CLIFFORD
CHANCE

CLIFFORD CHANCE
DEUTSCHLAND LLP
PO BOX 11 14 42
60049 FRANKFURT AM MAIN
MAINZER LANDSTRASSE 46
60325 FRANKFURT AM MAIN
TEL +49 69 71 99-01
FAX +49 69 71 99-4000
www.cliffordchance.com

The European Federation of Energy Traders
Amstelveenseweg 998
1081 JS Amsterdam
The Netherlands

Our ref: 41-40582802
Direct Dial: +49 697199 3304
E-mail: marc.benzler@cliffordchance.com

29 April 2015

Dear Sirs,

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

We refer to your instruction letter of 19 August 2014 in which 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 the Federal Republic of Germany ("**Germany**") on certain questions raised by EFET in respect of the Master Netting Agreement published by EFET in June 2010 (the "**MNA**"), the Cross Product Master Agreement published by The Bond Market Association in February 2000, as modified by the EFET (as so modified, the "**CPMA**" and, together with the MNA, the "**Master Agreements**"), EFET Credit Support Annex to the MNA published by EFET in February 2011 (the "**2011 CSA**") and the Cross Product Credit Support Annex to the CPMA published by EFET 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.

CONTENTS

Clause	Page
1. Documents Considered	1
2. Scope of Review	1
3. Our Understanding of the Main Effects of the Agreements	8
4. Assumptions	9
5. Opinion and Legal Analysis	15
6. Reservations	154
7. Addressees and purpose	164
Annex 1 Transactions under the Netted Agreements	165
Annex 2 Master Agreements covered by the MNA or the CPMA	172

1. **DOCUMENTS CONSIDERED**

In this opinion (the "**Opinion**") we considered the following documents:

(a) the MNA;

(b) the CPMA;

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

(d) the Credit Support Annexes.

This Opinion does not relate to any individual contract evidenced by a confirmation ("**Confirmation**") under the relevant master agreements which are covered by the Master Agreements ("**Individual Contracts**"). We do not opine on any tax, accounting, regulatory or related matters.

2. **SCOPE OF REVIEW**

2.1 The opinions given in this Opinion relate only to German law as applied by the German courts as at today's date. We express no opinion on the laws of any other jurisdiction, even where, under German law, a foreign law would be applicable. This Opinion expresses and describes German legal concepts in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying German law concepts. Any issues of interpretation arising in respect of the Master Agreements, the Commodities Schedule, the Credit Support Annexes and any Individual Contract (to the extent governed by German law) which are in the English language or this Opinion will be determined by the German courts in accordance with German law and we express no opinion on the interpretation that the German courts may give to any such expressions or descriptions. In this respect German courts have held that, under German law, documents which are governed by German law may, if they have been executed in the English language, be interpreted with a view to the meaning of such English terms in an English legal environment.

2.2 We express no opinion as to any provisions of the agreements referred to in Paragraph 1(a) through 1(d) on page 1 above, other than those to which express reference is made in this Opinion except insofar as any such provision relates to the effectiveness of the Netting Provisions.

2.3 We do not express any opinion as to any matters of fact.

2.4 This Opinion is given solely in respect of parties which are[1]:

(a) companies,

(b) partnerships,

(c) credit institutions[2],

(d) financial services institutions,

(e) investment management companies, and

(f) insurance companies,[3]

in each case incorporated, organised, established or formed under private law in accordance with the laws of Germany,

(g) the Federal Republic of Germany (*Bund*), Federal States (*Bundesländer*) of the Federal Republic of Germany and German municipalities (*Gemeinden*), and

(h) German public law entities with legal capacity (rechtsfähige juristische Personen des öffentlichen Rechts).

---

1 We do not express an opinion on general regulatory restrictions, including investment guidelines, under the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*), the German Covered Bond Act (*Pfandbriefgesetz*) or the German Capital Investment Code (*Kapitalanlagegesetzbuch*) or other regulatory restrictions regarding entities subject to further regulatory restrictions other than those generally applicable for all credit institutions or financial services institutions under the German Banking Act (*Kreditwesengesetz*).

2 We do not express an opinion on credit institutions holding a licence as a covered bond bank (*Pfandbriefbank*) with respect to any transactions relating to or included in the cover register (*Deckungsregister*) and we do not give an opinion on general regulatory restrictions under the German Covered Bond Act (*Pfandbriefgesetz*).

3 With respect to insurance companies, section 77 para. 2 sentence 2 of the Insurance Supervisory Act, imposes restrictions on the set-off of claims against claims held by insurance companies if the claim held by the insurance company belongs to its so-called "cover assets" (*Sicherungsvermögen*) within the meaning of section 66 para. 1 of the Insurance Supervisory Act. The cover assets are part of the committed assets (*gebundenes Vermögen*) within the meaning of section 54 para. 1 of the Insurance Supervisory Act. Such committed assets are subject to certain investment restrictions to secure the financial stability of the insurance company. In addition, section 77 para. 2 sentence 2 of the Insurance Supervisory Act provides that satisfaction of a third party by way of set-off against a claim contained in the cover assets is only permitted if the claim for the benefit of which any such set-off has been effected has to be allocated to the cover assets (section 66 paras. 1 to 4 of the Insurance Supervisory Act) and if such allocation has actually been made.

2.5 For purposes hereof, a reference to a "**company**", is a reference to a stock corporation (*Aktiengesellschaft*) incorporated under the German Stock Corporation Act (*Aktiengesetz*), or a European stock company (*Societas Europaea*) incorporated under the German Act on the Introduction of the European Company (*Gesetz zur Einführung der Europäischen Gesellschaft*), [4] or a limited liability company (*Gesellschaft mit beschränkter Haftung*) incorporated under the German Act on Limited Liability Companies (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*); a reference to a "**partnership**" is a reference to a general partnership (*offene Handelsgesellschaft*) or a limited partnership (*Kommanditgesellschaft*) (including all permutations thereof) organised under the German Commercial Code (*Handelsgesetzbuch*) – the "**Commercial Code**"; a reference to a "**credit institution**" is a reference to a credit institution (*Kreditinstitut*) within the meaning of section 1 para. 1 of the Banking Act, and a reference to a "**CRR Credit Institution**" is a reference to a CRR credit institution (*CRR-Kreditinstitut*) as defined in section 1 para. 1 para. 3d sent. 1 of the Banking Act,[5] the home member state (as defined in Article 2 of the EU Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions ("**Winding-Up Directive**") of which is Germany,[6] and a reference to a "**European CRR Credit Institution**" is a reference to a CRR-Credit Institution the home member state (*Herkunftsstaat*) of which is a member state of the European Economic Area (the "**EEA**") (other than Denmark). A reference to a "**financial services institution**" is a reference to a financial services institution (*Finanzdienstleistungsinstitut*) within the meaning of section 1 para. 1a of the Banking Act. A reference to an "**investment management company**" (*Kapitalverwaltungsgesellschaft*) is a reference to an investment management company within the meaning of section 18 of the Capital Investment Code. A reference to an "**insurance company**" is a reference to an insurance company (*Versicherungsunternehmen*) within the meaning of section 1 para.

---

4 According to Article 10 of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), an SE is treated in every Member State as if it were a public limited-liability company formed in accordance with the law of the Member State in which it has its registered office. Thus the provisions of the German Stock Corporation Act are applicable unless the provisions of the Council Regulation prevail.

5 According Article 4 para.1 no 1 of Regulation 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation 648/2012 (OJ No L 321 of 30 November 2013, p. 6, "**CRR**") CRR-credit institution means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account.

6 According to section 1 para. 4 of the Banking Act, the home member state is the state where a bank has its main office (*Hauptniederlassung*).

1 no. 1 of the Act on the Supervision of Insurance Companies (*Versicherungsaufsichtsgesetz* – the "**Insurance Supervisory Act**"), a reference to a "**German insurance company**" is a reference to an insurance company the home state (*Herkunftsstaat*) of which is Germany,[7] and a reference to an "**European insurance company**" is a reference to an insurance company the home state of which is a member state of the European Economic Area (other than Denmark).

This Opinion also applies to any non-German company ("**foreign company**") which is incorporated or established under the laws of another jurisdiction but with a branch or branches established or located in Germany. Where such foreign company is neither an insurance company, credit institution, investment undertaking (*Wertpapierfirma*)[8] which provides services involving the holding of funds or securities for third parties, nor a collective investment undertaking (*Organismen für gemeinsame Anlagen*),[9] it is assumed that each branch will constitute an

---

[7] The Insurance Supervisory Act does not define the term home state (*Herkunftsstaat*) with respect to an insurance company. However, section 88 para. 1a sent. 1 of the Insurance Supervisory Act, which provides that insolvency proceedings regarding the assets of an insurance company in the EEA may only be opened by the competent authorities of the home state (*Herkunftsstaat*), implements Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the Reorganisation and Winding-up of Insurance Undertakings. Article 2 (e) of such Directive defines the term "home member state" (*Herkunftsmitgliedstaat*) as the member state of the EEA "in which an insurance undertaking has been authorised in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC".

[8] There is no definition of "investment undertaking" in EU directives but Article 4 (1) no. 1 of the Directive 2014/65/EU of the European Parliament and Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("**MiFID II**") defines the term "investment firm" to include any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis (see also *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings, no. 59). The German wording of both the EU Insolvency Regulation (as defined below) and the MiFID II uses the term "*Wertpapierfirma*" which confirms this interpretation.

[9] The term "collective investment undertaking" means, in accordance with Article 1 no. 2 of the Council Directive 86/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for the collective investment in transferable securities (UCITS) ("**UCITS Directive**" as amended) undertakings (i) the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and (ii) the units of which are, at the request of the holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets. This interpretation is based on the assumption made by *Virgos/Schmit* (Report on the Convention on Insolvency Proceedings, no. 56 *et seq.*) according to which the rationale behind the exceptions provided in Article 1 (2) of the EU Insolvency Regulation is to exclude such entities, which are subject to specific EU regulations and supervision by regulators in their respective EU member states. Investment undertakings that qualify as UCITS are regulated and supervised in accordance with the UCITS Directive and, hence, they are to be excluded from the scope of application of the EU Insolvency Regulation.

"establishment" within the meaning of EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, which applies to all EU member states other than Denmark (the "**EU Insolvency Regulation**").

2.6 Defined terms and expressions

Unless otherwise defined herein or the context requires otherwise, words and expressions used in this Opinion have the meanings and constructions ascribed to them in the Master Agreements, the Commodities Schedule or the Credit Support Annexes.

In this Opinion, unless otherwise specified:

(a) "**Party**" means a party to the Master Agreements;

(b) references to a "**Paragraph**" are to a paragraph of this Opinion;

(c) a reference to "**Financial Collateral**" is a reference to an arrangement defined as such in section 1 para. 17 sent. 1 and 2 of the Banking Act[10];

From our point of view, this general analysis prevails over the wording of the EU Insolvency Regulation that might lead to the conclusion that the term "collective investment undertaking" within the meaning of the EU Insolvency Regulation corresponds to the equivalent term in the UCITS Directive according to which it is used for such undertakings which do not qualify as UCITS as defined in the UCITS Directive. It must be noted, however, that due to the lack of court precedents dealing with this topic a certain degree of uncertainty remains.

[10] In English section 1 para. 17 sent. 1 and 2 of the Banking Act reads as follows: "Financial collateral within the meaning of this Act are cash, securities, money market instruments and other credit claims within the meaning of Article 2 para. 1 (o) of the Directive 2002/47/EC of the European Parliament and the Council on financial collateral dated 6 June 2002 as amended by Directive 2009/44/EC (the "**Financial Collateral Directive**") including all related rights or claims which have been transferred as collateral either by way of an *in rem* security arrangement (*beschränktes dingliches Sicherungsrecht*) or by way of a money transfer or by way of full title transfer on the basis of an agreement between a secured party and a security provider, each belonging to one of the categories named in article 1 para. 2 (a) to (e) of the Financial Collateral Directive. Should the security provider be a person or business undertaking named in article 1 para. 2 (e) of the Financial Collateral Directive, financial collateral is only given, if the collateral secures obligations arising under agreements or the procurement of agreements which serve

(a) the acquisition and sale of financial instruments,

(b) repurchase, lending or similar transactions on financial instruments or,

(c) loans to finance the acquisition of financial instruments."

(d) "**Netting Provisions**" means the central provisions of the Master Agreements for Close-Out Netting as set out under Paragraph 3, which amend the netting provisions of the Netted Agreements;

(e) "**Netted Agreement**" means all of the master agreements described in Annex 2[11]; and

(f) headings are for ease of reference only and shall not affect the interpretation.

2.7 This Opinion may only be relied upon on the express condition that any issues of interpretation arising hereunder will be governed by and construed in accordance with German law and all disputes in relation to this Opinion shall be brought before the courts of Frankfurt am Main, Germany.

2.8 **Executive summary**

On the basis of the scope of view and the assumptions in Paragraphs 2 and 4 respectively, and subject to the qualifications set out in Paragraph 6, this is an executive summary of the opinion expressed in Paragraph 5 with regard to close-out netting only. This executive summary does not form part of this Opinion and is provided for ease of reference only, and in no circumstances may be interpreted or read as amending, affecting or having any interpretative effect on the opinion expressed in Paragraph 5, which is the only opinion which can be relied upon. Reading this executive summary does not substitute reading the entire Opinion.

(a) Close-out netting based on a non-insolvency related termination event exercised before the opening of Insolvency Proceedings is generally enforceable, see Paragraph 5.1.1(d)(i)(1) on page 27 and Paragraph 5.1.1(i)(i) on page 63 below.

(b) Close-out netting based on an insolvency related termination event exercised prior to the point in time in which, based on a valid application for the opening of Insolvency Proceedings, the opening of Insolvency Proceedings is to be seriously expected *(mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*) should generally be enforceable, see Paragraph 5.1.1(i)(ii) on page 68 below.

(c) Close-out netting based on an insolvency related termination event should generally be enforceable with respect to all Individual Contracts that fall

---

[11] Each referred to as "Principal Agreement" under the CPMA.

within the scope of application of section 104 of the German Insolvency Code (*Insolvenzordnung*, "**Insolvency Code**") (i.e. Individual Contracts that are fixed date transactions or financial transactions within the meaning of that provision) (see Paragraph 5.1.1(i)(iii)(3)(B) on page 78) and the results of such close-out netting should be determined by the terms of the Master Agreements provided that the early termination has occurred before the opening of Insolvency Proceedings, subject to limitations imposed on the method for calculating a close-out amount by application of the restrictions under section 119 of the Insolvency Code (see Paragraph 5.1.1(i)(ii) on page 68) and subject to any challenge in insolvency rights of an Insolvency Representative (see Paragraph 5.1.1(c) on page 21 below).

(d) The clauses with regard to automatic termination, in the event of insolvency, should generally be upheld by a German court, see Paragraph 5.1.1(i)(ii) on page 68 below, with respect to Individual Contracts falling within the scope of application of section 104 of the Insolvency Code (i.e. Individual Contracts that are a fixed date transaction or a financial transaction within the meaning of that provision) (see Paragraph 5.1.1(i)(ii) on page 68 below), subject to limitations imposed on the method for calculating a close-out amount (see Paragraph 5.1.1(i)(ii) on page 68 below) and subject to any challenge rights of an Insolvency Representative (see Paragraph 5.1.1(c) on page 21 below).

(e) With respect to Individual Contracts falling within the scope of application of section 104 of the Insolvency Code (see Paragraph 5.1.1(i)(ii) on page 68 below), the determination of the Final Net Settlement Amount should generally be enforceable in the event of insolvency, see Paragraphs 5.1.1(c) on page 21 below and subject to any challenge in insolvency rights of an Insolvency Representative (see Paragraph 5.1.1(c) on page 21 below).

(f) Upon the opening of Insolvency Proceedings, all Individual Contracts not yet terminated in accordance with the Master Agreements should either terminate by virtue of section 104 of the Insolvency Code if falling within its scope of application or become subject to the Insolvency Representative's right to decide whether to assume or reject such contracts ("**Selection Right**" - such "selection right" by the Insolvency Representative often being referred to as "cherry-picking" right) under section 103 of the Insolvency Code (see Paragraph 5.1.1(i)(ii) on page 68 below). Individual Contracts already fully performed by one party and falling within the scope of application of section 104 of the Insolvency Code should also be covered by such termination (see Paragraph 5.1.1(i)(iii)(3)(D) on page 76 below).

(g) The Resolution Act contains far-reaching powers of the Resolution Authority that may affect SAG Firms and their creditors (see paragraph 5.1.1(d)(iv)(3)(C) on page 38 below). These powers include, *inter alia*, the conversion into equity as well as the write-off of obligations owed by a relevant SAG Firm and the temporary suspension of payment and delivery obligations or of rights to enforce a security interest. Affected creditors must not exercise early termination rights on the basis of the imposition of resolution measures provided that the main obligations including obligations to provide security under the relevant agreements continue to be performed.

(h) The determination of the Final Net Settlement Amount is generally enforceable in the event of insolvency, see Paragraphs 5.1.1(c) on page 21.

2.9 Assumptions and Reservations

The opinions given in this Opinion are given on the basis of the assumptions set out under Paragraph 4 (*Assumptions*) below and are subject to the reservations set out under Paragraph 6 (*Reservations*) below in each case in their entirety. The opinions given in this Opinion are strictly limited to the matters expressly stated under Paragraph 5 (*Opinions*) below and do not extend to any other matters.

