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The European Federation of Energy Traders
Amstelveenseweg 998
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The Netherlands

28 February 2011

Dear Sirs

EFET Master Netting Agreement, EFET Credit Support Annex to the Master Netting Agreement and TBMA Cross Product Master Agreement – Belgium

We have been asked, as legal advisers to the European Federation of Energy Traders ("**EFET**"), to give an opinion in respect of the laws of Belgium ("**this jurisdiction**") in relation to a number of issues and questions raised by EFET in respect of its Master Netting Agreement published in June 2010 (the "**MNA**"), the Cross Product Master Agreement published by The Bond Market Association in February 2000, as modified by EFET and the International Energy Credit Association European Commodities Schedule published on 23 June 2003, (as so modified, the "**CPMA**" and, together with the MNA, the "**Master Agreements**"), the EFET Credit Support Annex to the MNA published in February 2011 (the "**2011 CSA**") and the Cross Product Credit Support Annex to the CPMA published on 23 June 2003 (the "**2003 CSA**" and, together with the 2011 CSA, the "**Credit Support Annexes**", which together with the Master Agreements are hereafter referred to as the "**Agreements**"). Terms used in this opinion and not otherwise defined herein shall have the meanings ascribed to them in the Agreements.

PART I - EXECUTIVE SUMMARY

In broad terms, the Agreements and their close-out netting provisions are effective under the laws of Belgium, and remain effective despite the insolvency of a Party, subject to the terms of reference, assumptions and qualifications in our opinion.

The main point of doubt about their enforceability relates to the question whether close-out may be effected by reason of a Party being subject to reorganisation proceedings, in circumstances where the termination does not actually aim at achieving a netting arrangement, for instance because there is only one outstanding Netted Agreement, Principal Agreement or transaction at the time, or because all outstanding Netted Agreements, Principal Agreements and transactions give rise to a Settlement Amount owing from the same Party to the other (as to which see section 3.6.1 below). There is also uncertainty as to the efficacy of the close-out netting provisions in the case of rescue measures imposed by the government to financial institutions of systemic importance, or after a "bank split" resulting from this type of rescue measures.

We should also point out a risk that the requirements for the provision of Performance Assurance be seen as lacking determinability or being susceptible of abuse (as to which see section 12.2 below).

A table of content is included at the end of this opinion letter.

PART II - TERMS OF REFERENCE

1. SCOPE OF REVIEW

1.1 We have been asked to opine on the basis of the following scenarios:

(a) two counterparties enter into the Agreements and at least one of the counterparties is incorporated or organised or has its centre of main interest in this jurisdiction ("**Party A**")[1] [2];

(b) Party A is a corporation, financial institution or other entity as further described in Schedule 1 (*Types of counterparties*);

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1 Under the Belgian rules of conflicts, companies are governed by Belgian law if their principal establishment has been located in Belgium since their incorporation or has since then been validly transferred into Belgium; Code of International Private Law ("**Code IPL**"), Art. 110 and 112. There is a debate as to whether the rule that the nationality of a company is determined by the place of its principal establishment, even in circumstances where the company was incorporated under the laws of another jurisdiction where the relevant nationality criterion is not the place of principal establishment but rather the law of incorporation, is consistent with the European law principle of freedom of establishment. See T. Delvaux, "La concurrence entre ordres juridiques est-elle efficace ? Quelques réflexions à propos de la liberté d'établissement des sociétés", *RPS*, 2004, p. 207.

2 For the avoidance of doubt, this opinion therefore does not contemplate the scenario of a counterparty which is incorporated or organised and has its centre of main interest outside this jurisdiction, and merely has an establishment in this jurisdiction, save where expressly set out otherwise.

(c) the Agreements are governed by the laws of this jurisdiction, save in respect of sections 3 (*Winding-up, insolvency or attachment*), 4 (*Non-insolvency related material reasons*), 5 (*Multibranch Parties*) and 10 (*Governing law, arbitration and jurisdiction*), for the purposes of which the Agreements may be governed by the laws of this jurisdiction or by foreign laws;

(d) the relevant Master Agreement provides for the inclusion of some or all of the master agreements described in Schedule 2 (*Types of Netted Agreements and Principal Agreements*), each such master agreement being a Netted Agreement or Principal Agreement;

(e) on the basis of the terms and conditions of the Master Agreements and other relevant factors, and acting in a manner consistent with the intentions stated in the Master Agreements, the counterparties over time enter into enter into a number of transactions which include some or all of the transactions described in Schedule 3 (*Types of transactions*); and

(f) 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.

1.2 In this opinion, unless otherwise specified:

(a) "**Party**" means a party to the Agreement;

(b) references to a "**paragraph**" or a "**section**" are (except where the context otherwise requires) to a paragraph or a section of this opinion;

(c) references to the "**Netted Agreements**" or the "**Principal Agreements**" include references to any transactions thereunder unless the contrary is stated;

(d) "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1, where governed by Belgian law; and

(e) headings are for ease of reference only and shall not affect its interpretation.

1.3 This opinion relates solely to matters of Belgian law (as in force at the date hereof) and does not consider the impact of any other laws (including insolvency laws), even where under Belgian rules of conflicts any foreign law falls to be applied. This opinion letter and the opinions given in it are governed by Belgian law and relate only to Belgian law as applied by the courts of Belgium as at today's date. Our opinion is based upon the express words of the Agreements as they would be interpreted under

Belgian law, and takes no account of how such words would be interpreted under, or the effect of, any other law which may govern the Agreements.

1.4 This opinion relates solely to the Agreements in the form examined by us. We have not considered the effect of any elections that may be made by the Parties under the Agreements, other than those elections made in a form expressly set out in full in the model Agreements examined by us (and ignoring, for the avoidance of doubt, the effect of elections marked as "specify" in those model Agreements).

1.5 We do not express any opinion as to any matters of fact or as to any competition law aspects raised by virtue of the publication of the Agreements.

1.6 We have not considered any Netted Agreement, Principal Agreement or Uncovered Transactions, nor any transactions thereunder, and do not express any opinion thereon except as such agreements are modified by the Agreements.

1.7 We do not express any opinion as to a Party's tax liability under the Agreements and any Netted Agreement or Principal Agreement.

2. GENERAL ASSUMPTIONS NECESSARY FOR OPINION

For the purposes of this opinion we have made the assumptions set out below:

2.1 That each Party has the capacity, power and authority, under all applicable laws, to enter into and to exercise its rights and to perform its obligations under the Agreements and all relevant Netted Agreements and Principal Agreements, and that each Party has duly authorised, executed and delivered and properly completed the applicable Agreement and all relevant Netted Agreements and Principal Agreements and taken all necessary steps to ensure their legality, validity, enforceability and admissibility in evidence in Belgium.

2.2 That each Party holds and complies with all regulatory licences or other requirements applicable in connection with its entry into and exercise of its rights and performance of its obligations under the Agreements and all relevant Netted Agreements and Principal Agreements.

2.3 That the Agreements and all relevant Netted Agreements and Principal Agreements are legal, valid, binding and enforceable in accordance with their respective terms and conditions under the law by which they are expressed to be governed and the laws of the places where the obligations thereunder have to be or have been performed[3] (save that this assumption does not apply to the Agreements when governed by Belgian law or where the place of performance is Belgium), and that the governing law of the Agreements (unless that governing law is Belgian law) allows post-insolvency netting[4].

2.4 That each Netted Agreement, Principal Agreement, Uncovered Transaction and transaction thereunder is capable of being terminated and closed out in the manner envisaged by the Agreements and is capable of having a Settlement Amount determined; and that all Settlement Amounts falling to be determined under the Netted Agreements, Principal Agreements and Uncovered Transactions are duly determined in accordance with the relevant provisions thereof.

2.5 That each Netted Agreement, Principal Agreement and Uncovered Transaction is capable of being amended in the manner envisaged by the Master Agreements.

2.6 That there is no other agreement, instrument or other arrangement between or affecting the Parties to the Agreements which conflicts with, overrides, modifies or supersedes the Agreements or any Netted Agreement, Principal Agreement or Uncovered Transaction (save for any such agreement or arrangement in relation to any Netted Agreement, Principal Agreement or Uncovered Transaction which is effected under the terms of the Agreements).

2.7 That the Agreements and all relevant Netted Agreements, Principal Agreements and Uncovered Transactions, and all relevant transactions, are entered into prior to the commencement of any Insolvency Proceedings in respect of either Party[5].

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3 This assumption is required because the courts of Belgium may give effect, at their discretion, to the overriding mandatory laws of any jurisdiction where the obligations arising out of the Principal Agreements have to be or have been performed; they may also take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance. Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**"), Art. 9.3 and 12.2

4 This assumption is required because of Code IPL, Art. 119 §2, 2°; European directive 2001/24 of 4 April 2001 on the reorganisation and winding up of credit institutions ("**WUD**"), Art. 25; law of 22 March 1993 on the status and supervision of credit institutions, Art. 109/19. These provisions provide that post-insolvency set-off is governed by the governing law of the netting agreement between parties, if any, or by the governing law of the claim of the insolvent party.

5 This assumption is required because of the law of 15 December 2004 on financial collateral (the "**Law on Financial Collateral**"), Art. 14 and 15 §1, the law of 8 August 1997 on bankruptcy, Art. 16, and the law of 31 January 2009 on the continuity of enterprises, Art. 28 §1, par. 1.

2.8 That (save in relation to any non-performance by one Party which leads to the taking of action by the other Party under the termination and close-out provisions of the Agreements) each Party will duly perform its obligations under the Agreements and each Netted Agreement, Principal Agreement and Uncovered Transaction, and each relevant transaction, in accordance with their respective terms.

2.9 That each applicable Agreement, Netted Agreement, Principal Agreement and Uncovered Transaction, and each relevant transaction, is entered into by each Party as principal.

2.10 That each Close-Out Event specified as applicable pursuant to the elections made under §3 of Part I of the Election Sheet to the MNA or under Division 1, Part II, Section A of the Schedule is an effective and valid Event of Default under the applicable underlying Netted Agreement, Principal Agreement or Uncovered Transactions.

We have also made certain assumptions specific to certain questions on which we are asked to opine. These specific assumptions are set out under the questions to which they relate.

PART III - OPINION AND LEGAL ANALYSIS

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in section 12 below, we are of the following opinion. The paragraphs set out in small capitals contain the questions raised by EFET, and are not part of our opinion.

3. WINDING-UP, INSOLVENCY OR ATTACHMENT

GENERAL OVERVIEW (INCLUDING SET-OFF).

This section 3 is based on the additional assumptions that the relevant Master Agreement is governed by any law (including English, German or New York law or the laws of Belgium), and that 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 Belgium 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.

3.1 **Insolvency Proceedings in Belgium**

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party could be subject under the laws of Belgium, and which are relevant for the purposes of this opinion, are:

(a) bankruptcy (*faillite / faillissement*) under the law of 8 August 1997; this law also permits the temporary appointment of a provisional administrator (*administrateur provisoire / voorlopige bewindvoerder*) in the anticipation of a possible declaration of bankruptcy;

(b) judicial reorganisation (*réorganisation judiciaire / gerechtelijke reorganisatie*) under the law of 31 January 2009[6];

(c) voluntary or judicial liquidation (*liquidation / vereffening*) under the Company Code[7] or, in respect of institutions for occupational retirement provision, voluntary or judicial liquidation (*liquidation / vereffening*), imposition of a stabilisation or recovery plan, or appointment of provisional managers under the law of 27 October 2006[8]; a liquidation does not necessarily mean that the entity concerned is insolvent properly speaking, but the liquidation proceedings trigger the applicability of many rules of insolvency law (*concours des créanciers / samenloop van schuldeisers*);

(d) rescue measures (*mesures de redressement / herstelmaatregelen*) taken by the government in respect of a financial institution of systemic importance under the law of 2 June 2010[9]; and

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[6] Judicial reorganisation proceedings cannot be opened in respect of credit institutions, insurance companies and certain other categories of regulated financial institutions; law of 31 January 2009 on the continuity of enterprises, Art. 4, par. 2.

