The Business Reorganisation Act applies to all business undertakings (*Unternehmen*) except credit institutions, pension funds, insurance undertakings and investment firms[11].

The entrepreneur in need of business reorganisation would be the only competent person to apply for the opening of business reorganisation proceedings, provided, however, it is still solvent at that time. Upon application to the insolvency court, which must include sufficient proof of the need for the business reorganisation and a reorganisation plan for the debtor's business (such reorganisation plan may also be filed within 60 days following the application for the institution of a business reorganisation proceedings), the court initiates the business reorganisation proceedings by appointing a temporary reorganisation auditor. The opening of business reorganisation proceedings will not be publicly announced or published.

Contractual termination rights giving a party the right to rescind a contract in the event that such proceedings are opened are null and void[12]. Consequently, a party's rights to terminate the MNA or the CPMA are not effective in case of the opening of business reorganisation proceedings by court decision. However, the mere filing of an application for the opening of business reorganisation proceedings, other related action taken by the

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[8] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganization and winding up of credit institutions (the "Bank Winding-Up Directive"), OJ EC L 125, 5.5.2001, p. 15–23.

[9] Insolvenzrechtsänderungsgesetz 1997 ("IRÄG 1997"), Federal Law Gazette I, No. 106/1997 (the "Insolvency Law Amendment Act").

[10] Unternehmensreorganisationsgesetz („URG"), Federal Law Gazette I, No. 114/1997, as most recently amended by Federal Law Gazette I, No. 120/2005.

[11] The German term used in the Business Reorganisation Act is "*Wertpapierunternehmen*" which covers, as confirmed by the legislative materials to the Business Reorganisation Act, the investment services provider under the SecuritiesSupervision Act 2007 (Bundesgesetz über die Beaufsichtigung von Wertpapierdienstleistungen; (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*) (the "Securities Supervision Act 2007"), Federal Law Gazette I, No 2007/60 as amended by Federal Law Gazette I; No. 2010/58.

[12] Section 19 Business Reorganisation Act stipulates (English translation): "*Contractual rights to terminate, automatic termination or provisions that a loan granted shall become due and payable in case business reorganisation proceedings are instituted are void.*"

debtor or financial difficulties prior to the formal institution of business reorganisation proceedings, which may constitute a Material Reason, remain unaffected by the said provision. In practice, very few business reorganisation proceedings have been initiated in Austria since the entry into force of the Business Reorganisations Act. Accordingly, this form of restructuring remains more of theoretical interest than of practical relevance.

Business reorganisation proceedings as such do not limit the legal ability of the business entering into such proceedings to validly enter into agreements and perform its obligations thereunder.

1.3 Application of Austrian insolvency laws

Austrian international insolvency law is governed by several bilateral insolvency treaties, the EC Insolvency Regulation[13] and the insolvency related provisions of the Federal Act on International Insolvency Law of 13 June 2003[14], all of them are being hereinafter collectively referred to as "Provisions on International Insolvency Law".

In principle, bankruptcy proceedings may be opened in Austria in respect of assets of a corporation located in the territory of Austria irrespective of the place where the debtor has its principle office or its registered seat.

Contrary to previous legal practice[15], the Insolvency Act (Section 237 Bankruptcy Act as amended by BGBl I 36/2003, effective as of July 1, 2003. remains unchanged as Section 237 Insolvency Act after the IRÄG 2010) provides for an extension of insolvency proceeding opened in Austria to assets located outside the territory of Austria unless the following cumulative conditions have been met: (a) the center of the main interest ("*Interessen*")[16] of the debtor is located within another country, (b) an insolvency proceeding has been opened in that country, and (c) such insolvency proceeding does extend to foreign property.

The EC Insolvency Regulation entered into force on May 31, 2002 and, pursuant to its Article 44, supersedes the bilateral treaties of Austria with Belgium, Germany, France and Italy regarding the recognition of insolvency proceedings. Its territorial scope encompasses the entire European Union with the exception of Denmark[17].

A prerequisite for the application of the EC Insolvency Regulation is that Insolvency Proceedings have a cross-border effect. Insolvency Proceedings without a cross-border effect are solely governed by Austrian substantive law excluding the EC Insolvency Regulation and the (other) Provisions on International Insolvency Law.

The EC Insolvency Regulation has been adopted in order to improve the efficiency and effectiveness of insolvency proceedings having cross-border effects by providing binding effect and direct application in Member States of the provisions, jurisdiction, recognition and applicable law in insolvency proceedings.

The EC Insolvency Regulation does not apply to insolvency proceedings of insurance undertakings, credit institutions, investment undertakings which provide services

[13] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ EC L 160, 30/06/2000 p. 1-13.

[14] Bundesgesetz über das Internationale Insolvenzrecht - IIRG, Federal Law Gazette I, No. 2003/36.

[15] For the historic jurisprudence see OGH 25.11.1999, 2 Ob 316/99f. For a summary of the ambivalent position of the Austrian Supreme Court prior to the decision OGH 25.11.1999, 2 Ob 316/99f see *Keppelmüller*, Österreichisches Internationales Konkursrecht (1997) 46 ff.

[16] The term "centre of main interest" is defined in consideration 13 of the EC Insolvency Regulation.

[17] Consideration 33 of the EC Insolvency Regulation.

involving the holding of funds or securities for third parties and collective investment undertakings[18].

The EC Insolvency Regulation allows for the *main insolvency proceedings* to be opened in the Regulation State where the debtor has the center of its main interest. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this regulation permits *secondary proceedings* to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that Member State. The principle of "universality" applies with effect as of May 31, 2002, within the European Union - except Denmark - whereby such principle remains subject to secondary proceedings with respect to the assets located in other Member States. As set forth in the EC Insolvency Regulation, insolvency proceedings shall be in general based on the law of the Member State of the commencement of proceedings, with exceptions in particular for third parties rights *in rem* situated within the territory of another Member State at the time of the commencement of proceedings, contracts relating to immoveable property and employment contracts[19].

According to Section 240 Insolvency Act, insolvency proceedings opened abroad, i.e. outside the territorial scope of the EC Insolvency Regulation, will be recognised in Austria if the following conditions are met: (a) the centre of the main interest ("*Interessen*") of the debtor is located within another state, and (b) the proceedings opened abroad must be comparable to Austrian insolvency proceedings, in particular Austrian creditors must be equally treated with creditors located within the territory of state in which the proceeding takes place. A recognition will, however, in any case be denied if (a) insolvency proceedings have been opened in Austria or injunctive relief has been granted in Austria or (b) the recognition of a foreign insolvency proceeding would yield a result contrary to the fundamental principles of the Austrian legal system (*ordre public* exemption)[20].

The provisions of Austrian insolvency laws constitute public policy provisions which apply irrespective of the choice of law. This is in particular true with respect to provisions serving to maintain the debtor's assets, such as the provisions on the recognition of set-off provisions, the rights and duties of the receiver, etc.

1.4 The effects of insolvency proceedings on transactions in general

Upon the opening of insolvency proceedings, the debtor is deprived of all rights to make any dispositions with respect to its property and the administration thereof is exclusively conferred to a receiver (*Sanierungsverwalter*) appointed by the insolvency court. Any transactions concluded by the debtor after the opening of insolvency proceedings are void with respect to its creditors.

Legal proceedings can no longer be initiated against the debtor once insolvency proceedings have been opened and any pending litigation is temporarily suspended. Further any steps for the enforcement of claims against the debtor are likewise

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[18] Article 1 Section 2 of the EC Insolvency Regulation, pursuant to consideration 9 of the EC Insolvency Regulation, states that such undertakings should be excluded from the scope of such regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

[19] The European Court of Justice ("ECJ") clarified in 2006 in Case C-1/04 (Susanne Staubnitz-Schreiber) the relevant point in time for the examination of the international jurisdiction: according to the ECJ the moment of the application for the opening of insolvency proceedings and not the moment of the opening of the insolvency proceedings shall be the relevant point in time in determining the competent body for the conduct of insolvency proceedings.

[20] Section 240 Paragraph 2 Insolvency Act.

suspended after the opening of insolvency proceedings and new enforcement proceedings may not be initiated.

Before the IRÄG 2010, going concern of self-administration of the debtor was only possible in judicial composition proceedings; according to the repealed Judicial Composition Act (provided that the debtor could offer a minimum satisfaction quota of 40 % of all open claims within a period of 2 years) under supervision of a judicial composition administrator (*Ausgleichsverwalter*). As an alternative, the debtor was entitled to bring about a debt relief of the company during the (former) bankruptcy proceeding under the Bankruptcy Act by means of a compulsory settlement (*Zwangsausgleich*; with a minimum satisfaction quota of 20 % of all open claims within a period of 2 years). During a compulsory settlement, the debtor lost its sole power of disposal to the liquidator by means of the opening of the bankruptcy proceeding, but was able to benefit from the lower satisfaction quota in comparison to the one required by the Judicial Composition Act. As a consequence of this distinction, judicial composition historically was not used in practice and virtually all corporate restructurings were carried out through compulsory settlements in bankruptcy proceedings.

According to the new Insolvency Act, which explicitly has been designed to improve the earlier imperfect system and to promote less negatively regarded self-administration, the following recapitalization instruments have been established:

(i) Recapitalization Plan Proceeding with self-administration of the debtor:

according to the Insolvency Act, the debtor shall maintain its self-administration, provided that (i) a recapitalization administrator is appointed; (ii) the debtor submits a sufficient prepared recapitalization plan (*Sanierungsplan*) in collaboration with its application for the opening of insolvency proceeding; and (iii) he offers a satisfaction quota of at least 30 % within 2 years to its creditors.

(ii) Recapitalization Plan Proceeding without self-administration of the debtor:

Provided that an insolvency-administrator is appointed; the debtor has to submit an application to open the proceedings in collaboration with the recapitalization plan that contains at least a quota of 20 % within a period of 2 years.

(iii) Recapitalization Plan Proceeding during pending insolvency proceedings:

At the opening of the proceeding, an insolvency administrator is appointed; quota of at least 20 % within a period of 2 years.

2. The Effects of Insolvency Proceedings on Commodity Transactions in General

The MNA and the CPMA are designed to facilitate and support, where permitted under applicable law, the early termination and close-out netting of unsettled trades of one or more commodities, derivatives and/or related products transacted under multiple bilateral trading agreements and, if applicable, other forms of transactional documentation. The MNA and the CPMA have a clear focus on the commodities and derivative products traded in European energy markets, as well as related markets like emissions, pipeline, freight and wire capacity and weather derivatives (but is not structured to impose this scope as a limitation on users wishing a broader application of the document). § 1.2 of the Additional Netted Agreement Rider to the MNA's Election Sheet provides a set of standardized optional descriptions to define Commodities. These options are divided into a few general categories: traditional energy products, agricultural/soft commodities, metals and paper products; transportation, transmission, freight and storage capacity products; emissions credits and products; green energy products and tradable certificates; and weather derivatives. As with all similar provisions in the MNA, the parties are free to add their own customized additions to the standard list provided in the Rider.

In the context of Austrian insolvency laws, transactions entered into under Netted Agreements or Principal Agreements, would be, in general, categorised as contracts providing for reciprocal obligations (*zweiseitiger Vertrag*). With respect to reciprocal obligations, Austrian insolvency laws provide for an important distinction between (i) contracts which have been fully performed by one party at the time of the institution of the insolvency proceeding ("unilaterally unperformed contracts") and (ii) those contracts that have not, or not fully, been performed by each of the parties at such time ("mutually unperformed contracts").

As an example: a contract regarding the purchase and sale of commodities that has not yet been performed by both of the parties, i.e. no delivery of the commodity has been made and payment has not been effected by the respective other party, is a mutually unperformed contract. To the contrary, if one party has fully performed its obligations under a contract regarding the purchase and sale of the commodities and has delivered the commodities in accordance with the provisions of such contract, whereby no payment has been made by the respective other party, the contract is a unilaterally unperformed contract. By the same means, an *exercised* option on the purchase and sale of commodities which has not been performed by each of the parties, is a mutually unperformed contract and an exercised option which has been fully performed by only one party at the time of the institution of the bankruptcy proceeding constitutes a unilaterally unperformed contract. The same principle applies with respect to forward sales or purchases.

The same principle applies also to "spot" contracts[21] if under such a spot contract either no delivery of a commodity has been made or no payment has been effected. In an insolvency situation Austrian law does, subject to the clarifications set forth in Section II.A.3 of this Opinion, not distinguish between "forward" and "spot" contracts but does only differentiate between (i) unilaterally unperformed contracts and (ii) mutually unperformed contracts, which could be either spot or forward contracts.

Section 21 Paragraph 4 Insolvency Act provides that, if the performance under a mutual contract is divisible, and the creditor has at the time of the institution of the insolvency proceedings already partially performed his obligations, the contract will be divided in (i) a unilaterally unperformed contract constituting a claim against the estate corresponding to the obligations performed and (ii) a mutually unperformed contract (as described below).

As a general rule, the existence of unilaterally unperformed contracts remains unaffected by the mere opening of insolvency proceedings. If the solvent party still owes performance under such a contract, the receiver has a claim for performance enforceable against the solvent party. If the insolvent party still owes performance, the solvent party

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[21] In practice, these are viewed as transactions where settlement occurs at the latest two banking days after the trade date; this also concurs with the definition of spot contract in Art 38 (2) of Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (MIFID), published in OJ EC L 241, 02/09/2006, p. 0001 – 0025. The statutory definition reads "*A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods: (a) two trading days; (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period. However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph*".

has a claim against the insolvency estate, which takes part in any distribution of the estate as an unsecured ordinary claim.

This position is different from mutually unperformed contracts providing for reciprocal obligations. Sections 21 and 22 Insolvency Act set out provisions with respect to the effects of the opening of an insolvency proceeding on such mutually unperformed contracts:

Section 21 Insolvency Act[22] sets out the general rule that the receiver is entitled to elect either to perform or to reject performance of any mutually unperformed and not otherwise terminated contract providing for reciprocal obligations. In determining whether to request or reject performance, the receiver must be guided by the interests of the insolvency estate and the creditors generally and shall act accordingly. Should the receiver reject performance, the creditor is entitled to claim damages resulting from non-performance. Such damage claims, however, constitute ordinary claims in the insolvency proceedings and entitle to a respective share in the distributions to other unsecured creditors.

In case the other party is required to perform first, it can refuse performance until performance by the insolvent counterparty is effected or secured, provided it was not required to be aware of the financial distress at the time of execution of the contract (Section 21 Paragraph 3 Insolvency Act).

Section 22 Insolvency Act[23] provides for an exemption to the receiver's right of election. Such right does not exist in respect of contracts regarding the supply of goods which have a market or exchange price and which are to be performed at a fixed time or within a fixed period of time (*Fixgeschäft*).

A contract falling under Section 22 Insolvency Act is automatically terminated upon the opening of insolvency proceedings. The receiver has no right to either request or reject performance. The mutual obligations under such contract are by operation of law replaced by a claim of the receiver or the solvent party for damages which, under the

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[22] Section 21 Insolvency Act stipulates (English translation):

(1) If at the time of the opening of insolvency proceedings a mutual agreement has not been performed or not been fully performed by the insolvent party and the other contracting party, the receiver may either perform the agreement on behalf of the insolvent party and request that the other contracting party also perform the contract, or withdraw from the contract.

(2) The receiver must declare his intentions at the latest within a period of 5 working days upon the other contracting party's request; otherwise it is assumed that the receiver withdraws from the transaction. If the receiver withdraws from the transaction, the other contracting party may demand reimbursement of the damage incurred by it as a creditor in bankruptcy. In case that the debtor is obliged to a performance not consisting in cash, and he is in delay with its performance, the receiver has to declare his intention without delay after receiving the request from the contracting party, at the latest within a period of 5 working days. Otherwise it is assumed that the receiver withdraws from the transaction.