3. OUR UNDERSTANDING OF THE MAIN EFFECTS OF THE AGREEMENTS

The MNA constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain master agreements as listed in the Election Sheet to the MNA (i.e. the Netted Agreements) falling within the scope of the MNA. The MNA provides that the MNA, all Netted Agreements and all transactions entered into thereunder form a single agreement (§ 2.3 of the MNA). Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all transactions under all of its Netted Agreements (§ 4.1 of the MNA). Settlement Amounts are determined for the terminated Netted Agreement in accordance with its terms (§ 7.1 of the MNA) and, to the extent necessary, converted into the Base Currency (§ 7.2 of the MNA). If on the Early Termination Date both Parties owe one or more Settlement Amounts under two or more Netted Agreements, such Settlement Amounts are aggregated and netted and only the difference, if any, between the two offsetting aggregate amounts (the "**Final Net Settlement Amount**") shall be owed by the Party with the larger aggregate obligation (§ 8.1 of the MNA).

The CPMA constitutes a bilateral cross-product netting agreement governing all transactions the Parties may enter into under certain Netted Agreements falling within the scope of the CPMA. If so selected by the Parties in Section 10.6 of the Commodities Schedule, the CPMA provides that it forms together with all Netted Agreements and all transactions entered into thereunder a single agreement. Upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all covered Netted Agreements (Section 2.1 of the CPMA). Settlement Amounts are determined for the terminated Netted Agreement in accordance with its terms (Section 3.1 of the CPMA) and, to the extent necessary, converted into the Base Currency (Section 3.2 of the CPMA). If after termination both Parties owe one or more Settlement Amounts under two or more Netted Agreements, such Settlement Amounts are aggregated and netted-off and only the difference, if any, between the two offsetting aggregate amounts (the Final Net Settlement Amount) shall be owed by the Party with the larger aggregate obligation (Section 4 of the CPMA).

To summarise, we understand that the Master Agreements are intended to provide for a termination of all Transactions as well as the Netted Agreements under which the Transactions have been entered into and that the Netting Provisions under the Master Agreements are intended to prevail over any netting provisions under such Netted Agreements if and to the extent valid under the terms of the relevant Netted Agreement and the laws governing such Netted Agreement (which we understand and assume as we do not opine on the Netted Agreements).

The 2003 CSA and the 2011 CSA supplement the CPMA and the MNA to secure any exposure under these agreements. They provide for the transfer of full ownership in the collateral to the Transferee who acquires the right of complete and unrestricted use of the collateral (§ 7 of the Credit Support Annexes). Upon termination of the CPMA or the MNA, any collateral provided but not yet re-transferred by the Parties is to be valued and included in the Final Net Settlement Amount to be determined pursuant to Section 4 of the CPMA and Section 8 of the MNA (Section 11 of the 2003 CSA and section 12 of the 2011 CSA). One special feature of the 2003 CSA and the 2011 CSA is the inclusion of Letter of Credits.

4. ASSUMPTIONS

4.1 Assumptions relating to the Parties

(a) Two parties enter into one of the Master Agreements and at least one of the parties is incorporated or organised or has its centre of main interest in Germany ("**Party A**").

(b) Party A qualifies as a company, credit institution or any other entity as further described under Paragraph 2.4 on page 2.

(c) Each Party to the Master Agreements is, and will continue to be, a validly existing legal entity with capacity, power and authority under any applicable laws to enter into and perform its obligations under the Master Agreements, the Netted Agreements and any Individual Contract that may be entered into by the Parties, and each of the Parties have taken all necessary steps to execute, deliver and perform the Master Agreements, the Netted Agreements and any Individual Contract and to ensure their legal validity.

(d) None of the Parties qualifies as a consumer (*Verbraucher*) within the meaning of section 13 of the German Civil Code (*Bürgerliches Gesetzbuch*), i.e. a natural person entering into a legal transaction for a purpose which belongs neither to its commercial business nor to its self-employed business, but qualifies – as applicable – as a merchant (*Kaufmann*) within the meaning of section 1 of the German Commercial Code (*Handelsgesetzbuch*) or as an entrepreneur (*Unternehmer*) within the meaning of section 14 of the German Civil Code, i.e. any natural or legal person or partnership entering into a legal transaction in the course of its commercial business or its self-employed business.

(e) The Master Agreements, any Netted Agreement and any Individual Contract entered into thereunder will have been duly authorised, executed and delivered by each Party in accordance with all applicable laws and the Master Agreements, any Netted Agreement and any Individual Contract will have been properly completed by the Parties.

(f) Where any authority or power of attorney (including sub-power of attorney) has been used to enter into in connection with the Master Agreements, any Netted Agreement or any Individual Contract, or any decisions or operations contemplated thereby, such authority or power of attorney and its communication to other parties had/have under all applicable laws the effect of binding the person or entity purportedly represented under such authority or power of attorney and such power of attorney has not been revoked prior to such execution.

(g) Each of the Parties has obtained, complied with the terms of, and maintained all authorisations, approvals, licences and consents required to enable it to lawfully enter into, and perform its obligations under the Master Agreements, any Netted Agreement and any Individual Contract and to ensure the legality, validity, enforceability or admissibility in evidence of the Master Agreements, any Netted Agreement and any Individual Contract.

(h) None of the Parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process. However, insofar as the German Federal Government (*Bundesregierung*), any German Federal State (*Bundesland*) or any entity established under German public law enters into one of the Master Agreements, the execution of such Master Agreement, any Netted Agreement and any Individual Contract constitutes, and the exercise of that Party's rights and performance of its obligations thereunder will constitute, private and commercial acts done and performed for private and commercial purposes.

4.2 Assumptions relating to the Master Agreements, the Netted Agreements and Individual Contracts

(a) The relevant Master Agreement, the Commodities Schedule and the Credit Support Annexes are governed by the laws of Germany, save in respect of Paragraphs 5.1.1 on page 15, 5.1.2 and 5.2 on page 109 and 5.7 on page 152, for the purposes of which the Agreements may be governed by the laws of Germany or by foreign laws. Where the relevant Master Agreement is governed by the laws of a jurisdiction other than Germany, under the laws of such jurisdiction (including its insolvency laws) and under all other relevant laws (other than the law of this jurisdiction):

(i) the relevant Master Agreement constitutes and will at all times constitute valid and legally binding obligations of the Parties thereto, enforceable in accordance with its terms;

(ii) the choice of the laws of such jurisdiction as the governing law of the relevant Master Agreement is a valid and binding selection; and

(iii) the Netting Provisions are valid and enforceable, validly incorporated into the Netted Agreements or any Individual Contracts and prevail over any relevant provisions under the Netted Agreements or any Individual Contracts.

(b) 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 Parties over time enter into a number of Individual Contracts which belong to the Individual Contracts described in the Annex 1.

(c) Save for any specification in the election sheet relating to the MNA or the schedule relating to the CPMA (the "**Election Sheets**"), none of the terms of the Master Agreements will be varied, waived or discharged and any Individual Contract entered into after the date of this Opinion will be entered into as specified in the Netted Agreements and the Master Agreements, any Netted Agreement and each Individual Contract cannot be voided or otherwise held ineffective (in whole or in part) by reason of mistake, illegality or otherwise.

(d) Save in respect of a termination for Close Out Events in respect of a Party, each Party will perform its obligations under the Master Agreements, the Netted Agreements and any Individual Contract in accordance with their respective terms and nothing in the terms of any Individual Contract contradicts the assumptions set out under this Paragraph 4 or the reservations set out under Paragraph 6 below.

(e) The Netted Agreements constitutes and will at all times constitute valid and legally binding obligations of the Parties thereto, enforceable in accordance with their terms with the valid and enforceable Netting Provisions prevailing over any netting provisions under the Netted Agreements.

(f) None of the Individual Contracts or operations contemplated by the Netted Agreements or the Master Agreements will infringe the terms of, or constitute a default under, any trust deed, debenture, agreement or other instrument or obligation to which any of the Parties to the Master Agreements, the Netted Agreements or an Individual Contract is a Party or by which any of its property, undertaking, assets or revenues are bound.

(g) The obligations under the Master Agreements, the Netted Agreements and any Individual Contract are mutual between the Parties. "**Mutuality**" generally exists where each Party is personally and solely liable as regards obligations owed by it and is solely entitled to the benefit of obligations owed to it. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest (including partnership) or such in respect of which a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law.

(h) All of the representations and warranties given by any of the Parties to the Master Agreements, the Netted Agreements or any Individual Contract (other than representations and warranties as to such matters of German law on which we express an opinion herein) are and will be, when made or repeated or when deemed to be made or repeated (as the case may be), and were at all relevant times, true and accurate. Any representation or warranty given by any of the Parties to the Master Agreements, the Netted Agreements or any Individual Contract (other than representations and warranties as to such matters of German law on which we express an opinion herein) that such Party is not aware of or has no notice of any act, matter, thing or circumstance means that the same does not exist or has not occurred.

(i) Each Close-Out Event specified as applicable pursuant to the Master Agreements is a valid, binding and enforceable termination event under the applicable underlying Netted Agreement validly amended by the Netting Provisions.

4.3 **Assumptions relating to the Credit Support Annexes**

(a) The Eligible Credit Support provided under the Credit Support Annexes only takes the form of Cash (as defined therein).

(b) The provision of Eligible Credit Support is not restricted by law, contractual agreement, court order, procedural, administrative or other rulings. We give no opinion on the ownership of any of the Parties to any Eligible Credit Support or on the legal existence of any Eligible Credit Support.

(c) Each Party is at the time of the transfer of Cash under section 7 of the Credit Support Annexes the unrestricted owner of the transferred Cash and entitled to dispose of the transferred Cash, which at that time is unencumbered.

(d) All necessary steps and requirements for the valid and legally binding provision of the Eligible Credit Support that are required pursuant to the laws applicable to such provision have been taken or fulfilled in order to effect such transfer. Please note that in relation to each relevant Eligible Credit Support and its provision the applicable law has to be determined and complied with.

(e) The rights of each relevant Transferor in connection with the provision of Eligible Credit Support are not subject to any lien, right of rescission, counterclaim, set-off or other defence and the performance of any of the terms of any Eligible Credit Support or the exercise of any rights will not render such Eligible Credit Support unenforceable in whole or in part or subject it to such lien, right of rescission, set-off, counterclaim or defence.

4.4 **Bona Fide Purpose and Insolvency**

(a) In respect of the Master Agreements, any Netted Agreement and each Individual Contract:

(i) each of the Parties has entered into and will enter into the same in good faith and for the purpose of carrying on its business;

(ii) each of the Parties has entered into and will enter into the same on arm's length commercial terms;

(iii) each of the Parties has and will have reasonable grounds for believing that the same will benefit it; and

(iv) none of the Parties has entered into or will enter into the same if entering into the same would prejudice any of its creditors.

(b) None of the Parties is or would (as a consequence of entering into the Master Agreements, any Netted Agreement and each Individual Contract or performing any obligation or allowing or doing any act or thing which the Master Agreements, any Netted Agreement or each Individual Contract contemplates, permits or requires such Party to do) be in each case within the meaning of Sections 16 *et seqq*. of the Insolvency Code:

(i) in a stoppage of payment situation (including German law *Zahlungsunfähigkeit*); or

(ii) a status of overindebtedness (including German law *Überschuldung*); or

(iii) in any other situation justifying an application for the opening of Insolvency Proceedings under German law or in any analogous situation as contemplated by the laws of any jurisdiction other than Germany.

At the time at which the Master Agreements or any Individual Contract is entered into neither Party has actual notice of the insolvency of the other Party and no regulatory proceedings as outlined under Paragraph 5.1.1(a)(ii) and Paragraph 5.1.1(a)(iii) on page 18 have been commenced.

5. OPINION AND LEGAL ANALYSIS

5.1 Enforceability of Close-out Netting

5.1.1 Winding-up, Insolvency or Attachment

(a) *Brief general discussion of the relevant German insolvency proceedings, laws and terminology applicable to Party A and the contract types listed in Appendix C*

(i) The main procedures (*Hauptverfahren*) under the Insolvency Code are the only insolvency procedures (for example liquidation, administration, receivership or voluntary arrangement) to which a Party would be subject in Germany.

The main procedures[12] pursuant to the Insolvency Code are together called "**Insolvency Proceedings**". A Party which is insolvent is called the "**Insolvent Party**" and the other Party is called the "**Solvent Party**".

"**Insolvency Representative**" [13] means a liquidator, administrator, administrative receiver or analogous or equivalent official appointed under the Insolvency Code in Germany.

In this Opinion, in relation to an Insolvency Proceeding under the laws of Germany, the opening of Insolvency Proceedings refers to the time of the issue of an order of commencement (*Eröffnungsbeschluss)* by the competent insolvency court of Insolvency Proceedings.

---

[12] As opposed to any preliminary proceedings immediately following the filing for insolvency but before the opening of main proceedings – preliminary insolvency proceedings (*Vorverfahren*).

[13] Where an insolvency court has, upon application of the Insolvent Party ordered the management of the Insolvent Party to continue its activities in accordance with section 270 of the Insolvency Code (*Eigenverwaltung*, self administration proceedings), numerous rights which normally would belong to the Insolvency Representative may be exercised by the Insolvent Party itself (e.g. the Selection Right as further referred to in Paragraph 5.1.1(i)(ii) on page 43 below, see section 279 of the Insolvency Code) or by a creditors' trustee (*Sachwalter*) (e.g. any challenging rights in accordance with section 129 *et seq*. of the Insolvency Code as further referred to in Paragraph 5.1.1(c) on page 15 below, see section 280 of the Insolvency Code).

Insolvency Proceedings over the assets of either a credit institution, a financial services institution or an insurance company may only be instituted by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "**BaFin**") (section 46b para. 1 sent. 4 of the Banking Act, section 88 para. 1 of the Insurance Supervisory Act) by filing a petition for commencement of Insolvency Proceedings with the competent insolvency court.[14] To avert Insolvency Proceedings with respect to credit and financial services institutions, the BaFin may, *inter alia*, temporarily prohibit the disposition of assets by the relevant institution and issue a payment moratorium, close the institution for ordinary business with customers and, unless a deposit or customer protection scheme applies, prohibit the institution from accepting payments except those made in respect of obligations owed to the institution (section 46 para. 1 sent. 2 of the Banking Act). Similar orders may be issued by the BaFin in respect of insurance companies pursuant to section 89 of the Insurance Supervisory Act. Such measures are not considered to be Insolvency Proceedings themselves.

Insolvency Proceedings may not be opened over the assets of the German Federal Government or a German Federal State (section 12 para. 1 no. 1 of the Insolvency Code).

Legal entities established under public law (including German municipalities) which are subject to the supervision of a German Federal State may be exempt from Insolvency Proceedings in Germany by the law of such Federal State (section 12 para. 1 no. 2 of the Insolvency Code).

Where a legal entity established under public law is exempt from Insolvency Proceedings, German insolvency law generally should not interfere with netting as specified by the

14 Accordingly, pursuant to sections 46b para. 1 sent. 1 of the Banking Act, section 88 para. 2 sent. 1 of the Insurance Supervisory Act or section 43 para. 1 of the Capital Investment Code, the management of the relevant credit institution, a financial services institution, an insurance company or an investment management company must inform BaFin of an actual or impeding insolvency of such institution or company.

Master Agreements if such legal entity becomes insolvent. Therefore, the limitations on the enforceability of the Netting Provisions as referred to in this Opinion (please refer in particular to Paragraph 5.1.1(i)(ii) on page 68 and Paragraph 5.1.1(i)(iii) on page 75) should not apply to such entities. However, special rules may apply under public law to the winding-up of such entities and such special rules may have an impact on netting. Where a legal entity established under public law is not exempt from Insolvency Proceedings, it is generally treated as any other Party to the Master Agreements.

A municipality may act through an enterprise which is legally not a separate legal entity (*Eigenbetrieb*). In this case, only the municipality (which is exempt from Insolvency Proceedings) becomes a Party to the relevant Master Agreement.

Legal entities incorporated under private law which are publicly owned are not exempt from Insolvency Proceedings and are treated as any other Party to the Master Agreements.[15]

(ii) On 1 January 2011, Act on the Restructuring and Orderly Liquidation of Credit Institutions (*Gesetz zur Restrukturierung und geordneten Abwicklung von Kreditinstituten* (*Restrukturierungsgesetz*) - "**Bank Restructuring Act**") entered fully into force. It introduced, among others, the Bank Reorganisation Act (*Gesetz zur Reorganisation von Kreditinstituten*, "**Bank Reorganisation Act**" including restructuring proceedings (*Sanierungsverfahren*) and the reorganisation proceedings (*Reorganisationsverfahren*)).

The measures under the Bank Reorganisation Act do not qualify as Insolvency Proceedings. However, there is no official guidance whether a reorganisation proceeding (*Reorganisationsverfahren*) pursuant to sections 7 *et seq*. of the Bank Reorganisation Act should be construed as a reorganisation measure (*Sanierungsmaßnahme*) within the meaning of the European Council Directive (EC) No. 2001/24

---

15 *Ott / Vuia* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 12 no. 16.

dated 4 April 2001 on the Reorganisation and Winding Up of Credit Institutions ("**Winding-Up Directive**") [16] with the consequence that such proceeding would have to be considered effective in all member states of the European Union upon the formal requirements being met and subject to the conflict of law provisions, both as set out in the Winding-Up Directive as implemented into the relevant national law which would also have an impact on the Netting Provisions (see in more detail on page below).[17]

The Winding-Up Directive does not specify proceedings within each member state that qualify as reorganisation measures. The German legislator takes the view that reorganisation proceedings constitute reorganisation measures for purposes of Article 2 point 7 and Article 3 of the Winding-Up Directive.[18]

The proceedings as implemented by the Bank Restructuring Act refer to the formal notification procedures and other formal requirements of section 46d paras. 1 to 4 of the Banking Act which implements Article 6 of the Winding-Up Directive into German law (see section 7 para. 5 of the Bank Reorganisation Act).