[7] Or under the law of 27 June 1921 on non-profit associations, international non-profit associations and foundations in the case of pension funds established as an *association sans but lucratif / vereniging zonder winstoogmerk*, or the general principles of law in the case of pension funds established as an *association d'assurances mutuelles / onderlinge verzekeringsvereniging* (see law of 11 June 1874, constituting *Titre X* of *Livre premier* of the Commercial Code, Art. 2).

[8] Law of 27 October 2006 on the supervision of institutions for occupational retirement provision, Art. 35 *et seq*.

[9] The government's powers to impose rescue measures relate only to insurance companies, credit institutions, and operators of clearing and settlement systems; law of 2 June 2010 on the completion of rescue measures applicable to enterprises in the banking and financial sector, Art. 3, 5 and 6.

(e) attachment (*saisie-arrêt / beslag onder derden*) under the Judicial Code; an attachment does not necessarily mean that the entity concerned is generally insolvent, but the attachment proceedings trigger the applicability of many rules of insolvency law (*concours des créanciers / samenloop van schuldeisers*).

The above are together called "**Insolvency Proceedings**". Generally speaking[10], the territorial scope of bankruptcy and judicial reorganisation proceedings catches entities that have the centre of their main interests (main proceedings) or an establishment (secondary or territorial proceedings) in Belgium[11]; liquidation proceedings may apply to entities that have the centre of their main interests or their principal establishment in Belgium[12], and attachments may apply to any entity.

The opening of Insolvency Proceedings generally gives rise to official publication, albeit with some delay, in the *Annexes au Moniteur belge / Bijlagen tot het Belgisch Staatsblad* or in the *Moniteur belge / Belgisch Staatsblad*. Attachments are not published but must be notified to a central registry, where these notifications are available for inspection by lawyers and bailiffs when in charge of legal proceedings against the relevant party[13].

Certain entities of the types described in Schedule 2 (*Types of counterparties*) may benefit from immunities against Insolvency Proceedings; in particular, immunities are generally available to central or local authorities, and may be available to entities organised under public law.

3.2 Main effects of Insolvency Proceedings

The main effects of Insolvency Proceedings are as follows.

3.2.1 *Bankruptcy*

(a) *Cessation of activities and appointment of liquidator.* The declaration of bankruptcy normally results in the immediate cessation of the activities of the entity concerned; the court may however order a

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10 Specific rules apply in particular to financial institutions.

11 European Regulation 1346/2000 of 29 May 2000 on insolvency proceedings ("**EUIR**"), Art. 3.1 and 3.2; Code IPL, Art. 118 §1 par. 2, 2°.

12 EUIR Art. 3.1, or Code IPL, Art. 110, 111 §1, 3° and 112.

13 Judicial Code, Art. 1390 and 1391.

temporary continuation of the activities[14]. A liquidator (*curateur / curator*) is appointed and the powers of the members of management are terminated by the bankruptcy judgment.

(b) *Current contracts.* The declaration of bankruptcy does not by itself cause the termination of current contracts to which the bankrupt entity was a party. Termination clauses triggered by the bankruptcy, however, are valid. In the absence of such a clause, the solvent party may require the liquidator to decide whether he wishes to continue the contract or not; failing a decision within 15 days, the contract is deemed terminated. The liquidator is in any event entitled to take the initiative of terminating the contract if he wishes to. Termination indemnities payable by the bankrupt entity normally have the same rank as claims of ordinary creditors[15].

(c) *Enforcement of claims and security.* Unsecured creditors cannot take enforcement steps any more after the bankruptcy; it is the exclusive role of the liquidator to sell the assets and distribute the proceeds between the creditors. Secured creditors must suffer a temporary suspension of their right to enforce security for a period set by the court, which is usually about one to two months after the date of the bankruptcy; the court may order the suspension of enforcement for a period of up to one year from the date of bankruptcy if this is considered to be in the interests of the bankrupt estate (for example, if individual enforcement by a secured creditor would prejudice the possibility of selling the business as a whole in going concern), provided that the liquidator has a reasonable expectation that a sale of the assets may subsequently be effected without prejudicing the interests of the secured creditors[16]. These suspension measures do not affect security regulated by the Law on Financial Collateral, *ie* collateral in the form of securities or cash.

(d) *Close-out, netting and set-off.* See below, section 3.4.

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[14] Law of 8 August 1997 on bankruptcy, Art. 47.

[15] *Ibid.*, Art. 46.

[16] *Ibid.*, Art. 24 to 26.

(e) *Super-preference after failed reorganisation.* If the declaration of bankruptcy follows an unsuccessful attempt at judicial reorganisation proceedings, the liabilities that were incurred during the reorganisation proceedings (including for instance the price of supplies made to the debtor during that period, or loans granted during that period to finance the operations of the debtor) has the benefit of a "super-preference" and will be paid in the subsequent bankruptcy ahead of all ordinary creditors or creditors with a general preference[17].

(f) *Voidable preferences.* When declaring the bankruptcy or in a later judgment, the court will determine the date when the debtor ceased to pay its debts. The period between that date of cessation of payment and the date of bankruptcy is the so-called "suspect period". This period may have a duration of up to six months before the declaration of bankruptcy, or more if the bankrupt entity was already in liquidation or subject to judicial reorganisation before its bankruptcy[18]. Very often, when the bankruptcy is declared upon admission by the debtor itself rather than upon summons by a third-party creditor or by the public prosecutor, the court will decide that the date of cessation of payment is the same as the date of bankruptcy, so that there is no suspect period.

Certain types of transactions made during the suspect period are voidable, in particular[19]:

- transactions that entail a significant undervalue (the law reads "if the value of what was given by the bankrupt party notably exceeds the value of the consideration received by it");
- payments of unmatured debts, whether in cash or by set-off or otherwise, and payments of matured debts made in kind[20];

[17] Law of 31 January 2009 on the continuity of enterprises, Art. 37.

[18] Law of 8 August 1997 on bankruptcy, Art. 12.

[19] *Ibid.*, Art. 17 and 18.

[20] Until the Law on Financial Collateral became applicable, this also caught payments of matured debts made by contractual set-off.

- transactions made or payments received by a party in the knowledge that the other party was already in a situation of cessation of payments; and
- new security provided for pre-existing debts.

With regard to close-out and netting agreements and payments made pursuant thereto, the above provisions have to a large extent been made inapplicable by the Law on Financial Collateral (as to which see paragraph 3.4.2(b)).

So-called "fraudulent transactions", *ie* abnormal transactions entered into in the knowledge that the transaction would prejudice the creditors of a party, are also voidable in the subsequent bankruptcy of that party[21]. This is so even if the transaction dates back from before the suspect period.

3.2.2 *Judicial reorganisation*

(a) *Conditions and process.* A judicial reorganisation[22] may be granted if the survival of a business is under threat; this procedure remains available as an alternative to bankruptcy when the debtor has run out of cash and is virtually bankrupt already. The judicial reorganisation process starts at the initiative of the debtor entity, which files an application with the commercial court. The debtor will normally remain "in possession" throughout the process, *ie* current management remains in place and continues to run the business. The court however retains the power to displace management, and to appoint a provisional manager, in cases of fraud or crass incompetence.

The debtor may opt between three types of processes: an amicable agreement (*ie* an arrangement made with a limited number of creditors and with their individual consent, which we will not further discuss in this opinion), a collective agreement, and a transfer of business.

[21] Law of 8 August 1997 on bankruptcy, Art. 20; cass., 15 March 1985, *Pas.*, 1985, I, 875; 27 February 1998, *Pas.*, 1998, p. 109.

[22] Law of 31 January 2009 on the continuity of enterprises. As mentioned above, these proceedings are not available to credit institutions, insurance companies and certain other categories of regulated financial institutions.

Switching from one type of process to another is possible during the proceedings.

A collective agreement is essentially a debt rescheduling or forgiveness plan which, once approved by a majority of the creditors and the court, will bind all creditors, including those who voted against it or did not vote. The sequence of the procedure is as follows:

- application by the debtor, examination by the court, and decision on the admissibility of the application: normally the decision must be rendered within 18 days of the application;
- moratorium phase: its duration is set by the court and may initially not exceed six months, although it may subsequently be extended to 18 months; during this phase the debtor is expected to submit and negotiate a reorganisation plan;
- vote on the plan: if the plan is approved by a double majority of the creditors (measured both by headcount and in value) and by the court, the plan implementation phase follows, with a duration of maximum five years.

A transfer of business consists in a sale of all or part of the debtor's assets and activities, as a going concern. The transfer must be carried out by a judicial representative appointed and supervised by the court. The proceeds of the sale are distributed among the creditors.

(b) *Current contracts, grace period and contractual walkaway.* The reorganisation proceedings do not and may not cause the termination of current contracts to which the insolvent entity was a party: termination clauses triggered by the occurrence of reorganisation proceedings are unenforceable[23] (subject to a major exception where the termination clause aims at achieving a netting arrangement, as to which see sections 3.4.1 and 3.6.1 below).

The debtor who applies for reorganisation automatically benefits from a 15 day grace period to cure previous breaches of contract. During this time, the other party cannot terminate the contract because of that

[23] *Ibid.*, Art. 35 §1, par. 1.

breach[24] (save to the extent that the termination occurs in the context of a close-out netting arrangement, as to which see paragraph 3.6.1(a) below).

Also, the debtor who applies for reorganisation may opt to stop performing its obligations under current contracts. Damages for breach of contract will be due (and will be subject to whatever rescheduling or forgiveness measures may be provided by the reorganisation plan), but the other party will not be able any more to obtain injunctions ordering performance in kind of the contract[25].

(c) *Enforcement of claims and security.* During the procedure, the debtor is protected against its creditors: it cannot be declared bankrupt, and enforcement actions for pre-existing liabilities are not permitted as long as the moratorium phase runs (see above)[26]. After approval of the plan enforcement rights are fully available again, but the debts will only be enforceable in accordance with their rescheduled or restructured terms as they result from the approved plan.

(d) *Risk of discriminatory treatment and subordination.* During the moratorium phase of the reorganisation, pre-existing claims cannot be enforced, but the debtor may still voluntarily pay those claims. There is no obligation for the debtor to treat all creditors equally, and there is a possibility that the debtor may favour certain creditors. Also, the reorganisation plan itself may differentiate between categories of creditors, and may impose harsher rescheduling or forgiveness terms on certain creditors compared to others[27].

As mentioned in paragraph 3.2.1(e) above, new liabilities that arise during the reorganisation process (trade suppliers, fresh money advanced by lenders, etc) will be super-preferred if the reorganisation fails and ends in a bankruptcy. A reorganisation process that lasts for any significant period of time therefore results, in fact, in subordinating the old creditors.

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24 *Ibid.*, Art. 35 §1, par. 2.

25 *Ibid.*, Art. 35 §2.

26 *Ibid.*, Art. 30 and 31.

27 Brussels, 16 December 2010, 2010/AR/2935, *juridat*.

(e) *Close-out, netting and set-off*. See below, section 3.4.

(f) *Voidable preferences.* There is no "suspect period" in the case of reorganisation proceedings, and there are no voidable preferences.

3.2.3 *Liquidation*

Liquidation can be used, in the case of an insolvency, as an alternative to bankruptcy or reorganisation proceedings, but only if a significant majority of creditors agree with this[28]. The liquidation process is less closely supervised by the court than the other two types of proceedings[29].

Creditors lose their enforcement rights in a liquidation, save to the extent that they have the benefit of security or of a lien over specific assets or that the enforcement would not prejudice other creditors[30].

As to close-out, netting and set-off, see section 3.4 below. There is no "suspect period" in the case of a liquidation, and there are no voidable preferences.