(3) If the other contracting party is obliged to render an advance performance, such other party may refuse to perform until such time when the consideration or security therefore is provided, unless he should have been aware of the unsound financial situation of the insolvent party at the time the contract was concluded.

(4) If the performance due is divisible and the creditor has already rendered the performance to which he is obliged partially at the time of the opening of the bankruptcy proceedings, such creditor will be deemed as creditor in insolvency in terms of this claim, but only in respect of the amount corresponding to his partial performance.

[23] Section 22 Insolvency Act stipulates (English translation):

(1) If the delivery of goods having a market or stock market price was required at a fixed date or within a fixed term and if such date or expiry of such term occurs after the institution of insolvency proceedings, it is not permitted to request performance, but only to request damages due to non-performance

(2) The amount of damages equals the difference between the purchase price and the market or stock market price applicable at the place of performance or the relevant market place for transactions which involve the required term of performance and are concluded on the second day after the institution of insolvency proceedings.

terms of Section 22 Paragraph 2 Insolvency Act, equals the amount of the difference between the original purchase price and the market price prevailing on the second business day after the opening of the insolvency proceedings for the goods bought for delivery on the originally agreed delivery date.

Due to the wide scope of Transactions, the applicability of Section 22 Insolvency Act cannot be completely excluded for individual Transactions. We deem, however, that Section 21 of the Insolvency Act would in most circumstances apply.

No Section of the MNA contains a provision that a Transaction is terminated if not performed on the agreed date. In order to constitute a fixed date transaction, performance other than on the pre-agreed date must not be permissible. In addition, a termination of the Individual Contract upon the occurrence of such an event must be pre-agreed either explicitly or by an implied declaration of intention (*konkludente Willenserklärung*).[24]

The termination of a Transaction under the MNA is regulated in the MNA as a consequence of a Close-Out Event, which can be elected by the Parties. For Example "Failure to Deliver" can be chosen by the parties in the Election Sheet as a Close Out Event and therefore the Agreement can be – again upon election of the Parties – terminated, either automatically or by Termination Notice. It has to be noted that according to Section 3.1 of the MNA, the parties shall specify in the Election Sheet the definition of a Close Out Event, which they desire to apply to the MNA. Possible definitions which may be selected for this purpose include, without limitation, the MNA Default Events set forth in Section 3.1 (A) (Master Netting Agreement Default Events) and either: (i) the Netted Agreement Default Events according to Section 3.1 (B) or (ii) the Harmonized Default Events according to Section 3.1 (C), each if and as further revised, amended, restated, modified or supplemented by the Parties in the Election Sheet.

As an example, Section 3.1 (C) (I) defines "Non-Performance" of a Party or its Credit Support Provider as a Close-Out Event:

Non-Performance: "the failure of a Party or a Credit Support Provider, when required, to make a payment, to deliver any Credit Support or to perform any other material obligation

a) under the Netted Agreement; provided that in the case of a failure to pay, such failure is not cured within two Business Days of a written demand, or, in the case of any other failure of performance (not covered by Section 3.1(C)(IV) of the MNA (Prolonged or Repeated Failure to Deliver or Accept, see below)), such failure is not cured within ten Business Days of a written demand;

b) under any Credit Support Document (after giving effect to any applicable notice or grace period thereunder); or

c) in accordance with provisions of the applicable Netted Agreement regarding the provision of, as applicable, Credit Support, Performance Assurance or other financial security or collateral, however described.

Further to the general provisions of the effect of the opening of insolvency proceedings on mutual obligations according to Sections 21 ff of the Insolvency Act, the Austrian Insolvency Act contains certain mandatory regulations regarding the "set-off" (*Aufrechnung*) of claims during an insolvency proceeding. These regulations affect Transactions and have been modified by the IRÄG 2010. Section 20 Paragraph 4

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[24] *Kramer* in *Straube*, HGB I[3] § 367 Rz 3. An implied declaration of intention is recognized, if there is no explicit declaration but if the meaning of an act or omission as a declaration of an intention and its content are evident by the act itself, always depending on the specific situation. See *Rummel* in *Rummel*[3] § 863 ABGB, Rz 9.

Insolvency Act expressly provides that claims arising out of contracts involving special off-balance sheet financial transactions as set forth in Annex 2 to Section 22 Banking Act and certain other transactions that have been rescinded because of the opening of insolvency proceedings may be set-off if the parties to a contract have agreed that these contracts are automatically rescinded or may be rescinded at the option of a party in case of opening of insolvency proceedings against a counterparty and that all mutual claims are to be set-off[25]. By the IRÄG 2010, the list of exemptions in the banking sector in Section 20 Paragraph 4 of the Insolvency Act has been extended by adding number 2a to the exemption catalogue which covers the trade with goods which are listed on an exchange, and commodities. This exemption is connected to Section 25b Paragraph 2 of the Insolvency Act regulating limitations to terminate contracts during insolvency proceedings applying to the counterparty of the insolvent person. For a detailed discussion and the problems of this provision please see Section II.A.3 1.1 of this Opinion.

Further to be mentioned in terms of insolvency proceedings/regulations effecting transactions in general, is that in the event that insolvency proceedings are opened against the writer of an option *prior to the exercise* of such option, the writer's obligations - and consequently the holder's right to require each party to meet the obligations to perform - cease by virtue of law, whereas the opening of bankruptcy proceedings against the holder of an option - again prior to its exercise - does not affect the writer's obligations and the holder's right to require each party to meet the obligations to perform if not provided for the contrary (Section 26 Insolvency Act).

Section 25b Paragraph 1 Insolvency Act underlines the mandatory nature of the provisions mentioned above (Sections 21 to 25a Insolvency Act). This is in particular true with respect to the election rights of the receiver. Section 25a Insolvency Act has been introduced by IRÄG 2010 for all insolvency proceedings by extending a principle earlier applicable in judicial composition proceedings (former Sections 20a and 20b of the – repealed – Judicial Composition Act). Therefore the termination of contracts shall only be possible by means of an important reason, i.e. in case that the termination could endanger the going concern of the enterprise. For a detailed discussion please see Section II.A.3.1.1 below.

3. The Effects of Insolvency Proceedings on Transactions under the MNA and CPMA

According to Section 3 of the MNA, the Parties shall specify in the Election Sheet the definition(s) of Close-Out Events which they desire to apply to the MNA, and, if

[25] Section 20 Paragraph 4 of the Insolvency Act stipulates (English translation):

"Claims under agreements which have been terminated by virtue of the opening of insolvency proceedings concerning

(1) the special off-balance sheet financial transactions referred to in Annex ./2 to Section 22 of the Banking Act (including credit derivative transactions),

(2) sold interest rate, currency, precious metal, commodity, stock and other securities options, index options and commercial transactions with publicity traded goods within the meaning of Section 1 Paragraph 4 of the Stock Exchange Market as far as this transaction does not merely serve to cover own demand, but constitutes a pure trading transaction.

(2a) commercial transactions with publicly traded goods and commodities within the meaning of Section 1 Paragraph 4 of the Stock Exchange Act, as far as this transaction does not merely serve to cover own demand, but constitutes a pure trading transaction.

(3) repurchase transactions (Section 50 sub-para 1 Banking Act) and reverse repurchase transactions of the securities trading book (Section 20 no 46 Banking Act) and

(4) securities lending and securities borrowing transactions of the securities trading book (Section 2 Numbers 45 and 47 Insolvency Act).

may be offset, provided that it has been agreed that these agreements are terminated or may be terminated by the other party upon opening of a bankruptcy proceeding against the assets of one contract party and that all mutual claims resulting from such agreement shall be offset."

The duplicative wording of the latter part of number 2 and of the entire number 2a is an editing error, since in a parliamentary redraft the wording was not moved but copied from 2 into 2a. On the substance this mistake does not cause any uncertainties.

applicable, to the Netted Agreements. Section 3.1(C)(III) specifies – as so called Harmonized Default Events - Winding-up/Insolvency/Attachment, which are that one Party

(a) is dissolved (other than pursuant to a consolidation, amalgation or merger);

(b) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

(c) makes a general assignment, arrangement or composition with or for the benefit of its creditors;

(d) 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 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;

(e) has a resolution passed for its winding-up, official management or liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;

(f) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;

(g) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets;

(h) causes of is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in Sections 3.1(C)(a) to 3.1(C)(III)(g) (inclusive); or

(i) takes an action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts referred to in this Section 3.1(C)(III).

Section 4 of the MNA stipulates that if a Close-Out Event has occurred and is continuing in respect of a Party, then the other Party (the "Terminating Party") shall be entitled to close-out all transactions under all of its Netted Agreements (provided, however, that absent an election to disapply Section 4.2. of the MNA (Global Nature of close-out), it may not close-out less than all transactions under all such Netted Agreements, and, if applicable, the Netted Agreements themselves (and if any such Netted Agreement is itself a single transaction, such Netted Agreement itself) by providing a Termination Notice under Section 5.1 (Termination Notice) of the MNA; and provided further, that no Termination Notice shall be required for the close-out of any Netted Agreement and its underlying transactions which have been Closed-Out automatically by, as applicable, either the Netted Agreement's own terms or the terms of the MNA set forth in Section 6 (Customization of Automatic Termination Rights). A Close-Out Event will be deemed to be continuing until the earlier of such time as the conditions that constituted the Close-Out Event cease to exist or the payment in full of any amount that has become due and payable, as applicable, hereunder or under the terms of all relevant Netted Agreements, as the result of the occurrence of such Close-Out Event. Each Netted Agreement is hereby amended accordingly.

Consequently, unless parties actively opt-out of Global Close-Out in their Election Sheet, both automatic and voluntary termination rights contained in their underlying Netted

Agreements will cease and termination will be possible only under the terms of their MNA, and only in respect of all Netted Agreements.

To sum up, in case that a Close-Out Event like Winding-up, Insolvency or Attachment occurs, the Party can select in the Election Sheet, whether in such a case, the terminating Party shall initiate Close-Out under all of the Netted Agreements by sending to the Defaulting Party a notice ("Termination Notice") which notice may be, but need not be, in the form provided in Annex 2 to the MNA, specifying the date on which all transactions under all Netted Agreements are Closed-Out (the "Early Termination Date"); or whether the Close-Out shall be initiated automatically in accordance with the procedure set forth in Section 6 of the MNA. Section 6 of the MNA provides different options for the Parties to elect for Automatic Termination.

3.1 Insolvency

3.1.1 Termination of the MNA/CPMA and all Principal Agreements

Sections 25a and 25b Insolvency Act have effectively limited the discretion for contractual parties to terminate contracts for cause because of the occurrence of insolvency <u>and</u> to agree on (and exercise) contractual termination rights in such situations. This is, in effect, an extension and further restriction of principles previously applicable only in judicial composition proceedings. The prevailing scholarly opinion and corresponding case law developed by the Austrian Supreme Court that it is permitted to agree on (and exercise) contractual termination rights tied to the opening of bankruptcy proceedings has been set aside by this legislative development.

According to Section 25a Paragraph 1 Insolvency Act, the termination of contracts during the period of 6 months from the opening of insolvency proceedings is only possible for an important reason and for the case, that the termination would endanger the going concern of the enterprise[26].

As a supporting provision to Section 25a Paragraph 1 Insolvency Act, Section 25b Paragraph 2 Insolvency Act stipulates that agreements containing a right of withdrawal or termination of a contract in case of the opening of an insolvency proceeding, are disallowed, besides of contracts according to Section 20 Paragraph 4 Insolvency Act. Section 20 Paragraph 4 Insolvency Act refers to contracts involving special off-balance sheet financial transactions as set forth in Annex 2 to Section 22 Banking Act and also contracts regarding the trade with goods, listed on the stock exchange, and raw-materials. However, this exemption, set out in number 2a is only valid as far as this transaction does not merely serve to cover one's own demand (*Eigenbedarf*), but is to be considered as a true commercial transaction (*Handelsgeschäft*).

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[26] Section 25a Insolvency Act (English translation):

(1) If the termination of a contract may endanger the continuation of the going concern of the enterprise, contractual parties of the debtor may terminate contracts concluded with the debtor only for important reasons.

The following reasons are not important reasons:

1. an adverse development of the commercial status of the debtor; or
2. delay by the debtor with the performance of claims having matured prior to the opening of the insolvency proceedings.

(2) The limitations of Paragraph 1 do not apply

1. if the termination of the contract is indispensable for avoiding material personal or commercial disadvantages to the contractual partner,
2. to entitlements for the disbursement of loans and
3. to employment contracts.

The explanatory remarks to the governmental bill for the IRÄG 2010[27] expressly refer to the trade with commodities and to standardised Master Agreements developed for such purpose that generally provides a right to withdrawal or a right to termination of a contract in the case of insolvency of a contracting party. The explanatory remarks recognise that the competitiveness of Austrian entrepreneurs would be gravely impaired in the international market.

The scope of the exemption in Section 20 Paragraph 4 Number 2a Insolvency Act is unclear since the line of distinction between a transaction covering own demand and a pure trading transaction cannot be drawn in a certain way on the basis of the current statutory law. It is not obvious, whether this is an objective criterion or whether the intention of the party in question is relevant. Similarly it is not clear, whether acquisition of an asset or its actual use for covering own demand is relevant.

Finally, it is unclear how far the effect of a tainted portfolio will reach – will only claims related to the transaction involving the "tainted asset" be excluded from the termination and netting mechanism or is the entire portfolio effected?

As a consequence, two ways to proceed appear possible:

a. in order to avoid any risk, no reliance on Section 20 Paragraph 4 Number 2a is made and automatic termination triggered by an event preceding the opening of insolvency proceedings is agreed;

b. in case of a portfolio where trades covering own demand of the Austrian party can be excluded, one could rely on the exemption and resort to termination by notice upon the occurrence of a Close-Out Event described in Section 3.1(C)(III) of the MNA.

This (new) regulation can therefore be brought in line with the rights of early termination/automatic early termination of the MNA and the CPMA and all Netted Agreements or Principal Agreements as provided in Section 3 of the MNA (Section 3 of the Election Sheet to the MNA) and Section 2 of the CPMA if applied and/or modified as described above and recommended in Section II. A. 3.3 of this Opinion. In our opinion the Austrian courts will uphold and enforce the concerned Sections of the MNA and the CPMA in the context of insolvency proceedings.[28]

3.1.2 Set-Off of all Settlement Amounts under domestic Austrian Law

Section 19 and 20 Insolvency Act[29] set out the general rule regarding set-off (netting) in connection with insolvency proceedings. Section 19 and 20 Insolvency Act do not make a

[27] 612 der Beilagen XXIV. GP.

[28] Before this new regulation in Section 25a Insolvency Act was, introduced by the IRÄG 2010, it had been generally accepted by courts and legal commentators in Austria that the parties may effectively provide that certain circumstances or facts which necessarily precede the formal opening of bankruptcy proceedings, such as the establishment of insolvency, over-indebtedness, failure to pay debts as they become due in general, etc., entitle the solvent party to terminate an agreement either by giving prior notice or by way of automatic termination. Such contractual termination right has been enforceable in subsequent bankruptcy proceedings, irrespective of whether notice is given prior or after the opening of bankruptcy proceedings[28].
Furthermore, according to courts and the prevailing legal scholars in Austria the parties have been allowed to effectively provide in a contract that upon the opening of bankruptcy proceedings the solvent party may terminate the contract by giving notice or by operation of automatic termination. This is in particular true as the parties may even validly provide that upon the opening of bankruptcy proceedings the solvent party may terminate a contract (*argumentum a maiori ad minus*).
The Austrian Supreme Court (*Oberster Gerichtshof*) recognised the validity of a contractual right to terminate a contract upon the opening of bankruptcy proceedings, and that such contractual termination rights are not affected by Section 21 (former) Bankruptcy Act. OGH 26. 10. 1960 HS 261, I/94; 23.2. 1966 HS 5394, V/32, *Mohr*, KO[10] (2006) § 21 KO E 71.