(iii) Additional regulatory proceedings may be instituted and measures may be taken by the competent resolution authority ("**Resolution Authority**") [19] with respect to CRR Credit

---

[16] OJ No L 125 of 5 May 2001, p. 15. The WUD has been amended by Article 117 of the Directive of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ No L 173 of 12 June 2014, p 190) ("**EU Bank Recovery and Resolution Directive**").

[17] Considering the reorganisation proceeding as reorganisation measures under the Winding-Up Directive: *Lorenz*, NZG 2010, 1046; with respect to the transfer order, more carefully *Eidenmüller* in: Festschrift für Klaus J. Hopt "Unternehmen, Markt und Verantwortung", 2010, 1729 *et seq*.

[18] BT-Drucksache 17/3024, p. 49. The authorities of other Member States in which the Winding-Up Directive has been implemented are obliged to recognise the effects of the reorganisation plan.

[19] In Germany, the Federal Agency for Financial Market Stabilisation (*Finanzmarktstabilisierungsanstalt*) acts as Resolution Authority (section 3 para 1 of the Resolution Act).

Institutions and SAG Investment Firms[20] or group companies[21] under the German Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz*, "**Resolution Act**")[22] (CRR Credit Institutions, SAG Investment Firms and Group Companies which may be subject to resolution action under the Resolution Act collectively, "**SAG Firms**"), in order to avoid the insolvency of any such institution or company.[23]

(b) *Discussion on whether the contract types listed in Appendix C are governed by different rules and whether these rules would result in a split or segregation of the portfolio of Individual Contracts under the Netted Agreement into multiple "netting pools" of disparate treatment or whether these rules would otherwise limit or render wholly or partially unenforceable the early termination and close-out netting rights provided for in the Master Agreements.*

---

[20] "**SAG Investment Firms**" are CRR Investment Firms which need to have a minimum initial capital of EUR 730,000 as provided in section 33 para 1 sentence 1 no. 1 of the Banking Act. "**CRR Investment Firms**" are investment firms within the meaning of Article 4 para 1 no. 2 CRR (CRR Investment Firms and CRR Credit Institutions together "**CRR Institutions**").

[21] "**Group Company**" means a parent undertaking or a subsidiary of a group (of companies), section 2 para 3 no. 30 of the Resolution Act. In our view it is not entirely clear which affiliates of CRR Credit Institutions and SAG Investment Firms can become subject to resolution action. The powers of the Resolution Authority generally relate to CRR Credit Institutions and SAG Investment Firms as well as their group companies. However, section 64 of the Resolution Act specifies the conditions for resolution only for certain subsidiaries (other than CRR Credit Institutions and SAG Investment Firms), but does not refer to all group companies (see footnote 56 below).

[22] From 1 January 2016 onwards, the single resolution board ("**Board**") acting within a single resolution mechanism ("**SRM**") will exercise resolution powers in respect of certain institutions and companies which are currently subject to the resolution powers of the Resolution Authority if they are subject to direct prudential supervision by the ECB. The Board and the SRM are established under Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ EU No L 225 of 30 July 2014, 1) ("**SRMR**"). A draft act to implement the SRM in Germany has been published by the German Federal Finance Ministry (*Bundesfinanzministerium*) on 10 March 2015 (see http://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Referentenentwuerfe/2015-03-10-Bankenabwicklungsrechts-srm.html).

[23] We do not opine on any proceedings etc. applicable on the basis of a consolidated supervision or as a consequences of supervision as financial conglomerate or similar provisions.

If the contractual Netting Provisions of the Master Agreements are recognised in an Insolvency Proceeding, the Netting Provisions are validly incorporated into the Netted Agreements and Individual Contracts and the terms of the Master Agreements prevail over the terms of the Netted Agreements and Individual Contracts (and this is recognised under all applicable laws) and the relevant Master Agreement, the Netted Agreements and all Individual Contracts entered into thereunder are terminated prior to the opening of the Insolvency Proceeding (please see Paragraph 5.1.1(d) on page 27), based on a "non insolvency related" Termination Event, the contractual netting arrangement would be recognised (subject to sections 94 *et seqq.* of the Insolvency Code, please see Paragraph 5.1.1(o)(i)(1) on page 98).

The statutory rules provided for in sections 103 *et seq.* of the Insolvency Code apply to contracts that are terminated upon the occurrence of an "insolvency related" Termination Event at the time of or after the opening of the main Insolvency Proceeding (please see to Paragraph 5.1.1(i)(ii) on page 68) and may render an insolvency related termination invalid with respect to those Individual Contracts. Based on a judgment of 15 November 2012 of the German Federal Court of Justice (*Bundesgerichtshof* – "**BGH**")[24] the term "insolvency related" refers to termination provisions under which a contract may be terminated or terminates automatically upon a stoppage of payment (*Zahlungseinstellung*), the filing for Insolvency Proceedings (*Insolvenzantrag*) or the opening of Insolvency Proceedings (*Insolvenzeröffnung*). According to that court decision this even applies to situations created prior to the opening of Insolvency Proceedings from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected *(mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*).

To the extent section 103 of the Insolvency Code applies excluding any contractual or statutory termination of Individual Contracts, the portfolio of Individual Contracts under the Netted Agreements may be subject to disparate treatment. Pursuant to section 103 of the

[24] BGH WM 2013, 274.

Insolvency Code, transactions (in this case, Individual Contracts) which have not, or not fully, been performed by either of the parties and which have not been effectively terminated prior to the opening of Insolvency Proceedings are subject to the Insolvency Representative's Selection Right. Consequently, the Insolvency Representative has the power to disclaim unprofitable transactions and to enforce profitable ones ("**cherry-picking**") (please see Paragraph 5.1.1(i)(ii) on page 68).[25]

However, section 104 of the Insolvency Code provides for exceptions to the Insolvency Representative's "cherry-picking" right if the respective transaction qualifies as fixed date transaction (*Fixgeschäft*), or if it falls within the definition of financial transactions of section 104 para. 2 of the Insolvency Code (please see Paragraph 5.1.1(i)(iii) on page 75).

For an analysis of whether certain Individual Contract types fall within these exceptions, please see Paragraph 5.1.1(i)(iii) on page 75 below.

(c) *Opinion whether the termination of the Netted Agreements or the Individual Contracts, the calculation of the Settlements Amounts, the aggregation and set-off of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, other third party or the court.*

The early termination of the Netted Agreements and of the Individual Contract, the calculation of the Settlements Amounts, the aggregation and set-off of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment, as provided for in the Netting Provisions could be challenged by an Insolvency Representative during insolvency challenge periods (*Anfechtungsfristen*) on the basis of prejudicing the Insolvent Party's creditors as set out below (Paragraph 5.1.1(i)(iv) on page 92). There is no general exemption from the application of the provisions on insolvency challenge rights of the Insolvency Representative under

---

[25] *Kreft/Huber* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 103 nos. 196 *et seqq.*

substantial German insolvency law with respect to netting arrangements.

However, even when these preconditions are fulfilled, the possibility of an insolvency challenge of legal acts under German law may be excluded pursuant to Article 13 of the EU Insolvency Regulation or section 339 of the Insolvency Code (please refer to Paragraph 5.2.1(d)(i)(4) on page 119 and Paragraph 5.2.1(d)(ii)(1) on page 120. Moreover, pursuant to section 142 of the Insolvency Code, a payment on the part of the Insolvent Party in return for which the Insolvent Party's property benefited directly from an equivalent (*gleichwertig*) consideration may only be challenged if such a payment was made with the intention to prejudice the creditors.

Under German law, a legal act (*Rechtshandlung*) made prior to the opening of Insolvency Proceedings which prejudices other creditors of the Insolvent Party may be challenged by the Insolvency Representative under sections 129 *et seq.* of the Insolvency Code. The term "legal act" refers to acts within the scope of contractual agreements, in particular the execution of a declaration of intention such as a declaration to terminate, but also to other acts having a legal effect,[26] as well as to factual acts in the context of *in rem* transfers and

[26] According to a judgment of BGH dated 7 May 2013 (BGH WM 2013, 1132 *et seq.*) a set-off declared by the Solvent Party after the commencement of Insolvency Proceedings against an Insolvent Party's claim arising from a contract that has been terminated by the Solvent Party prior to the commencement of Insolvency Proceedings is invalid in accordance with section 96 para. 1 no. 3 in connection with section 130 para. 1 sent. 1 no. 2 of the Insolvency Code if the terminating Party had knowledge of the insolvency of the other Party. In the case underlying the decision, the Insolvency Representative did not challenge the termination of the relevant contract but the creation of a situation giving a right to set off (*Herstellung der Aufrechnungslage*). When declaring the invalidity of the set-off invalid, the BGH explicitly did not consider the entire consequences of the termination but took an isolated view on the creation of a situation giving a right to set off.

However, in contrast to the case on which BGH had to decide (the Insolvent Party's claim resulted from termination of a commercial agency agreement (*Vertragshändlervertrag*) falling within the scope of section 108 para. 1 sent. 1 of the Insolvency Code, i.e. an agreement regularly to be continued after the commencement of main Insolvency Proceedings), contracts falling within the scope of section 104 paras. 1 or 2 of the Insolvency Code do not continue after the opening of Insolvency Proceedings. Rather, upon commencement of Insolvency Proceedings any payment and delivery claims terminate and are replaced by a claim for damages by virtue of law. However, in our view one could well argue that it is assured by law that the Insolvent Party's claim resulting from such contracts would come into existence and become due and, accordingly, is available for a set-off in accordance with sections 94 *et seq* of the Insolvency Code.

assignments. Thus, the entering into the Netted Agreements or an Individual Contract under the Netted Agreements, or the termination of the Netted Agreements and the Individual Contracts, the calculation of the Settlements Amounts, the aggregation and set-off of such Settlement Amounts and the determination of the Final Net Settlement Amount and/or its payment may be challengeable (voidable) subject to the fulfilment of the preconditions set out below. Further legal acts that are typically, subject to the satisfaction of corresponding challenge in insolvency requirement, for example (without being conclusive) the transfer or granting of collateral, any payment or delivery under an Individual Contract, any modification or waiver with respect to the Netted Agreements and/or an Individual Contract, the exercise of any discretion, etc.[27]

Challenge periods are ascertained separately in respect of each legal act (and not on an "aggregated" transaction basis) and whether a legal act is detrimental to the creditors of the Insolvent Party is also considered separately for each legal act.[28] In particular, further indirect consequences of such legal act which may have even had a positive effect on the Insolvent Party's assets need not be taken into account[29] and do not prevent the Insolvency Representative from exercising a right to challenge. However, where the legal act consists of the entering into an agreement, the Insolvency Representative is not permitted to separately challenge specific clauses but may only challenge conclusion of the agreement in its entirety.[30]

From our point of view, it cannot be generally predicted whether the application of the contractual provisions is more favourable than the application of statutory law and, hence, one could well argue that such provisions are not generally voidable because they are not *per se* detrimental to other creditors.

---

[27] Regarding the question whether the determination of the Final Net Settlement Amount could be qualified as a legal act, please see Paragraph 5.1.1(o)(ii) on page 73 below.

[28] *Kayser*, in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 129 no. 118.

[29] BGH ZIP 2002, 489, 490; BGH WM 2005, 1712, 1714; *Kayser*, in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 129 no. 175 *et seq*.

[30] *Kayser*, in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 129 no. 175 *et seq*.

However, in case of a legal act that is subject to a condition precedent, which is for example the case if an agreement automatically terminates if certain circumstances occur, the fulfilment of such condition precedent is not regarded as a legal act (section 140 para. 3 of the Insolvency Code).[31] Whether or not a specific legal act is voidable therefore depends on the individual circumstances of the respective transaction.[32]

(i) *Challenge in insolvency pursuant to section 130 para. 1 sent. 1 of the Insolvency Code*

Pursuant to section 130 para. 1 sent. 1 of the Insolvency Code, a legal act can be challenged if it gives or makes available to a creditor security or satisfaction (i) where it was effected in the last three months prior to filing for the opening of Insolvency Proceedings, if the Insolvent Party was unable to pay its debts when due at the time of the legal act and if the creditor had knowledge of such inability to make payments at such time; or (ii) where it was effected after filing for the opening of Insolvency Proceedings and the creditor had knowledge of the Insolvent Party's inability to make payments or the petition for opening of Insolvency Proceedings at the time of the legal act.

Knowledge of circumstances that compel the conclusion as to the Insolvent Party's pending inability to make payments or of the filing for the opening of Insolvency Proceedings are regarded as equivalent to actual knowledge of the Insolvent Party's inability to make payments or of the petition for opening of Insolvency Proceedings (section 130 para. 2 of the Insolvency Code).

---

31 The condition may however not refer to an "insolvency event" (*Insolvenzfall*) which we understand will be given upon the formal opening of Insolvency Proceedings; see *Huhn/Bayer*, ZIP 2013, 1965 *et seqq.*; *Kirchhof* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 140 no. 52c; BAG, NZI 2007, 58 *et seqq.*, p. 61.

32 The following enumeration is not conclusive, as additional circumstances may be relevant for the challenge in insolvency of a specific legal act. For example, section 138 of the Insolvency Code provides for a definition of "related persons" (*nahestehende Personen*) of the debtor.

However, these provisions are not applicable where the legal act is based on a security agreement which contains an obligation to provide Financial Collateral, to replace Financial Collateral by other Financial Collateral or to provide additional Financial Collateral in order to readjust the relation between the value of the obligation and the value of the collateral as set forth in the security agreement (*Margensicherheit* - margin collateral, section 130 para. 1 sent. 2 of the Insolvency Code).[33]

(ii) *Challenge in insolvency pursuant to section 131 para. 1 of the Insolvency Code*

Pursuant to section 131 para. 1 of the Insolvency Code, a challenge period of one to three months applies where a legal act gives or makes available to a creditor, security or satisfaction to which it has no right or no right to claim in such manner or at such time. Such legal act is subject to challenge if either (i) the legal act was effected in the last month prior to filing for the opening of Insolvency Proceedings or following such filing or (ii) the legal act was effected during the second or third month prior to filing for the opening of Insolvency Proceedings and the Insolvent Party was unable to make payments at the time of the legal act or (iii) the legal act was effected during the second or third month prior to filing for the opening of Insolvency Proceedings and the creditor had knowledge at the time of the legal act that it was detrimental to the Insolvent Party. In relation to (iii), knowledge of circumstances that compel the conclusion that a legal act is detrimental to the Insolvent Party is equivalent to actual knowledge of such detriment (section 131 para. 2 of the Insolvency Code).

---

[33] Notwithstanding this exemption, the provision of margin collateral may still be challengeable (voidable) pursuant to section 131 of the Insolvency Code concerning incongruent coverage. However, according to the legislative materials (BT-Drucksache 15/1853, 16), and although the German legislator did not expressly incorporate this into law, the German legislator recommended to construe section 131 of the Insolvency Code in the light of the exemption made to section 130 of the Insolvency Code and the relevant provisions in the Financial Collateral Directive. It remains to be seen whether German courts will follow this recommendation.

(iii) *Challenge in insolvency pursuant to section 132 para. 1 of the Insolvency Code*

A legal act by the Insolvent Party that is directly detrimental to the creditors is subject to challenge (i) if it was effected in the last three months prior to filing for the opening of Insolvency Proceedings, if the Insolvent Party was unable to pay its debts when due at the time of the legal act and if the other party had knowledge of such inability to make payments at such time; or (ii) where it was effected after filing for the opening of Insolvency Proceedings and the other party had knowledge of the inability of the Insolvent Party to make payments or of the petition for opening of Insolvency Proceedings at the time of the legal act (section 132 para. 1 of the Insolvency Code).

A legal act which involves the Insolvent Party losing a right, or pursuant to which the Insolvent Party is no longer able to assert such a right, or which results in a property claim against the Insolvent Party being maintained or becoming enforceable is equivalent to a legal act that is directly detrimental to the creditors (section 132 para. 2 of the Insolvency Code).

(iv) *Challenge in insolvency pursuant to section 133 para. 1 sent. 1 of the Insolvency Code*

Pursuant to section 133 para. 1 sent. 1 of the Insolvency Code, a legal act made by the Insolvent Party during the last ten years prior to the request to open Insolvency Proceedings, or subsequent to such request, with the intention to disadvantage his creditors may be challenged if the other party was aware of the debtor's intention on the date of such legal act. Such awareness is presumed if the other party knew of the imminent inability of the Insolvent Party to make payments when due, and that the legal act constituted a disadvantage for the creditors (section 133 para. 1 sent. 2 of the Insolvency Code).

The periods of time set out in Paragraph 5.1.1(c)(i) on page 24 to Paragraph 5.1.1(c)(iv) on page 26, begin on the day on which the filing for the commencement of the Insolvency Proceeding is received by the relevant insolvency court (section 139 para. 1 of the Insolvency Code), or, if the debtor is a credit institution or a financial services institution and the BaFin has issued an order pursuant to section 46 para. 1 sentence 2 no. 4 to 6 of the Banking Act (please see Paragraph 5.1.1(a) on page 15), from the time when such order is issued (section 46c of the Banking Act).