3.2.4 *Rescue measures*

The near collapse in 2008 of some Belgian financial institutions led to the adoption of the law of 2 June 2010 on the completion of rescue measures applicable to enterprises in the banking and financial sector. This law allows the government, in crisis situations, to take rescue measures in respect of credit institutions and insurance companies of systemic importance. This includes the power to order a forced transfer to the State or to a third party of certain assets of the institution[31].

Rescue measures of this type may only be taken in severe crisis situations. The regulator (the Banking, Finance and Insurance Commission or CBFA) must provide its input to the government prior to the decision. The govern-

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28 Cass., 6 March 2003, *Pas.*, 2003, p. 475, with concl. adv. gen. Werquin.

29 Company Code, Art. 181 *et seq*.

30 Cass., 25 September 2006, *Pas.*, 2006, p. 1823; 22 September 2006, *Pas.*, 2006, p. 1814; 23 January 1992, *Pas.*, 1992, I, 445, with concl. adv. gen. Janssens de Bisthoven; 7 April 1986, *Pas.*, 1986, I, 951; 24 March 1977, *Pas.*, 1977, I, 796.

31 The same powers apply in respect of operators of clearing and settlement systems. The government may also impose a forced transfer of the shares in the institution concerned.

ment's decision must determine the compensation payable in consideration for the forced disposal. The decision is subject to validation by the courts and only becomes effective when the validation judgment has been rendered and published. The amount of compensation may subsequently be reviewed by the courts.

The adoption of rescue measures may not cause the termination of current contracts to which the financial institution concerned was a party: termination clauses triggered by the adoption of these measures are unenforceable. For the rest, the legal regime of these rescue measures is not set out in any detail by the law, which leaves it to the government to set the rules if and when applicable[32]. There has been no case of application so far.

3.2.5 *Attachments*

Attachments can be made fairly easily, often without prior authorisation from the court (the attachment is then merely conservatory (*conservatoire / bewarend*))[33]. With regard to their impact on netting and set-off in respect of the claim being attached, see section 3.4 below.

3.3 Timing of the Insolvency Proceedings

The general procedural aspects of Insolvency Proceedings are described in section 3.2 above. As to timing of the proceedings, more specifically:

(a) *Bankruptcy*. A bankruptcy is effective at zero hour on the date when the court issues the judgment declaring the bankruptcy[34]. There are some relevant exceptions to this "zero hour rule": a netting agreement (such as either Agreement) is valid if entered into before the actual time of a declaration of bankruptcy, or later as long as the solvent party was legitimately unaware of this declaration at the time when entering into the agreement[35]; payments made to or by an insolvent credit institution before the actual time of the declaration

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[32] For example, in respect of credit institutions: law of 22 March 1993 on the status and supervision of credit institutions, newly inserted Art. 57*bis*, §4, 2nd and 4th par.

[33] Judicial Code, Art. 1445.

[34] Law of 8 August 1997 on bankruptcy, Art. 16, par. 1.

[35] Law on Financial Collateral, Art. 15 §1.

of its bankruptcy, or later as long as the counterparty was legitimately unaware of this declaration, remain valid despite the declaration of bankruptcy[36].

Bankruptcy proceedings are initiated by the bankrupt party's own application, or by summons of a creditor or the public prosecutor. The time of the application or the summons has no relevant effect for the purposes of this opinion. In the infrequent cases when the court appoints a provisional administrator in the anticipation of a possible declaration of bankruptcy, some effects of the bankruptcy will already arise from the time of the appointment[37].

As to the starting time of the pre-bankruptcy "suspect period", see paragraph 3.2.1(f) above.

(b) *Reorganisation proceedings.* The timing and sequence of reorganisation proceedings are described in paragraph 3.2.2(a) above. Reorganisation proceedings are initiated by the insolvent party's own application[38].

(c) *Liquidation.* A liquidation will arise from a decision made by the general meeting of shareholders (or equivalent body) of the entity concerned, a judgment of the court, or (rarely) the expiry of the limited period of time for which the company was incorporated. There is some uncertainty as to the time when the effects of a liquidation arise: actual time of the decision, zero hour on the day of the decision, day of official publication of the liquidation, or 16 days after the publication[39].

The time of initiation of court proceedings seeking a liquidation has no relevant effect for the purposes of this opinion.

(d) *Rescue measures.* Rescue measures become effective when the judgment that validates the government's decision is published in the *Moniteur belge / Belgisch Staatsblad*. Before validation by the court, the mere notification of

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[36] Law of 22 March 1993 on the status and supervision of credit institutions, Art. 157 §1; this also applies to other categories of financial institutions, pursuant to a royal decree of 28 January 1998.

[37] Law of 8 August 1997 on bankruptcy, Art. 8, par. 8.

[38] Or, in certain limited circumstances, on application by a creditor; see footnote 79.

[39] Company Code, Art. 76.

the decision to the institution concerned already has the effect of freezing the assets of which the government ordered the disposal[40].

(e) *Attachments.* An attachment takes effect at the time when the bailiff gives official notification, to the third-party debtor, of the attachment of the debt it owes to the party against which the attachment is made.

The time of initiation of legal proceedings seeking authorisation to proceed with an attachment (this authorisation is often unnecessary anyway) has no relevant effect for the purposes of this opinion.

3.4 Close-out, netting and set-off

3.4.1 *Close-out*

Termination provisions triggered by the occurrence of bankruptcy proceedings, a liquidation or an attachment are enforceable. In the case of a bankruptcy, there is an argument that the termination clause must be automatic in order to be enforceable[41], *ie* that a clause allowing the non-defaulting party to terminate or not at its option would be unenforceable and that the liquidator would in such a case be the only party entitled to decide whether to terminate or not. That argument is weak in our view, and in any event does not apply when the termination aims at achieving a netting arrangement[42].

Termination provisions triggered by the occurrence of reorganisation proceedings, by contrast, are not enforceable, unless they aim at achieving a netting arrangement[43]. Termination provisions triggered by the adoption of rescue measures are not enforceable either, and it is uncertain in this case whether an exception applies if the termination aims at achieving a netting arrangement[44].

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40 For example, in respect of credit institutions: law of 22 March 1993 on the status and supervision of credit institutions, newly inserted Art. 57*bis*, §3, 2nd par., and 57*ter*, §2.

41 The argument is based on (an extensive reading of) the wording of Art. 46 §1 of the law of 8 August 1997 on bankruptcy.

42 Law on Financial Collateral, Art. 14.

43 *Ibid*.

44 See footnote 32. The main argument to support the idea that a netting-related termination remains possible upon the adoption of rescue measures is that the Law on Financial Collateral, which permits close-out arrangements, is generally regarded as taking priority over insolvency legislations (see law of 31 January

As to whether the termination provisions set out in the Agreements can be regarded as aimed at achieving a netting arrangement, see section 3.6.1 below.

3.4.2 *Netting and set-off*

Belgian law distinguishes between "legal" and "contractual" set-off (the concept of "netting" is for these purposes the same as that of "set-off"[45]). Legal set-off occurs automatically, as a matter of law, when reciprocal debts are due and payable between the same parties[46]. Contractual set-off is any other form of set-off that takes place pursuant to an agreement to that effect between the parties.

(a) *Legal set-off.* Legal set-off cannot take place any more after the commencement of Insolvency Proceedings, *ie* the set-off will be effective if the mutual debts were both due and payable before the commencement of these proceedings but will be impossible if either debt only becomes due and payable at or after that time. In particular, legal set-off cannot apply to a termination payment which arises by reason of a termination triggered by the Insolvency Proceedings. However, there is an exception to that rule, and post-insolvency set-off remains possible, if the mutual debts are closely connected with each other. The concept of "close connection" is highly factual; case law does not provide consistent guidelines for the application of this

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2009 on the continuity of enterprises, Art. 7), and that this must indeed be so since the Law on Financial Collateral is the implementation of a European directive and domestic legislation may not disobey European law. There are also arguments to the contrary: whilst the law of 31 January 2009 on the continuity of enterprises (Art. 7) contains an express article to ensure that the earlier Law on Financial Collateral takes priority, the law of 2 June 2010 does not contain any such provision; further, legislative history indicates that Parliament considered the judicial reorganisation regime to be unsuitable to financial institutions because, in particular, counterparties remained entitled to invoke close-out netting and therefore to compromise the survival of the institution; this must mean that Parliament wanted to disapply close-out netting in the new rescue measures regime that it was introducing as a substitute for the judicial reorganisation regime (law of 2 June 2010, *doc. parl.*, Ch., *Statement of reasons*, 52/2406/01, pp. 9 and 10).

[45] The provisions of the Law on Financial Collateral that protect the efficacy of set-off also apply to "netting by novation", Art. 3, 4°.

[46] Civil Code, Art. 1289 *et seq*.

concept and it is often difficult to assess whether a particular set of facts will be recognised as showing a close connection or not[47].

(b) *Contractual set-off.* Contractual set-off is any set-off that takes place pursuant to an agreement to that effect between the parties (the "Netting-Off of Settlement Amounts; Accrual of Interest" provisions in §8 of the MNA, and the "Set-Off of Settlement Amounts" provisions in Section 4 of the CPMA, are examples of contractual set-off); it may also be called "netting". This form of set-off falls under the provisions of the Law on Financial Collateral, and remains effective irrespective of the existence of Insolvency Proceedings, provided only that the agreement providing for set-off was entered into before the commencement of the Insolvency Proceedings[48] (see sections 3.6.2 and 3.9(a) below with regard to the consequences of a "bank split" scenario imposed by rescue measures, however). Termination indemnities that arise by reason of the insolvency may thus be included in a netting calculation. The Law on Financial Collateral also makes various rules of bankruptcy law in relation to voidable preferences (see paragraph 3.2.1(f) above) inapplicable to contractual set-off and netting arrangements: the rules providing for the voidness of payments of unmatured debts made during the suspect period, and of transactions made or payments received during the suspect period by a party in the knowledge that the other party was already in a situation of cessation of payments, do not apply to close-out and netting agreements and to payments made pursuant thereto[49] (see section 3.9 below as to those voidable preference rules that remain applicable).

3.5 Effect of foreign secondary insolvency proceedings

The question whether current contracts may be closed out upon or by reason of the Insolvency Proceedings is governed by the law of the jurisdiction of opening of

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[47] *Ibid*., Art. 1298; law of 31 January 2009 on the continuity of enterprises, Art. 34; cass., 24 June 2010, C.09.0365.N, *juridat*; 1 June 2006, *Pas.*, 2006, p. 1255; 7 April 2006, *Pas.*, 2006, p. 812, with concl. Adv. Gen. Werquin; 12 January 1996, *Pas.*, 1996, I, 27; 25 May 1989, *Pas.*, 1989, I, 1015; 11 April 1986, *Pas.*, 1986, I, 987; 28 February 1985, *Pas.*, 1985, I, 795; 2 September 1982, *Pas.*, 1983, I, 3.

[48] Or at a time when the solvent party was legitimately unaware that Insolvency Proceedings had already commenced. Law on Financial Collateral, Art. 14 and 15 §1.

[49] Law of 8 August 1997 on bankruptcy, Art. 17, 2° and 18; Law on Financial Collateral, Art. 16 §3.

Insolvency Proceedings[50]. The question whether set-off may be invoked in Insolvency Proceedings is governed by various combinations of the law of the jurisdiction of opening of Insolvency Proceedings, the law that governs the claim of the insolvent debtor, and the law that governs the netting agreement between the parties[51].