[29] Section 19 of the Insolvency Act stipulates (English translation):

distinction between contractual close-out netting provisions and set-offs in general. A contractual close-out netting provision is regarded as a mutually pre-agreed set-off triggered by the occurrence of certain events. This is partially due to the fact that for the time being, Austrian scholars and judicial opinion do not make a clear distinction between set-off and close-out netting[30] and consider them basically as similar rights, the latter being often viewed merely as a contractually pre-agreed set-off upon the occurrence of certain events.

Accordingly, set-off is not permitted if claims could not have been set off[31] at the time of the formal opening of bankruptcy proceedings or the solvent party became a debtor of the insolvent party only thereafter due to a contractual arrangement after the opening of insolvency proceedings or in the event the claim against the insolvent party has been assigned after such opening. The same applies in the event of an assignment/a creation of claims before the formal opening of insolvency proceedings and the solvent party has known or should have known of the insolvency of the insolvent party.

Consequently, should the MNA or the CPMA and all Netted Agreements or Principal Agreements and/or Uncovered Transactions be terminated *before* the opening of insolvency proceedings, it is generally accepted among courts and legal commentators in Austria that the netting of all termination values is valid and remains unaffected by the insolvency proceedings.

Should the MNA or the CPMA and the Netted Agreements or Principal Agreements and/or Uncovered Transactions be terminated *upon* the formal opening of insolvency proceedings, the interpretation of this case is controversial in the jurisdiction of the Austrian Supreme Court (*Oberster Gerichtshof*)[32]. The relevant question is whether reciprocal claims and obligations arising as a result of such early termination of each Netted Agreement or Principal Agreement or Uncovered Transaction may be considered as such which have already been in existence, although conditional or not due, at the time of opening of insolvency proceedings (Section 19 Insolvency Act) or as such which have been established upon the opening of insolvency proceedings (Section 20 Insolvency Act).

According to the prevailing number of legal commentators contractually agreed close-out netting provisions are valid and enforceable[33]. This position is, in general, supported by

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(1) Claims which could already have been set off at the time of the opening of insolvency proceedings need not be enforced in the insolvency proceedings.

(2) The fact that a claim of a creditor or of the insolvent debtor is conditional or not due at the time of the opening of insolvency proceedings or that a creditor's claim does not refer to the payment of monies, does not preclude a set-off. For purposes of a set-off the creditor's claim is to be calculated pursuant to Section 14 and 15. If the creditor's claim is conditional, the court may hold the admissibility of a set-off to be subject to the provision of security.

Section 20 Paragraph 1 of the Insolvency Act stipulates (English translation):

(1) A set-off is not permitted if a creditor in bankruptcy became a debtor of the bankrupt assets only after the opening of bankruptcy proceedings or if the claim against the bankrupt has been acquired only after the opening of bankruptcy proceedings. The same applies if the debtor acquired the counterclaim before the opening of bankruptcy proceedings but at the time he acquired such claim was or should have been aware of the bankrupt's insolvency.*[...]*.

[30] In view of the tendencies to harmonise the *Acquis Communautaire* with respect to close-out netting as reported by ISDA, this situation is likely to change; see also the report prepared by the European Financial Markets Lawyers Group, Protection for bilateral Insolvency Set-off and netting agreements under EC Law (October 2004), which provides a comprehensive comparative law analysis on the differences in the implementation of the close-out netting EU legislation by the EU Member States.

[31] For netting and set-off under Austrian Law in general please see Section II.A and B of this Opinion.

[32] For a discussion of the different decisions, see *Koch*, Netting-Vereinbarungen und das Österreichische Konkursrecht. Am Beispiel von Swap-Rahmenverträgen ÖBA 1995, 495.

[33] *Schubert*, in: *Konecny/Schubert*, KO §§ 19, 20 Rz. 83; *Koch*, Netting-Vereinbarungen und das Österreichische Konkursrecht. Am Beispiel vom Swap-Rahmenverträgen ÖBA 1995, 495; (with a detailed discussion on the different opinions and the decisions of the Austrian Supreme Court (*Oberster Gerichtshof*)).

the decisions of the Austrian Supreme Court (*Oberster Gerichtshof*)[34]. In our opinion, the view of the Austrian Supreme Court in connection with individual cases where set-off has been denied may not be extended and applied to the termination of other contracts. Consequently, we are of the opinion that the close-out netting provisions pursuant to Section 3 of the MNA and Section 2 of the CPMA are valid and enforceable in the context of insolvency proceedings always provided that termination of the MNA as well as the CPMA and the Netted Agreements or Principal Agreements has occurred in compliance with the relevant restrictions in case of insolvency of one of the parties (see Section II. A.3.1.1 above). In such a case Austrian Law will recognise and give effect to the provisions of the MNA and the CPMA providing for the determination and netting of the Settlement Amounts in determining a single lump-sum amount (Final Net Settlement Amount) upon the insolvency of an Austrian Party.

Even if the Austrian Supreme Court recognises the validity of a Close-Out Netting provision upon the opening of insolvency proceeding, please note that set-off is prohibited (Section 20 Paragraph 1 and 2 Insolvency Act) with a claim that has been acquired (assigned) within six months prior to the opening of insolvency proceedings, in the event that the assignee acquired such claim although he was aware or should have been aware of the debtor's insolvency. The Austrian Supreme Court held that this principle shall also apply with respect to any such agreements pursuant to which claims are created as a "covering fund"[35].

Accordingly a contractual close-out netting provision will be valid and enforceable in the context of insolvency proceedings with respect to all amounts payable encompassed by the close-out netting provision. Only insofar as other claims against the insolvent Austrian counter party not encompassed by the contractual close-out netting provision are concerned, a set-off against such amounts will be subject to the limitations outlined above for set-off in general (Section 20 Paragraphs 1 and 2 Insolvency Act). Consequently, Austrian courts would apply and enforce the close-out netting provision pursuant to Section 3 of the MNA and Section 2 of the CPMA.

These restrictions do, however, not apply in the context of Section 20 Paragraph 4 of the Insolvency Act. Section 20 Paragraph 4 Insolvency Act expressly provides that claims arising out of contracts involving special off-balance sheet financial transactions as set forth in Annex 2 to Section 22 Banking Act and certain other transactions that have been rescinded because of the opening of insolvency proceedings may be set-off if the parties to a contract have agreed that these contracts are automatically rescinded or may be rescinded at the option of a party in case of opening of insolvency proceedings against a counterparty and that all mutual claims are to be set-off.

Contrary to Article 6 of the EC Insolvency Regulation and to Section 223 of the Insolvency Act, where it is unclear whether the provisions cover a mere set-off[36], Section 20 Paragraph 4 of the Insolvency Act is clearly a provision recognizing Close-Out Netting as it covers the termination and aggregation of all mutual claims upon the opening of bankruptcy proceedings. According to Section 20 Paragraph 4 Insolvency Act the underlying contract has to be terminated as a consequence of a contractually stipulated right of the solvent party or a contractually stipulated automatic termination upon the

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[34] inter alia: EvBl 1977/153 and EvBl 1978/4; JBl 1960, 230; HS 14.933/24; for a detailed discussion of the doctrine of the Austrian Supreme Court also see WBl 1987, 52

[35] ÖBA 1993, 659. The "covering fund" in this case was a savings book that has been posted as collateral by the insolvent debtor with the creditor after the debtor had already been insolvent. After the debtor successfully appealed this collateral according to Section 30 Para 1 Number 1 Insolvency Act, the Bank tried to set-off the debtor's claim with a counter claim. The Austrian Supreme Court regarded this set-off as not permissible, not only because of the successful appeal but also, because the bank had knowledge about the insolvency of the debtor at the time of obtaining counterclaim.

[36] European Financial Markets Lawyers Group, Protection for bilateral Insolvency Set-off and netting agreements under EC Law (October 2004), explains this difference for historical reasons, the text of the EC Insolvency Regulation dating back even to the 1990ies when the concept of close-out netting had been less developed.

opening of insolvency proceedings. Section 20 Paragraph 4 Insolvency Act is limited to the transactions specifically referred therein, the major part forming the transactions covered by Annex 2 to Section 22 of the Banking Act.

Effective as of January 1, 2007, Annex 2 to Section 22 Banking Act was amended to expressly include certain derivative instruments as set out in Annex 1 Section C no 10 of Directive 2004/39//EC ("MIFID"). The relevant instruments are "options, futures, swaps, forward rate agreements, and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties, as well as any other derivative financial contract relating to assets, rights obligations, indices, and measures not otherwise mentioned, which have the characteristics of other financial derivative instruments, having regard to whether, inter alia, they are traded on a regulated market or a multilateral trading facility (MTF[37]), are cleared and settled through recognised clearing houses or are subject to regular margin calls"[38].

Accordingly, in respect of cash settled (including at the option of one of the parties) weather index transactions, freight transactions, emissions allowances transactions, and economic statistics transactions, Austrian Law has now clarified that these transactions benefit from Section 20 Paragraph 4 Insolvency Act. In former legislative amendments (2007) to the Insolvency Act (back then still Bankruptcy Act)[39], the legislator exhaustively clarified that credit derivatives are explicitly included in the off-balance transactions of Annex 2 Banking Act and would, thus, benefit from the favourable treatment of Section 20 Paragraph 4 Insolvency Act (back then still Bankruptcy Act). The legislator did not change its position on this issue in the IRÄG 2010.

To sum up:

(i) Claims which could already be set off at the time of the opening of insolvency proceedings need not be enforced in an insolvency proceeding. Therefore, should the MNA or the CPMA and all Netted Agreements or Principal Agreements and/or Uncovered Transactions be terminated *before* the opening of insolvency proceedings, it is generally accepted among courts and legal commentators in Austria that the netting of all termination values is valid and remains unaffected by the insolvency proceedings.

(ii) Set-off is not permitted if claims could not have been set off[40] at the time of the formal opening of bankruptcy proceedings or the solvent party became a debtor of the insolvent party only thereafter due to a contractual arrangement after the opening of insolvency proceedings or in the event the claim against the insolvent party has been assigned after such opening. The same applies in the event of an assignment/a creation of claims before the formal opening of insolvency proceedings and the solvent party has known or should have known of the insolvency of the insolvent party.

(iii)Set-off is further prohibited with a claim that has been acquired (assigned) within six months prior to the opening of insolvency proceedings, in the event that the assignee acquired such claim although he was aware or should have been aware of the debtor's insolvency.

[37] These being alternative trading systems.

[38] Annex I Section C, Number 10 of the Directive 2004/39/EC, OJ EC L 145/1 of April 21, 2004.

[39] Published in the Federal Law Gazette, BGBl number 18/2007.

[40] For netting and set-off under Austrian Law in general please see Section II.A of this Opinion.

(iv)A contractual close-out netting provision will be valid and enforceable in the context of insolvency proceedings with respect to all amounts payable encompassed by the close-out netting provision.

(v) Contractual close-out netting is recognised within the scope of Section 20 Paragraph 4 of the Insolvency Act.

3.1.3 Modifications to close-out netting in cross-border situations

As described Section II. A.1.3 above, the Provisions on International Insolvency Law provide for certain conflict of law provisions in the event insolvency would have a certain cross-border effect as specified in the relevant Provisions on International Insolvency Law.

In this respect, Article 6 EC Insolvency Regulation provides that the opening of insolvency proceedings shall not affect the right of creditors to declare the set-off of their claims against the claims of the debtor where such a set-off is permitted by the law applicable to the insolvent debtor's claim. According to Article 4 EC Insolvency Regulation the *lex fori concursus* is applicable to the conditions under which set-offs may be invoked. However, it is disputed whether Article 4 Section 2 Number d EC Insolvency Regulation only refers to the specific limitations on set-offs provided for by national insolvency law or whether it refers to the entire body of law governing set-offs in general[41].

Notwithstanding the interpretation of Article 4 Section 2 Number d EC Insolvency Regulation, Article 6 of the EC Insolvency Regulation provides a legal basis regarding the permissibility of set-offs. The intention of Article 6 EC Insolvency Regulation is to safeguard the rights of set-off of creditors to set-off against claims of the debtor. However, it is now widely disputed whether the provisions on set-off as set forth in the EC Insolvency Regulation encompass Close-Out Netting[42].

In addition, it has to be pointed out that pursuant to Article 9 EC Insolvency Regulation the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market[43] shall be governed solely by the law of the Member State applicable to that system or market. In this respect, the Finality Act[44] makes netting arrangements[45] in an insolvency scenario subject to the law

[41] *Burgstaller*, Internationales Zivilverfahrensrecht II (2003), Art 6 InsVO, Rz 1.

[42] This, in essence, due to the fact, that close-out netting is "more" than a "set-off" as it also encompasses a termination, valuation and aggregation of claims. Directives posterior to the EC Insolvency Regulation provide for different and more precise definitions of the terms; see *inter alia*, the report prepared by the European Financial Markets Lawyers Group, Protection for bilateral Insolvency Set-off and netting agreements under EC Law (October 2004).

[43] Although the EC Insolvency Regulation does not define the term "financial market", this term would be understood to comprise a market in a Member State where financial instruments, other financial assets or commodity futures and options are traded. Such a market would be characterized by regular trading and conditions of operation and access and it is subject to the law of the relevant Member State, including appropriate supervision, if any by the regulatory authorities of that Member State, for more details on the interpretation of Article 9 of the EC Insolvency Regulation, please refer to *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings (1996). The Convention on Insolvency Proceedings is a predecessor of the EC Insolvency Regulation.

[44] *Finalitätsgesetz*, the "**Finality Act**", Federal Law Gazette, BGBl I, No. 2001/98, as most recently amended by BGBl. I, No. 91/2010.

[45] The term being in this respect used, in our opinion, interdependently with close-out netting.

applicable to the payment or settlement system. Article 9 EC Insolvency Regulation supersedes in this respect Article 6 EC Insolvency Regulation[46].

In addition, Section 233 Insolvency Act explicitly provides that "netting agreements" shall be subject to the law applicable to the agreement. Accordingly Austrian Courts will recognize and enforce such contractual close-out netting provisions, subject to the general limitations regarding avoidance of contracts[47] (for a more specified description of Section 233 Insolvency Act please see Section II.A.3.2 of this Opinion).

3.1.4 Avoidance of Transactions

Pursuant to Sections 27 et seq Insolvency Act, the receiver may avoid any transaction (including the granting of security and the performance of an obligation) of the debtor under certain circumstances. In addition, any transactions of the debtor may be avoided by creditors pursuant to the Austrian Act on Avoidance of Contracts[48] (*Anfechtungsordnung*), which proceedings may be continued by the receiver upon the opening of insolvency proceedings. For a brief outline of the rules on the avoidance of transactions in connection with insolvency proceedings please see Section II.A.4 of this Opinion. In practice the avoidance of legal acts in accordance with Section 30 and 31 Insolvency Act (outlined in Section II.A.4. of this Opinion) are of particular relevance.

Although the avoidance of the early termination/automatic termination and close-out netting under the General Agreement cannot be excluded[49], it can be said that no particular problems arise in this connection (i) as long as the solvent party does not conclude further Individual Contracts upon knowledge - including imputed knowledge - of the counter-party's insolvency or of the filing of a petition for the opening of insolvency proceeding or (ii) where the execution of the Individual Contract prefers the solvent party in relation to the other creditors of the debtor within the meaning of Section 30 Insolvency Act[50].

3.2 Enforceability of Early Termination, Close-Out Netting and Payment of Termination Amounts as a result of an insolvency related Close-Out Events assuming a choice of another governing law than Austrian Law

The following comments are based on the additional assumption that the MNA and the CPMA will be legal, valid, binding and enforceable under the law specified as governing law (not being Austrian Law).