(d) *Opinion on whether or not there is a distinction in time with respect to a creditor's rights between: (i) the filing of proceedings seeking a judgment of insolvency; (ii) a bankruptcy court recognising the filing of proceedings seeking a judgment of insolvency; (iii) the date on which a bankruptcy court determines a party first becomes insolvent; and (iv) any other stage of the proceedings where a creditor's rights may be affected.*

(i) *The filing of proceedings seeking a judgment of insolvency;*

(1) Pre-insolvency proceedings by the insolvency court

Under German law, the term "commencement" of any proceedings under any insolvency law is likely to be construed to refer to the opening of Insolvency Proceedings, i.e. the time of the issue of an order of commencement of Insolvency Proceedings (*Eröffnungsbeschluss)* by the competent insolvency court.

Upon the filing of an application for the commencement of Insolvency Proceedings and prior to that order of commencement of Insolvency Proceedings, a German insolvency court is entitled to appoint a preliminary administrator (*vorläufiger Insolvenzverwalter*) or initiate preliminary proceedings with the following effects:

The court may, *inter alia*, enjoin the Insolvent Party from transferring assets in the course of preliminary proceedings pursuant to sections 21 *et seq.* of the Insolvency Code. However, such measures do not affect the validity of dispositions over Financial Collateral.

In the preliminary proceedings, the insolvency court's competences are restricted to attachments (freezing injunctions) that prevent the Insolvent Party from disposing of his assets and thus jeopardising the purpose of formal Insolvency Proceedings. Such a freezing injunction might refer to the current assets of the Insolvent Party or parts thereof.

Within the scope of preliminary proceedings, the insolvency court may impose a general prohibition on dispositions (*Verfügungen*) on the debtor (section 21 para. 2 sent. 1 no. 2 of the Insolvency Code), order that the debtor's dispositions of property require the consent of the preliminary administrator (section 21 para. 2 sent. 1 no. 2 of the Insolvency Code) or order a restriction (or temporary restriction) in certain measures of enforcement (*Zwangsvollstreckungsmaßnahmen*) against the Insolvent Party (section 21 para. 2 sent. 1 no. 3 of the Insolvency Code).

The preliminary administrator is however not entitled to exercise any "cherry-picking" right pursuant to section 103 of the Insolvency Code (see Paragraph 5.1.1(i)(ii) on page 68. The scope of application of section 103 of the Insolvency Code is in terms of timing restricted to the time of the opening of Insolvency Proceedings.[34]

According to the BGH,[35] section 119 of the Insolvency Code protects the Insolvency Representative's Selection Right (please refer to Paragraph 5.1.1(i)(ii) on page 68 below) under section 103 of the Insolvency Code following the opening of Insolvency Proceedings and, in the view of the BGH also applies prior to the opening of Insolvency Proceedings from the point in time in which, based on a valid application for the opening of

---

[34] BGH WM 2007, 2331; BGHZ 97, 87, 90; 130, 38, 42; OLG Düsseldorf ZInsO 2005, 820, 821; *Gottwald/Huber*, Insolvenzrechts-Handbuch, 5th ed. (2015), § 35 no. 2; *Wegener* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 103 no. 99; *Tintelnot* in: Kübler/Prütting/Bork, InsO, 62nd update (2015), § 103 no. 51; *Marotzke* in: Heidelberger Kommentar zur Insolvenzordnung, 7th ed. (2014), § 103 no. 116.

[35] BGH WM 2013, 274.

Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected *(mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*). This means that a termination of an agreement may be invalid if it is based on an insolvency related termination right even if it occurred prior to the opening of Insolvency Proceedings.

According to a decision of the BGH [36] of 2004, preliminary measures pursuant to section 21 para. 2 sent. 1 nos. 2 and 3 of the Insolvency Code do not exclude the permissibility of set-off since the provisions concerning insolvency set-off pursuant to sections 94 through 96 of the Insolvency Code (see Paragraph 5.1.1(o)(i)(1) on page 98) are deemed as both comprehensive and exclusive.[37] Pursuant to the BGH, even though, from a genuinely economic perspective, a set-off could be deemed as a payment by the Insolvent Party, a general prohibition of transfers does not include the prohibition of set-off of claims against the Insolvent Party (although it may be subject to challenge in insolvency (*anfechtbar*)). In particular, a general prohibition of transfers is only targeted at the Insolvent Party and, hence, cannot effectively prevent the other party from effecting a set-off in the course of preliminary proceedings[38] such as under the Netting Provisions.

Likewise, a restriction in measures of execution against the Insolvent Party is not aimed at the other Party who can unilaterally declare set-off without the involvement of a court and/or the enforcement of a court decision. Notwithstanding the fact that a set-off achieves an

---

36 BGH NJW 2004, 3118, 3119; BGH ZIP 2005, 181.

37 See also *Lüke* in: Kübler/Prütting/Bork, InsO, 62th update (2015), § 94 nos. 88 *et seqq*.; *Gerhardt*, Festschrift für Zeuner, 353, 366; *Häsemeyer*, Kölner Schrift zur Insolvenzordnung, 2nd ed. (1999), 663 no. 50; *Brandes/Lohmann* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 94 no. 5.

38 BGH ZInsO 2004, 852.

economically similar effect to a measure of execution, it is supported by legal literature that a restriction pursuant to section 21 para. 2 sent. 1 no. 3 of the Insolvency Code does not directly prohibit any set-offs.[39]

Preliminary measures do not affect the validity of dispositions over Financial Collateral and the validity of the netting of obligations based on transfer orders that have been entered into a system pursuant to section 1 para. 16 of the Banking Act ("**System**") (see Paragraph 5.1.1(o)(i)(7) on page 102).[40]

(2) Pre-insolvency proceedings

With regard to credit institutions, financial services institutions, insurance companies and capital investment management companies, Insolvency Proceedings may only be instituted by the BaFin.

Furthermore, the BaFin may - prior to a petition for the opening of Insolvency Proceedings - issue certain measures (including a temporary ban on sales and payments by the institution) pursuant to section 46 sent. 1 of the Banking Act if the credit or financial services institution's capacity to fulfil its obligations with respect to its creditors, particularly the security of assets entrusted to the institution, is in jeopardy. Such temporary measures aim at maintaining the institution's capability of being restructured.[41] Similar orders may be issued by the BaFin in respect of insurance companies pursuant to section 89 of the Insurance Supervisory Act. With respect to capital investment companies, section 42 of the German Capital Investment Code

39 *Haarmeyer* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 21 no. 72; *Lüke* in: Kübler/Prütting/Bork, InsO, 62nd update (2015), § 94 no. 102 with the argument that section 96 no. 3 of the Insolvency Code is an adequate protection against unjustified set-off which does not leave room for any analogies as regards section 21 para. 2 sent. 1 nos. 2 and 3 of the Insolvency Code.

40 *Lindemann* in: Boos/Fischer/Schulte-Mattler, KWG, 4th ed. (2012), § 46 nos.108 *et seq*.

41 *Lindemann* in: Boos/Fischer/Schulte-Mattler, KWG, 4th ed. (2012), § 46 no. 73 *et seq*.

(*Kapitalanlagegesetzbuch*) enables BaFin to issue "appropriate and necessary" measures, in particular, if the capital investment management company fails to fulfil its obligation with respect to its creditors However, the scope of such measures is disputed in legal literature:

It has been suggested that a ban on payment and sales by the BaFin under section 46 para. 1 sent. 2 no. 4 of the Banking Act has the effect of a deferral (*Stundung*).[42] In particular, it has been disputed whether a ban on sales and payments equally precludes a creditor from setting off his claims against the institution.[43] Accordingly, set-off of obligations would be impermissible in such circumstances (as set-off may not be effected where the claim against which the set-off is to be effected is not due).

In a decision of 12 March 2013, the BGH held that a ban on payment and sales by the BaFin under section 46 para. 1 sent. 2 no. 4 of the Banking Act would not result in a deferral.[44] Instead, the ban creates a temporary obstacle to specific performance and entitles the credit or financial services institution to refuse specific performance for the duration of the ban (based on an analogous application of section 275 para. 1 of the

---

42 See Higher Regional Court (*Oberlandesgericht* – "**OLG**") of Frankfurt am Main ("**OLG Frankfurt**") ZinsO 2013, 388 *et seqq*. The judgment has been given in respect of the former section 46a para. 1 sent. 1 no. 1 of the Banking Act but the wording of section 46 para. 1 sent. 2 no. 4 of the revised Banking Act is identical. Also the German legislator has considered this provision having the effect of a deferral, BT-Drucksache 7/4631, p. 8 and BT-Drucksache 14/8017, 141. See also *Schwennicke/Haß/Herweg* in: Schwennicke/Auerbach, Kreditwesengesetz mit Zahlungsdiensteaufsichtsgesetz, 2nd ed. (2013), § 46 no. 39.

43 This view is taken by *Szagunn/Haug/Ergenzinger*, Gesetz über das Kreditwesen, 6th ed. (1997), § 46a KWG no. 4a; *Kokemoor* in Beck/Samm/Kokemoor, KWG, September 2014, § 46a no. 28; *Zietzsch,* WM 1997, 954, 956 *et seq.*, *Pannen*, Krise und Insolvenz bei Kreditinstituten, 3rd ed. 2010, 55 whilst *Lindemann* in: Boos/Fischer/Schulte-Mattler, KWG, 4th ed. (2012), § 46 no. 92 argues that set-off should be permissible.

44 BGH WM 2013, 742. The decision repealed the OLG Frankfurt's decision referred to above under footnote 41 and restored the decision delivered by the Regional Court (*Landgericht* – "**LG**") Frankfurt am Main (WM 2012, 403).

German Civil Code).[45] Whilst the BGH did not have to decide on the effectiveness of a set-off, it has made *obiter* remarks indicating that a ban on payment and sales does not prevent set-off. Among other arguments, the BGH points out that the purpose of section 46 para. 1 sent. 2 no. 4 of the Banking Act to secure the assets of the credit or financial services institution concerned and prevent its insolvency would not prevent set-off. Even pre-insolvency measures by an insolvency court and the opening of Insolvency Proceedings would generally not prevent set-off and section 46 para. 1 sent. 2 no. 4 of the Banking Act is not intended to impose restrictions beyond the restrictions Insolvency Proceedings entail.[46] While these remarks are, in our view, convincing, the BGH does, however, not address the question whether a temporary obstacle for the performance of a claim would still prevent set-off against such claim given that German statutory law allows for set-off only, if the claim against which set-off is to be effected can be performed.

It is possible that Insolvency Proceedings are opened over the credit or financial service institution by a German court after application by the BaFin without the ban having been lifted before.

With respect to agreements governed by a law other than German law, section 46d para. 3 sent. 3 of the Banking Act makes reference to section 340 of the Insolvency Code which stipulates that in case of an insolvency "netting agreements" are governed solely by the law of the contract which governs such agreement.

---

[45] BGH WM 2013, 742, 748. As a consequence, the creditor of the German institution would in our view generally be entitled to refuse performance of any counterclaims for as long as the ban continues to exist under section 326 para. 1 sent. 1 of the German Civil Code (applied by way of analogy). Pursuant to section 326 para. 1 sent. 1 of the German Civil Code the debtor is not required to perform in accordance with section 275 paras. 1 to 3 of the German Civil Code, the counterclaim ceases to exist. In cases of partial performance section 441 para. 3 of the German Civil Code applies by way of analogy.

[46] BGH WM 2013, 742, 747.

For a detailed analysis of the effects of section 340 of the Insolvency Code we refer to Paragraph 5.2.1(d)(ii)(2) on page 121 below.

(3) Challenging of the Insolvent Party's transactions

The time of filing of a petition for the opening of Insolvency Proceedings, or, if the debtor is a credit institution or a financial services institution and the BaFin has issued an order pursuant to section 46 para. 1 of the Banking Act (please see Paragraph 5.1.1(a) on page 15), the time when such order is issued (section 46c of the Banking Act), is decisive for the calculation of insolvency challenge periods (section 139 para. 1 sent. 1 of the Insolvency Code) (please see 5.1.1(c) on page 21 above).

(ii) *A bankruptcy court recognising the filing of proceedings seeking a judgment of insolvency;*

The recognition of the filing of proceedings seeking a judgment of insolvency does not qualify as a technical term under the Insolvency Code referring to a specific procedural step of Insolvency Proceedings. Section 26 of the Insolvency Code provides that the bankruptcy court rejects such filing in case the assets of the insolvent debtor are insufficient to compensate for the costs of the Insolvency Proceeding (*Abweisung mangels Masse*). However, such rejection has no impact on statutory netting or the enforceability of the contractual Netting Provisions.

(iii) *The date on which a bankruptcy court determines a party first becomes insolvent; and*

Upon the opening of Insolvency Proceedings, an insolvency court does not determine the date when the Insolvent Party has become insolvent. It rather determines that the Insolvent Party is insolvent at the point in time of issuing the order for the opening of the Insolvency Proceedings or, as the case may be, preliminary insolvency proceedings. The date when the Insolvent Party has become insolvent is only relevant to determine whether or not a legal act of an Insolvent Party can be challenged by an Insolvency Representative (please see Paragraph 5.1.1(c) on page 21). Therefore, we only refer to the point in time of the opening of the Insolvency Proceedings.

(iv) *Any other stage of the proceedings where a creditor's rights may be affected*

(1) Besides the filing for the opening of Insolvency Proceedings, the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected *(mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*) is relevant. According to the BGH,[47] this point in time is decisive for whether the Netting Provisions apply or whether such provisions are overridden by the statutory provisions of the Insolvency Code if termination is based on an insolvency related Termination Event (please see Paragraph 5.1.1(o)(i) on page 96).

(2) In addition, the actual opening of the main Insolvency Proceedings is of relevance. Pursuant to section 81 of the Insolvency Code, any dispositions (*Verfügung*) of the Insolvent Party over its property made after the opening of Insolvency Proceedings are void unless the relevant court orders otherwise. However, dispositions over Financial Collateral affected after the actual opening of Insolvency Proceedings are valid, provided that such dispositions were effected on the day of the opening of Insolvency Proceedings and the other party proves that it did not know, nor should have known of the opening of the Insolvency Proceedings.

After the opening of Insolvency Proceedings rights in assets forming part of the insolvency estate cannot be acquired with legal effect even if such acquisition of

---

47 BGH WM 2013, 274.

rights is not based on a disposition by the insolvent party or effected by enforcement measures (section 91 para 1 of the Insolvency Code).

(3) Termination rights under the Master Agreements may be affected by restructuring measures under the Bank Reorganisation Act and the Banking Act applicable to credit institutions within the meaning of section 1 para. 1 of the Banking Act which have their seat in Germany.

(A) As already mentioned in Paragraph 4.1.1(a)(ii) on page 17 above, the Bank Reorganisation Act provides for a restructuring proceeding (*Sanierungsverfahren*) involving the appointment of a restructuring advisor (*Sanierungsberater*) to implement a restructuring plan. Restructuring proceedings are initiated by the credit institution on a voluntary basis in close consultation with the BaFin and commenced by a court order of the OLG Frankfurt upon application. The restructuring proceedings do not affect creditors' rights.[48]

(B) If restructuring proceedings have failed or are without prospect of success, a reorganisation proceeding (*Reorganisationsverfahren*) may be commenced. Reorganisation proceedings are initiated by the credit institution on a voluntary basis in close consultation with BaFin and commenced by a court order of the OLG Frankfurt upon application. Reorganisation proceedings may only be commenced if the ongoing existence of the credit institution is endangered and that this in turn may endanger

---

[48] Section 2 para. 2 of the Bank Reorganisation Act provides that the restructuring plan may provide that certain loans granted in the context of the restructuring within the approved aggregate limit not exceeding 10% of the own capital of the relevant institution may rank superior to claims of all other insolvency creditors in case that insolvency proceedings are commenced within a period of three years following the commencement of the restructuring proceeding.

the stability of the financial system. Together with the application for commencement of a reorganisation proceeding, a reorganisation plan must be filed as prepared by the relevant credit institution. The measures proposed in the reorgansation plan are subject to a positive majority vote of the creditors and shareholders of the respective credit institution accepting such measures. The Bank Reorganisation Act stipulates detailed rules on the voting process and on the required majorities and to what extent negative votes rejecting such measures may be disregarded.[49]

The reorganisation proceeding may involve measures that affect the rights of the credit institution's creditors and/or its shareholders.

I. Pursuant to section 12 of the Bank Reorganisation Act the reorganisation plan as approved by the OLG Frankfurt may provide that claims of creditors are partially reduced, deferred or modified in another way. Only the modification of salary and pension claims and claims that are protected by a statutory or voluntary deposit protection scheme is excluded.

This right to reduce, defer or modify claims may also be extended to creditors' rights as regards collateral with respect

---

[49] The general concept of the reorganisation plan is based on that of an insolvency plan under existing German insolvency law. According to sections 14 *et seq.* of the Bank Reorganisation Act, those creditors whose rights are affected by the reorganisation plan must approve the reorganisation plan by voting whereby the credit institution has the right to group creditors into different voting groups each containing creditors with similar specific interests. The reorganisation plan is approved by a positive vote of the majority of each voting group of creditors which means that negative votes of a minority of creditors can be overruled. The reorganisation plan (including the grouping of creditors into voting groups and the measures affecting their rights) has to be approved by the OLG Frankfurt am Main after having been approved by the relevant majorities among the voting groups of creditors.

to which they are entitled to separate satisfaction (*absonderungsberechtigt*) such as pledges over securities by applying section 223 of the Insolvency Code by way of analogy to the reorganisation proceeding.[50] However, pursuant to section 223 para. 1 sent. 2 of the Insolvency Code the insolvency plan and thus a reorganisation measure does not affect creditors' rights with respect to collateral where the collateral granted qualifies as Financial Collateral.[51]

Section 9 of the Bank Reorganisation Act provides that claims of a creditor may even be converted into equity, however, only with the relevant creditor's consent.