If a Party is subject to main bankruptcy or reorganisation proceedings or to liquidation proceedings in Belgium (because it has the centre of its main interests in Belgium) and to secondary insolvency proceedings in a foreign jurisdiction (because it has an establishment in that foreign jurisdiction, unless it is a credit institution or an insurance undertaking[52]), there may be a possibility that the Belgian courts would give effect to the foreign insolvency laws, to the extent that such laws regulate the right to close out certain contracts (for instance by allowing the liquidator in charge of these secondary proceedings to "cherry pick" which transactions to close out or to continue) and that these contracts are deemed situated in that foreign jurisdiction. Although the determination of the situation of a contract is not free from doubt, there can be an argument that it is situated in the jurisdiction where the counterparty to the insolvent Party has the centre of its main interests[53].

If a Party is subject only to secondary bankruptcy or reorganisation proceedings in Belgium, the enforceability of close-out netting provisions may of course be affected by the laws of the jurisdiction of opening of the main proceedings.

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 BELGIUM 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

50 EUIR, Art. 4.2(e); Code IPL, Art. 119 §1; WUD, Art. 10.2(d); European directive 2001/17 of 19 March 2001 on the reorganisation and winding-up of insurance undertakings ("**WUD(I)**"), Art. 9.2(d).

51 EUIR, Art. 4.2(d), 6 and 9; Code IPL, Art. 119 §2, 2°; WUD, Art. 10.2(c), 23 and 25; WUD(I), Art. 9.2(c) and 22.

52 WUD, Art. 10.2(d); WUD(I), Art. 9.2(d).

53 EUIR, Art. 2(g). See Virgos-Schmit Report on the Convention of Insolvency Proceedings, No. 89.

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?

3.6 The early termination provisions set out in §§4 to 6 of the MNA or Section 2 of the CPMA will be enforceable under the laws of Belgium, in relation to the Agreements and to Netted Agreements or Principal Agreements, subject to the following reservations and those set out in section 4.

3.6.1 ***Termination not aiming at a set-off arrangement***

The Law on Financial Collateral protects the efficacy of termination clauses to the extent that they aim at achieving a netting arrangement[54]. The termination provisions in §§4 to 6 of the MNA and Section 2 of the CPMA are linked to the provisions in §8 of the MNA and Section 4 of the CPMA, respectively, relating to the calculation of a single net termination amount. These provisions thus qualify in principle for the protection offered by the Law on Financial Collateral.

In certain specific factual circumstances, however, there may be an argument that a termination made under §§4 to 6 of the MNA or Section 2 of the CPMA does not actually aim at achieving a netting arrangement[55], for instance because there is only one outstanding Netted Agreement or Principal Agreement at the time, or because all outstanding Netted Agreements or Principal Agreements give rise to a Settlement Amount owing from the same Party to the other. In those circumstances only, the following two risks may arise:

(a) *Reorganisation proceedings.* In the case of reorganisation proceedings, the non-defaulting Party would not be entitled to terminate the Netted

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[54] Law on Financial Collateral, Art. 14: "*les clauses et conditions résolutoires ou de déchéance du terme stipulées pour permettre la novation ou la compensation / de ontbindende bedingen en voorwaarden of de bedingen en voorwaarden met betrekking tot de vroegtijdige beëindiging die zijn vastgelegd om de schuldvernieuwing of -vergelijking mogelijk te maken*".

[55] The legislative history of the law of 31 January 2009 on the continuity of enterprises confirms that an effective netting is required in order for Art. 14 of the law of 15 December 2004 on financial collateral to be applicable; see Government's amendment, *doc. parl.*, Ch., 52-160/02, p. 62. See also R. Houben, *Schuld-vergelijking*, No. 912.

Agreements or Principal Agreements by reason of these Insolvency Proceedings[56] (but termination for other causes would remain possible); in addition, the Netted Agreements or Principal Agreements cannot be terminated by reason of a breach that occurred before the commencement of these Insolvency Proceedings if that breach is subsequently remedied within fifteen days of demand[57]. In other words, close-out may not be possible in reorganisation proceedings (but to the extent that close-out would be allowed, there is no doubt that netting will then also be allowed).

(b) *Bankruptcy and optional termination.* In the case of a bankruptcy, the non-defaulting Party would not be entitled to terminate the Netted Agreements or Principal Agreements by reason of these Insolvency Proceedings unless the Parties have elected to apply an "automatic termination"[58] (and again, to the extent that close-out would be allowed, there is no doubt that netting will then also be allowed).

The argument under (b) is weak in our view, but the argument under (a) is not unreasonable and we cannot reliably assess, in the absence of relevant case law of legal doctrine, its chances of success.

3.6.2 *Termination upon rescue measures*

As indicated in section 3.4.1 above, rescue measures may not be invoked as a trigger for an early termination, and it is uncertain whether an exception applies if the termination aims at achieving a netting arrangement.

In addition, rescue measures may lead to a forced "bank split"[59]: the government might adopt measures whereby part only of the Netted Agreements, Principal Agreements or transactions of the relevant bank (the "**Bank**") are transferred to a third party (the "**Transferee**"), or whereby different parts are transferred to different third parties. The original counterparty of the Bank would thus be in a situation where some of the Netted Agreements, Principal

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56 See paragraph 3.2.2(b) above and footnote 23.

57 See paragraph 3.2.2(b) above and footnote 24.

58 Law of 8 August 1997 on bankruptcy, Art. 46 §1. See section 3.4.1 above.

59 The word "bank" is used for the facility; the measures may also relate to an insurance company or a clearing and settlement system.

Agreements or transactions that it had made with the Bank are now agreements with the Transferee, whilst others remain agreements with the Bank. If, after the split, an event of default arises in respect of the Bank and justifies a termination of those Netted Agreements, Principal Agreements or transactions that remained with the Bank, it is uncertain whether this event of default can also be invoked against the Transferee and trigger the termination of those Netted Agreements, Principal Agreements or transactions that have been transferred to the Transferee (or conversely)[60]. We believe that the government has the power, when adopting rescue measures, to impose either solution[61].

3.6.3 *Liquidated damages upon reorganisation*

The law of 31 January 2009 on the continuity of enterprises has created some uncertainty as to the effectiveness, in proceedings of judicial reorganisation, of clauses providing for a method of calculation of the amount due upon termination of a transaction, such as §7 of the MNA or Section 3 of the CPMA in respect of the calculation of Settlement Amounts. Article 35 §3 of that law invalidates liquidated damage clauses during a judicial reorganisation. We believe that this provision is disapplied by the Law on Financial Collateral when the relevant liquidated damage clause is part of a close-out netting arrangement, but in the absence of clear indication in the legislative history or of other authority on the point, there remains a degree of uncertainty[62].

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[60] The law of 2 June 2010 expressly provides that rescue measures "may not have the effect of modifying the terms of any agreement made between the [credit institution / insurance company] and one or more third parties" (in respect of credit institutions: law of 22 March 1993 on the status and supervision of credit institutions, newly inserted Art. 57*bis*, §4, 2nd par.). This may suggest that the contractual termination rights remain applicable in full, and that the counterparty remains entitled to terminate the entire portfolio of Individual Contracts despite the split of the portfolio and the transfer of some Individual Contracts to a Transferee. However, legislative history seems to show that the purpose of this article in the law was just to prevent the parties from inserting in their contracts provisions that would change the terms of a contract if and when rescue measures are adopted (law of 2 June 2010, *doc. parl.*, Ch., *Statement of reasons*, 52/2406/01, p. 17); for instance, parties could not validly provide for a margin call or a pricing step-up triggered by the adoption of rescue measures.

[61] See footnote 32.

[62] Our view is based on the facts that the Law on Financial Collateral takes priority over the law on the continuity of enterprises (see law of 31 January 2009 on the continuity of enterprises, Art. 7; Government's amendment, *doc. parl.*, Ch., 52-160/02, p. 62), that a liquidated damage clause is an inherent component of any close-out netting arrangement, and that the Law on Financial Collateral precisely aims at keeping these

3.6.4 ***Termination by the liquidator and walkaway in case of reorganisation***

It should also be noted that, in the case of a bankruptcy, the liquidator of the insolvent Party will be entitled to terminate any Netted Agreement, Principal Agreement or transaction even if the non-defaulting Party does not exercise its own right to do so[63]. In the case of reorganisation proceedings, the insolvent Party will be entitled to suspend performance of its obligations under any Netted Agreement, Principal Agreement or transaction (whereupon the other Party may, if contractually entitled to do so, terminate the relevant Netted Agreement, Principal Agreement or transaction), subject to damages, as mentioned in paragraph 3.2.2(b) above[64].

3.6.5 ***Impact of foreign insolvency proceedings***

If the insolvent Party is subject to foreign insolvency proceedings (including foreign secondary proceedings in cases where the main proceedings take place in Belgium), the foreign law may have an impact on the effectiveness of the termination provisions of the Agreements; see section 3.5 above.

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 BELGIUM OR IS THERE A RISK THAT THE AUTOMATIC TERMINATION COULD BE CHALLENGED BY A LIQUIDATOR, ADMINISTRATOR, RECEIVER OR THIRD PARTY?

3.7 See section 3.6 above. Apart from paragraph 3.6.1(b), the discussion in that section applies irrespective of whether the parties have opted for automatic termination.

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close-out netting arrangements effective in an insolvency (Art. 14). The circumstance that Art. 14 of the Law on Financial Collateral expressly deals with the "termination" and "set-off" aspects only of these arrangements, and not with the "damage calculation" aspects, can be explained by the lack of any provision in the earlier law of 17 July 1997 on judicial composition that would have purported to invalidate liquidated damage clauses.

63 Law of 8 August 1997 on bankruptcy, Art. 46 §1.

64 See footnote 25.

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.

3.8 It is marginally preferable, for the reason described in paragraph 3.6.1(b) above, to opt for automatic termination when dealing with a Belgian counterparty. No grace period should apply. We would then, in respect of the MNA, recommend to write in §6 of Part I of the Election Sheet "§6.2 shall apply to Party A/B in the case of bankruptcy only, and shall not apply to Party A/B in other circumstances, with the Effective Time of Automatic Termination occurring upon the declaration of bankruptcy of Party A/B".

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 BELGIUM OR IS THERE A RISK THAT SUCH DETERMINATION COULD BE CHALLENGED BY A LIQUIDATOR, ADMINISTRATOR, RECEIVER OR THIRD PARTY?

3.9 The provisions in relation to netting and the calculation of a Final Net Settlement Amount set out in §8 of the MNA and Section 4 of the CPMA will be enforceable under the laws of Belgium, subject to the following reservations.

(a) *"Bank split" scenario upon rescue measures.* In a "bank split" scenario as described in section 3.6.2 above, and for the same reasons as set out in footnote 60 to that section, it is uncertain whether netting would be possible between Settlement Amounts arising on the one hand from Netted Agreements, Principal Agreements or transactions that were transferred to a Transferee and on the other hand from Netted Agreements, Principal Agreements or transactions that remained with the Bank. We believe in this case as well that the government has the power, when adopting rescue measures, to impose either solution.

(b) *Post insolvency interest.* The inclusion in the Final Net Settlement Amount of interest accrued after the commencement of the Insolvency Proceedings might not be enforceable[65].

(c) *Post insolvency transactions.* The calculation of a single Final Net Settlement Amount may not include transactions entered into after the commencement of the Insolvency Proceedings[66].

(d) *Abnormal transactions.* Abnormal transactions entered into in the knowledge that the transaction would prejudice the creditors of a party are voidable in the subsequent bankruptcy of that party[67]. None of the provisions of the Agreements in itself appears to us as "abnormal" for the purposes of this rule of bankruptcy law, but the assessment of the abnormal character of a contractual arrangement may be affected by the factual circumstances of a particular case.

(e) *Transactions at an undervalue.* Transactions entered into by a party during the suspect period prior to the declaration of bankruptcy of that party are voidable if they entail a significant undervalue; see paragraph 3.2.1(f) above. None of the provisions of the Agreements in itself appears to us as entailing a significant undervalue for the purposes of this rule of bankruptcy law, but the assessment of this question may be affected by the factual circumstances of a particular case and in particular by the arm's length character of the transactions entered into under the Netted Agreements or Principal Agreements.