Under Austrian Law on conflicts of law, compensation of a party in case of an early termination under the MNA or the CPMA is, in general, subject to the governing law and not to the law governing insolvency proceedings in Austria over the assets of an Austrian counter-party.

However, the provisions of Austrian insolvency laws include a number of public policy provisions which apply *irrespective of the choice of law*. This is in particular true with respect to provisions serving to maintain the debtor's assets, such as the provisions on the recognition of set-off provisions, the rights and duties of the receiver, etc. outlined in Section II.A.2. and Section II A.3.1.2. above.

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[46] *Burgstaller*, Internationales Zivilverfahrensrecht II (2003), Art 9 InsVO, Rz 3; *Virgos/Schmit (footnote 153)* with respect to a similar provision under the Convention on Insolvency Proceedings.

[47] See Section III.A.3.1. of this opinion for a general overview of the Rules on the avoidance of contracts.

[48] Anfechtungsordnung (AnfO), Imperial Law Gazette, RGBl. 1914/377, as amended most recently by Federal Law Gazette, BGBl. I Nr. 29/2010.

[49] For a detailed discussion of the possibilities of the receiver to avoid the close-out netting provision, please see *Koch*, Netting-Vereinbarungen und das Österreichische Konkursrecht am Beispiel vom Swap-Rahmenverträgen ÖBA 1995, 495

[50] For a more detailed discussion of section 30 Insolvency Act please see Section II. A. of this opinion.

Section 233 Insolvency Act explicitly provides that netting agreements (*Aufrechungs- und Schuldumwandlungsvereinbarungen*) shall be subject to the law applicable to the agreement. Under the assumption that under the law other than the laws of Austria governing the General Agreement, the contractual close-out netting provision is valid and enforceable, Austrian Courts will recognize and enforce such contractual close-out netting provisions, subject to the general limitations of actions for avoidance of contracts[51].

Section 233 Insolvency Act complements Section 223 Insolvency Act, which mirrors Article 6 of the Regulation on Insolvency Proceedings. In effect, in addition to and irrespective of the permissibility of set-offs under Article 6 of the Regulation on Insolvency Proceedings, Austrian Law gives deference to the choice of law regarding netting agreements by virtue of Section 233 Insolvency Act. This reference to the governing law refers to the contractual law only, e.g. the question of validity of the netting agreement, and not to the substantive insolvency laws of such other jurisdiction.[52]

Due to the absence of corresponding legal provisions, Section 233 Insolvency Act does not apply in reorganisation proceedings.

Therefore, there is no change in our conclusion concerning the enforceability of Termination for Material Reason/Automatic Termination, close-out netting and calculation and payment of Termination Amounts in respect of an Austrian counterparty assuming the choice of another law than Austrian Law to govern the MNA or the CPMA.

3.3 Recommendation to Opt for Automatic Termination

With respect to qualified privileged transactions as defined in Section 20 Paragraph 4 of the Insolvency Act, the close-out netting provisions as provided for in the MNA and the CPMA will be enforceable. In this respect, it is not necessary to opt for an automatic termination.

With respect to other transactions, reference is made to the conclusions in Section II.A.3.1 of this Opinion. In order to preserve the full operation of the close-out netting provisions of the MNA and the CPMA in the event of insolvency proceedings being opened in Austria over the assets of an Austrian party, it is necessary to ensure that the MNA, the CPMA and all transactions concluded thereupon are terminated as soon as possible. We would therefore recommend that the parties opt for Automatic Termination to be applicable to parties incorporated in Austria, whereby the Early Termination Date in such event shall be the date on which the Close-Out Event triggering early termination occurs.

Only in cases where the concerns in connection with the criteria set out in Section 20 Paragraph 4 Number 2a Insolvency Act do not apply (i.e. the Austrian party maintains a "pure" trading portfolio without the risk of adverse effects of the use of assets in this portfolio for the coverage of own demand), automatic termination does not have to be selected. Given the uncertainty of the details of the definition of this term "own demand" addressed in Section II. A.3.1.1, it is highly recommended to carefully analyze the circumstances of each individual counter-party.

We can propose to amend the MNA and the CPMA[53] by agreeing the following additional clauses as applying to the Austrian party (being "Party A"), whereby this proposal is

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[51] See Section III A. 4. of this Opinion for a general overview of the Rules on the avoidance of contracts.

[52] *Burgstaller/Katzmayer* in *Burgstaller*, Internationales Zivilverfahrensrecht, § 233 KO Rz 3.

[53] A direct amendment of the CMPA in this manner is not feasible in the same way, since the definition of "Close-Out Event" in Section 1.1. of the CPMA simply refers to the "Principal Agreements" and the standard form of the CPMA does not set out genuine Close-Out Events.

based on the assumption that it is the intention of the parties to implement Automatic Termination only for the events stipulated in Section 3.1(C)(III) (d) of the MNA:[54]

"§ 6 shall apply to *Party A*, only upon occurrence of the Close-Out Event specified in Section 3.1(C)(III)(d) with termination effective

a. in case of the filing of a petition for the opening of any kind of insolvency proceedings or any other proceeding having an analogous effect by *Party A* or its Credit Support Provider against itself ("*Antrag auf Eröffnung des Insolvenzverfahrens*" – "*Schuldnerantrag*" pursuant to Section 69 Austrian Insolvency Act) at 11.59 pm, on the day before the filing of such petition.

b. in case of the filing of the petition for the opening of any kind of insolvency proceedings or any other proceeding having an analogous effect against Party A or its Credit Support Provider by a third party (other than *Party A* or its Credit Support Provider; "*Gläubigerantrag*" pursuant to Section 70 Austrian Insolvency Act) as of 11.59 pm on the day before the filing of such petition, unless such filing (as referred to in Section 3.1(C)(III)(d)) is withdrawn, dismissed, discharged, stayed or restrained within a period of ten (10) Business Days from its filing."

3.4 Enforceability of Payment Claims in Foreign Currency

Payment claims in foreign currency against an insolvent party shall pursuant to Section 14 Insolvency Act be converted into and filed in Euro (EUR) at the exchange rate on the date of the opening of the insolvency proceedings.

4. Brief General Outline of the Rules on the Avoidance of Contracts

In the event of insolvency proceedings over the assets of an Austrian counter-party any legal act (*Rechtshandlung*) and hence also the execution of the Agreements or the Principal Agreements or the carrying-out of Uncovered Transactions, any payments thereunder or the granting of a security ("Performance Assurance") is avoidable according to the rules of the Insolvency Act[55]. As a general rule, legal acts may be avoided if (i) performed within a certain "suspect period" (ranging from 10 years to 6 months) prior to opening of insolvency proceedings; (ii) being disadvantageous of the other creditors of the Austrian counter-party (*Gläubigerbenachteiligung*); and (iii) the avoidance of the legal act is suitable to increase the other creditors' satisfaction (*Befriedigungstauglichkeit*), i.e. will lead to a re-payment or re-delivery to the insolvency estate.

Outside of insolvency proceedings any legal acts are avoidable according to the rules of the Act on Avoidance of Contracts in the events described below.

4.1 Avoidance under the Insolvency Act

According to the Austrian Supreme Court, the rules of the Insolvency Act concerning avoidance of contracts, in particular its pre-conditions, are mandatory rules of law (*Eingriffsnormen*) in relation to an Austrian counterparty and therefore the laws of the (Austrian) lex fori concursus (i.e. the laws applicable at the place the insolvency proceedings are commenced) will also apply in case of connection with another jurisdiction[56].

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[54] In our view it may make sense to consider the inclusion of Section 3.1(C)(III)(b) in the scope of the Automatic Termination mechanism.

[55] Sections 27 through 43 Insolvency Act.

[56] OGH 11.12.1989 on issues under the Bankruptcy Act, published *inter alia* in ecolex 1990, 85 = ÖBA 1990, 836; *Keppelmüller*, Österreichisches Internationales Konkursrecht (1997) Rz 100 ff

According to the Insolvency Act such legal acts may be avoided upon a motion by the receiver, if

(i) effected in the last ten years preceding the opening of insolvency proceedings and the intention of the insolvent Austrian counterparty to disadvantage its other creditors was known by the respective other party, as the case may be;

(ii) effected in the last two years preceding the opening of insolvency proceedings, if the other creditors of the insolvent Austrian party were effectively disadvantaged, and the intention of insolvent Austrian counterparty to disadvantage its other creditors should have been known by the respective other party;

(iii) effected with a close relative[57] (or in case of corporations: a shareholder or previous shareholder; *familia suspecta*) in the last two years preceding the opening of insolvency proceedings, and the other creditors of the insolvent Austrian counterparty were effectively disadvantaged unless such close relative or shareholder, as the case may be, can establish that the intention of the insolvent Austrian counterparty to disadvantage its other creditors was not known to it;

(iv) a sales, swap, or delivery agreement at an undervalue was effected within one year preceding the opening of insolvency proceedings and the dissipation of the insolvent Austrian counterparty's assets to the detriment of its other creditors was known or should have been known by the respective other party; [58]

(v) effected without consideration in the last two years preceding the opening of insolvency proceedings, unless (a) effected in discharging a legal duty, (b) constituting a customary donation, or (c) being of adequate amount for charitable purposes or to honor a moral obligation;

(vi) constituting the acquisition of assets of an insolvent Austrian counterparty in compliance with an authoritative order (mainly in execution proceedings) within the last two years preceding the opening of insolvency proceedings if the money payable as consideration originated from the insolvent Austrian counterparty (with respect to close relatives and shareholders see (c) above) it is a rebuttable presumption that the money originates from insolvent Austrian counterparty);

(vii) in relation to certain other assets (dowry, etc.)[59];

(viii) the discharge of obligations (*Befriedigung*) or the granting of security (*Sicherstellung*) was made within a period of one year prior to the opening of insolvency proceedings and within 60 days prior to or after the insolvency (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) or the filing of a petition for the opening of insolvency proceedings in relation to insolvent Austrian counterparty and a discharge or security of such kind or at such time was not due to the respective other party, unless the respective other party was not preferred (*inkongruente Deckung*) or a discharge or security of such kind or at such time was due to the respective other party (*kongruente*

[57] The scope of the close relative/familia suspecta has been extended since March 1, 2006 (amended Section 32 Paragraph 2 of the Insolvency Act) and applies to all entities subject to bankruptcy proceedings, in the case of a legal entity, this would include members of the management and supervisory board, shareholders with unlimited liability or persons having a participation of at least 25 per cent.

[58] (i) to (iv) are regulated by section 28 Insolvency Act.

[59] we have refrained from elaborating on this particular item as it has no relevance to this legal opinion; (v) to (vii) are regulated by section 29 Insolvency Act.

Deckung) but the intention of insolvent Austrian counterparty to prefer the respective other party was known or should have been known to the respective other party[60];

(ix) the discharge of obligations (*Befriedigung*) or granting of security (*Sicherstellung*) was made within a period of six months prior to opening of insolvency proceedings and after the insolvency (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) or the filing of a petition for the opening of insolvency proceedings in relation to insolvent Austrian counterparty, the discharge of obligations (*Befriedigung*) or granting of security (*Sicherstellung*) was disadvantageous to the creditors of insolvent Austrian counterparty, and the respective other party had knowledge or should have had knowledge of the insolvency (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) or of the filing of a petition for the opening of insolvency proceedings in relation to insolvent Austrian counterparty.

4.2 Avoidance under the Act on Avoidance of Contracts

According to the Austrian Supreme Court[61] the law governing avoidance of contracts outside of insolvency proceedings is the law applicable at the place in which the assets, the re-transfer of which to the debtor is the subject matter of the suit for avoidance, are located. The Supreme Court has also ruled that a choice of law with respect to avoidance of contracts is inadmissible and will not be honoured[62].

Outside of insolvency proceedings certain legal acts (as detailed under item (a) (i) through (vii) above, whereby the "suspect periods" are calculated from the moment the claim for avoidance is raised) may be avoided by any other creditor of Party A having an enforceable claim who has not been satisfied in enforcement proceedings or who most likely will not be satisfied if enforcement proceedings were initiated.

4.3 Avoidance of Early Termination, Close-Out Netting or the Calculation and Payment of the Termination Amount

Please see Section II. A 3.1.3. and Section II. A 3.2. of this Opinion.

5. Implications of the filing of a petition for the opening of insolvency proceedings on the Enforceability of Early Termination, Close-Out Netting and the Calculation and Payment of the Termination Amount

5.1 Insolvency Proceedings

The mere filing of a petition for the opening of insolvency proceedings does not have any effects on the enforceability of early termination/automatic termination, close-out netting and the calculation and payment of the Termination Amount in accordance with the provisions of the General Agreement. However, according to Sections 30 and 31 Insolvency Act the applicable suspect periods for the avoidance of transactions of the Austrian debtor are triggered by/calculated upon the filing of a petition for the opening of insolvency proceedings[63].

6. Individual Contracts for physical settled Options and Individual Contracts for forward sales and purchases

6.1 falling outside the MNA and the CPMA

[60] (viii) regulated by section 30 Insolvency Act.

[61] OGH 23.5.1984, published *inter alia* in JBL 1985, 299 = IPRE 2/106.

[62] OGH 27.2.1984, published *inter alia* in SZ 58/34 = IPRE 2/107.

[63] Please see Section II.A 4. 1 (viii) and (ix) of this opinion.

Please see Section II.A.2. of this Opinion.

6.2 falling under the MNA and the CPMA

Please see Section II.A.3. of this Opinion.

B. Enforceability of Early Termination and Close-Out Netting for Non-Insolvency related Material Reasons

According to Section 2.1. of the MNA, the scope of Close-Out netting rights available under the MNA is determined by a designation in the Election Sheet of agreements falling within its scope (each such agreement so designated being a "Netted Agreement" and all of them collectively being the "Netted Agreements"). Netted Agreements, and all transactions under the terms of those Netted Agreements entered into both before and after the date of the MNA, shall be governed by, and are made subject to, consolidated under, and, where applicable, amended, modified and/or supplemented by, the terms of the MNA. Any agreement or transaction between the Parties which might fall within the definition of a Netted Agreement, but which the Parties wish to exclude from the scope of the MNA and its Close-Out process, may be so excluded by listing such agreement of transaction in the Election Sheet as an Excluded Agreement. The MNA, all Netted Agreements, and all transactions relating or appended to, issued or entered pursuant to, or provided under or in accordance with, the terms of such Netted Agreements and/or this Master Netting Agreement, shall together constitute a single, integrated and inseparable agreement between the Parties. The Parties acknowledge that all such Netted Agreements, their underlying transactions and related documentation entered into after the date of the MNA are entered into upon reliance of this fact and that they would not otherwise enter into those Netted Agreements and/or transactions.

According to Section 3 of the MNA, the Parties shall specify in the Election Sheet the definition(s) of Close-Out Events which they desire to apply to the MNA, and, if applicable, to the Netted Agreements.

Section 3.1(C)(III) and the related sections of the Election Sheet, permit the parties to hand select and customize a list of bespoke, harmonised Close-Out Events which they wish to apply to all of their netted agreements and upon the occurrence of which the MNA and all of its underlying Netted Agreements may be terminated. Therefore Section 3.1(C)(III) specifies – as so called Harmonized Default Events - Winding-up, Insolvency and Attachment. But this is only one out of several other possible Close-Out Events for the Parties to elect. Section 3 of the MNA provides for example as a further Harmonized Default Events in Section 3.1((C)(I) Non Performance of a Party or its Credit Support Provider, in Section 3.1(C)(II) Cross Default Accelaration, in Section 3.1(C)(IV) Prolonged or Repeated Failure to Deliver or Accept is another Close-Out Event.