II. Furthermore, the Bank Reorganisation Act provides for certain mandatory temporary limitations of the rights of counterparties to terminate contractual relationships with a German credit institution that becomes subject to reorganisation proceedings (section 13 of the Bank Reorganisation Act). Contracts may not be terminated starting from the day on which the notification for the commencement of a reorganisation proceeding pursuant to section 7 para. 1 of the Bank Reorganisation Act is filed

---

[50] According to the legislative reasoning for the Bank Restructuring Act (BT-Drucksache 17/3024, 49), a reorganisation plan may contain all measures that can be contained in an insolvency plan within the meaning of section 217 *et seq.* of the Insolvency Code.

[51] Such right is equally excluded where collateral has been granted for the benefit of a participant in a system within the meaning of section 1 para. 16 of the Banking Act to secure his claims from the system, or for the benefit of the central bank of a Member State of the European Union or the European Central Bank.

with BaFin until the end of the next following business day.[52] The effectiveness of other termination events (for example in case of a payment default) occurring during this period is postponed until the expiration of that period. Contractual clauses that provide for the contrary (*i.e.* for an immediate termination) are invalid.

Where the notification for the commencement of a reorganisation proceeding is made less than two business days prior to termination upon the application of BaFin for the opening of insolvency proceedings, this suspensive effect would also hold true for a(n automatic) termination based on such event of default.

(C) If the conditions for resolution are met, the Resolution Authority can take any action in accordance with the Resolution Act to achieve the resolution objectives. This includes the right to issue Resolution Orders under sections 77 para 1 no. 1, 136 of the Resolution Act and, together with or independent from a Resolution Order any other action under sections 78 to 87 of the Resolution Act.[53] A Resolution Order may involve the application of the following resolution tools: write down or conversion of relevant capital instruments (section 89 of the

[52] Section 13 of the Bank Reorganisation Act refers to the business day of a System as defined in section 1 para. 16b of the Banking Act which comprises the usual business cycle of the System including day and night settlement.

[53] As regards the resolution objectives please refer to section 67 of the Resolution Act, as regards the general principles on resolution please refer to section 68 of the Resolution Act and as regards to the various valuation procedures please refer to sections 69 to 76 of the Resolution Act.

Resolution Act), the bail-in tool (section 90 of the Resolution Act), the sale of business tool (section 107 para 1 no. 1 lit (a) of the Resolution Act), the bridge institution tool (section 107 para 1 no. 1 lit (b) of the Resolution Act) and the asset separation tool (section 107 para 1 no. 2 of the Resolution Act).[54]

The conditions for the resolution (*Abwicklungsvoraussetzungen*) of CRR Credit Institutions and SAG Investment Firms are met if the ongoing existence of such entity is jeopardised (*Bestandsgefährdung*), the implementation of a resolution action (*Abwicklungsmaßnahme*) to achieve one or more resolution objectives (*Abwicklungsziele*) is necessary and proportionate (*erforderlich und verhältnismäßig*), and the situation cannot be remedied through measures other than resolution action with the same certainty regarding the time available (section 62 para 1 sentence 1 of the Resolution Act).[55] The ongoing existence of CRR Credit Institutions and SAG Investment Firms is jeopardised if (1) the CRR Credit Institution or SAG Investment Firm infringes or there are objective elements to support the view that the CRR Credit Institution or SAG Investment Firm will, in the near future, infringe the requirements for holding a licence under section 32 of the Banking Act in a way that would justify the withdrawal of the licence by the competent authority, (2) the assets of the CRR Credit Institution or SAG Investment Firm

---

[54] While we use the original terms of the English version of the EU Bank Recovery and Resolution Directive this does not imply that the EU Bank Recovery and Resolution Directive has been implemented on a one-by-one basis into German law.

[55] Section 62 para 1 sentence 2 of the Resolution Act does not require that any crisis prevention measures or any other appropriate measures under the Banking Act are instituted before a resolution action.

are or there are objective elements to support the view that the assets of the CRR Credit Institution or SAG Investment Firm will, in the near future, be, less than its liabilities or (3) the CRR Credit Institution or SAG Investment Firm is, or there are objective elements to support the view that the institution will, in the near future, be, unable to pay its debts or other liabilities as they fall due unless there is a serious chance (*ernsthafte Aussicht*) that following the issuance of a guarantee (as referred to in the next sentence) the CRR Credit Institution or SAG Investment Firm is in a position to meet its liabilities when they fall due; section 63 para 1 of the Resolution Act. The ongoing existence of a CRR Credit Institution or SAG Investment Firm is deemed to be jeopardised if extraordinary financial support is granted from public sources except when, in order to remedy a serious disturbance of the economy and preserve financial stability, the extraordinary public financial support takes any of the following forms: (1) a State guarantee to back liquidity facilities provided by central banks according to the central banks' conditions; (2) a state guarantee of newly issued liabilities; or (3) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution (for further details and exemptions refer to section 63 para 2 of the Resolution Act).[56]

[56] Section 64 of the Resolution Act provides that the conditions for the resolution of a financial institution as defined in Article 4 para 1 no. 26 CRR (i.e. a subordinated undertaking of a parent undertaking subject to prudential supervision at a consolidated level) are met if the conditions for the resolution of the parent undertaking pursuant to section 62 of the Resolution Act are satisfied. In respect of financial holding companies (as defined in Article 4 para 1 no. 20 CRR) mixed financial holding companies (as defined in Article 4 para 1 no. 21 CRR), parent financial holding companies in a Member State (as defined in Article 4 para 1 no. 30 CRR), EU parent financial holding companies (as defined in Article 4 para 1 no. 31 CRR),

With respect to the individual resolution tools, the bail-in tool (*Instrument der Gläubigerbeteiligung*) (section 90 of the Resolution Act) empowers the Resolution Authority to either convert eligible liabilities (*berücksichtigungsfähige Verbindlichkeiten*) of a SAG Firm into shares or other Common Equity Tier 1 (for purposes of Article 28 CRR) items or partially or fully write down or cancel eligible liabilities. Sections 91 and 92 of the Resolution Act provide for general and individual exemptions from the scope of eligible liabilities and, thus, from the bail-in tool (in particular liabilities arising from the safe keeping of client assets or client money and liabilities arising from a fiduciary relationship).[57]

With respect to derivatives in general (as defined in section 2 para 3 no. 11 of the Resolution Act by reference to the definition of financial instruments under section 1 para 11 sentence 3 of the Banking Act) the bail-in tool may only be applied after or simultaneously with the "closing-out" (*Glattstellung*) of such derivatives (section 93 para 1 of the Resolution

---

parent mixed financial holding companies in a Member State (as defined in Article 4 para 1 no. 32 CRR) and EU parent mixed financial holding companies in a Member State (as defined in Article 4 para 1 no. 34 CRR), the conditions are met if the conditions for resolution are met (a) both in respect of one such entity and in respect of at least one of its subordinated undertakings which qualifies as an SAG Firm (or if a non-EU resolution has determined that a third country subordinated undertaking can be resolved in accordance with the laws of such non-EU country) or (b) if (1) the conditions for resolution are met in respect of at least one of its subordinated undertakings which qualify as SAG Firms, (2) the jeopardy to the existence of the subordinated undertaking could result in the entire group's existence being jeopardised and (3) resolution action in respect of the holding company is necessary to resolve at least one of the subordinated undertakings or the group.

[57] Separately, the Resolution Authority may write down or convert relevant capital instruments under section 89 of the Resolution Act. For purposes of section 89 of the Resolution Act, relevant capital instruments comprise Additional Tier 1 and Tier 2 capital issued by a relevant institution and recognised as own funds (section 2 para 2 of the Resolution Act).

Act).[58] Pursuant to section 2 para 3 no. 11 of the Resolution Act, the term derivative means any derivative within the meaning of section 1 para 11 sentence 3 of the Banking Act including cleared and exchange traded derivatives. If the conditions for resolution are met, the Resolution Authority is empowered under section 93 para 2 of the Resolution Act to terminate and close out any derivative transaction for that purpose (except where such derivative has been individually excluded from bail-in under section 92 of the Resolution Act[59]). Where derivative transactions are subject to a netting agreement (*Saldierungsvereinbarung*), the Resolution Authority or an independent valuation expert must determine as part of the valuation under section 69 of the Resolution Act the net value of such liabilities on the basis of the derivative transactions and to simultaneously or subsequently apply the bail-in tool to the net claim (section 93 para 3 of the Resolution Act).[60]

---

58 It is not entirely clear whether and which forms of master agreements for derivatives are covered by this provision.

59 For example, if the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions.

60 Based on Article 49 para 4 of the EU Bank Recovery and Resolution Directive, section 93 para 4 of the Resolution Act states that Resolution Authority must determine the value of liabilities arising from derivatives in accordance with the following: (1) appropriate methodologies for determining the value of categories of derivatives, including transactions that are subject to netting agreements (*Saldierungsvereinbarungen*); (2) principles for establishing the relevant point in time at which the value of a derivative position should be established and (3) appropriate methodologies for comparing the destruction in value that would arise from the closing out of and application of the bail-in tool for derivatives with the amount of losses that would be borne by such derivatives upon the application of the bail-in tool. There is no guidance to what extent the valuation expert or the Resolution Authority must comply with the terms of the relevant netting agreement (to which express reference is made in Article 49 para 3 of the EU Bank Recovery and Resolution Directive which is implemented by section 93 para 3 of the Resolution Act) on valuation in connection with the close-out of transactions. While section 93 para 4 of the Resolution Act may be read so as to supplement section 93 para 3 of the Resolution Act in cases where the relevant

The term "netting agreement" is defined in section 2 para 3 no. 43 of the Resolution Act and comprises each agreement under which a series of pre-determined or determinable claims or obligations of the parties can be converted into a single net claim, including (1) agreements pursuant to which the obligations upon the occurrence of an event become immediately due or terminate and are converted into or replaced by a single net claim (close-out netting agreements), (2) set-offs (*Aufrechnungen*) based on a termination (close-out netting) for purposes of Article 2 para 1 lit (n) FCD and (3) set-offs (*Aufrechnungen*) for purposes of Article 2 lit (k) SFD.[61]

With respect to eligible liabilities governed by the laws of a non-EU Member State coming into existence after 1 January 2015, SAG Firms are obliged to agree on contractual terms with relevant creditors or counterparties pursuant to which the creditors recognise that the bail-in tool may be applied to such liability and to obtain such creditors' consent to the partial or full write-down of the relevant nominal amount or residual amount and the conversion of the relevant liability into shares or other Common Equity Tier 1 items, as carried out by the Resolution Authority when applying the bail-in tool (section 55 of the Resolution Act).[62] If the parties fail to agree to such terms in the contract

---

derivatives contract is silent on one or more points it is not clear what exactly the relationship of section 93 para 3 and section 93 para 4 of the Resolution Act is.

61 In the English language version, both Article 2 para 1 lit (n) FCD and Article 2 lit (k) SFD refer to "close-out netting" or "netting" while the German language version refers to set-off (*Aufrechnung*).

62 This does not apply where the Resolution Authority determines that such liabilities can be subject to write down and conversion powers by the Resolution Authority pursuant to the law of the third country or to a binding agreement concluded with that third country (section 55 para 4 of the Resolution Act).

governing a liability, such liabilities are not eligible as regulatory own fund.

Shares or all or any assets including the liabilities of an SAG Firm in resolution or may be transferred to a third party under the sale of business tool (section 107 para 1 no. 1 lit (a) of the Resolution Act) or to a bridge institution[63] under the bridge institution tool (section 107 para 1 no. 1 lit (b) of the Resolution Act). Under the asset separation tool (section 107 para 1 no. 2 of the Resolution Act) all or any assets including the liabilities of an institution or group company in resolution may be transferred to an asset management company.[64] Secured assets and liabilities may not be separated from the relevant collateral assets serving as security as such assets or liabilities may only be transferred if they are transferred together with any relevant collateral assets and all collateral assets may only be transferred together with the relevant assets or liabilities which are secured by such collateral assets; section 110 para 1 of the Resolution Act. This prohibition of partial transfers is extended by section 110 para 3 of the

63 "Bridge institution" (*Brückeninstitut*) means a legal entity which (1) is entirely held by the Resolution Authority or another public authority, (2) is controlled by the Resolution Authority on the basis of corporate law, contract law or public law powers to exercise influence and (3) has been established as a bridge institution for purposes of section 107 of the Resolution Act (section 128 of the Resolution Act).

64 The Resolution Authority is empowered to modify all or some provisions, to refuse performance or to replace a counterparty with a recipient (*übernehmender Rechtsträger*) in connection with agreements to which an SAG Firm in resolution is a party (section 79 para 5 of the Resolution Act). A relevant counterparty is not entitled to terminate an agreement as a result of the imposition of such measures. However, the powers in section 79 para 5 of the Resolution Act must not be exercised in respect of Financial Collateral, netting agreements, set-off agreements, or liabilities under covered bonds and their exercise must not (a) result in a cancelation of resolution orders (Article 5 SFD) or (b) affect the validity of resolution orders or set-offs (Arts. 3 and 5 SFD), (c) affect the use of credit balances, securities or credit facilities (Article 4 SFD) or (d) affect the protection of *in rem* security (Article 9 SFD) (section 79 para 6 of the Resolution Act).

Resolution Act to collateral assets securing liabilities included in a System, to netting agreements (*Saldierungsvereinbarungen*) and set-off agreements.

There is no definition of "set-off agreements" in the Resolution Act. Given that the term "set-off agreement" is generally understood to cover any agreement by which parties set-off their liabilities, section 110 para 3 of the Resolution Act should have a broad scope of application.

As long as the conditions for resolution are fulfilled, the asset transfer tools can be used multiple times and each transfer is valid (and the transfer of title is actually effected) upon the publication of the relevant Resolution Order (sections 114, 136 of the Resolution Act).

The Resolution Authority is entitled under section 82 para 1 of the Resolution Act to suspend any payment or delivery obligations under any contract to which an institution or group company under resolution is a party from the publication of a notice of the suspension in accordance with section 137 of the Resolution Act until the end of the business day following such publication. Such suspension may also affect payment and delivery obligations arising under derivative transactions. Any suspension under section 82 para 1 of the Resolution Act does not apply to payment and delivery obligations owed to Systems, system operators within the meaning of section 1 para 16a of the Banking Act, central counterparties within the meaning of section 1 para 31 of the Banking Act and central banks.

A payment or delivery obligation which would have been due during the suspension period becomes due immediately upon expiry of the suspension period. If the payment or delivery obligations of an institution under resolution under a contract are suspended, the payment or delivery obligations of such institution under resolution's counterparties under that contract are suspended for the same period of time.

The Resolution Authority has the power to temporarily prevent secured creditors of an institution or group company under resolution from enforcing security interests in relation to any assets of that institution or group company under resolution from the publication of a notice of the restriction in accordance with section 137 until the end of the business day following that publication (section 83 para 1 of the Resolution Act). Such restrictions do not apply in relation to any security interest provided by the institution or group company under resolution for Systems, system operators within the meaning of section 1 para 16a of the Banking Act, central counterparties within the meaning of section 1 para 31 of the Banking Act and central banks. There is no definition of "secured liabilities" in the Resolution Act. However, Article 2 para 1 no 67 of the EU Bank Recovery and Resolution Directive provides that secured liabilities include title transfer collateral arrangements and the term "secured liabilities" should in our view be construed accordingly. Conversely, the Resolution Act as well as the EU Bank Recovery and Resolution Directive address netting agreements and security arrangements separately. Therefore, a competent authority or court would in our view likely not consider a netting agreement as a form of security for purposes of the Resolution Act.

Under section 84 para 1 of the Resolution Act, the Resolution Authority is entitled to suspend the termination rights[65] of any party to a contract with an institution or group company under resolution from the publication of such suspension pursuant to section 137 para 1 of the Resolution Act until the end of the business day following that publication. The Resolution Authority may also suspend the termination rights of any party to a contract with a group company forming part of the group of an institution under resolution from the publication of such suspension pursuant to section 137 para 1 of the Resolution Act until the end of the business day following that publication where (1) the obligations under that contract are guaranteed or are otherwise supported by the group company under resolution, (2) the termination rights under that contract are based solely on the insolvency or the conditions for resolution or the institution or implementation of resolution actions and (3) in the case of a transfer power that has been or may be exercised in relation to the institution or group company under resolution, (i) all rights and liabilities of the institution or group company under resolution of the subsidiary relating to that contract have been or may be transferred to and assumed by the recipient or (ii) the Resolution Authority provides in any other way adequate protection for the rights of the other parties (section 84 para 2 of the Resolution Act).

Such suspension rights may also not be exercised *vis-à-vis* Systems, system operators

[65] Section 84 para 7 of the Resolution Act states that section 84 of the Resolution Act applies to all termination events arising under a contract with an institution or group company in resolution which, our view, should also include automatic termination rights.

within the meaning of section 1 para 16a of the Banking Act, central counterparties within the meaning of section 1 para 31 of the Banking Act and central banks. A party may exercise a termination right under a contract before the end of the period referred to in paragraphs 1 or 2 of section 84 of the Resolution Act if that party receives notice from the Resolution Authority under section 84 para 5 of the Resolution Act that the rights and liabilities covered by the contract are either (i) not to be transferred to another entity or (ii) subject to write down or (iii) subject to conversion upon the application of the bail-in tool. Subject to sections 82 and 144 of the Resolution Act, where no notice has been given pursuant to section 84 para 5 of the Resolution Act, a counterparty may exercise termination rights after the expiry of the period of suspension if, (1) in cases where the rights and liabilities covered by the contract have been transferred to a recipient entity, the contractual requirements for terminating the contract are still met after the transfer to the recipient entity (2) in cases where the rights and liabilities covered by the contract remain with the institution or group company under resolution and the Resolution Authority has not applied the bail-in tool, the contractual requirements for terminating the contract are still met on the expiry of the suspension.