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65 Law of 8 August 1997 on bankruptcy, Art. 23; cass., 7 April 1986, *Pas.*, 1986, I, 951; 24 March 1977, *Pas.*, 1977, I, 796. In respect of judicial reorganisations, there is no express legal provision, but an argument can be made from the fact that the rule of the earlier law on composition proceedings that required the debtor to continue to pay interest accruing during the proceedings (law of 17 July 1997, Art. 21 §2) was not repeated in the new law on the continuity of enterprises.

66 Law on Financial Collateral, Art. 14.

67 See footnote 21, and law on Financial Collateral, Art. 16 §3.

(f) *Legal fees.* The MNA provides, in §4 of Part III of the Election Sheet, for the possible inclusion of "all reasonable legal fees" in the calculation of a Settlement Amount. There may be an argument that legal fees are not recoverable beyond a maximum amount set by royal decree[68]. We believe that this argument will in any event be inapplicable when the MNA is governed by a foreign law and provides for jurisdiction of foreign courts or arbitral tribunals.

DO THE LAWS OF BELGIUM 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.

3.10 The provisions in relation to close-out and netting set out in §8 of the MNA and Section 4 of the CPMA will be enforceable under the laws of Belgium, in the manner indicated above, in respect of all Netted Agreements, Principal Agreements or transactions. The "single agreement" concept is not relevant in this respect.

3.11 It would be possible in principle to amend the termination provisions of the Agreements so that only some but not all Netted Agreements or Principal Agreements and some but not all transactions thereunder would be terminated, at the option of the non-defaulting party. These amended provisions would be enforceable, subject to the same reservations as mentioned in section 3.6.1 above. The manner in which the non-defaulting party exercises its option may however increase the risk that the termination will be regarded as not aiming at achieving netting, for instance if that

68 Judicial Code, Art. 1022 *in fine*, introduced by the law of 21 April 2007 on the recoverability of lawyers' fees and costs; royal decree of 26 October 2007.

party only terminates those Netted Agreements or Principal Agreements that give rise to a Settlement Amount owing in the same direction.

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 BELGIUM OR COULD THE CALCULATION OR DEMAND OF SUCH AMOUNT IN A FOREIGN CURRENCY BE CHALLENGED BY A LIQUIDATOR, ADMINISTRATOR, RECEIVER OR THIRD PARTY?

3.12 Claims may be filed in Insolvency Proceedings in any currency in which they are denominated. In the case of a bankruptcy or a liquidation, an unsecured net claim filed in a foreign currency will be converted, for the purposes of measuring *pro rata* distributions between creditors, at the rate of exchange prevailing on the date of commencement of the Insolvency Proceedings or, if applicable, at the rate set by agreement between the parties[69].

The enforceability in Belgium of monetary claims is not limited to claims denominated in euro. Judgments from the Belgian courts ordering the payment of a sum of money, however, may only be expressed in euro or in the currency of an OECD member state[70]; claims denominated in another currency will be converted into euro by the courts.

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?

3.13 The Law on Financial Collateral, which is the main legal basis for the close-out and netting analysis made in this opinion, applies to all types of parties (subject to certain limited exceptions in respect of natural persons)[71]. The above analysis would thus not be affected by the status of the insolvent Party, subject to the discussion in

[69] A. Zenner, *Dépistage, faillites & concordats*, No. 410; A. Cloquet, *Les concordats et la faillite, Novelles,* t. IV, No. 1725.

[70] Law of 30 December 1885, Art. 3.

[71] Law on Financial Collateral, Art. 12 §4; Const. C., 27 November 2008, *Monit.*, 4 February 2009, p. 7947.

sections 3.1 and 3.2 as to the types of Insolvency Proceedings that are available to different categories of Parties.

4. NON-INSOLVENCY RELATED MATERIAL REASONS

PLEASE DISCUSS AND ADVISE ON THE ISSUES OUTLINED ABOVE UNDER 3.9 TO 3.12 IN THE CONTEXT OF NON-INSOLVENCY RELATED MATERIAL REASONS, AS WELL AS THE FOLLOWING QUESTION: 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?

4.1 Agreements governed by foreign law

If the applicable Agreement is governed by a foreign law (and assuming of course its validity under that foreign law), and outside the context of Insolvency Proceedings, its early termination for a material reason and close-out netting provisions will be recognised as valid and enforceable by the courts of Belgium. In contractual matters, the Belgian rules of conflicts of laws give effect to the choice of governing law made by the parties, subject to certain mandatory rules (*lois de police / bepalingen van bijzonder dwingend recht*) or rules of international public policy (*ordre public international / internationale openbare orde*)[72]. The above provisions of the Agreements do not conflict with any such mandatory rules or rules of international public policy, subject perhaps to the reservation mentioned in paragraph 3.9(f) above in respect of the recoverability of legal fees.

4.2 Agreements governed by Belgian law

If the applicable Agreement is governed by Belgian law, and outside the context of Insolvency Proceedings, its early termination for material reason and close-out netting

[72] The courts of Belgium may nevertheless give effect, at their discretion, to the overriding mandatory laws of any jurisdiction where the relevant obligations have to be or have been performed; they may also take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance; Rome I, Art. 3, 9 and 21; Code IPL, Art. 20 and 21. In addition, if all relevant elements are located in Belgium, then all mandatory provisions of Belgian law (*dispositions impératives / bepalingen van dwingend recht*) will remain applicable irrespective of the choice of governing law; Rome I, Art. 3.3.

provisions will be valid and enforceable[73]. Limitations to their enforceability can arise in the following respects:

(a) *Abuse of right.* The courts have developed a body of case law to the effect that rights may not be exercised in an abusive manner, and a party may be denied the right to invoke a contractual right if so doing would be abusive[74]. It is unlikely in fact that the exercise of a right of set-off could ever be considered abusive, but the exercise of a right to terminate or close out a transaction might be susceptible of abuse.

(b) *Liquidated damages and penalties.* Belgian law allows contractual arrangements providing for liquidated damages (*clause pénale / strafbeding*), but gives the courts the power to reduce the agreed amount of liquidated damages if such amount manifestly exceeds the loss that the parties could reasonably expect[75]. The determination of a Final Net Settlement Amount upon close-out of a transaction may fall under these rules but, given the wording of §8 of the MNA and Section 4 of the CPMA, it seems extremely unlikely that a Final Net Settlement Amount calculated in accordance with the Agreements could be challengeable on this ground.

(c) *Grace periods.* The courts have the power to grant periods of grace for the performance of its obligations to a debtor who has acted in good faith[76].

(d) *Legal fees.* There may be an argument that legal fees are not recoverable beyond a maximum amount set by royal decree; see paragraph 3.9(f) above.

5. MULTIBRANCH PARTIES

Belgian Multibranch Parties

5.1 Sections 5.1 to 5.3 relate to a Multibranch Party incorporated, organised or having its centre of main interest in Belgium. They are based on the additional assumption that Party A has entered into transactions under Netted Agreements or Principal Agreements through offices in Belgium as well as through one or more branches located abroad. After entering into these transactions and prior to the maturity thereof,

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73 Civil Code, Art. 1134.

74 For example, Cass., 8 February 2001, *Pas.*, 2001, 244.

75 Civil Code, Art. 1231.

76 Civil Code, Art. 1244.

Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Belgium.

WOULD THERE BE ANY CHANGE IN YOUR CONCLUSIONS REACHED UNDER 3 OR 4 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?

5.2 No.

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 BELGIAN RECEIVER UNDER THE LAWS OF BELGIUM, 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?

5.3 The "single agreement" concept is not relevant for the purposes of this opinion.

Foreign Multibranch Parties

5.4 Sections 5.4 to 5.7 relate to a Multibranch Party incorporated, organised or having its centre of main interest outside this jurisdiction, but operating through one or more branches in this jurisdiction. They are based on the additional assumption that 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, organised or having its centre of main interest in a country ("Country H") other than Belgium 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 this jurisdiction (the "Belgian 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.

WOULD THERE BE SEPARATE PROCEEDINGS IN BELGIUM WITH RESPECT TO THE ASSETS AND LIABILITIES OF THE BELGIAN BRANCH UPON THE START OF THE INSOLVENCY PROCEEDING FOR PARTY F IN COUNTRY H? OR WOULD THE RELEVANT AUTHORITIES IN BELGIUM DEFER TO THE PROCEEDINGS IN COUNTRY H, SO THAT THE ASSETS AND LIABILITIES OF THE BELGIAN BRANCH WOULD BE HANDLED AS PART OF THE PROCEEDINGS FOR PARTY F IN

COUNTRY H? COULD LOCAL CREDITORS OF THE BELGIAN BRANCH INITIATE SEPARATE PROCEEDINGS IN BELGIUM EVEN IF THE RELEVANT AUTHORITIES IN BELGIUM DID NOT DO SO?

5.5 The courts of this jurisdiction may open secondary (or "territorial") insolvency proceedings if, and only if, the relevant foreign entity has an establishment in this jurisdiction (save in the case of credit institutions and insurance undertakings, which may only be subject to insolvency proceedings in their home jurisdiction)[77]. Creditors of the Belgian branch, or creditors resident in this jurisdiction, may initiate legal proceedings with a view to the opening of territorial insolvency proceedings; the local courts have no discretion in that case as to whether it is appropriate to open territorial proceedings in addition to, or before, the home jurisdiction's main proceedings[78]. Creditors are not entitled to apply for judicial reorganisation proceedings, save in certain limited circumstances[79]. The effect of territorial insolvency proceedings opened in this jurisdiction is restricted to the assets of the insolvent party situated in the territory of this jurisdiction; note that the determination of the situation of a contract is not free from doubt[80].

If no territorial insolvency proceedings are opened in this jurisdiction, the courts of this jurisdiction will recognise the effects of the insolvency proceedings opened in the insolvent party's home jurisdiction, also in relation to the assets and liabilities of the Belgian branch. These effects will also be recognised, when territorial insolvency proceedings have been opened in this jurisdiction, in relation to any assets situated outside this jurisdiction (the situation of assets does not depend for these purposes on whether they are allocable to the business of the Belgian branch, but on certain objective tests such as the physical location of tangible property or the place of principal establishment of the debtor of a claim)[81].

IF THERE WERE SEPARATE PROCEEDINGS IN BELGIUM WITH RESPECT TO THE ASSETS AND LIABILITIES OF THE BELGIAN BRANCH, WOULD THE RECEIVER OR LIQUIDATOR IN BELGIUM AND THE BELGIAN COURTS, BASED ON THE FACTS ABOVE, INCLUDE PARTY F´S POSITION

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77 See footnotes 11 and 52.

78 EUIR, Art. 3.4(b) and 29; law of 8 August 1997 on bankruptcy, Art. 6; Company Code, Art. 634; P. Wautelet, "De Europese insolventieverordening", *in* coll., *Het nieuwe Europese IPR: van verdrag naar verordening*, p. 103, n° 5-38.

79 Law of 31 January 2009 on the continuity of enterprises, Art. 17, 23 and 59 §2.

80 EUIR, Art. 3.2 and 27.

81 EUIR, Art. 2(g) and 3.2; Code IPL, Art. 117, 3°.

under the Netted Agreements or Principal Agreements, in whole or in part, among the assets of Belgium and, if so, would the receiver or liquidator and the Belgian 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 Belgian receiver, liquidator or court considering a single EFET Master Netting Agreement or Cross-Product Master Agreement were to require a counterparty of the Belgian Branch of Party F to pay the mark-to-market value of transactions entered into with the Belgian Branch to the liquidator or receiver of the Belgian 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.