The same can be stated for the CPMA, also here, the Agreement provides a wide spectrum of possible Close-Out Events that initiate Termination, i.e. Automatic Termination of the Agreement and the underlying Principal Agreements. Section 2.1 of the CPMA stipulates a right to Close-Out in case that certain events occurred and are continuing: (a) a Close-Out Event in respect of a party under the terms of a Principal Agreement, (b) a representation or warranty made or repeated by a party hereunder proves to have been incorrect or misleading in any material respect when made or repeated, or (c) a party is in violation of a covenant made hereunder. The EFET/IECA Commodities Schedule to the CPMA describes a variety of Close-Out Events which can be elected as such by the Parties, for example Non-Payment, Breach of Representation or Warranty, Breach of Material Obligation, or other Events which can be specified by the Parties (Subdivision C of Division 1, Part II of the Schedule).

Subject to the general qualifications set out in this Opinion we are of the opinion that the right of Termination for non-insolvency-related Material Reason and the related close-out netting provision constitute legal, valid and binding obligations of the parties and are enforceable in accordance with their terms.

C. Multibranch Parties

1. Austrian Multibranch Party

According to the Austrian Trade Act (*Gewerbeordnung 1994 – GewO*)[64] companies may have, outside of their place of the seat, branches where business activities are conducted. A branch shall be opened by a decision of a competent authority of a company in accordance with the incorporation statement or the articles of association. The competent trade authority is the administrative district authority (*Bezirksverwaltungsbehörde*).[65]

A branch is not a legal entity. The company shall acquire rights and obligations through the business activity of its branch. The branch is organizationally and economically connected to the company and conducts its own business pursuant to the instructions by the company. A branch shall conduct business under its own firm name and indicating its seat as well as the seat of its founder. According to Section 33 of the Austrian Companies Act, the director of a company has to apply for the registration of the branch in the Austrian Commercial Register.

Based on the above stated, the obligations of the branch, that were taken over by execution of the respective Agreements under the MNA or the CPMA are actually obligations of the company itself. There would be no change in the conclusions reached under Sections II. A and B above based upon the fact that Party A has conducted business under the MNA or the CPMA on a multibranch basis prior to its insolvency.

The MNA and the CPMA shall be treated as a single unified agreement by the Austrian receiver under the laws of Austria, regardless of the treatment of the MNA, the CPMA or its Agreements by an insolvency official in a country where close-out netting may be unenforceable.

2. Foreign Multibranch Party

In Austria, a foreign company may perform business activities through a branch provided that the foreign company is registered with the respective foreign commercial registry. In Austria, a branch is not considered as a separate legal entity; transactions conducted by the branch are considered as transactions of the foreign legal entity.

Applications with the commercial registry in Austria are required and have to be done with the respective competent court at the designated seat of the branch. In case of branches with their main seat, i.e. the main administrative center, outside of the EEC, a permanent representative with its usual place of residence in Austria has to be appointed.

In principle, insolvency proceedings may be opened in Austria in respect of assets of a corporation located in the territory of Austria irrespective of the place where the debtor has its principle office or its registered seat.

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[64] Federal Law Gazette BGBl. No. 194/1994, amended by Federal Law Gazette BGBl. No. 08/2010.

[65] Section 46 of the Austrian Trade Act.

Contrary to previous legal practice[66], Section 237 Austrian Insolvency Act[67] provides for a principal extension of insolvency proceedings to assets located outside the territory of Austria unless the following cumulative conditions are not met: (a) the center of the main interest[68] of the debtor is located within another country, (b) an insolvency proceeding has been opened in that country, and (c) such insolvency proceeding does extend to foreign property.

Austrian international insolvency law is governed by several bilateral insolvency treaties, the EC Insolvency Regulation[69] and the insolvency related provisions of the Federal Act on International Insolvency Law [70], all of them are being hereinafter collectively referred to as "Provisions on International Insolvency Law".

Please see in this respect the description of International Insolvency law as set forth in Section II.A.1.3.

The provisions of Austrian insolvency laws constitute public policy provisions which apply irrespective of the choice of law. This is in particular true with respect to provisions serving to maintain the debtor's assets, such as the provisions on the recognition of set-off provisions, the rights and duties of the receiver, etc.

The EC Insolvency Regulation does not apply to insolvency proceedings of insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings[71].

Sections 243 Paragraph 1, 244 and 246 to 251 Insolvency Act are regulations that apply solely to credit institutes, licensed in a contracting country of the EEC according to Art. 4 to 11 of Directive 2000/12/EC, and insurance companies, accredited in an EEC country according to Art. 6 of Directive 73/239/EC or Art. 4 of Directive 2002/83/EC.

Sections 244 to 251 Insolvency Act are applicable to credit institutions and insurance companies with their registered seat outside of the EEC, solely in the event of the existence of a branch or a subsidiary in at least one EEC-state.

According to Section 244 Paragraph 1 Insolvency Act, Austrian courts may open insolvency proceedings over the assets of credit institutions or insurance companies licensed in the EEC, solely in the case that in the event of a credit institution, a license according to Section 1 Paragraph 1 of the Austrian Banking Act, or in the event of an insurance company, a license according to Sec. 1 Paragraph 1 Austrian Insurance Control Act, has been issued.

For the opening of insolvency proceedings over the assets of credit institutions or insurance companies with their registered seat outside of the EEC, the Austrian courts are only responsible in case of the existence of a branch of such a credit institution or insurance company in Austria.

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[66] For the historic jurisprudence see OGH 25.11.1999, 2 Ob 316/99f. For a summary of the ambivalent position of the Austrian Supreme Court prior to the decision OGH 25.11.1999, 2 Ob 316/99f see *Keppelmüller*, Österreichisches Internationales Konkursrecht (1997) 46 ff.

[67] This Section has been amended by Federal Law Gazette I No. 2003/36.

[68] The term "centre of main interest" is defined in consideration 13 of the EC Insolvency Regulation.

[69] Council Regulation (EC) No. 1346/2000 of May 29 2000 on insolvency proceedings, OJ EC L 160, 30/06/2000 p. 1-13.

[70] Bundesgesetz über das Internationale Insolvenzrecht – IIRG, Federal Law Gazette I, No. 2003/36.

[71] Article 1 section 2 of the EC Insolvency Regulation, pursuant to consideration 9 of the EC Insolvency Regulation, states that such undertakings should be excluded from the scope of such regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

D. Collateral

1. Austrian laws governing the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Cross Product Credit Support Annex ("CPCSA")

The CPCSA supplements, amends, forms part of and is subject to the CPMA. The Parties agree to provide each other with Eligible Credit Support according to the provisions of the Annex. This shall serve to collateralize outstanding obligations between the Parties from time to time pursuant to the Agreement.

Credit Support, according to the CPCSA, encompasses the obligation that upon demand by a Party (the "Transferee") on or promptly following a Valuation Day, the other Party (the "Transferor") shall transfer to the Transferee Eligible Credit Support.

The Eligible Credit Support will consist of either cash or a letter of credit.

According to Section 7 Number 1 of the CPCSA, each Party agrees that all right, title and interest in and to any Eligible Credit Support or Interest amount which it transfers to the other Party under the terms of this Annex will vest in the Transferee free and clear of any liens, claims, charges or encumbrances or any other interest of the Transferor or of any third person (Transfer of Title).

Austrian Law generally recognizes the following types of security interests with respect to moveable assets and securities where a right in rem is established: (i) pledges, (ii) fiduciary transfers of ownership for security purposes as well as (iii) security assignments of claims.

The Austrian Civil Code does not recognize expressly transfer of ownership for purposes of collateral. Its use in practice commenced in the 19th century and as a concept it has been recognized by the (former) Bankruptcy Act and Judicial Composition Act.

Generally, a valid transfer of ownership of movable goods for security purposes will be valid only if the collateral is handed over to the beneficiary or its representative by party posting the collateral.

If the collateral consists of assets other than cash, the beneficiary has to liquidate the collateral upon foreclosure. Clauses pursuant to which he can simply keep the collateral are considered null and void. These limitations do not apply to cash.

The Austrian Financial Collateral Act[72], implementing the Financial Collateral Directive, regulates the creation and the liquidation of collaterals between certain financial market participants. According to the current scope of the Financial Collateral Act (Section 2) all parties involved in the relevant collateral transaction have to be either one of the following:

(i) a public law entity of the European Union member states in charge of management of public debt or entitled to hold business accounts; or

(ii) central bank of an European Union member state, European Central Bank, International Monetary Fund, European Investment Bank, BIS, IBRD, International Financial Corporation, Inter-American Bank for Development, Asian Bank for Development, African Bank for Development, Council of European Fund for Redistribution, Nordic Investment Bank, Caribbean Bank for Development, European Bank for Reconstruction and Development ("EBRD"), European Investment Fund and Inter-American Investment Corporation; or

[72] Austrian Financial Collateral Act (*Finanzsicherheitengesetz* – FinSG), Federal Law Gazette I, No. 117/2003.

(iii)financial institution (i.e. credit institution, investment company, financial institution, insurance company, company for joint investments in transferable securities); or

(iv)central counterparty, settlement agent and clearing organization.

The Austrian parliament has recently adopted an amendment to the Financial Securities Act which will extend its scope of application to transactions between financial market participants on the one side and certain other commercial parties (not being a financial market participant)[73]. This amendment enters into force on June 30, 2011.

The Financial Collateral Act contains specific provisions concerning Financial Collateral Arrangements with respect to cash or financial instruments. The term "Financial Collateral Arrangements" comprises title transfer financial collateral arrangements and security financial collateral arrangements whether or not these are covered by a master agreement or general terms and conditions.

As a matter of Austrian Law, the creation or transfer of rights in rem, including the transfer of ownership title and the creation of a pledge, requires both a valid contractual agreement or other obligation to transfer ownership title or to create a security interest, ("titulus"), and the valid transfer of ownership title or creation of the security interest, ("modus").

Both the Act on Private International Law[74] and the Rome I EC-Directive recognize, subject to certain limitations, a contractual choice of the law governing the obligation to transfer title or to provide security, i.e. the titulus.[75]

However, to the extent Austrian Law applies according to mandatory provisions of Austrian conflict of law rules, the parties may not freely choose the law governing the transfer of the ownership right or the creation of a security interest, i.e. the modus.

The modus as well as other issues concerning rights in rem (establishment, acquisition, types, contents, effects, protection, transfer and loss of rights in rem) are governed, in essence, by the law determined by application of the rules of the Act on Private International Law.

Pursuant to Section 31 (1) of the Act on Private International Law Austrian law governs the modus if the collateral is located in Austria at the time of the creation of the right in rem.

A choice of law with respect to rights in rem concerning the transfer of ownership or the creation of a security interest which is not in compliance with Austrian conflict of law rules will be disregarded by the Austrian courts. They will uphold such transfer of ownership or security interest if it is valid under the substantive laws which are to be applied according to Austrian conflict of law rules.

Austrian conflict of law rules previously did not contain specific provisions concerning the law applicable to collateral. However, the Austrian legislator is following the international developments in this area[76].

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[73] Federal Law Gazette I, No. 90/2010.

[74] Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht, Federal Law Gazette BGBl 1978/304, as most recently amended by the Federal Law Gazette BGBl I 2004/58 (*Internationales Privatrechts-Gesetz, IPRG;* the "Act on Private International Law").

[75] Article 3 of EC-Directive No 593/2008 (Rom I Directive)

[76] On an international level, the Hague Conference on Private International Law (the „Hague Conference") adopted the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an

2. Does each transfer of collateral effect an unconditional transfer of ownership in the assets transferred?

As a matter of Austrian Law, pledges, security transfers of ownership and security assignments of rights are strictly accessory and thus dependant on the validity and existence of a secured obligation. Accordingly, upon discharge of the secured obligation the pledge as a general rule (with certain limited exceptions concerning real estate mortgages) will automatically cease to exist.

With respect to other security interests (fiduciary transfer of ownership and security assignment) interpretation of the contract in most cases will lead to the same result since no security interest can exist without a secured obligation. Also in the case of a novation of the secured obligation the security interest will cease to be valid unless otherwise agreed.

The secured obligation, which can also be conditional or not yet due, has to be determined or at least be determinable. For future obligations this means that the parties (i.e. the collateral provider and the collateral taker) and the legal basis (causa, *Rechtsgrund*) of the obligation (i.e. the obligation to be secured) need to be determined in a way that the secured obligation can at least be individualised. On the contrary, a security for all future obligations arising generally from "the parties" business relations (*Geschäftsbeziehung*) might be considered too vague.

Austrian Law does not distinguish between the "creation" and "perfection" of a security interest, but distinguishes between the obligation to provide a security interest (the *titulus*), i.e. the agreement between the parties on the creation of a security interest (*Sicherungsabrede*), and the creation (*Bestellung*) of the security interest as such (the *modus*).

Under the Financial Collateral Act a transfer of title based on a financial collateral agreement is possible. Unless otherwise stipulated under the financial collateral agreement, the collateral taker is entitled to use the collateral freely without limitations, including the rights to dispose of the collateral. If the collateral taker decides to dispose of the collateral, and at the same time: (i) preconditions for enforcement of collateral are fulfilled; and (ii) obligation of the collateral taker to deliver substitute security instrument still exists or it is still valid, early termination of obligations is possible.

Unless otherwise stipulated in the financial collateral agreement, early termination of the obligations referred to above is possible without: (i) prior notification of the collateral taker to the collateral giver; (ii) expiry of additional notice period; and (iii) organization of public auction or without anybody's approval for sale.

3. Requirements for the establishment of a security interest and to obtain, establish, enforce or continue with an ownership interest of the collateral provided under the CPCSA

Intermediary ("Hague Securities Convention") on July 5, 2006. The Hague Securities Convention has not yet entered into force but is open for signature and ratification by the 62 Member States of the Hague Conference on Private International Law, as well as by all other States. The purpose of the Hague Securities Convention is to provide financial markets with legal certainty for dealings in indirectly held securities. If ratified, it should produce a uniform and rational rule for determining the proprietary aspects of a transfer or pledge of indirectly held securities. In this respect, the Hague Conference proposes to look to the law of the location of the intermediary maintaining the account to which the securities are credited (the "Place of the Relevant Intermediary Approach" or "PRIMA"). The major advantage of PRIMA would be that the perfection of security interests will be governed by the law of one jurisdiction even where a portfolio of securities of issuers from different countries is involved.

In order to establish a valid security interest both the obligation to provide the collateral (the *titulus*) and the creation of the security interest (the *modus*) have to be validly established and completed.

Equally, in order to validly transfer ownership title under Austrian Law both the obligation to transfer ownership title (the *titulus*), i.e. the agreement between the parties on the transfer of ownership and the transfer of ownership title as such (the *modus*) have to be validly completed.

This also means that no right in rem can be transferred or created in the event the appropriate modus is affected without the underlying *titulus*. Austrian Law does not recognise an abstract transfer of rights.

Generally speaking, the contractual element of such transaction (the *titulus*) is governed by the principle of contractual freedom. Furthermore, Austrian Law contains a numerus clausus with respect to the possible *modus* of transferring ownership title and creating security interests, i.e. the law exhaustively enumerates which *modus* will effectively transfer ownership or create a security interest, as the case may be.

For the creation of an *in rem* transfer of ownership for security purposes all ways of validly creating an unconditional transfer of ownership where the transferor gives up physical control over the asset are recognized. If cash is handed over to the transferee, such requirement will be fulfilled.

The Austrian Financial Collateral Act does not require any specific form or action for validity of the financial collateral, except that there exists a written proof according to Section 4 of the Act. Therefore, if transferee receives absolute ownership in the collateral there is no need to take any action thereafter to ensure that its title therein continues.

4. What is the effect under Austrian law of the right to substitute collateral pursuant to Section 6 of the CPCSA? Does the presence or absence of consent to substitution by Party B have any bearing on this question?