Pursuant to section 144 para 1 of the Resolution Act, a crisis prevention measure or a crisis management measure (*Krisenmanagementmaßnahme*), including the occurrence of any event directly linked to the application of such a measure, shall not in relation to the institution or the group and all group companies be deemed to be an enforcement or termination event within the meaning of the FCD or as insolvency proceedings within the meaning of the SFD provided that the main obligations (*Hauptleistungspflichten*) under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed.[66]

Under section 144 para 3 of the Resolution Act, a crisis prevention measure or crisis management measure, including the occurrence of any event directly linked to the application of such a measure, do not make it possible (1) exercise any termination, suspension, modification, netting (*Verrechnung*) or set-off rights vis-à-vis an institution or group company, (2) acquire title over any property of the institution or group company, exercise control over it or enforce any rights under a security and (3) affect any contractual rights of the institution or group company. This does only apply if the main obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed. A suspension or restriction under sections 82 to 84 of the Resolution Act is not regarded as non-performance of contractual main obligations.

Section 144 of the Resolution Act does not affect the right of a person to take an action referred to in paragraph 3 of section 144 of the Resolution Act where that right arises by virtue of an event other than the crisis prevention measure, the crisis management measure or the occurrence of any event directly linked to the

---

[66] To the extent a resolution procedure of a third country state can be recognised under section 169 of the Resolution Act such procedure is deemed a crisis management measure for the purpose of section 144 of the Resolution Act.

application of such a measure. Section 144 para 5 of the Resolution Act provides that agreements violating sections 144 para 1 to 3 of the Resolution Act are not enforceable.[67] As section 144 para 5 of the Resolution Act implements Article 68 para 6 of the EU Bank Recovery and Resolution Directive which clarifies that Article 68 of the EU Bank Recovery and Resolution Directive is to be considered as overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation we understand that section 144 of the Resolution Act would be enforced in accordance with Article 9 of the Rome I Regulation even where German courts do not have jurisdiction. However, we do not opine on whether or not section 144 of the Resolution Act would be recognised in any jurisdiction other than Germany.

Under section 146 of the Resolution Act the Resolution Authority must ensure that immediately after the resolution action or actions have been effected a valuation is carried out by an independent person (such valuation must be distinct from the valuation carried out under section 69 of the Resolution Act) to assess if and to what extent shareholders and creditors would have received better treatment if the institution under resolution had entered into normal insolvency proceedings. If such assessment shows that creditors are worse off than they would have been in insolvency proceedings, such creditors are entitled to seek compensation from the German bank

[67] Institutions and group companies may only use standard agreements if they comply with the requirements, section 144 para 5 sent 2 of the Resolution Act.

restructuring fund (*Restrukturierungsfonds*) (section 147 of the Resolution Act).

To summarise, upon the imposition of crisis prevention measures or crisis management measures in respect of SAG Firms contractual termination, set-off or netting rights as well as the enforcement of security may be suspended, excluded or otherwise restricted, subject to applicable exemptions. Contractual rights and obligations may be subject to mandatory conversion or write off and may be transferred to another party and/or modified. If the relevant SAG Firm subsequently becomes insolvent, this may (in particular in conjunction with the temporary suspension of enforcement, set-off or netting rights under the Resolution Act) result in a situation where the counterparty would continuously be prevented from exercising any termination, set-off or netting rights, first under the Resolution Act and subsequently under the Insolvency Code. However, this would only apply as a matter of German law and it is unclear whether the provisions of the Resolution Act would be given effect before any courts outside Germany, in particular before courts outside the EU.

A resolution action may be challenged before the Higher Administrative Court (*Verwaltungsgerichtshof*, "**VGH**") Kassel within one month upon their publication (section 150 of the Resolution Act). The law does not expressly foresee any appeal against any such judgment, although legal remedies may from time to time be available under generally applicable laws, including German constitutional law. The filing of a law suit does not suspend or otherwise affect the validity of the relevant resolution action.

(D) International scope of application of regulatory measures under the Banking Act, the Bank Reorganisation Act and the Resolution Act

In accordance with section 46d para 3 sentence 3 of the Banking Act, section 340 paras 2 and 3 of the Insolvency Code applies by analogy to reorganisation measures (*Sanierungsmaßnahmen*). Among such reorganisation measures are, in particular, measures taken under section 46 of the Banking Act which are intended to preserve or restore the financial status of a Credit Institution and which may affect existing rights of third parties in a host member state of the European Economic Area ("**EEA**") (section 46d para 3 sentence 1 of the Banking Act). The view of the German legislator appears to be that such "reorganisation measures" qualify as "reorganisation measures" as defined in Article 2 no. 7 of the Winding-Up Directive because section 46d para 1 sentence 1 of the Banking Act requires BaFin to inform the competent authorities of host EEA member states when taking "reorganisation measures" under the Banking Act.[68] However, the scope of section 46d para 3 of the Banking Act is not clear as the term "reorganisation measure" is not used elsewhere in the Banking Act.

The same issue arises under section 7 para 5 sentence 2 of the Bank Reorganisation Act providing that section 46d paras 1 to 4 of the Banking Act applies by analogy to reorganisation proceedings under the Bank Reorganisation Act. Whether restructuring proceedings or reorganisation proceedings under the Bank Reorganisation Act are covered by the

[68] BT-Drucksache 17/3024, 49.

reference is in our view not entirely clear, although, given the purpose of the Bank Reorganisation Act to stabilise Credit Institutions and to allow them to operate as going concerns, there is good reason to conclude that at least the measures under the Bank Reorganisation Act qualify as reorganisation measures for purposes of the Winding-Up Directive and section 46d para 3 sentence 3 of the Banking Act. In such case, sections 338 and 340 of the Insolvency Code would be applicable and, if a court were to follow our interpretation of sections 338 and 340 para 2 of the Insolvency Code, the effects of the regulatory measures and reorganisation proceedings on transactions would therefore have to be decided on the basis of the law governing the transactions. However, absent any authoritative precedents from courts and, at least a detailed analysis in legal literature, it is unclear whether a German court would also apply Article 9 of the Rome I Regulation and, if so, in which way the court would resolve the conflict between section 340 of the Insolvency Code on the one hand and the direct application of overriding mandatory provisions of German law under Article 9 of the Rome I Regulation on the other hand.

There is no similar conflict of laws provision in the Resolution Act. However, Article 25 of the Winding-Up Directive as amended by the EU Bank Recovery and Resolution Directive clarifies that without prejudice to Articles 68 and 71 of the EU Bank Recovery and Resolution Directive netting agreements are to be governed solely by the law of the contract which governs such agreements (Article 25 of the Winding-Up Directive has been implemented in Germany by section 340 para 2 of the Insolvency Code but section 340 of the Insolvency Code has not been amended following the amendment of Article 25 of the Winding-Up Directive). We understand and construe the reference to Articles 68 and 71 of the Winding-Up Directive to allow for the exclusion of certain contractual rights and the suspension of termination rights irrespective of the law governing the relevant netting agreement and thus as a special conflict of laws provisions. We do not express any opinion as to whether the complete implementation of Article 25 of the Winding-Up Directive will lead to further changes of German law or whether the German legislator considers that Article 25 of the Winding-Up Directive has already been fully implemented.

Under German law, the termination restrictions under section 144 of the Resolution Act are considered to qualify as overriding mandatory provisions within the meaning of Article 9 para 1 of the Rome I Regulation. Thus, a German court would generally have to recognise the termination restrictions, irrespective of the law governing the transactions (Article 9 para 2 of the Rome I Regulation). However, to the extent bound by the Rome I Regulation, a court outside Germany would have to consider applying such termination restrictions only if the obligations arising out of the transactions had to be or have been performed in Germany (Article 9 para 3 of the Rome I Regulation). In such case, effect may be given to the overriding mandatory provisions of German law, in so far as those overriding mandatory provisions render the performance of the contract unlawful. The fact that the termination restrictions under section 144 of the Resolution Act are from a German law perspective overriding mandatory provisions within the meaning of Article 9 para 1 of the Rome I Regulation, would not require a court outside Germany to apply the termination restrictions if obligations arising out of the transactions were not to be performed in Germany.

We are not aware of any guidance from BaFin, the ECB or the Resolution Authority or court precedents on the Bank Reorganisation Act, the Resolution Act and the aforementioned provisions of the Banking Act.

(e) *Opinion on whether the German insolvency law provides for a "safe harbour" for certain derivatives or other categories of transactions and whether the contract types listed in Appendix C would benefit from such provision(s).*

We understand that the term "safe harbour" refers to a provision pursuant to which the opening of an Insolvency Proceeding would not affect the enforceability of claims under the relevant transaction. Such provisions do not exist under German law. However, section 104 of the Insolvency Code provides for an exception to the Insolvency Representative's Selection Right (please see Paragraph 5.1.1(i)(ii) on page 68). Most of the contract types listed in the Appendix C would benefit from such exception (see in more detail Paragraph 5.1.1(i)(iii) on page 75).

German substantive insolvency law does not provide for an exception from the statutory provisions of challenging in insolvency (see Paragraph 5.1.1(c) on page 21 above).

(f) *Opinion on whether there is publicly available information that would confirm any of the procedural steps mentioned above under (a) through (d) or other solvency related facts (e.g., financial statements, corporate actions, etc.).*

Pursuant to section 9 para. 2 sent. 2 of the Insolvency Code in connection with section 2 of the Regulation on Public Announcements in Insolvency Proceedings via Internet (*Verordnung zu öffentlichen Bekanntmachungen in Insolvenzverfahren im Internet*), several procedural steps, including the court order on the opening of Insolvency Proceedings (*Eröffnungsbeschluss*) or the decision by a court not to open Insolvency Proceedings due to insufficient funds (*mangels Masse*) have to be published on the internet by the insolvency court. The relevant website is www.insolvenzbekanntmachungen.de. This website is updated several times a day. Thus, depending on the time when the opening of the Insolvency Proceeding is ordered, the announcement may be made on the same day or the day after the announcement. Additional publications may be made in print media.[69]

The filing for insolvency may also be made public by the relevant company itself. There is no general obligation on behalf of the insolvent party to publish the fact that it has submitted an insolvency filing. However, if a company qualifies as a domestic issuer (*Inlandsemittent*, as defined in section 2 para. 7 of the German Securities Trading Act (*Wertpapierhandelsgesetz*) and has issued financial instruments which are admitted for trading on a German exchange, such company is subject to the *ad hoc* requirements provided for in the Securities Trading Act (section 15 of the Securities Trading Act). The *ad hoc* requirement applies to all information which, *inter alia*, is not known to the public and may, if it becomes public, have a significant effect on the price of the relevant financial instrument. Thus, the filing for the opening of an Insolvency Proceeding and the insolvency court's order on the commencement of an Insolvency Proceeding is likely subject to the *ad hoc* publication requirement. An *ad hoc* publication has to be made without undue delay (*unverzüglich*).

In case of an insolvency filing by the BaFin with respect to a credit institution, a financial services institution or an insurance company, the filing for insolvency is likely to be published on the BaFin's website (www.bafin.de).

In case of an Insolvency Proceeding over the assets of a CRR Credit Institution, the announcement of an Insolvency Proceeding is also published in the Official Journal of the EU and two nationwide

---

[69] The information as published under www.insolvenzbekanntmachungen.de must also be published in the company register (*Unternehmensregister*) pursuant to section 8b para. 2 no. 11 of the German Commercial Code and is accessible via the electronic Federal Gazette (*elektronischer Bundesanzeiger*) under www.unternehmensregister.de.

newspapers (section 46e para. 3 sent. 2 of the Banking Act). In case of an Insolvency Proceeding over the assets of a German insurance company, the announcement of an Insolvency Proceeding is also published in the Official Journal of the EU (section 88 para. 3 sent. 3 of the Insurance Supervisory Act).

(g) *A general description of limitations in German law, if any, applicable to set off of claims (both in an Early Termination scenario and otherwise).*

Before analysing whether German laws consider early termination, set-off and close-out netting as legally distinct and separate or similar rights (please see 5.1.1(h) on page 62) we provide you with an overview of set-off under German law.

(i) *Set-off and "close-out netting"*

Under German statutory law, set-off (*Aufrechnung*) is understood as the mutual discharge of two corresponding obligations of the same nature. The rules relating to set off are contained in sections 387 *et seqq.* of the German Civil Code. According to this provision, a party that demands payment – or of whom payment is demanded – is entitled to unilaterally declare that the debt is extinguished by a set-off provided that the legally defined set-off requirements are met. Set off requires that (i) both parties have claims against each other (mutuality - *Gegenseitigkeit*), (ii) such claims are of similar nature (similarity - *Gleichartigkeit*), (iii) the claim against which set-off is to be effected is valid, due and enforceable (*Wirksamkeit, Fälligkeit und Durchsetzbarkeit der Gegenforderung*) and (iv) the other claim (against which set-off is to be effected) can be fulfilled (*Erfüllbarkeit der Hauptforderung*). Pursuant to section 388 para. 1 of the German Civil Code, a set-off right is exercised by giving notice of set-off to the other party (*Aufrechnungserklärung*). The right to set-off may only be exercised if set-off is neither excluded by law[70] nor by agreement.[71]

The concept of "close-out netting" is distinct from the statutory concept of set-off as the corresponding obligations that are normally subject to close-out netting are neither of the same nature nor due at the same time. However, pursuant to the principles of contractual freedom and party autonomy, contractual set-off agreements (*Aufrechnungsvertrag* or *Aufrechnungsvereinbarung*) are permissible. To the extent that the arrangements do not conflict with mandatory provisions of German law, the parties are allowed to deviate from the statutory requirements for set-off (such as the requirement that the claim with which set-off is to be effected is due and payable) by agreement. Such an agreement can modify the requirements for set-off or extend the right to set off (for example, by enabling the party to set off against a claim of a third party).[72] Pursuant to section 94 of the Insolvency Code and subject to the challenging of transactions in Insolvency Proceedings, such a contractual agreement concerning set-off is generally enforceable, even in case of the insolvency of either or both parties. However, there is a view supporting a narrow interpretation of section 94 of the Insolvency Code to restrict the scope of permissible agreements concerning set-off in case of insolvency with a view to ensure an appropriate equal treatment of all creditors.[73]

---

70 There are several instances where the law prohibits a party to set off, for example, if an obligation arises from a claim for compensation for an intentional tort (section 393 of the German Civil Code) or if one of the claims is not capable of being subject to attachment (section 394 of the German Civil Code).

71 For an overview see *Schlüter* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 6th ed. (2012), § 387 nos. 56 *et seq*.

72 We do not give an opinion on German corporate law where, in specific cases, statutory restrictions on set-off apply (sections 19 of the Act on Limited Liability Companies and section 66 of the Stock Corporation Act) which restrict the right of a shareholder or partner to set off against its obligation to provide equity contributions). Set-off is generally subject to restrictions in specific circumstances pursuant to sections 392 *et seq*. of the German Civil Code, i.e. in case of confiscated claims, claims due to an intentionally committed tort and unpledgeable claims.

73 *Schwahn*, NJW 2005, 473, 474.

(ii) *Limitations on contractual set-off arrangements*

Limitations on contractual set-off arrangements apply to agreements which deviate from the requirement of mutuality of the claims. For example, in 2004, the BGH decided that section 96 para. 1 no. 2 of the Insolvency Code applies to agreements which provide for the right to set off claims of an affiliated company by another company against the claims of a third party (*Konzernverrechnungsklausel*).[74] The BGH therein took the view that after the opening of Insolvency Proceedings, a set-off with claims not owned by the offsetting party but by its affiliate is ineffective. This applies even if such "tri-party" set-off had been agreed upon by the three parties involved before the opening of Insolvency Proceedings as in the specific case the set-off declaration had been made only after the opening of Insolvency Proceedings and, accordingly, the preconditions of section 94 of the Insolvency Code had not been met.[75]

Typically, the mutuality that is required for set-off in liquidation does not exist in cross affiliate set-off and, as such, cross affiliate netting may not work in insolvency. The Set-Off Provision in Section 4 of the CPMA and the Netting Provision in § 8 of the MNA only apply to netting and set-off between the Parties.

However, statutory provisions may limit or prohibit set-off with respect to certain entities, including, for example, insurance companies and investment management companies:[76]

(1) Insurance companies

With respect to insurance companies, section 77 para. 2 sent. 2 of the Insurance Supervisory Act limits the possibility of set-off against claims belonging to the

---

74 BGH NJW 2004, 3185.

75 With respect to "tri-party" set-off, the BGH argued in its judgment that the situation entitling to a set-off (*Aufrechnungslage*) which is protected by section 94 of the Insolvency Code does not come into existence prior to the declaration of set-off.

76 Please also refer to paragraph 5.1.12 on page 159.

"cover assets" (*Sicherungsvermögen*) of an insurance company.[77]

(2) Investment management companies

Pursuant to section 93 para. 6 sentence 1 of the Capital Investment Code, claims against the investment management company and claims which belong to the assets of a fund may not be set off against each other. This prohibition is framed broadly and should therefore apply to any set-off or netting agreements.