5.6 The insolvency official in charge of territorial insolvency proceedings in respect of a Belgian branch, and the Belgian courts, will need to give effect to the close-out and netting provisions of the Agreements in the manner indicated in sections 3.1 to 3.5 above, without distinction between those Netted Agreements or Principal Agreements that are allocable to the Belgian branch and those that are not. The laws of the jurisdiction of opening of the main insolvency proceedings may have an impact on these provisions, as to which please see section 3.5. The Final Net Settlement Amount resulting from that process, if payable to Party F, will be part of the assets to be collected and distributed by the Belgian insolvency official if, and only if, the counterparty by which this Final Net Settlement Amount is payable has the centre of its main interests in this jurisdiction[82].

[82] EUIR, Art. 2(g) and 3.2. In the case of territorial insolvency proceedings that do not fall within the scope of the EUIR, and are governed by domestic law only, there is an argument that claims are always to be collected and distributed by the official in charge of the main proceedings, and that the Belgian insolvency official never has any power in this regard irrespective of the location of the counterparty or of whether the claim was allocable to the branch; Code IPL, Art. 87 §§1 and 3, and 117, 3°.

PLEASE CONSIDER YOUR ANSWER TO YOUR QUESTION ASSUMING INSTEAD THAT PARTY F HAS NO BRANCH LOCATED IN BELGIUM, BUT HAS ASSETS IN BELGIUM.

5.7 The existence of assets in this jurisdiction, in the absence of an establishment, is insufficient to permit the opening of insolvency proceedings (other than attachments) in this jurisdiction.

6. COLLATERAL

6.1 This section 6 is based on the additional assumptions that, although each Credit Support Annex is a bilateral form in that it contemplates that each party may be required to post collateral to the other, (i) Party A is at all times Transferor under the applicable Credit Support Annex and (ii) the collateral is owned by Party A or Party A is authorized and empowered to transfer ownership in the collateral, and that the counterparties agree that Eligible Credit Support will include cash and Letters of Credit, cash being denominated in a freely convertible currency and held in an account under the control of Party B maintained in the jurisdiction of the relevant currency[83].

UNDER THE LAWS OF BELGIUM, WHAT LAW GOVERNS THE TRANSFER OF OWNERSHIP IN THE VARIOUS FORMS OF ELIGIBLE CREDIT SUPPORT DELIVERABLE UNDER THE EFET CREDIT SUPPORT ANNEX?

6.2 With regard to Letters of Credit, there is no "transfer of ownership" properly speaking and the question does not arise. The Letter of Credit will be governed by the chosen law or, in the absence of express choice, by the law of the place of central administration of the issuing bank (or, if the Letter of Credit is issued through a branch of that bank, the law of the location of the relevant branch)[84].

6.3 With regard to cash, the governing law in respect of the relationship between the Parties will be the law chosen by them to govern the applicable Agreement and Credit Support Annex, provided that the courts may also have regard to the law of the place of the payment[85]. The question whether the transfer of cash may be voidable in an insolvency of the transferor will be governed by the law of the insolvency proceedings, provided that the transfer will not be voidable if the governing law of the

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83 For the avoidance of doubt, this opinion does not discuss collateral in any other form than cash or Letters of Credit.

84 Rome I, Art. 3, 4.2 and 19.

85 Rome I, Art. 12.1(b), 12.2 and (arguably) 14.1.

applicable Agreement and Credit Support Annex would not in the circumstances allow any means of challenging that transfer[86].

WOULD THE LAWS OF BELGIUM 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?

6.4 With regard to Letters of Credit, there is no "transfer of ownership" properly speaking and the question of recharacterisation does not arise.

6.5 With regard to cash, assuming that the governing law of the applicable Agreement and Credit Support Annex (if not Belgian law) characterises it as effecting an unconditional transfer of ownership, such characterisation will be recognised by the courts of Belgium[87]. The courts of Belgium might add that such transfer of ownership constitutes a security arrangement (*sûreté / zekerheid*), but such an analysis would have no detrimental consequences and would not render the cash collateral ineffective[88].

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 BELGIUM 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?

6.6 The substantive law of this jurisdiction does not impose any such action of requirement (other than, of course, actual transfer of the cash to Party B[89]).

The rules of conflicts of laws of this jurisdiction, however, provide that the perfection of an assignment of, or security over, a claim is governed by the law of the place of

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86 EUIR, Art. 4.2(m) and 13; Code IPL, Art. 119 §1 and §4, 1°.

87 Rome I, Art. 12.

88 Law on Financial Collateral, Art. 12.

89 *Ibid.*, Art. 4 §1 par. 2.

principal establishment of the assignor or provider of security[90]. The provision of cash collateral may arguably be subject to these rules of conflict, and it is therefore advisable to comply with the perfection requirements, if any, imposed by the law of the jurisdiction of the principal establishment of Party A.

WHAT IS THE EFFECT, IF ANY, UNDER THE LAWS OF BELGIUM 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?

6.7 In the absence of an insolvency, an exchange of Eligible Credit Support pursuant to §6 of the applicable Credit Support Annex is a contractual right only and would not affect our opinions set out in sections 6.2 to 6.6. In the case of an insolvency, please refer to section 6.12. The presence of consent has no bearing on the question.

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 BELGIUM 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?

6.8 Yes, §11 or §12 of the applicable Credit Support Annex would also be valid to the extent that it provides that the Base Currency Equivalent of all Eligible Credit Support provided thereunder will be included in the calculation of the Final Net Settlement Amount as an amount payable by the Transferee[91].

We read §11 and §12, respectively, of the Credit Support Annexes as meaning that the value of collateral is included in the calculation of the Final Net Settlement Amount as an amount that must be returned by the holder of collateral to the other party. We do not read this provision as meaning that the value of collateral not yet transferred to a Party must be included in the calculation; however, assuming that the value of that

[90] Code IPL, Art. 87 §3 and 4 §2, 2°.

[91] Civil Code, Art. 1134; Law on Financial Collateral, Art. 14.

collateral would be included in the calculation both as an amount payable by the Transferor (because the Transferor still has an obligation to transfer that collateral) and as an amount payable by the Transferee (who must return that collateral), this provision would also be valid.

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?

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

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?

6.10 Please see paragraph 3.2.1(f) above for a discussion of "suspect periods". Suspect period rules apply only in the case of a bankruptcy; there are no rules of that type in the case of other forms of Insolvency Proceedings.

Eligible Credit Support that consists in Letters of Credit issued by a third-party credit institution cannot be recovered by an insolvency official of the Transferor.

Eligible Credit Support that consists in cash may be voidable, upon the bankruptcy of the Transferor, in the following circumstances:

(a) If it is provided during the suspect period as security for pre-existing transactions[92]. It will not be voidable on this ground, however, if it is provided during the suspect period but pursuant to an undertaking to do so that was entered into prior to the suspect period with a view to ensuring, during the life

[92] Law of 8 August 1997 on bankruptcy, Art. 17, 3°; Law on Financial Collateral, Art. 15 §2, par. 2.

of one or more transactions, a balance between the respective obligations of the parties[93]. Eligible Credit Support delivered pursuant to §3.1 of the applicable Credit Support Annex should in principle satisfy this condition and therefore be immune against avoidance on this ground, but the assessment of this question may be affected by the factual circumstances of a particular case; further, the question may be debatable where the obligation to provide Eligible Credit Support is not triggered by changes in the marked-to-market value of the underlying transactions, but rather by changes in the rating of a party or similar events[94].

(b) If it constitutes an abnormal transaction entered into in the knowledge that the transaction would prejudice the creditors of the Transferor[95]. The delivery of cash collateral pursuant to the provisions of the Credit Support Annexes does not in itself appear to us as "abnormal" for the purposes of this rule of bankruptcy law, but the assessment of the abnormal character of such an arrangement may be affected by the factual circumstances of a particular case.

(c) If it is provided during the suspect period and entails a significant undervalue for the Transferor[96]. The delivery of cash collateral pursuant to the provisions

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93 Law on Financial Collateral, Art. 3, 9° and 16 §1.

94 We believe it can be reasonably argued that a rating based test does not jeopardise the effectiveness of collateral delivered during the suspect period, but legal doctrine is divided on this point and the outcome of litigation would be uncertain. The wording of the Belgian Law on Financial Collateral is different from that of the European directive 2002/47 of 6 June 2002 on financial collateral arrangements (the "**Financial Collateral Directive**") in this respect, and this gives rise to ambiguity. Article 8.3(a) of the Financial Collateral Directive validates the delivery during the suspect period of top-up collateral "in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations"; Article 3, 9° of the Belgian law by contrast refers to top-up collateral "provided with a view to ensuring during the life of an agreement the agreed balance between the obligations of the parties". The wording of the Belgian law is thus broader than that of the directive, and we believe it can be reasonably argued that the rating of the parties may be a component of the "agreed balance" that top-up collateral is meant to maintain. Part of the legal doctrine supports that argument; see I. Peeters et K. Christiaens, "De Wet Financiële Zekerheden – een stap te ver of de aanloop naar een totaal vernieuwd zekerheidsrecht ?", *RDCB*, 2006, p. 170, n° 59. Other commentators take the opposite view: V. Sagaert en H. Seeldrayers, "De wet financiële zekerheden", *RW*, 2004-2005, p. 1521, n° 78; D. De Marez, "De wet financiële zekerheden", *TPR*, 2006, p. 1101, n° 61; there is some suggestion in the legislative history that the Belgian law in this respect should be given the same meaning as the directive: *doc. parl.*, Ch., *Statement of reasons*, 51/1407/01, p. 28.

95 See footnote 21.

96 See paragraph 3.2.1(f).

of the Credit Support Annexes does not in itself appear to us as entailing a significant undervalue for the purposes of this rule of bankruptcy law, but the assessment of this question may be affected by the factual circumstances of a particular case.

(d) If it is provided during the suspect period and the Transferee at the time knew that the Transferor was already in a situation of cessation of payments[97], unless it is provided pursuant to an undertaking to do so that was entered into prior to the suspect period with a view to ensuring, during the life of one or more transactions, a balance between the respective obligations of the parties[98]. Eligible Credit Support delivered pursuant to §3.1 of the applicable Credit Support Annex should in principle satisfy this condition and therefore be immune against avoidance on this ground, but the assessment of this question may be affected by the factual circumstances of a particular case; further, the question may be debatable where the obligation to provide Eligible Credit Support is not triggered by changes in the marked-to-market value of the underlying transactions, but rather by changes in the rating of a party or similar events[99].

6.11 The return of Eligible Credit Support in the form of cash made by the Transferee during the suspect period prior to its bankruptcy may arguably be avoided if the Transferor knew at the time that the Transferee was already in a situation of cessation of payments[100]. The Law on Financial Collateral made this ground of voidness inapplicable to the provision of top-up collateral, but seems not to have made it inapplicable to the return of collateral.

6.12 The substitution of Eligible Credit Support during the suspect period will not invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing and that there is no time gap between the restitution of the "old" assets and the delivery of the "new" assets[101].

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

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97 Law of 8 August 1997 on bankruptcy, Art. 18.

98 See footnote 93.

99 See footnote 94.

100 Law of 8 August 1997 on bankruptcy, Art. 18; Law on Financial Collateral, Art. 16 §3.

101 Cass., 12 November 1914, *Pas.*, 1915-1916, I, 124; Law on Financial Collateral, Art. 16 §2.

B? ARE THERE ANY OTHER REQUIREMENTS TO BE OBSERVED IN BELGIUM 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 6.4 OR 6.5 ABOVE?

6.13 The Credit Support Annexes are appropriate and effective in the manner set out in this opinion. There are no other relevant requirements, save as indicated in section 6.6 above.

DO YOU HAVE OTHER SPECIFIC RECOMMENDATIONS ON THE SUBJECT OF COLLATERAL THAT YOU WOULD LIKE THE EFET MEMBERS TO CONSIDER?

6.14 There are no other material issues relevant to the questions on the subject of collateral addressed in this opinion which we wish to draw to your attention.