Within the scope of applicability of the Financial Collateral Act the right to substitute collateral is now explicitly recognized. The provisions on the right to use under Section 7 Financial Collateral Act are, however, limited to security financial collateral arrangements within the meaning of Section 3 Paragraph 1 Number 3 of the Financial Collateral Act[77]. Nevertheless, a similar right to use applies with respect to title transfer collateral arrangements, as Section 8 Financial Collateral Act – stipulating the acknowledgment of an unconditional transfer of rights - makes it explicitly clear that in the context of transfer of title collateral arrangements there would be only an obligation to transfer the same type of collateral.

Outside of the scope of applicability of the Financial Collateral Act, the substitution of collateral with concurrent preservation of identity and priority of the pledge is not possible unless specifically stipulated by Austrian Law.

As a matter of Austrian Law the identity and priority of the pledge could be preserved inter alia with respect to:

(i) proceeds of moveable assets pledged as collateral sold in execution proceedings which will substitute the pledged Collateral in accordance with section 285 Enforcement Act ;

[77] Section 3 Paragraph 1 Number 3 of the Financial Collateral Act defines financial collateral in the form of a limited right in rem, which is therefore a collateral over a cash deposit or a financial instrument, whereupon at the time of posting of the collateral, the ownership on the provided collateral stays with the collateral provider.

(ii) proceeds derived from the enforcement of a security deposited with the court in accordance with Sections 297 Paragraph 2 Enforcement Act;

(iii) the asset handed over consequent to a pledge of the transfer claim in accordance with Sections 327 et seq. Enforcement Act; and

(iv) an amount deposited with the court pursuant to Section 455 Civil Code.

5. Payable Net amount according to Section 4 of the CPMA together with Section 11 of the CPCSA.

According to Section 11 of the CPCSA, "in the event a Close-Out Event occurring in relation to a Party, the Valuation Agent shall determine the Base Currency Equivalent of all Eligible Credit Support provided under the Annex on the date of calculation of the Final Net Settlement Amount ("Determination Date")"; provided, however, that any Eligible Credit Support in the form of a Letter of Credit as of the Determination Date shall not be considered by the Valuation Agent in making such determination. Notwithstanding the preceding sentence, to the extent that the Transferee draws under any such Letter of Credit, the obligations of the Transferor shall be discharged in an amount equal to such drawings. Such amount shall be included in the Final Net Settlement Amount to be determined pursuant to Section 4 of the CPMA."

Such a determination would be – within the scope of applicability of the Financial Collateral Act – explicitly recognized under Section 8 Financial Collateral Act.

However the collateral taker (i.e. the Transferee) shall, when exercising its rights under the Financial Collateral Act, undertake the valuation and enforcement of security financial collateral and the determination of the amount of the relevant financial obligations pursuant to the principles of fair business dealings (*Grundsätze des redlichen Geschäftsverkehrs*) and the security Financial Collateral Arrangement. In particular, the estimated, current or market value of the financial collateral shall be considered. Surplus funds shall be returned to the collateral provider (the Transferor) or credited to its account in its favour.

By reference to the rules applicable to enforcement of cash pledges and cash transfers of title collateral arrangements, we deem that an inclusion in the Final Net Settlement amount would be, also outside the scope of applicability of the Financial Collateral Act, recognized in Austria.

There are no particular issues under Austrian Law with respect to third party collateral agent as this concept is recognized under Austrian Law.

6. Are the rights of Party B enforceable in accordance with the terms of the CPMA and the CPCSA, irrespective of the insolvency of Party A?

Outside the scope of application of the Financial Collateral Act, the general restrictions of the Insolvency Act have to be taken into account.

Apart from the general rules regarding the avoidance of contracts set out in the Insolvency Act (see Section II. A. 4 above) one needs to note Section 11 Paragraph 2 Insolvency Act pursuant to which claims of creditors regarding the hand-over of assets being owned by such creditor are not enforceable during a period of six months from the opening of the insolvency proceedings, if satisfaction of such claim may endanger the going concern of the insolvent party. An exception applies if the delay were to cause significant personal or economic disadvantages to the entitled third party.

If cash is given as collateral, these issues will not arise, since the collateral has been transferred to the creditor. From the creditor's point of view performance of the collateral arrangement is completed upon transfer, the termination of the right of the (insolvent) transferee to demand return of a corresponding amount to the extent he has an open obligation to the transferee is not affected by the opening of insolvency proceedings.

The Financial Collateral Act has – within the scope of applicability of the Financial Collateral Act – clarified the process of enforcing collateral in case of insolvency of the collateral provider or of the transferee. According to Section 6 Paragraph 2 of the Financial Collateral Act, the collateral can be enforced and liquidated also in case of the opening of an insolvency or liquidation proceeding.

Pursuant to Section 5 Paragraph 1 Financial Collateral Act the transferee may enforce any financial collateral provided under, and subject to the terms agreed in a security Financial Collateral Arrangement, as follows:

(i) financial instruments by sale or appropriation and by setting off their value against, or applying its value in discharge of, the relevant financial obligations; and

(ii) cash by setting off the amount against or applying it in discharge of the relevant financial obligations.

Pursuant to Section 5 Paragraph 2 Financial Collateral Act, an appropriation of the collateral by the beneficiary is possible only if this has been agreed by the parties and the financial collateral arrangement allows the valuation of the financial instruments. In case of cash this will not be an issue.

7. Recovery/Substitution/Avoidance of the transfer of collateral during "suspect period"?

Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by 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 CPCSA 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 reasons?

In the event of insolvency proceedings over the assets of an Austrian counterparty any legal act (*Rechtshandlung*) and hence also the execution of Principal Agreements, any payments under the CPMA or the granting of a security ("Performance Assurance") is avoidable according to the rules of the Insolvency Act[78]. As a general rule, legal acts may be avoided if (i) performed within a certain "suspect period" (ranging from 10 years to 6 months) prior to opening of bankruptcy proceedings; (ii) being disadvantageous of the other creditors of the Austrian counter-party (*Gläubigerbenachteiligung*); and (iii) the avoidance of the legal act is suitable to increase the other creditors' satisfaction (*Befriedigungstauglichkeit*), i.e. will lead to a re-payment or re-delivery to the bankrupt estate.

For details on the reasons for the avoidance of a legal act stipulated in the Insolvency Act, see above under Section II.A.4.1.

According to the Austrian Supreme Court[79] the law governing avoidance of contracts outside of bankruptcy proceedings is the law applicable at the place in which the assets,

[78] Sections 27 through 43 Insolvency Act.

[79] OGH 23.5.1984, published *inter alia* in JBL 1985, 299 = IPRE 2/106.

the re-transfer of which to the debtor is the subject matter of the suit for avoidance, are located. The Supreme Court has also ruled that a choice of law with respect to avoidance of contracts is inadmissible and will not be honoured[80].

Outside of bankruptcy proceedings certain legal acts may be avoided by any other creditor of Party A having an enforceable claim who has not been satisfied in enforcement proceedings or who most likely will not be satisfied if enforcement proceedings were initiated.

8. Is the CPCSA in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B?

Pursuant to the aforementioned conclusions, the CPCSA is in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B.

E. Confirmation Practices

1. Binding Individual Contract

1.1 Does the formation of a legally binding and enforceable Transaction require any formal act (e.g. execution in writing, signature, registration or notarization)?

Under Austrian Law the conclusion of contracts is in general not subject to compliance with any particular statutory form[81]. Valid and binding agreements may for instance be concluded in writing, verbally, by fax, e-mail, etc. Even an implicit or tacit agreement would be legally valid and binding, provided that the parties' intent to conclude an agreement was - taking into consideration all circumstances - recognisable for the respective other party without doubt[82].

The general rule certainly applies with respect to transactions concluded under the relevant Netted Agreement or Principal Agreement and the related MNA or CPMA.

1.2 At what point in time does a Transaction agreed upon orally and later confirmed in writing become legally enforceable?

Upon the time of reaching oral agreement (please see the above general introduction).

1.3 Does failure to object to incorrect terms in received Confirmation constitute "acceptance" of those terms? If so, is there a relevant period?

Under Austrian Law failure to object to incorrect terms of a previous valid and binding agreement in a received confirmation does in general not constitute acceptance of those terms and thereby modifying the terms of the original agreement. According to the jurisdiction of the Austrian Supreme Court (*Oberster Gerichtshof*)[83] a failure to object to incorrect terms of a received confirmation exceptionally constitutes acceptance if (i) the deviation of the confirmation from the agreed terms is not material or (ii) such deviation regards certain terms that have been intentionally left open for determination/modification in a later confirmation.

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[80] OGH 27.2.1984, published *inter alia* in SZ 58/34 = IPRE 2/107.

[81] *Rummel* in *Rummel³*, § 883 Rz 1-3.

[82] *Rummel* in *Rummel³*, § 863 Rz 10-20.

[83] OGH ecolex 1994, 316 = HS 24.084; 24.083.

Therefore, it may be concluded that in connection with Transactions concluded under the MNA or CPMA failure to promptly object to the incorrect terms of a received Confirmation does not immediately constitute *acceptance*. In our non-binding assessment a maximum delay of two days should be acceptable.

According to Austrian legal practice and jurisprudence, remaining silent is generally no declaration of intention, especially, it does not have the meaning of a confirmation. An exception is recognized for the case of "silence upon receiving of a commercial confirmation letter".

The typical case of a commercial confirmation letter is that the parties orally agree upon a contract, whereupon one party confirms the previous oral contract in a letter addressed to the other party.

As long as the content of such letter and the previous oral agreement are not deviating, there are no further problems given. Then the writing is only written evidence about the execution and the content of the oral agreement.

More complex is the case, if the confirmation letter deviates from the oral agreement. Then the question raises, whether the content of the confirmation letter, or the content of the previous oral agreement is valid. In any case, it depends upon the materiality of the deviations and whether they still allow to find a consensus; according to the theory of trust, which is employed in Austrian contract law to interpret agreements and is based on Section 863 of the Austrian Civil Code, only minor deviations or edditions to a commercial confirmation letter can constitute acceptance, according to a fair customary usage ("*redliche Verkehrsauffassung*") and by taking into consideration the objective meaning of the letter ("*objektiver Erklärungswert*").[84]

1.4 Is the reference to the Netted Agreement or Principal Agreement sufficient for the inclusion of the Transaction in the Agreement?

As long as there is no written form required, the parties may enter into contract in any manner, however, it must satisfy standards for legal acts as outlined above. In these cases it is important to determine how the legal act made by the parties can be interpreted. The rules for interpreting a contract are stipulated in the Austrian Civil Code.

Section 914 of the Austrian Civil Code declares that for the interpretation of contracts, not the literally sense of a (written or oral) expression is to adhere, but the intention of the parties is to determine and the contract is to be understood as it complies with common sense.

If the contract was entered into according to already printed contents or it was prepared and proposed by one party, the dubious provisions shall be interpreted in favour of the other party. The parties may agree that a particular third party shall have the right of interpretation.

Thus, a Transaction would be deemed part of the Netted Agreement or Principal Agreement if this is implied by the legal acts of the parties (on the basis of aforementioned principles for interpretation). Indeed, for avoidance of doubt, it is recommended that the inclusion of the Transaction to an Agreement is confirmed in writing (if not entered into in writing) with explicit reference to the Netted Agreement or Principal Agreement. Such reference is in our view sufficient.

2. Means of Evidence

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[84] *Kletecka* in *Koziol/Welser* I [13], S 95; *Gruber*, Unternehmensbezogene Geschäfte [9], S 10.

2.1 Are there any local requirements or other consideration that are relevant to each form of evidence?

In general, in Austria exists the basic principle of the free consideration of evidence[85], nevertheless there are certain restrictions for the application and the gathering of evidence, even prohibitions. It is further to differ between direct and indirect means of evidence.

However, witness statements in front of a court are direct means of evidence like taped recordings, e-mail or other electronic messages or facsimile. In case of taped recordings, e-mails or other electronic messages or facsimile evidence is taken by direct observation and examination of persons and things directly in front of the court. Only in the case that the observation/examination is not possible directly in front of the case, because it would cause difficulties that cannot be prevented, evidence can be gathered indirectly. Even taped recordings that have been taken without the consent of the observed person are allowed after a consideration of the interests of the parties and of the concerned legal values.

In a civil court proceeding, every fact has to be proven by the parties; the parties have to convince the judge about the truth of their allegations at least with a possibility that almost equals certainty. Whether this standard is satisfied, is subject of the independent decision of the judge.

F. Core Provisions

1. Would any of the elections contemplated by the MNA or the CPMA or the CPCSA change the substance of conclusions reached under Part II A and Part II B (Enforceability of Close-out Netting)?

We believe that any of the elections contemplated by the MNA or the CPMA or the CPCSA would not affect our conclusions reached in the Opinion, so long as any such modification would not have the effect of modifying any Core Provisions (as defined below).

2. What are the provisions of the MNA and the CPMA that are essential and that a material alteration thereof could affect the conclusions reached in that Part II A or Part II B (each such provision a "Core Provision")?

We believe that the following provisions contained in the EFET General Agreement are to be considered as Core Provisions:

2.1 MNA:

Scope of Early Termination and Close-Out Netting Rights (§ 2);

Close-Out Events (§ 3); including § 3 of the Election Sheet;

The rights to Close-Out, Its Effect and Applicable Limitations (§ 4), including § 4 of the Election Sheet;

Voluntary Commencement of Close-Out (§ 5)

Customization of Automatic Termination Rights (§ 6), including § 6 of the Election Sheet;

Determination of Settlement and Settlement Amounts (§ 7)

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[85] Section 272 Paragraph 1 of the Austrian Code of Civil Procedure, as amended by Federal Law Gazette No 137/2009

Netting-Off of Settlement Amounts; Accrual of Interest (§ 8)

2.2. CPMA:

Close-Out of all Principal Agreements (§ 2), as well as Subsection A of Division 1, Part II of the EFET/IECA Commodities Schedule;

Determination and Settlement of Settlement Amounts (§ 3);

Set-Off of Settlement Amounts; Accrual of Interests (§ 4).

We believe that modifications to any Modifiable Provisions (being any provision of the MNA/CPMA not specified as a Core Provision) would not affect our conclusions reached in the Opinion so long as any such modification would not have the effect of modifying any Core Provisions.

Further to the above, as the MNA as well as the CPMA are integrated legal documents with numerous cross-references within each paragraph and given the fact that the MNA as well as the CPMA have been drafted in a way to enable the Parties to be as flexible as possible and given that the MNA and the CPMA may widely be amended and specified by selecting from the optional provisions and otherwise inserting specifically negotiated changed in the Election Sheet, it is impossible to assess the variety of possible changes to the MNA as well as the CPMA which could either each on its own or together constitute a "material alteration" of the MNA or the CPMA, which would affect the conclusions reached in the Opinion.

It is therefore impossible to render an exhaustive and final legal opinion that would cover all possible alterations to the MNA and the CPMA and to confirm that any of the elections to be contemplated by the MNA or the CPMA or any of the Annexes would not change the substance of the conclusions set by this Opinion. Further to that as stated previously, the Opinion does not substitute the independent review of any individually negotiated EFET documentation. The Opinion must be strictly limited to the issues addressed herein which we have reviewed in accordance with your instructions and which we have deemed important and necessary to fit the purpose of the Opinion regarding the standard form of the MNA and CPMA.

G. Governing Law, Arbitration and Jurisdiction

1. Choice of Law

Assuming that the relevant EFET General Agreement is governed by the laws of a jurisdiction other than Austria, would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (Section 12 of the MNA and Section 6 of the CPMA) be upheld in Austria and what would be the consequence if it were not?

Agreements on the *choice of law* will be effected in conformity with Article 3 of the Rome I Regulation[86] which grants parties' autonomy to agree upon the applicable law for a contract.