Pursuant to section 93 para. 6 sentence 2 Capital Investment Code the prohibition of set-off does not apply[78] to master agreements or transactions pursuant to

---

[77] Pursuant to the legislative reasoning of section 77 para. 2 sent. 2 of the Insurance Supervisory Act, this provision primarily intends to prevent a reinsurance company from setting off its claims vis-à-vis a direct insurance company (*Erstversicherer*) vis-à-vis the claims such insurance company has against the reinsurance company, as such set-off which would result in a decrease of the assets from which the direct insurance company could satisfy claims of the insurance holders (BT-Drucksache 16/6518, 18). However, the scope of application of section 77 para. 2 sent. 2 of the Insurance Supervisory Act is not limited to claims of a reinsurance company against a direct insurance company.

[78] Under German statutory law, set-off is restricted in an insolvency scenario if the claims to be set off are not mutual. While when entering into a master agreement, the investment management company is the debtor of contractual claims thereunder (section 93 para 2 of the Capital Investment Code), the claims arising out of the master agreement may either be claims of the investment management company acting as trustee for the investors which are beneficial owners if the fund is established in the form of a trust structure (*Treuhandstruktur*), in which case mutuality would be questionable or the claims arising out of the master agreement may be claims in the joint ownership of the investors in the fund if the fund is established in the form of joint ownership of its investors (*Miteigentumsstruktur*), in which case mutuality would not be given.

In our view, however, the explicit exemption from the prohibition of set-off contained in the German Capital Investment Code should be construed to prevail over the limitations of set-off arising out of the legal form of a Fund as described above and this should also overcome missing mutuality under civil law aspects (*Anders,* in: Weitnauer/Boxberger/Anders, KAGB, § 93 no. 15 *et seq*., *Nietsch,* in: Emde/Dornseifer/Dreibusch/Hölscher, Investmentgesetz, section 31 no. 50 *et seq*.). This is supported by the reasoning to the German Investment Act (*Kapitalanlagegesetz*, a predecessor of the Capital Investment Code) as the German legislator has explicitly mentioned that the provision shall enable the valid conclusion of close-out netting arrangements in BT-Drucksache 14/8601 (21 March 2002), S. 21, when implementing section 9 para. 6 sentence 2 of the Investment Act in the course of the Fourth Financial Markets Enhancement Act, and in BT-Drucksache 1/8933 (6 November 1997), S. 105, with respect to section 8e of the Investment Act. In our view, this reasoning applies accordingly to section 93 para 6 sentence 2 Capital Investment Code as the provision has been adopted in the Capital Investment Code without major change sections 197 para. 1 no 1, 200, and 203 Capital Investment Code or which have been concluded with prime brokers for which it has been agreed that the claims arsing from these transactions or master agreements which have been concluded for the account of a fund shall be netted automatically or upon the declaration of a party or that they shall be replaced by a single compensation claim in the event of the termination as a result of non-performance or insolvency. However, the scope of application of section 197 para. 1 no. 1 of the Capital Investment Code is expressly limited to derivatives which are not traded on an exchange or another organised market.[79]

Generally, the German courts have taken the view that violations of regulatory law do not render contractual agreements void.[80] Where provisions of regulatory law serve the protection of the interests of a certain counterparty, such counterparty may, however, be entitled to claim damages in tort in order to be put in the position it would be in, if no violation of regulatory law had occurred.[81]

The restrictions laid down under section 93 para. 6 of the Capital Investment Code may be applicable despite the choice of non German law to govern the Master Agreements and the Netted Agreements, if a German court qualifies section 93 para. 6 of the Capital

---

and without further reasoning. We are not aware of any court decision in this respect and a court may take a different view.

79 Section 197 para 3 no. 3 of the German Capital Investment Code should arguably be construed broadly to apply to exchange traded derivatives as well. Sections 31 para. 6 of the former German Investment Act (*Investmentgesetz*) and 9 para. 6 of the Investment Act which preceded section 197 para. 3 no 3 of the Capital Investment Code was enacted primarily to clarify that netting agreements in standardised master agreements are permissible but not to establish a different treatment of OTC and exchange traded derivatives (see BT-Drucksache 14/8601, S. 21). However, *Möllers*, BKR 2011, 353, 358 *et seq.* proposes a restrictive interpretation of section 9 para 6 InvG.

80 BGH NJW 2011, 3024, 3025; BGH NJW 1980, 1394; BGH WM 1978, 785.

81 BGH NJW 2005, 2703 *et seq.*; BGH NJW-RR 2006, 1713 *et seq.*

Investment Code to constitute an overriding mandatory provision within the meaning of Article 9 para 1 of the Rome I Regulation. Since Article 9 para 2 of the Rome I Regulation provides that nothing in the Rome I Regulation restricts the application of the overriding mandatory provisions of German law section 93 para. 6 of the Capital Investment Code would be applicable to the Master Agreements and the Netted Agreements based on an interpretation of 93 para. 6 of the Capital Investment Code as an overriding mandatory provision.

(h) *Opinion on whether German laws consider early termination, set-off and close-out netting as legally distinct and separate or similar rights, similar or related rights or whether they make no such distinctions between them.*

Under German law, "netting" technically does not constitute a legal term referring to a specific and clearly defined legal concept. Instead, the term "netting" may denote a variety of legal concepts such as payment or payment netting,[82] netting by novation (*Schuldersetzung*), and close-out netting (*Liquidations-Netting*).[83]

In the context of master agreements for derivative transactions, the legal concept that is most relevant under German law is "close-out netting" which provides for a method of reducing the parties' exposure by terminating outstanding transactions, calculating their values and determining compensation payments for all outstanding transactions that are subsequently netted against each other. This concept is distinct from the statutory concept of set-off (see Paragraph 5.1.1(g) on page 57) as the corresponding obligations that may be subject to close-out netting do neither need to be of the same nature nor to fall due at the same time. Rather, the parties contract to deviate from the statutory requirements for set-off, subject to certain restrictions due to

[82] Under German law, the immediate automatic netting of claims booked into a bank account qualifies as equated current account (*Staffelkontokorrent*).

[83] For an overview please refer to: European Financial Markets Lawyers Group, Protection for Bilateral Insolvency Set-off and Netting Agreements under EC Law, October 2004, Annex 6, 75.

mandatory provisions of German law (please see Paragraph 5.1.1(g) on page 57).

(i) *Assuming the Parties have <u>not</u> specified that Automatic Termination (as defined in § 6.3 of the MNA or Part II.B of the Commodities Schedule) applies, are the provisions of the Master Agreements permitting the other Party (the* ***"Terminating Party"*** *or* ***"Closing-Out Party"****) to terminate the Netted Agreements including all Individual Contracts upon the occurrence of a Close-Out Event enforceable under the laws of Germany or is there a risk that (i) the entering into Master Agreements, (ii) the entering into Netted Agreements or Individual Contracts thereunder or (iii) the early termination by notice described in § 5.1 of the MNA or Section 2.2 of the CPMA itself could be challenged by a liquidator, administrator, receiver or third party?*

(i) *Enforceability of the termination rights under the Master Agreements prior to the commencement of Insolvency Proceedings*

Prior to the commencement of Insolvency Proceedings, the law applicable for termination under the Master Agreements depends on the law governing the relevant Master Agreement. We do not opine on the enforceability of the early termination of the Netted Agreements and whether or not the Netted Agreements are validly amended by the Master Agreements as this is a matter to be verified under the terms of the relevant Netted Agreements.

(1) Enforceability of the termination rights if the Master Agreements are governed by a law other than German law

From a German law perspective, pursuant to Article 12 para. 1 of the Rome I Regulation, the law applicable to a contract is generally decisive for its interpretation, the performance of the obligations created by it, within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law, the various kinds of extinguishing obligations, and prescription and limitation of actions and the consequences of the nullity of the contract.

Pursuant to Article 12 para. 1 (d) of the Rome I Regulation and to the extent the Rome I Regulation applies, the validity of the termination of a transaction, which is not governed by German law, is determined under the law that governs such transaction. To the extent the termination is valid under the law governing the Master Agreements, for example, English law, German law recognises the validity of such contractual early termination.

(2) Enforceability of the termination rights if the Master Agreements are governed by German law

(A) Termination rights under the single agreement concept

According to the single agreement concept contained in § 2.3 of the MNA and, if selected, in Part VIII Section 10.6 of the Commodities Schedule, in the CPMA, all Netted Agreements and Individual Contracts entered into under the relevant Master Agreement are governed by the terms of the Master Agreement, and the Master Agreement, all Netted Agreements and Individual Contracts form a single agreement between the parties. Based on the agreement between the Parties that the terms of the Master Agreement prevail, the afore-mentioned termination rights also apply to each of the Netted Agreements and each of the Individual Contracts.

(B) Close Out Events under § 3 of the MNA[84] and Section 2.1 of the CPMA[85] and termination for serious cause under section 314 para. 1 of the German Civil Code.

If the Master Agreements are governed by German law, the Master Agreements may generally be terminated upon the occurrence of a serious cause (*wichtiger Grund*). Generally, section 314 para. 1 of the German Civil Code provides for the termination of a contract for the performance of a continuing obligation on notice with immediate effect upon a serious cause. Serious cause exists if, after having regard to all circumstances of the specific case and balancing the interests of both parties, the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed termination date or until the end of a notice period. Serious cause might consist in the infringement of a duty under the contract or a material change of circumstances.

Under the principles of contractual freedom and party autonomy, the parties to an agreement may agree on termination rights which specify or supplement the statutory termination rights for serious cause. Parties to an agreement may specify individual events giving rise to a

---

84 § 3.1 of the MNA and the Election Sheet permit the Parties to identify and customize those events, the occurrence of which would permit the early termination and close out of the MNA, the Netted Agreements and the Individual Contracts entered into thereunder.

85 Pursuant to Section 2.1 of the CPMA, any event that would result in the close out of a Netted Agreement becomes a contractual basis for the party entitled to close out that Netted Agreement and to close out all (but not fewer than all) other Netted Agreements that, in that party's good faith judgment, may legally be closed out. In addition, a party's breach of a representation, warranty or covenant under the CPMA itself will entitle the other party to close out all (but not fewer than all) Netted Agreements that may be legally closed out.

termination right for serious cause by individual agreement (*Individualvereinbarung*).[86]

Therefore, the events specified as a Close Out Event in § 3.1 MNA or in Section 2.1 of the CPMA are construed as an agreement between the parties that such events qualify as a serious cause for purposes of section 314 para. 1 of the German Civil Code.[87]

In case of a provision such as § 3.1 MNA or in Section 2.1 of the CPMA, in which the parties agree on a specific set of termination events which shall give rise to an early termination without any notice period, the terminating party only needs to prove the relevant facts giving rise to such termination event. No proof as to whether such termination event would actually qualify as serious cause needs to be given by the terminating party since the parties have agreed already that such event qualifies as serious cause. In such case, the other party would explicitly have to establish that despite of the occurrence of such event which both parties explicitly agreed to qualify serious cause, it is not unreasonable to continue the contractual relationship.[88]

---

86 BGH NJW-RR 1988, 1331, 1332.

87 Such enumeration would, however, not be capable of being construed as a conclusive enumeration of all events which may qualify as a serious cause under section 314 para. 1 of the German Civil Code because this would (a) then imply a contractual limitation of the right to terminate for serious cause and (b) limitation of the termination right for serious cause by standard terms and conditions would not be binding (BGH ZIP 1986, 919, 920). Furthermore, even by individual agreement the parties cannot entirely waive the termination right for serious cause (BGH BB 1973, 819).

88 Generally it depends on the individual circumstances whether an event constitutes a serious cause pursuant to section 314 para. 1 of the German Civil Code and has to be determined on a case-by-case basis. Absent any contractual agreement between the parties to a contract, the terminating parties would have to prove the existence of the facts that give rise to a serious cause and would also have to demonstrate that in balancing the interests of both parties it cannot reasonably be expected to continue the contractual relationship in case

According to German court precedents, termination rights may not be exercised at an inappropriate point in time (*Kündigung zur Unzeit*), i.e. the terminating party must consider prior to any termination whether the point in time when the termination right is exercised would impose an additional significant burden on the other party to the contract that could be prevented by taking less severe steps.[89] Whether the point in time when the relevant Master Agreement, the Netted Agreements and all Individual Contracts entered into thereunder are terminated may be regarded as inappropriate depends on the specific circumstances of the individual case. The party raising such defence against a termination right would have to give conclusive evidence that its particular interest to reject the termination and continue the agreement is to be considered more justified than the interest of the terminating party to terminate the relevant Master Agreement, the Netted Agreements and all Individual Contracts entered into thereunder *i.e.* that the other party has used its contractual right in an abusive manner (*rechtsmißbräuchlich*).

(3) Where a valid and enforceable Netted Agreement covered by the MNA or CPMA is governed by a law other than the law governing the relevant Master Agreement, a termination triggered by such Master

of a dispute over the validity of a termination pursuant to section 314 para. 1 of the German Civil Code. Where an event is contractually agreed to constitute "serious cause", the burden of proof as described would be on the non-terminating party.

89 LG Frankenthal ZIP 2006, 752; Schleswig Holsteinisches OLG, 3 May 2010 (5 U 29/10); OLG München BB 1997, 435, 436; OLG Frankfurt WM 1992, 1018; BGH WM 1985, 1136; BGH DB 1959, 594. Whereas most courts have rejected the defence that a termination was exercised at an inappropriate point in time, LG Frankenthal considered the termination of a loan ineffective as the termination right was exercised by the terminating party "out of the blue" (*aus heiterem Himmel*) without considering less severe steps.

Agreement could be effected under the governing law of the relevant Master Agreement if the laws governing the Netted Agreement recognise the termination under the Master Agreement (for example, pursuant to Article 3 paras. 1 and 2, Article 12 para. 1 of the Rome I Regulation, if applicable).[90] If applicable, pursuant to Article 3 para.1 of the Rome I Regulation, the parties are free to choose the law governing their legal relationship including selecting different jurisdictions to govern the relevant agreements. According to Article 3 para. 2 of the Rome I Regulation the parties may furthermore agree any time to govern a Netted Agreement by a law other than that which previously governed the Netted Agreement.

(ii) *Enforceability of contractual Early Termination rights in case of insolvency*

Under the Insolvency Code, following the opening of Insolvency Proceedings, executory contracts[91] which have not been effectively terminated prior to such opening of Insolvency Proceedings are, pursuant to section 103 of the Insolvency Code, subject to the Insolvency Representative's Selection Right.[92] An English translation of section 103 of the Insolvency Code reads as follows:

"Section 103

---

90 *Martiny*, in: Münchener Kommentar zum BGB, Vol. 5, 6th ed. (2015) Rom I-VO no. 70.

91 Executory contracts are mutual contracts (*gegenseitige Verträge*) which have not, or not (yet) fully, been performed (*nicht oder nicht vollständig erfüllt*) by either party.

92 The opening of Insolvency Proceedings does not lead to the termination of the contractual obligation to perform. Rather, the opening of Insolvency Proceedings only affects the enforceability of the respective claims since both parties to a contract may raise the objection of non-performance of a contract (BGH ZIP 2002, 1093, 1095). Therefore, neither the opening of Insolvency Proceedings nor the decision of the Insolvency Representative result directly in a termination of the contractual agreement.

Option to be Exercised by the Insolvency Representative

(1) If a mutual contract was not or not fully performed by either the debtor and the other party at the date when the insolvency proceedings were opened, the insolvency representative may perform such contract in place of the debtor and claim performance by the other party.

(2) If the insolvency representative refuses to perform such contract the other party is entitled to a claim for non-performance only as a creditor in the insolvency proceedings. If the other party requires the insolvency representative to decide whether he chooses performance or non-performance, the insolvency representative shall state his intention to claim performance without undue delay. If the insolvency representative does not give his statement he may no longer insist on performance."

Under section 103 of the Insolvency Code, the Insolvency Representative has the power to exercise its Selection Right, i.e. to refuse performance of unprofitable contracts and to enforce profitable ones. In the event that the Insolvency Representative refuses to perform, the contracts are terminated and the Solvent Party may assert claims arising from non-performance. Such claims rank *pari passu* with the claims of all other unsecured creditors. Section 119 of the Insolvency Code provides that agreements excluding or limiting the application of sections 103 to 118 of the Insolvency Code in advance are invalid and therefore protects the Insolvency Representative's Selection Right (see further below).

Section 104 of the Insolvency Code provides for two major exceptions to this principle. One exception relates to outstanding contracts on the sale of tangible goods where the obligations must be fulfilled by a particular date as otherwise their fulfilment becomes worthless for the purposes of the receiving party (fixed date transactions, *Fixgeschäfte*) (section 104 para. 1 of the Insolvency Code; see Paragraph 5.1.1(i)(iii)(3)(B) on page 78) and the other relates to financial transactions within the meaning of section 104 para. 2 of the Insolvency Code. To the extent that section 104 of the Insolvency Code applies, it overrides the Insolvency Representative's Selection Right under section 103 of the Insolvency Code and therefore there is no need to protect the Selection Right under section 119 Insolvency Code, even in cases where an insolvency-related termination right has been exercised.