7. GENERAL ENFORCEABILITY

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 BELGIUM IN ACCORDANCE WITH THEIR OWN TERMS? WE ARE ESPECIALLY INTERESTED IN PROVISIONS THAT YOU MAY BELIEVE INFRINGE UPON THE ORDRE PUBLIC IN AND THAT MAY BE CHALLENGED BY THE COURTS IN BELGIUM IRRESPECTIVE OF THE LAW THAT GOVERNS THE AGREEMENT.

7.1 If an Agreement is governed by a foreign law (and assuming of course its validity under that foreign law), that Agreement will be recognised as valid and enforceable by the courts of Belgium. The choice of governing law will be recognised, and their provisions do not conflict with any overriding mandatory rules (*lois de police / bepalingen van bijzonder dwingend recht*) or rules of international public policy[102].

If an Agreement is governed by Belgian law, that Agreement will be valid and enforceable, subject to the reservations set out in this opinion.

[102] See section 4.1 and footnote 72.

DO YOU HAVE OTHER RECOMMENDATIONS GOING TO THE TOPIC OF GENERAL LEGAL ENFORCEABILITY THAT YOU WOULD LIKE EFET MEMBERS TO CONSIDER?

7.2 The EFET members may consider the following changes to the MNA, when governed by Belgian law.

(a) The MNA provides in §11 for payment netting (*ie*, on an on-going basis, the payment on a net basis of amounts that fall due on the same date and in the same currency between the parties) "if this §11.1 is made operative by the Parties in the Election Sheet". Under Belgian law payment netting applies by default unless the parties expressly provide otherwise[103]. In order to give effect to the apparent intent of §11, the following sentence should be added at the end of the paragraph: "If not so specified, payments shall be made on a gross basis and without set-off, without prejudice to §7 (*Determination and Settlement of Settlement Amounts*) and §8 (*Netting-Off of Settlement Amounts; Accrual of Interest*)".

(b) The definition of "Total Capitalisation" in Annex 1 to the MNA may not achieve its intended result. The words "in respect of the relevant period" are confusing, because one would expect capitalisation to be measured at a specific point in time rather than over a period. More importantly, the definition includes "paid up shareholder cash contributions" but ignores all retained earnings and reserves. In order to express what is presumably intended and to maintain consistency with the wording of other definitions (in particular "Tangible Net Worth"), we would suggest the following changes: "***Total Capitalisation*** means ~~in respect of the relevant period~~ the sum of Total Debt and all paid up shareholder cash contributions to the share capital account or any other capital account of the Relevant Entity ascribed for such purposes of the Relevant Entity <u>and any accumulated retained earnings less any accumulated retained losses</u>".

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

(a) Belgian law allows third-party creditors to launch proceedings seeking the bankruptcy or liquidation of a debtor. These proceedings may ultimately be dismissed, and may occasionally be frivolous; some considerable time may

103 Civil Code, Art. 1290.

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

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

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

8. CONFIRMATION PRACTICES

8.1 This section 8 discusses (1) the formal requirements and procedure in the formation of a legally binding and enforceable transaction and its inclusion in the Netted Agreement or Principal Agreement and the related Master Agreement and (2) the formal requirements a confirmation should comply with under the procedural laws of Belgium in order to be sufficient for all purposes to evidence a binding transaction and its inclusion in the agreements mentioned under (1). It is based on the additional assumption that, as far as the confirmation practice is concerned, when entering into a 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). It is furthermore based on the additional assumption that Parties may or may not use matching systems (like EFET eCM, MarkitWire or DTTC DS Match) to electronically match and exchange confirmations.

8.2 Under Belgian rules of conflicts of law, there is a large degree of flexibility as to the law that governs the formal validity of an agreement: an agreement will be formally valid if it satisfies the formal requirements of any one or more of its governing law and the laws of the countries in which any of the parties was present or resident at the time of its conclusion[104].

As to admissibility of evidence, the issue is in the first place governed by the governing law of the substance of the dispute, rather than by the procedural rules of the court. There is a large degree of flexibility as well, however, with the result that a particular form of evidence will generally be admissible if it is allowed under any one or more of the law that governs the substance of the matter, the law of the court where the dispute is litigated, or any of the various laws referred to in the preceding paragraph[105].

The opinions set out in this section 8 deal only with Belgian law; they are without prejudice to the application of the various foreign laws that may be applicable.

DOES THE FORMATION OF A LEGALLY BINDING AND ENFORCEABLE TRANSACTION REQUIRE ANY FORMAL ACT (E.G., EXECUTION IN WRITING, SIGNATURE, REGISTRATION OR NOTARIZATION)?

8.3 In commercial matters, *ie* between parties that are both tradesmen (as opposed to "civil" parties such as consumers, public authorities or non-profit organisations), any form of evidence is in principle admissible and there is generally no requirement that obligations be documented in writing or in any particular form[106]. In practice, however, the courts tend to give much more credibility to written evidence. There is

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[104] Rome I, Art. 11.1 and 11.2.

[105] Rome I, Art. 18; G. Van Hecke and K. Lenaerts, *Internationaal privaatrecht*, No. 830; F. Rigaux and M. Fallon, *Droit international privé*, No. 11.16.

[106] Comm. Code, Art. 25; Civil Code, Art. 1341, par. 2.

no signature requirement, but as a matter of fact a signature on a written document facilitates evidence of the authenticity of the document and of the identity (and hence the powers, as the case may be) of the person who concluded the transaction on behalf of the party concerned.

Between "civil" parties, written evidence is in principle required[107]. There are some exceptions, in particular for *de minimis* matters or when there is already a commencement of written evidence. It is highly advisable in practice to draw up written evidence. In cases where one party is a tradesman and the other is not, the "civil" party may bring evidence against the tradesman in any form; by contrast the tradesman may only bring written evidence against the "civil" party[108].

The opinions set out below in this section 8 assume that the relevant issues have arisen between tradesmen only[109].

AT WHAT POINT IN TIME DOES A TRANSACTION AGREED UPON ORALLY BECOME LEGALLY BINDING OR ENFORCEABLE?

8.4 A binding contract comes into existence between the parties as soon as they have exchanged an expression of their agreement on the essential terms of the contract, irrespective of whether that exchange is oral or in writing[110]. A transaction which is first agreed upon orally and later confirmed in writing will thus be binding as from the time of the oral agreement.

DOES FAILURE TO OBJECT TO INCORRECT TERMS IN A RECEIVED CONFIRMATION CONSTITUTE "ACCEPTANCE" OF THOSE TERMS? IF SO, IS THERE A RELEVANT TIME PERIOD?

8.5 Parties are free to agree between them procedures in respect of verification, objections and tacit acceptance or rejection of or to a contract confirmation sent by either of them to the other. Belgian law does not prescribe further details as to the length of time allowed by these procedures.

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107 Civil Code, Art. 1341, par. 1, and 1347.

108 Cass., 18 January 1990, *Pas.*, 1990, I, 592.

109 Certain types of entities listed in Schedule 2 (*Types of counterparties*) do not qualify as tradesmen; this may in particular be the case of pension funds and public authorities.

110 Civil Code, Art. 1583.

In the absence of agreed procedures, whether Belgian law would derive acceptance from a failure to object will entirely depend on the factual circumstances, and in particular on whether there is an on-going business relationship between the Parties.

IS THE REFERENCE TO A NETTED AGREEMENT OR PRINCIPAL AGREEMENT SUFFICIENT FOR THE INCLUSION OF THE TRANSACTION IN THE AGREEMENT?

8.6 This would depend on the factual circumstances and on the terms of the relevant Netted Agreement or Principal Agreement.

8.7 **Means of Evidence**

ASSUMING THERE IS A DISPUTE WITH RESPECT TO THE EXISTENCE OR THE TERMS OR CONDITIONS OF A TRANSACTION, WOULD ANY OR ALL OF THE FOLLOWING BE ELIGIBLE FOR RENDERING OR OTHERWISE PROPERLY INTRODUCING EVIDENCE OF THE AGREED TERMS OF THE INDIVIDUAL CONTRACT 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?

8.8 A taped verbal agreement is in principle sufficient[111]. In practice, a court may be inclined to deny credibility to a taped verbal agreement unless there is already between the parties a course of dealing that justifies the practice of entering into verbal agreements and tape recording the relevant conversations, or a written agreement providing for this possibility.

The recording of a telephone conversation as evidence of a commercial transaction is expressly permitted by law, subject to conditions. The participants involved in the conversation must be informed prior to the commencement of the tape recording of the fact of the recording, of its purpose, and of the length of time during which the record will be stored. The recording must be erased immediately at the end of the time period during which the transaction is capable of being legally disputed[112].

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[111] Cass., 24 November 1961, *Pas.*, 1962, I, 367 (in tort matters); 29 October 1962, *Pas.*, 1963, I, 272 (in criminal matters).

[112] Law of 13 June 2005 on electronic communications, Art. 128. Belgium has not used the option offered by the level 2 MiFID directive (directive 2006/73 of 10 August 2006, Art. 51.4) to impose obligations relating to the recording of telephone conversations or electronic communications involving client orders, for the simple technical reason that the MiFID provisions were implemented by way of a royal decree whilst provisions in respect of recording of conversations would have required an act of Parliament because they

In the case of a business conversation between individuals acting for their respective enterprises, which is being recorded by a system installed by either enterprise (*ie* the recorder is not operated by the individual participant), it is not entirely clear whether the information required to be given prior to the recording of the call may be given to the enterprise, or must be given to the individual involved. There are arguments either way; our view is that, in a business context where it is not unusual for recordings to take place, where both enterprises have agreed to the recording and shared the required advance information, where the individual can reasonably expect that conversations will be tape recorded as evidence of transactions, and where that evidence is invoked against the counterparty to the transaction (and not against the individual, for instance in an employment dispute), the recording is permitted and the evidence will be admissible[113]. There remains a degree of uncertainty, however.

8.9 Hearing witnesses is at the discretion of the courts[114]; in business disputes the courts will generally be very reluctant to do so.

8.10 An electronic confirmation of a transaction is admissible in evidence. Of course, practical difficulties may arise if the other party to a dispute alleges that the print-out of that confirmation submitted to the court is not genuine, or that the electronic communication never took place[115]. Usage of certified "electronic signatures", which have the same evidentiary value as manuscript signatures, can alleviate these difficulties[116].

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may touch on privacy issues; see royal decree of 27 April 2007 implementing MiFID, *report to the King* and *Council of State advice*, *Monit.*, 31 May 2007, pp. 29285 and 29313.

[113] This view is based on the purpose of the law, which essentially aims at protecting the privacy of the participants. If the evidence is sought purely between the legal entities involved in the commercial transaction, no privacy issue in respect of the individuals arises. Also, an unauthorised recording of the conversation would be criminally sanctioned, and courts tend to construe narrowly, in case of doubt, the scope of criminally sanctioned behaviours; Penal Code, Art. 314*bis* (and Art. 259*bis* in respect of telephone tapping by public authorities). See D. Dewandeleer, "Afluistermisdrijven", *in* coll., *Strafrecht en strafvordering, commentaar met overzicht van rechtspraak en rechtsleer*, No. 94 *et seq.*

[114] Judicial Code, Art. 915 *et seq*.

[115] A. Clabots, "Bewijs van handelsverbintenissen, art. 25 W. Kh.", *in* coll., *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer,* No. 12; G. Somers and J. Dumortier, *Elektronische post juridisch bekeken: Praktische gids voor de onderneming en het bestuur*, No. 3.1 *et seq*.

[116] A law of 9 July 2001 on the legal framework for electronic signatures and certification services implemented the European directive 1999/93 on a Community framework for electronic signatures; see in particular Art. 4 §4 of that law.

Parties are free to agree between them any procedures in respect of the automated conclusion or verification of transactions. If a process of automated transaction confirmation is operated in accordance with a prior agreement (entered into in a "traditional" form) between the parties, such as EFET's Electronic Confirmation Agreement, then such process and the resulting transactions will be binding between them. In the absence of such a prior agreement, it is uncertain whether electronic confirmation matching would by itself create or evidence binding transactions.