The parties are free to elect any valid legal system; there is no need of a connection between the elected law and the actual facts of the case, nor to a special interest of the parties (so called neutral law). [87]

[86] Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), UJ L177 of July 4, 2008

[87] *Verschraegen in Rummel ³, EVÜ Art 3, RZ 16. The content of Article 3 Paragraph 2 of the EVÜ stayed the same also within the new Rome I Regulation. The freedom of choice rule did not chance.*

In this respect it should be noted that where any obligation is to be performed or observed in Austria, such obligation may not be enforceable under Austrian Law if and to the extent that such performance or observance would be contrary to public policy under Austrian law.

Regarding the validity of the *prorogation of the Austrian jurisdiction* it needs to be established whether the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in the following referred to as the "Brussels-I-Regulation") or the (at least in this context) identical Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters[88] (in the following referred to as the "Lugano Convention") apply or not.

According to Article 23 of the Brussels-I-Regulation/Article 17 of the Lugano Convention the Parties may agree that a court or the courts of a Member State/Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship if at least one of the parties is domiciled in a Member State/Contracting State and if so agreed in writing or by on oral agreement evidenced in writing[89]. Based upon our assumptions the agreement on the jurisdiction of a Contracting State is legally valid and binding.

An agreement on the jurisdiction of a Non-Contracting State is subject to the provisions of the respective foreign *lex fori*.

An agreement on arbitration is generally valid[90] if made in writing[91]. Pursuant to the Arbitration Amendment Act 2006, the receipt of written communication is deemed to have been received if the addressee has knowledge of the arbitral proceedings and the residence remains unknown despite reasonable inquiry[92]. If, however, the Parties seek enforcement of an international arbitration award in Austria, the enforceability of such award is subject to the condition that the arbitration award has been issued in the country being a party to a bilateral or multilateral agreement. Austria recognises

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[88] Official Journal L 319 of November 25, 1988 p. 9.

[89] Alternatively such agreement on the prorogation of jurisdiction can be also reached in a form which accords with practices which the parties have established between themselves; or (ii) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

[90] If signed on the basis of a power of attorney a special power of attorney in respect of the agreement on arbitration is required.

[91] The Arbitration Amendment Act (SchiedsrechtsÄnderungsgesetz – SchiedsRÄG 2006, Federal Law Gazette, I, No. 2006/7) entered into force on July 1, 2006. In essence, it provides for certain clarifications to the rules of arbitration applicable, in case the place of arbitration is in Austria, irrespectively whether the contractual arrangement is governed by Austrian substantive law. In such an event we would recommend to analyse whether the arbitration clause and the nomination procedures for arbitrators are in compliance with the conditions established by the relevant provisions of Austrian procedural laws.

Pursuant to Section 583 para 1 of the Civil Procedure Act the arbitration agreement can be concluded in written form as a signed document or as a fax, e-mail or other forms of telecommunications. However, we do advise to make use of signed documents.

[92] § 580 of the Civil Procedure Act stipulates (English translation):

(1) Unless otherwise agreed by the parties, any written communication is deemed to have been received on the day on

which it was personally delivered to the addressee or to an authorized recipient or, if this was not possible, on the day on which it was otherwise delivered to the place of business, residence or usual place of abode of the addressee.

Where the addressee has knowledge of the arbitral proceedings and where he or the authorized recipient remains of unknown residence despite reasonable inquiry, a written communication is deemed to have been received on the day on which orderly delivery is on record as having been attempted to a place stated by the addressee in the arbitration agreement or subsequently made known by the addressee to the other party or the arbitral tribunal and which, to that point, has not been revoked by the reporting of a new address.

(3) Paragraphs (1) and (2) do not apply to communications in court proceedings.

arbitration awards of basically all developed countries and is a party to the New York Convention of Recognition of International Arbitration Awards of 1958.

J. Credit Institutions

1. General statement

Certain special rules apply, in addition to the general insolvency proceedings described herein, in the case of corporations which are credit institutions. Credit institutions are not subject to the provisions of the Insolvency Act on restructuring plans (Section 82 Paragraph 1 Banking Act). A credit institution may be subjected to a specific bank supervision proceeding (*Geschäftsaufsichtsverfahren*), which qualifies as a reorganization measure within the meaning of Article 2 of Directive 2001/24/EC. Directive 2001/24/EC has been transposed into Austrian law by virtue of an amendment to the Banking Act (see Section 81 ff Banking Act).

The Financial Markets Authority in Austria is a party to insolvency proceedings and bank supervision proceedings of credit institutions.

An application for the opening of bankruptcy proceedings regarding credit institutions can only be filed by the Financial Markets Authority in its capacity as banking supervisory authority and during a bank supervision proceeding also by the supervisor.

The conclusions in this Opinion regarding the General Agreement concerning insolvency related termination and close-out netting are valid and accurate also in the context of insolvency proceedings opened against a credit institution, unless otherwise mentioned in this Opinion.

2. Bank supervision proceeding

The Financial Markets Authority and/or the credit institutions, which are either over-indebted or insolvent, may file a petition for bank supervision proceedings if there is likelihood that the status of over-indebtedness or insolvency may be cured.

In case the competent court orders a supervision proceeding, it has to appoint a supervisor (*Aufsichtsperson*). Bank supervision proceedings take effect as of 0:00 hours of the day following publication of the supervision order in the insolvency data base.

The supervisor has full information rights and may veto management decisions. According to Section 83 et seq. of the Banking Act a bank supervision proceeding can last for up to one year[93]. In general, the credit institution is entitled to continue its business under the supervision of the supervisor. It is, however, not possible for a counterparty to set-off claims originating prior to the opening of supervision proceedings with claims of the credit institution under supervision originating after the opening of such proceedings.

3. Special receivership proceedings

Banks that are over-indebted or insolvent may, if the over-indebtedness or insolvency is likely to be cured, apply for special receivership proceedings with the competent court.

Such application may also be submitted by the Financial Market Authority. In the event the court decides on receivership it will have to appoint a receiver [94] who supervises the management of the credit institution. Special receivership proceedings take effect as of

[93] As from January 1, 2006 Directive 2006/48/EC has been introduced into the Austrian Banking Code

[94] Such receiver being either a natural or legal entity (Section 84 (1) Banking Act).

0:00 hours of the day following publication of the receiving order in the insolvency data base[95].

Unless the court orders otherwise, the credit institution may continue its business operations under the supervision of the receiver. For the conduct of business which goes beyond of normal business operations, the consent of the receiver is required. Ordinary business operations cannot be undertaken if the receiver has vetoed against them. Operations effected by a credit institution under receivership without the consent of the receiver (if such is needed) or in contravention thereto if there has been a veto of the receiver would be invalid against the creditor(s) if such creditors knew or ought to knew that there are beyond the actual scope of ordinary business and effected without the consent of the receiver or in contravention of a veto of the receiver, as applicable. It affects creditor's rights inter alia because it is not possible for the credit institutions business partners to set off claims originating prior to the opening of receivership against claims of the credit institution under supervision originating after the opening of the proceedings.

Special receivership may last for up to two years.

Section 81 c Banking Act explicitly provides that the entitlement of a creditor to demand a set-off of his claim against the claims of the credit institution shall not be affected by the opening of a reorganization measure within the meaning of Article 2 of Directive 2001/24/EC, where such a set-off is permitted by the law applicable to the claim of the credit institution.

Section 81 l Banking Act, which has an identical wording as Section 233 Insolvency Act (see II.A.3.c, above), explicitly provides that netting agreements ("*Aufrechungs- und Schuldumwandlungsvereinbarungen*") shall be subject to the law applicable to the agreement.

Furthermore, Section 81 l of the Banking Act –implementing Article 25 Bank Winding-Up Directive provides that netting agreements shall be governed solely by the law of the contract which governs such agreements. The term "netting agreements", as set forth in Section 81 lit l of the Banking Act, covers by explicit referral both set-off and novation agreements (*Aufrechnungs- und Schuldumwandlungsvereinbarungen*).

In addition, Section 22 Banking Act sets forth the criteria for consideration of netting agreements in the context of the determination of the solvency criteria of credit institutions. Pursuant thereto, netting arrangements (in order to be taken into account when determining the necessary own funds) have to be in line with 2006/48/EC[96] . Annex III Part 7 of the Capital Adequacy Directive provides for a statutory definition of netting arrangements covered for risk reduction purposes which include (i) bilateral contracts for novation under which mutual claims and obligations are automatically amalgamated in a way that such a novation fixes one single net amount each time novation applies and thus creates a legally binding, single new contract extinguishing former contracts as well as (ii) other bilateral netting agreements between a credit institution and its counter-party and contractual cross-product netting agreements.

On the other hand, Section 86 Banking Act stipulates that with the entry into force of the decision to impose a supervision proceeding all previous established claims against the credit institution are by virtue of law granted a respite. The respite is granted until the supervision proceedings are ended.

[95] Section 85 Paragraph 1 Banking Act.

[96] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, p. 1–200.

As a consequence we are of the opinion that a party of an Austrian party subjected to banking supervision proceedings could enforce the early termination and close-out netting provisions of the General Agreement, the resulting net termination claim, if owed by the Austrian counterparty, would however be granted a respite until the bank supervision proceeding is ended.

Peter Solt
Partner
Benn-Ibler Rechtsanwälte GmbH

Vienna, May 2011

ANNEX 1

Transactions entered into under Principal Agreements[97]

A Energy Transactions

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of commodity (e.g., base metals, gas, oil, electricity, emission rights or freight) 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.

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.

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 base metals, gas, oil, electricity, emission rights or freight, or a futures contract on a commodity (e.g., Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

B Energy Related Transactions

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 Emmissions Allowance Transaction may also constitute a swap of emissions allowancesor 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 Emission Allowances 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.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, 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.

C Other Transactions

[97] Some of the transactions provide for an exchange of cash by both parties and others for the physical delivery of commodities, shares or bonds in exchange for cash.

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.

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.

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) 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) or commodity price (in the case of a commodity cap).

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.

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) or commodity price (in the case of a commodity floor).

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 quality of freight or, in the case of time charter transactions, on a notional number of days.

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.

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.

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 specific local, regional or national area.

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.

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.

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.

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.

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.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price for 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 examples Gold-COMEX on the COMEX Division of the New York Merchantile Exchange) or another method specified by the parties. Bullion Swaps include cap, collar or floor transactions in respect of Bullion.

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 on 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.

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, and in the case of silver, platinum and palladium, a troy ounce.

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).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

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.

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.

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.

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.

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 to the other party (in consideration for the original cash payment plus a premium).

Credit Default Swap.[98] 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 (e.g., 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 competent Credit Default Swaps.

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.

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.

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

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98 Some market participants may refer to credit protection transactions as credit swaps, credit default swaps or credit default options.

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.

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.

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.

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 specific rate or index pertaining to statistical data on economic conditions, which may include economical growth, retail sales, inflation, consumer prices, consumer sentinent, unemployment and housing..

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.

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.

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.

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 from such other party at a future date.

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.

ANNEX 2

EFET Instruction Letter of 15 November 2010

EFET European Federation of Energy Traders

15 November 2010

EFET CPMA-MNA Legal Opinion Review

Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements under the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement.

Dear EFET Counsel,

We are seeking opinions from various jurisdictions on the enforceability of close-out netting provisions of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement. As far as the latter is concerned, we are also interested in the validity and enforceability of collateral provided under the EFET Cross Product Credit Support Annex to the TBMA Cross Product Master Agreement.

This process is in line with Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (the "**Banking Directive**") and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (the "**Capital Adequacy Directive**"), which, through implementation in all Member States of the European Union, apply to those of our members that are credit institutions or investment firms. Article 78(2) and Annex III, Part 7 of said Banking Directive require institutions to make available to the competent authorities written and reasoned legal opinions to the effect that, in the event of a legal challenge, the relevant courts and administrative authorities would uphold the netting agreement used by the institution ("**Enforceability of Close-out Netting**"). The Banking Directive specifically requires the opinions to address the validity and enforceability of the cross-product netting agreement under its terms and its impact on the material provisions of any included individual master agreement. In the case of a party which has entered into transactions under an EFET General Agreement as a multibranch party, i.e., where it operates for the purposes of the EFET General Agreement with two or more branches and in two or more jurisdictions ("**Multibranch Parties**"), it is necessary to obtain opinions on the enforceability of close-out netting from each jurisdiction where such a designated branch of that party is located. EFET has decided to commission such opinions and update them at least annually. Additionally, EFET members which are not credit institutions or otherwise expressly subject to the Banking Directive and Capital Adequacy Directive require the advice provided in these jurisdiction opinions for reasons of maintaining sound and legally optimal commercial contracting practices.

In addition to the traditional netting opinion scope covering the enforceability of close-out netting in relevant jurisdictions, EFET is also interested in your opinions and recommendations addressing (i) the enforceability of rights in collateral provided under the EFET Cross Product Credit Support Annex to the TBMA Cross Product Master Agreement ("**Collateral**"), (ii) the validity and enforceability of other provisions of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement ("**General Enforceability**"), (iii) in general terms the conditions that have to be met for a transaction concluded under a Netted Agreement or Principal Agreement to fall within the scope of the netting provisions of the relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement and for a confirmation or other non-written documentation to be eligible for evidencing a legally binding transaction ("**Confirmation Practices**"), (iv) the validity and enforceability of the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement and how this may be affected when certain provisions are modified by the parties ("**Core Provisions**"), and (v) the enforceability of the elections made with respect to governing law, arbitration and jurisdiction, especially if a foreign law has been chosen ("**Governing Law, Arbitration and Jurisdiction**").

We request that you provide us with a fixed quote for your fees and expenses for rendering a legal opinion in accordance with the specific content and form set forth in this letter. We will then decide as soon as possible whether to contact you again to request that you proceed. The detailed requirements for the opinion are as follows:

A. Documents to be Considered:

- EFET Master Netting Agreement (Version 1.0, published June 2010) (**Enclosure 1**)[1],
- Cross-Product Master Agreement (Version 1), published by The Bond Market Association (TBMA)[2] in February 2000 (**Enclosure 2**)[3],

[1] The EFET Master Netting Agreement 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 Master Netting Agreement. The EFET Master Netting Agreement provides that the Master Netting Agreement, all Netted Agreements and all transactions entered into thereunder form a single agreement (§ 2.3 of the EFET Master Netting 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 transactions under all of its Netted Agreements (§ 4.1 of the EFET Master Netting Agreement). Settlement Amounts are determined for the terminated Netted Agreement (each a "Closed-Out Agreement") in accordance with their terms (§ 7.1 of the EFET Master Netting Agreement) 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 Master Netting Agreement).

[2] In 2006 The Bond Market Association (TBMA) and the Securities Industry Association (SIA) merged to form the new Securities Industry and Financial Markets Association (SIFMA).

[3] The Cross-Product Master Agreement 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 Cross-Product Master Agreement. If so selected by the Parties in Section 10.6 of the EFET/IECA Commodities Schedule, the Cross-Product Master Agreement 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

- EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0. published 23 June 2003) (**Enclosure 3**),
- EFET Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosure 4**)[4],

Copies of current versions of each of the Enclosures are also available on the EFET website: www.efet.org

B. General Assumptions

- Two counterparties enter into the EFET Master Netting Agreement or the TBMA Cross Product Master Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in [jurisdiction] ("**Party A**").
- Party A is a corporation, financial institution or other entity as further described in Appendix A.
- The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement is governed by the laws of [jurisdiction][5].
- Each EFET Master Netting Agreement or TBMA Cross Product Master Agreement and (in case of the TBMA Cross Product Master Agreement) the EFET Cross-Product Credit Support Annex) is enforceable under the laws of any jurisdiction (other than the laws of [jurisdiction]) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.
- The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement provides for the inclusion of some or all of the master agreements described in Appendix B, each such master agreement being a Netted Agreement or Principal Agreement.

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terminate all of its Principal Agreements (Section 2.1 of the Cross-Product Master Agreement). Settlement Amounts are determined for the terminated Principal Agreement (each a "Closed-Out Agreement") in accordance with their terms (Section 3.1 of the Cross-Product Master Agreement) 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 Cross-Product Master Agreement).