8.11 Faxes are admissible in evidence as well and, again, practical difficulties may arise if the other party to a dispute alleges that the fax submitted to the court is not genuine[117].

9. CORE PROVISIONS

This section 9 is based on the same additional assumptions as sections 3 and 5.

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 SECTIONS 3 OR 4 (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.

9.1 As to the "automatic termination" election, please refer to paragraphs 3.6.1(b) and 3.8 above. For the rest, the elections contemplated by the Agreements are not of such a nature as to modify our conclusions reached under Sections 3 or 4.

CONSIDERING YOUR CONCLUSIONS REACHED UNDER SECTIONS 3 AND 4 (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 THOSE SECTIONS 3 AND 4 (EACH SUCH PROVISION A "CORE PROVISION")?

9.2 This opinion is given on the basis of the Agreements as reviewed by us, and amendments made to the Agreements could have an impact on this opinion. The most important provisions of the Agreements for the purposes of this opinion (the "**Core Provisions**") are §§3 to 6 and 7 of the MNA, and Sections 2 to 4 of the CPMA.

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[117] R. and D. Mougenot, *La preuve, Rép. not.*, No. 194.

10. GOVERNING LAW, ARBITRATION AND JURISDICTION

This section 10 is based on the additional assumption that the applicable Agreement is governed by the laws of a jurisdiction other than Belgium (including English, German or New York law).

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 BELGIUM, AND WHAT WOULD BE THE CONSEQUENCE IF IT WERE NOT?

10.1 As to choice of law in contractual matters, the Belgian rules of conflicts of laws give effect to the choice of governing law made by the parties, subject to certain mandatory rules (*lois de police / bepalingen van bijzonder dwingend recht*) or rules of international public policy (*ordre public international / internationale openbare orde*)[118]. The Agreements are generally not inconsistent with these mandatory rules or rules of international public policy; exceptions or doubts, if applicable, are mentioned in the relevant sections of this opinion. However:

(a) Where all the elements relevant to a situation were, at the time the choice of law was made, connected with a particular country, the courts will apply the rules of law of that country which cannot be derogated from by contract (*dispositions impératives / bepalingen van dwingend recht*)[119].

(b) The courts of Belgium may give effect, at their discretion, to the overriding mandatory laws of any jurisdiction where the relevant obligations have to be or have been performed; they may also take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance[120].

(c) With regard to perfection of security and the provision of cash collateral, please refer to section 6.6 above.

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[118] See footnote 72.

[119] Rome I, Art. 3.3.

[120] *Ibid.*, Art. 9.3.

(d) The courts of this jurisdiction may apply Belgian law despite the choice of another law by the Parties if it appears clearly impossible, in the course of legal proceedings, to determine the substantive rules of the chosen law[121].

10.2 Choice of jurisdiction clauses are in principle valid and enforceable in Belgium. However:

(a) The courts may refuse to give effect to a contractual choice of jurisdiction if they expect that a foreign judgment rendered pursuant thereto will not be capable of recognition or enforcement in Belgium[122] (as to which it should be noted that a final judgment obtained before the courts of England and Wales or the courts of Frankfurt am Main would be recognised and enforced in this jurisdiction in accordance with the provisions of Regulation 44/2001, and a final judgment obtained before the courts of New York would be recognised and enforced by the courts of Belgium without review on the merits subject to certain conditions, *ie* mainly that the recognition or enforcement of the New York judgment should not be a manifest violation of public policy, that the New York courts must have respected the rights of the defence, that the New York judgment should be final, and that the assumption of jurisdiction by the New York court may not have breached certain principles of Belgian law[123]).

(b) The courts of Belgium may accept jurisdiction despite a contractual choice of another jurisdiction if they are already seized with a closely connected matter, or if the dispute is closely connected with this jurisdiction and litigation abroad appears impossible or unreasonable[124].

10.3 As to arbitration, Belgium is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Arbitration clauses are upheld, and arbitral awards are enforced, in accordance with that Convention[125].

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121 Code IPL, Art. 15 §2.

122 Code IPL, Art. 7. This denial of jurisdiction clauses is not possible in cases where the European Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Regulation 44/2001**") applies; see Art. 23.3 of that Regulation.

123 Code IPL, Art. 22 to 25.

124 Code IPL, Art. 9 and 11; Regulation 44/2001, Art. 27 *et seq*. The circumstances where jurisdictions can be accepted are more restrictive in cases where Regulation 44/2001 applies.

125 See also Judicial Code, Art. 1676 *et seq.*

11. OTHER PROVISIONS

IF YOU HAVE OTHER RECOMMENDATIONS THAT YOU WOULD LIKE EFET MEMBER COMPANIES TO CONSIDER (FOR EXAMPLE TO FULLY OPTIMIZE THE AGREEMENTS FOR A SPECIFIC PURPOSE SUCH AS TO SUPPORT LIMITED TRADING BETWEEN TWO ENTITIES BOTH ORGANISED 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.

11.1 Please refer to sections 7.2 and 7.3.

12. QUALIFICATIONS

12.1 Suspension of performance

If a non-defaulting Party exercises its right to suspend performance or withhold payments pursuant to §10.1(B) of the MNA, Division 1, Part VIII, Section 10.4 or 10.8 of the Schedule to the CPMA, or §4.3 of the Credit Support Annexes:

(a) if the defaulting Party is bankrupt, its liquidator will be entitled anyway to terminate any transaction and thereby, in effect, to defeat the continuation of such suspension or withholding[126]; and

(b) in any event, the courts may not allow such suspension or withholding to continue beyond a reasonable period of time[127].

12.2 Provision of Performance Assurance

The provision of Performance Assurance, when required, must be "in a form, amount and from an Entity which is, and continues thereafter to remain, reasonably acceptable to the Requesting Party" pursuant to §3.1(C)(VI) of the MNA. When the MNA is governed by Belgian law, there may be an argument that this provision is void by lack of determinability; the absence of precision as to the nature and amount of the requested security may also facilitate arguments by the other party that the particular nature or amount of any demand for security constitutes an abuse of right (as to which see paragraph 4.2(a)).

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[126] See section 3.6.4 above.

[127] See the discussion of the concept of "abuse of right" in paragraph 4.2(a).

The same observation applies to Section 2.3 in item 1 of Part VII of the Schedule to the CPMA.

12.3 **Collateral**

Certain provisions of the Agreements (*ie* §9 (*Credit Support / Performance Assurance*) of the MNA, §12 (*Termination of the Netted Agreements*) of the 2011 CSA, §11 (*Termination of the Agreement*) of the 2003 CSA, item 1 under the "first alternative" heading in Division 1, Part VIII of the Schedule to the CPMA and Division 1, Part VIII, Section 10.7 of that Schedule) seek to extend to the Final Net Settlement Amount the coverage of Collateral granted under a particular Netted Agreement, Principal Agreement or Closed-Out Agreement. These provisions would not be binding on third-party Credit Support Providers unless accepted by them.

12.4 **Contingent or unascertained obligations**

If a Party is subject to Insolvency Proceedings in this jurisdiction, the courts may not give effect to the provisions set out in §10.1(A)(I) of the MNA or in Division 1, Part VIII, Section 10.1 of the Schedule to the CPMA to the extent that these provisions seek to allow set-off of a Final Net Settlement Amount owed to that Party against obligations of that Party that are merely contingent or amounts owing from that Party that are unascertained.

This opinion is addressed exclusively to EFET and its Legal Committee members and any other entities who have subscribed to the EFET Legal Module, is for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever and may not be disclosed to any other person or persons without EFET's prior written approval. It may however be made available by EFET members to the appropriate regulatory authorities.

Yours faithfully

Clifford Chance

Schedule 1 – Types of counterparties

(1) Corporations (*eg* a limited liability company, stock corporation or Societas Europaea)

(2) Partnerships (*eg* a general or limited partnership)

(3) Banks/Credit Institutions

(4) Investment Services Provider/Investment Firms

(5) Insurance Companies

(6) Investment Fund Management Companies

(7) Municipalities or Provinces

(8) Associations of Local Government

(9) Publicly-owned Corporations

Schedule 2 – Types of Netted Agreements and Principal Agreements

Energy Trading Master Agreements

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

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

Derivatives Master Agreements

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

- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 1994), sponsored by the Schweizerische Bankiervereinigung
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version July 2007), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre AFB Relative Aux Operations Sur Instruments Financiers à Terme (version), sponsored by the Association Française des Banques (AFB)
- Spanish Contrato Marco De Operaciones Financieras (versión 1997), sponsored by the Asociación Española de Banca Privada (AEB)
- Dutch Raamovereenkomst voor Financiële Derivaten (RFD), sponsored by the Nederlandse Vereniging van Banken (NVB)
- Japanese Bond Option Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Mexican Contrato Marco para Operaciones Financieras Derividas
- Mexican Contrato Normativo para la realización de las operaciones de Intercambio
- Mexican Master Agreement for Entering into Dollar against Mexican Peso Forward Transactions
- US Master Securities Forward Agreement (version 1996), sponsored by The Bond Market Association (TBMA)
- US Master OTC Options Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US OTC Option Transactions – U.S. Treasury Securities Master Dealer Agreement (version August 1989), sponsored by the Public Securities Association (PSA)
- UK International Currency Options Market Agreement (ICOM) sponsored by the British Bankers' Association (BBA)

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

Securities Lending Master Agreements

- Global Master Securities Lending Agreement (GMSLA) (version 2010), sponsored by the International Securities Lending Association (ISLA)
- Global Master Securities Lending Agreement (GMSLA) (version 2000), sponsored by the International Securities Lending Association (ISLA)
- Master Equity & Fixed Interest Stock Lending Agreement (MEFISLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Master Gilt Edged Stock Lending Agreement (GESLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version 1995), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version October 1994), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version February 1994), sponsored by the International Securities Lending Association (ISLA)
- US Master Securities Loan Agreement (version 2000), sponsored by The Bond Market Association (TBMA)

- US Master Securities Loan Agreement (version May 1993), sponsored by the Public Securities Association (PSA)
- Canadian Securities Loan Agreement, sponsored by the Investment Dealers Association of Canada (IDAC)
- German Rahmenvertrag für Wertpapierleihgeschäfte
- German Rahmenvertrag für Wertpapierdarlehen (version 1999)
- French Contract Cadre de Prêts des Titres (version 2007), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- French Contract Cadre de Prêts des Titres (version), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- Australian Master Securities Lending Agreement (version November 2003), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version December 2002), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version April 1997), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- New Zealand Master Repurchase Securities Lending Agreement
- Japanese Basis Agreement Concerning Stock Lending Transactions, sponsored by the Japan Securities Dealers Association (JSDA)

Repurchase Master Agreements

- Global Master Repurchase Agreement (GMRA) (version October 2000), sponsored by The Bond Market Association (TBMA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA) (version November 1992)

- US Master Repurchase Agreement (MRA) (version September 1996), sponsored by The Bond Market Association (TBMA)
- US Master Repurchase Agreement (MRA) (version 1987)
- Canadian Repurchase/Reverse Repurchase Transaction Agreement
- Australian version of the Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of Global Master Repurchase Agreement (GMRA) (version 1995)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2005)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2002)
- German Rahmenvertrag für echte Pensionsgeschäfte (version 1997)
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2007), sponsored by the Fédération bancaire française (FBF) [FBF07 REPO]
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2003), sponsored by the Fédération bancaire française (FBF)
- French Convention-cadre Relative Aux Opérations de Pensions Livriée, sponsored by the Association du Forex et des Trésoriers de Banque (AFTB
- Japanese Bond Lending Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Japanese Basic Agreement Concerning Gensaki Transactions of Bonds, Japan Securities Dealers Association (JSDA)

Schedule 3 – Types of transactions

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.

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