[4] The EFET Cross-Product Credit Support Annex supplements the Cross Product Master Agreement. 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 EFET Cross-Product Credit Support Annex). Upon termination of the Cross Product Master Agreement, 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 Cross Product Master Agreement (§ 11 of the EFET Cross-Product Credit Support Annex). One special feature of the EFET Cross-Product Credit Support Annex is the inclusion of Letter of Credits.

[5] Please note that, with respect to Part C.I.1 (Close-out Netting), Part C.II (Multibranch) and Part C.VII (Governing Law) the assumption is broader in order to also cover General Agreements governed by foreign law.

- On the basis of the terms and conditions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, the counterparties over time enter into a number of transactions which include some or all of the transactions described in Appendix C.

- 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..

You will find additional assumptions below.

C. Issues and Additional Assumptions

I. Enforceability of Close-out Netting

We would like you to distinguish between (1) a termination and close-out based on an event that constitutes a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the EFET Master Netting Agreement) or a similar insolvency related Close-Out Event and (2) other non-insolvency related Close-Out Events.

1. Winding-up, Insolvency or Attachment

General Overview (including Set-Off):

Please provide a short overview of the relevant insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Appendix C. Please discuss and advise on whether the contract types listed in Appendix C are governed by different rules and whether these rules would result in a splitting-up or segregation of the portfolios of transactions under the relevant Netted Agreements or Principal Agreements into multiple "netting pools" of disparate treatment or whether these rules would otherwise limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the EFET Master Netting Agreement or TBMA Cross Product Master Agreement.

When rendering your opinion on the enforceability of close-out netting in the context of an insolvency proceeding, you should discuss whether the termination of the Netted Agreements or Principal Agreements or the transactions entered into thereunder, the calculation of the Settlements Amounts, the aggregation and offsetting of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, other third party or the court. In particular, please clarify whether or not there is a distinction in time with respect to a creditor's rights between: (a) the filing of proceedings seeking a judgment of insolvency; (b) a bankruptcy court recognizing the filing of proceedings seeking a judgment of insolvency; (c) the date on which a bankruptcy court determines a party first becomes insolvent; and (d) any other stage of the proceedings where a creditor's rights may be affected. We are also interested in whether the insolvency law provides for a "safe harbor" for certain derivatives or other categories of transactions and whether the contract types listed in Appendix C would benefit from such provision(s). We would also like to know whether there is publicly available information that would confirm any of the procedural steps mentioned above under (a) through (d) or other solvency related facts (e.g., financial statements, corporate actions, etc.). Do the laws of your jurisdiction consider early termination, set-off and close-out netting as legally distinct and separate rights, similar or related rights or do they make no such distinctions between them?

Please base your opinion on the following additional assumptions:

- The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement is governed by any law (including English, German or New York law or the laws of [jurisdiction]).

- After entering into transactions and prior to the maturity thereof, Party A becomes the subject of voluntary or involuntary proceedings under the insolvency laws of [jurisdiction] and, subsequent to the commencement of the insolvency, either Party A or an insolvency official seeks to assume the confirmations representing profitable ("in the money") transactions for the insolvent counterparty.

Please discuss and advise on the following issues:

a) Assuming the Parties have not specified that Automatic Termination (as defined in § 6.3 of the EFET Master Netting Agreement or Part II.B of the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement) applies, are the provisions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement permitting the other Party (the "Terminating Party" or "Closing-Out Party") to terminate the Netted Agreements or Principal Agreements including all transactions upon the occurrence of a Close-Out Event enforceable under the laws of [jurisdiction] or is there a risk that (i) the entering into the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, (ii) the entering into Netted Agreements or Principal Agreements or transactions thereunder or (iii) the early termination by notice described in § 5.1 of the EFET Master Netting Agreement or Section 2.2 of the Cross-Product Master Agreement itself could be challenged by a liquidator, administrator, receiver or third party?

b) Assuming the Parties have elected Automatic Termination to apply, are the provisions of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement terminating the Netted Agreements or Principal Agreements including all transactions upon the occurrence of a Close-Out Event described in § 6.3 of the EFET Master Netting Agreement or Part II.B of the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement enforceable under the laws of [jurisdiction] or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?

c) Would you recommend to elect Automatic Termination to apply upon a Winding-up, Insolvency or Attachment (as defined in § 3.1(C)(iii) of the EFET Master Netting Agreement) 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 unsubstantiable 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.

d) Are the provisions in § 8 of the EFET Master Netting Agreement and Section 4 of the Cross-Product Master Agreement providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of [jurisdiction] or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?

e) Do the laws of [jurisdiction] recognize that the Close-Out applies to all transactions? Would we need the single agreement concept (as provided for in § 2.3 of the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, in the Cross-Product Master Agreement) in order to preserve the enforceability of the termination right and the ability to calculate a net amount? If the single agreement concept is particularly important in your jurisdiction, please give us your opinion on whether or not, and if so, the degree to which, provisions allowing or providing for the termination of some but not all Netted Agreements or Principal Agreements and some and not all transactions thereunder might impact termination and close out rights generally, as well as subsequent rights to terminate transactions remaining under the General Agreement following a previous Partial Close-Out.

f) Is 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 EFET/IECA Commodities Schedule) enforceable under the laws of [jurisdiction] or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?

g) Please specify, if and as applicable, the degree to which termination and close-out rights in insolvency in your jurisdiction are dependent upon, or otherwise effected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do 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?

2. Non-insolvency related Material Reasons

Please discuss and advise on the issues outlined above under d), e) and f) in the context of non-insolvency related Material Reasons, as well as the following question:

h) Are the rights of the Terminating Party or Closing-Out Party to terminate and Close-Out the Netted Agreements or Principal Agreements including all transactions enforceable in accordance with the terms of the EFET Master Netting Agreement or TBMA Cross Product Master Agreement, irrespective of the insolvency of Party A?

II. Multibranch Parties

We would like you to distinguish between (1) a Multibranch Party incorporated, organized or having its centre of main interest in [jurisdiction] and (2) a Multibranch Party incorporated, organized or having its centre of main interest outside [jurisdiction], but operating through one or more branches in [jurisdiction].

1. [Jurisdiction] Multibranch Party

Please base your opinion on the assumptions outlined under Part C.I and the following additional assumptions:

- Party A has entered into transactions under Netted Agreements or Principal Agreements through offices in [jurisdiction] as well as through one or more branches located abroad. After entering into these transactions and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of [jurisdiction].

Please discuss and advise on the following issues:

i) Would there be any change in your conclusions reached under C.I.1 or C.I.2 above based upon the fact that Party A has conducted business under some or all of the Netted Agreements or Principal Agreements on a multibranch basis prior to its insolvency?

j) Would the EFET Master Netting Agreement and, if so selected in Section 10.6 of the EFET/IECA Commodities Schedule, the Cross-Product Master Agreement be treated as a single unified agreement by the [jurisdiction] receiver under the laws of [jurisdiction], regardless of the treatment of the EFET Master Netting Agreement or Cross-Product Master Agreement or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?

2. Foreign Multibranch Party

Please base your opinion on the following additional assumptions:

- A corporation, 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 [jurisdiction] has entered under some or all Netted Agreements or Principal Agreements into transactions 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 [jurisdiction] (the "**[jurisdiction] 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.

Please discuss and advise on the following issues:

k) Would there be separate proceedings in [jurisdiction] with respect to the assets and liabilities of the [jurisdiction] Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in [jurisdiction] defer to the proceedings in Country H, so that the assets and liabilities of the [jurisdiction] Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the [jurisdiction] Branch initiate separate proceedings in [jurisdiction] even if the relevant authorities in [jurisdiction] did not do so?

l) If there were separate proceedings in [jurisdiction] with respect to the assets and liabilities of the [jurisdiction] Branch, would the receiver or liquidator in [jurisdiction] and the [jurisdiction] courts, based on the facts above, include Party F´s position under the Netted Agreements or Principal Agreements, in whole or in part, among the assets of [jurisdiction] and, if so, would the receiver or liquidator and the [jurisdiction] courts recognize the close-out netting provisions of the EFET Master Netting Agreement or Cross-Product Master Agreement in accordance with their terms? The most significant problem arising would be if a [jurisdiction] receiver, liquidator or court considering a single EFET Master Netting Agreement or Cross-Product Master Agreement were to require a counterparty of the [jurisdiction] Branch of Party F to pay the mark-to-market value of transactions entered into with the [jurisdiction] Branch to the liquidator or receiver of the [jurisdiction] 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 EFET Master Netting Agreement or Cross-Product Master Agreement. In considering this issue, please assume that close-out netting under the EFET Master Netting Agreement or Cross-Product Master Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.

m) Please consider your answer to your question assuming instead that Party F has no branch located in [jurisdiction], but has assets in [jurisdiction].

III. Collateral

Please base your opinion on the following additional assumptions:

- Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) Party A is at all times Transferor under the EFET Cross Product Credit Support Annex and (ii) that the collateral is owned by Party A or that Party A is authorized and empowered to transfer ownership in the collateral.

- The counterparties agree that Eligible Credit Support will include cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of Party B maintained in the jurisdiction of the relevant currency.

Please discuss and advise on the following issues:

n) Under the laws of [jurisdiction], what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Cross Product Credit Support Annex?

o) Would the laws of [jurisdiction] characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?

p) Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in [jurisdiction] necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?

q) What is the effect, if any, under the laws of [jurisdiction] of the right to substitute collateral pursuant to § 6 of the EFET Cross Product Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?

r) Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 4 of the Cross-Product Master Agreement together with §11 of the EFET Cross Product Credit Support

Annex. Assuming that Section 4 of the Cross-Product Master Agreement is valid and enforceable in [jurisdiction] insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, is § 11 of the EFET Cross Product Credit Support Annex also valid to the extent that it provides 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 Cross-Product Master Agreement?

s) Are the rights of Party B enforceable in accordance with the terms of the Cross-Product Master Agreement and the EFET Cross Product Credit Support Annex, irrespective of the insolvency of Party A?

t) Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral 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 EFET Cross Product 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?

u) Is the EFET Cross Product Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in [jurisdiction] in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Cross Product Credit Support Annex? For example, are there any other requirements such as those mentioned under o) above?

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

IV. General Enforceability

Please discuss and advise on the following issues:

w) Are the EFET Master Netting Agreement and the Cross-Product Master Agreement and the EFET Cross-Product Credit Support Annex enforceable under the laws of [jurisdiction] in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the *ordre public* in [jurisdiction] and that may be challenged by the courts in [jurisdiction] irrespective of the law that governs the Agreement.

x) Do you have other recommendations going to the topic of general legal enforceability that you would like EFET members to consider?

V. Confirmation Practices

We would like you to distinguish between (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 EFET Master Netting Agreement or the Cross-Product Master Agreement and (2) the formal requirements a Confirmation should comply with under the procedural laws of [jurisdiction] in order to be sufficient for all purposes to evidence a binding transaction and its inclusion in the agreements mentioned under (1). When doing so, please base your opinion on the following additional assumptions:

- As far as the confirmation practice is concerned, when entering into an transaction, the counterparties in each case (i) make oral reference to a Netted Agreement or Principal Agreement when concluding the relevant transaction over the phone or (ii) refer to a Netted Agreement or Principal Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming transactions (in whichever form, including telex, fax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission).

- Parties may or may not use matching systems (like EFET eCM, MarkitWire or DTTC DS Match) to electronically match and exchange confirmations.

1. Binding transaction

Please discuss and advise on the following issues:

y) Does the formation of a legally binding and enforceable transaction require any formal act (e.g., execution in writing, signature, registration or notarization)?

z) At what point in time does an transaction agreed upon orally become legally binding or enforceable?

aa) Does failure to object to incorrect terms in a received confirmation constitute "acceptance" of those terms? If so, is there a relevant time period?

bb) Is the reference to a Netted Agreement or Principal Agreement sufficient for the inclusion of the transaction in the Agreement?

2. Means of Evidence

Please discuss and advise on the following issues:

cc) Assuming there is a dispute with respect to the existence or the terms or conditions of an transaction, would any or all of the following be eligible for rendering or otherwise properly introducing evidence of the agreed terms of the transaction in court: (i) taped recording; (ii) witness' statement; (iii) e-mail or other electronic message or transaction entry system; and/or (iv) facsimile? Are there any local requirements or other considerations that are relevant to each form of evidence?

VI. Core Provisions

Please base your opinion on the additional assumptions outlined under Part C.I.1 and C.II and discuss the following issues:

dd) Would any of the elections contemplated by the EFET Master Netting Agreement or the Cross-Product Master Agreement or the EFET Cross-Product Credit Support Annex change the substance of your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting)? As far as the EFET Cross-Product Credit Support Annex is concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

ee) Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting), what are the provisions of the EFET Master Netting Agreement or the Cross-Product Master Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "**Core Provision**")? We believe that the following provisions are Core Provisions: [ ].

VII. Governing Law, Arbitration and Jurisdiction

Please base your opinion on the following additional assumptions:

- The relevant EFET General Agreement is governed by the laws of a jurisdiction other than [jurisdiction] (including English, German or New York law).

Please discuss and advise on the following issues:

ff) Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (§ 12 of the EFET Master Netting Agreement and Section 6 of the Cross-Product Master Agreement) be upheld in [jurisdiction], and what would be the consequence if it were not?

VIII. Other Provisions

gg) If you have other recommendations that you would like EFET member companies to consider (for example to fully optimize the General Agreement for a specific purpose such as to support limited trading between two entities both organized and doing business solely in your jurisdiction), then these types of suggestions may, but need not, be appended as an Annex to the end of your final opinion letter.

D. Addressees, Form and Tenor, Executive Summary and Other Issues

The opinion should be addressed to EFET and should provide that it: (i) is for the sole benefit of EFET and its Legal Committee members and any other subscribing entities; (ii) may not be relied upon by, or disclosed to, any other person or legal entity without EFET's or your prior written approval; but (iii) may be made available by EFET members to the appropriate regulatory authorities.

The opinion should discuss the issues outlined in Part C in substantially the same order as shown in this instruction letter. We expect a short introductory statement indicating a positive or negative answer, followed by an elaborated and reasoned discussion of the relevant legal aspects upon which your statement is based. We recognize that legal certainty or precedent is often lacking. However, we would like you to render a final conclusion even if it is based upon more generic concepts of laws or only reflects the "better view" or "more likely approach" you believe a court in [jurisdiction] would take.

The opinion should be accompanied by an executive summary presenting the main conclusions and reservations reached in the opinion. You may clarify that the executive summary does not form part of the opinion and that it is given for the purposes of convenience only.

If you believe that your conclusions reached under Part C I. (Enforceability of Close-out Netting) above will be that the receiver or liquidator in [jurisdiction] courts will not recognize the close-out netting provisions of the EFET General Agreements in accordance with their terms, please contact us immediately.

If you have any further questions or need some additional information, please do not hesitate to contact us.

Kind regards

Dr. Jan Haizmann
EFET Legal Committee
European Federation of Energy Traders (EFET)

<u>Appendices and Enclosures</u>

<u>Appendix A</u>

Types of Counterparties

Corporations (e.g., a limited liability company, stock corporation or *Societas Europaea*)

Partnerships (e.g., a general or limited partnership)

Banks/Credit Institutions

Investment Services Provider/Investment Firms

Insurance Companies

Investment Fund Management Companies

Other Financial Institution (please specify)

Municipalities or Counties

Associations of Local Government

Publicly-owned Corporations

Quasi Governmental Entities (please specify)

Appendix B

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)

<u>Securities Lending Master Agreements</u>

- 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)

<u>Repurchase Master Agreements</u>

- 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)

Appendix C

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.

   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).

6. 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).

7. 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).

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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).

23. 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.

24. 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.

25. 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.

26. 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).

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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. 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.

39. 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.