The Selection Right of the Insolvency Representative pursuant to section 103 of the Insolvency Code is protected by section 119 of the Insolvency Code which provides that agreements excluding or limiting the application of sections 103 to 118 in advance are invalid. Section 119 of the Insolvency Code only applies after the opening of Insolvency Proceedings. However, as already mentioned in Paragraph 5.1.1(d)(i)(1) on page 27 *et seqq.*, based on the purpose of such section to protect the rights under sections 103 to 118 of the Insolvency Code, according to the BGH[93] such provision applies to situations created prior to the opening of Insolvency Proceedings from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected *(mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*). The validity of contractually stipulated termination rights that are based on insolvency related events therefore depends on whether or not the respective agreement constitutes an exclusion or limitation of the application of the mandatory insolvency provisions regarding executory contracts.

---

93 BGH WM 2013, 274.

By way of background, it is disputed amongst German legal authors whether and to what extent German insolvency law prohibits contractually stipulated termination rights based on insolvency related events. The early termination indirectly prevents the Insolvency Representative from exercising its Selection Right under section 103 of the Insolvency Code to disclaim or enforce outstanding Individual Contracts and may therefore be regarded as a circumvention of mandatory insolvency provisions regarding executory contracts. The majority of German insolvency law commentators[94] advocate a narrow application of sections 103 and 104 of the Insolvency Code and, hence, view a contractual right of early termination as very likely to be held valid by a German court provided that it is based on non-insolvency related events or even on a Party's application to commence Insolvency Proceedings against its assets and/or the existence of any material reason for such an application (such as over-indebtedness).[95] A termination right directly based on an

[94] For example: *Wilmowsky,* ZIP 2007, 553, 554 *et seq.*; *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), §104 nos. 163 *et seq.*; *Huber* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 119 nos. 39 *et seq.*; *Huber*, NZI 1998, 97, 99; *Bosch* in: Kölner Schrift zur Insolvenzordnung, 2nd ed. (1999), 1009 *et seq.*; *Wortberg,* ZInsO 2003, 1032 *et seq.*

[95] Legal commentators assume that contractual termination provisions based on insolvency related events should principally be enforceable with respect to several (albeit only persuasive) precedents of the BGH under the former Bankruptcy Code, the predecessor of the Insolvency Code. In a decision (BGH NJW 2006, 915, 917), the BGH held, *inter alia*, that a contractual provision did not violate section 119 of the Insolvency Code in which the parties agreed on a "right of termination for serious cause" (*Kündigungsrecht bei Vorliegen eines wichtigen Grundes*). The parties in that case, however, did not specify in detail the events that would constitute serious cause for the purpose of their agreement. The decision therefore does not constitute an authoritative precedent with regard to the termination right. Both legal authors supporting a restrictive interpretation of section 119 of the Insolvency Code and legal commentators advocating an extensive interpretation reclaim the legislator's intention to support their respective views. The official draft of the Insolvency Code that was published by the German Federal Government (BT-Drucksache 12/2443) contained a provision (section 137 para. 2 sent. 1 of the official draft of the Insolvency Code) pursuant to which contractual agreements on the automatic termination of a contract that was not (or not fully) performed by the parties to the contract upon the opening of Insolvency Proceedings were void. The Committee on Legal Affairs of the German Federal Parliament (*Rechtsausschuss des Deutschen Bundestages*), however, proposed to waive this prohibition. While the Committee on Legal Affairs of the German Federal Parliament conceded that such contractual early termination rights indirectly restrict the

actual opening of Insolvency Proceedings is, however, considered to be legally ineffective.

In its judgment of 15 November 2012[96] the BGH held that an insolvency related termination provision in a contract is invalid, because it would exclude the Selection Right of the Insolvency Representative under section 103 of the Insolvency Code and therefore violate section 119 of the Insolvency Code. Whilst the BGH's judgment related to a contract for the supply of energy we understand that the BGH intends to apply its reasoning to any other agreements as long as an early termination under such agreements will result in the exclusion of an Insolvency Representative's Selection Right.[97]

According to the BGH, insolvency related termination provisions are provisions under which a contract may be terminated upon a stoppage of payment (*Zahlungseinstellung*), the filing for insolvency

---

Insolvency Representative's right to request or reject performance of the contractual obligation, it was the opinion of the Committee on Legal Affairs that this indirect impact on the Insolvency Representative's Selection Right does not justify such a far-reaching restriction of the parties' freedom to contract (*Bericht des Rechtsausschusses des Deutschen Bundestages*, BT-Drucksache 12/7302, 170). The committee's amendment to the official draft was unanimously accepted by the plenum of the German Federal Parliament. Accordingly, proponents of the restrictive interpretation of section 119 of the Insolvency Code emphasise that the legislator rejected an explicit prohibition by adopting the amended version of the act. This intention requires a restrictive interpretation of section 119 of the Insolvency Code (see *Huber* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 119 nos. 39 *et seq.*). On the other hand, the proponents of an extensive interpretation purport that section 137 para. 2 sent. 1 of the official draft of the Insolvency Code did not have a constitutive effect such that its deletion does not have an impact on the scope of application of section 119 of the Insolvency Code (see *Berscheid* in: an earlier edition of the legal commentary: Uhlenbruck, Insolvenzordnung, 12th ed. (2003), § 119 nos. 15 *et seq.*, however, the opposite view is now taken by *Sinz* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 119 nos. 13 et seq.; *Tintelnot* in: Kübler/Prütting/Bork, InsO, 62nd update (2015), § 119 nos. 15 *et seq.*).

[96] BGH WM 2013, 274.

[97] See also *Obermüller*, ZInsO 2013, 476, 480. Also *Huber*, ZIP 2013, 493, 496, emphasises that the BGH has considered the most relevant arguments that have been raised in this context even though this would not have been necessary to render the judgment with respect to the case which was the subject of the decision of 15 November 2012 (BGH WM 2013, 274).

proceedings (*Insolvenzantrag*) or the opening of insolvency proceedings (*Insolvenzeröffnung*).[98] In this judgment the BGH has also decided that section 119 of the Insolvency Code applies from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected.

The BGH argues that insolvency related termination provisions are only upheld if the contractual insolvency related termination right corresponds to a statutory termination right. Whilst the BGH does not refer to section 104 of the Insolvency Code, in our view, section 104 of the Insolvency Code should be regarded as such a corresponding statutory termination right as such provision operates as a statutory termination and close-out netting provision which under any circumstances precludes the Selection Right of the Insolvency Representative under section 103 of the Insolvency Code.[99]

Consequently, in our view, where the relevant agreement or any transactions thereunder fall within the scope of section 104 of the Insolvency Code, an insolvency related termination right should not be regarded as a circumvention of section 103 of the Insolvency Code.

If the Individual Contracts fall within the scope of section 104 of the Insolvency Code but the insolvency related early termination has occurred prior to the opening of Insolvency Proceedings it is not entirely clear whether the interpretation of section 119 of the Insolvency Code set out in the BGH's judgment of 15 November 2012[100] may also affect the results of such

[98] BGH WM 2013, 274.

[99] *Obermüller*, ZinsO 2013, 476.

[100] BGH WM 2013, 274.

early termination and, accordingly, the determination of the Final Net Settlement Amount under the Netting Provisions (§ 8.1 of the MNA) (see Paragraph 3 on page 8). Section 104 of the Insolvency Code which is equally protected by section 119 of the Insolvency Code could be considered a mandatory provision which must not be contracted out either. If such interpretation holds true, the results of a contractual automatic early termination would have to be equal to the results after the application of section 104 of the Insolvency Code in order to be valid. However, there is no explicit statement in the BGH's judgment supporting such a strict interpretation of section 119 of the Insolvency Code. In particular, as section 104 of the Insolvency Code has been designed as a statutory "close-out netting" rule, which in para. 2 sent. 3 explicitly refers to contractual close-out netting in master agreements upon an insolvency related trigger event ("*bei Vorliegen eines Insolvenzgrundes*"), the German legislator has accepted the concept of insolvency related contractual close-out netting generally. Furthermore, whilst the BGH held that section 119 of the Insolvency Code also applies to early termination rights exercised prior to the opening of Insolvency Proceedings, we are of the view that the results of the operation of the Netting Provisions should likely be upheld if they are essentially comparable to the results under section 104 of the Insolvency Code.

To summarise, in our view, section 104 of the Insolvency Code should be regarded as equivalent to a statutory termination right as referred to by the BGH in its judgement of 15 November 2012 excluding the Insolvency Representative's right to "cherry pick".[101] Therefore, parties may agree on an insolvency related termination right if the relevant transactions fall within the scope of section 104 of the Insolvency Code. With respect to the valuation of contracts within the scope of

[101] BGH WM 2013, 274.

section 104 of the Insolvency Code following a termination, it is not entirely clear whether contractually agreed methods of valuation will be recognised but we think the better arguments support the view that they should be.

(iii) *Limitations stipulated by section 104 of the Insolvency Code*

As set out in Paragraph 5.1.1(i)(ii) on pages 68 *et seqq.* above, section 104 of the Insolvency Code is in our view a "corresponding" statutory termination as referred to by the BGH in its judgement of 15 November 2012 and, therefore, Parties may agree on insolvency related termination provisions. As set out in Paragraph 5.1.1(i)(ii) on pages 68 *et seqq.* above, it is unclear whether the BGH would also uphold the valuation method agreed upon by the Parties. However, if a material reason has occurred in relation to a Party and the date for early termination falls after the opening of Insolvency Proceedings, sections 103, 104 of the Insolvency Code would override the Netting Provisions.

Upon the opening of Insolvency Proceedings, section 104 of the Insolvency Code provides for a mandatory automatic termination of those transactions which fall within the scope of section 104 of the Insolvency Code.

If the relevant date for early termination falls after the opening of Insolvency Proceedings, the provisions of section 104 of the Insolvency Code would govern the close-out netting of those transactions which fall within its scope. Section 104 of the Insolvency Code would have no effect on those obligations, which fall outside its scope and the analysis described in Paragraph 5.1.1(i)(ii) on page 68 would apply thereto, i.e. section 103 of the Insolvency Code would apply in relation to executory contracts under under the Master Agreements. Accordingly, the Insolvency Representative may have a right to assume or reject each Individual Contract ("cherry picking").

An English translation of Section 104 of the Insolvency Code[102] reads as follows:

Fixed date transactions, financial transactions

(1) In the event that a particular time or period was agreed upon for delivery of goods with a market or exchange price, and such time occurs or such period lapses after the opening of insolvency proceedings, specific performance may not be demanded, but rather only a claim for non performance may be asserted.

(2) Where a specified time or a specified period has been agreed for the delivery of financial transactions which have a market or listed price, and where this time, or the expiry of this period, is not until after the institution of insolvency proceedings, performance may not be demanded, but rather only damages for non performance may be claimed. Financial transactions shall include in particular:

1. delivery of precious metals,

2. the delivery of securities or comparable rights, except where there is an intention to acquire an interest in another enterprise with the aim of establishing a lasting connection with that enterprise,

3. payments of money which are to be made in a foreign currency or in a unit of account,

4. payments of money the amounts of which are calculated, directly or indirectly by referencing to the exchange rate of a foreign currency or a unit of account, to the interest rate for

[102] In the current version as amended by Article 1 of the Act for the Implementation of the Directive 2002/47/EC of 6 June 2002 on Financial Collateral and on the Amendment of the Mortgage Bank Act and other Acts (*Gesetz zur Umsetzung der Richtlinie 2002/47/EG vom 6. Juni 2002 über Finanzsicherheiten und zur Änderung des Hypothekenbankgesetzes und anderer Gesetze)* dated 5 April 2004 (BGBl. I p. 502).

borrowings or to the price of other goods or services,

5. options and other rights to demand delivery of something or performance of payment obligations within the meaning of sub Paragraphs 1 to 4 above, or

6. financial collateral within the meaning of section 1 para. 17 of the Banking Act.

Where the contracts involving financial transactions are combined in a master agreement for which it has been agreed that, where reasons for the opening of insolvency proceedings exist, it can only be terminated in its entirety, then such contracts are together deemed to form one single mutual agreement within the meaning of sections 103, 104.

(3) The amount of any claim for non performance is the difference between the agreed price and such market or exchange prices, applicable at the place of performance to an agreement with the stipulated time for performance on the date agreed between the parties, but no later than the fifth working day after the opening of insolvency proceedings. In the absence of an agreement between the parties, the second working day after the opening of insolvency proceedings shall apply. The other party may assert its claim only as an insolvency creditor."

(A) Overview

In replacing section 18 of the former Bankruptcy Code (*Konkursordnung*), section 104 para. 1 of the Insolvency Code applies to fixed date transactions (*Fixgeschäfte*) for tangible goods only. Para. 2 of section 104 of the Insolvency Code applies to financial transactions; sent. 3 of para. 2 is intended to ensure that all transactions entered into under a master agreement may be terminated at the same time; (see Paragraph 5.1.1(i)(iii)(3)(D) on page 84). Finally, para. 3 of section 104 of the Insolvency Code provides for the calculation method following the early termination of transactions by section 104 of the Insolvency Code.

Any automatic termination by virtue of section 104 of the Insolvency Code results in a claim for non-performance calculated on the basis of the difference between the agreed price and the market or exchange prices. The parties may agree on the point in time which is decisive for determining the relevant market or exchange prices; such date may not exceed five working days after the opening of Insolvency Proceedings. The claim for non-performance would, irrespective of the law governing the relevant transaction or agreement, be governed by German law and to the extent unsecured, it would rank *pari passu* with the claims of all other unsecured creditors. The claim for non-performance will be expressed in Euro and may be available for set off.[103]

(B) Fixed date transactions (Fixgeschäfte)

Section 104 para. 1 of the Insolvency Code applies to fixed date transactions (*Fixgeschäfte*) on tangible goods with a market or exchange price only. Whether or not an Individual Contract qualifies as a fixed date transaction depends on the individual terms of such contract. If the individual contract qualifies as fixed date transaction, it will be terminated

[103] Please note that section 104 para. 3 of the Insolvency Code does not provide for a set-off but may, by transforming the former payment and delivery claims into a Euro denominated payment claim, form a basis for set-off (subject to the general set off restrictions under contract and insolvency law, as applicable).

automatically by virtue of section 104 para. 1 of the Insolvency Code.[104]

(C) Financial transactions within the meaning of section 104 para. 2 of the Insolvency Code

Section 104 para. 2 of the Insolvency Code applies to financial transactions as defined in section 104 para. 2 sent. 2 of the Insolvency Code. As section 104 of the Insolvency Code is a special rule to section 103 of the Insolvency Code, to qualify as a "financial transaction" pursuant to section 104 para. 2 of the Insolvency Code, a transaction must also be an "executory" contract (as defined in footnote 90 above). However, an exception from this rule applies to transactions which have been entered into under a master agreement (see Paragraph 5.1.1(i)(iii)(3)(D) on page 84 below). In addition, as section 104 of the Insolvency Code is a special rule to section 103 of the Insolvency Code, to qualify as a financial transaction, the relevant agreement must be mutual and must provide for a specific time at which or period of time in which the performance has to be made.[105] Furthermore, the transaction needs to have a

[104] For further information on fixed date transactions please refer to our "Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements, and Other Related Issues, under the EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, dated 4 November 2013", on page 63 *et seq.*

[105] Section 104 para. 2 sent. 1 of the Insolvency Code requires that the transaction is due to be performed at a certain time or within a certain period of time. This is broader than the fixed date requirement in section 104 para. 1 of the Insolvency Code (*Lüer* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 104 no. 18). At the same time, undated transactions (e.g. transactions which are due upon the giving of notice or transactions with an undetermined period of time) are outside the scope of application of section 104 para. 2 of the Insolvency Code.

market or exchange price.[106] This is the case if a replacement transaction on equivalent terms can be entered into even if the price quotations for the entering of such replacement transaction vary. If the price of a transaction can be determined by (indirectly) referring to an objective price, the transaction is considered to have a market or exchange price within the meaning of section 104 of the Insolvency Code.[107] Where a transaction falls within the scope of section 104 para. 1 of the Insolvency Code, section 104 para. 2 of the Insolvency Code will not apply.[108]

According to the majority of German legal authors[109] section 104 para. 2 of the Insolvency Code also applies to spot transactions (*Kassageschäfte*). We are not aware of any court decisions on this matter. Spot transactions are transactions with short term delivery respectively fulfilment dates which are not entered into at a futures or forward market. The participants in a spot transaction agree to buy and sell, respectively, at the present market value and to settle the transaction a few days later (usually few more or even less than two

---

106 According to the reasoning of the German legislator (see Bericht des Rechtsausschusses, BT-Drucksache 12/7302, 168), the term "market or exchange price" within the meaning of section 104 para. 2 sent. 1 of the Insolvency Code is to be construed broadly.

107 *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 57.

108 *Lüer* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 104 no. 3.

109 *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 88; *Jahn* in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4th ed. (2011), § 114 no. 140; *Wegener* in: Frankfurter Kommentar zur Insolvenzordnung, 8th ed. (2015), § 104 no. 21; *Bosch*, Kölner Schrift zur Insolvenzordnung, 2nd ed. (2009), 1027 no. 72; as regards an opposite view: *Meyer* in: Smid, Insolvenzordnung, 2nd ed. (2001), § 104 no. 11.

business days[110]). Spot transactions, however, have to be distinguished from mere cash transactions (*Bargeschäfte*) which are settled same-day and not covered by section 104 para. 2 of the Insolvency Code. As the official heading of section 104 of the Insolvency Code changed from originally "financial futures transactions" (*Finanztermingeschäfte*) to "financial transactions" (*Finanzleistungen*), it is the prevailing view that spot transactions which are settled in two or more days may fall under section 104 para. 2 of the Insolvency Code.[111]

Section 104 para. 2 sent. 2 of the Insolvency Code provides examples of financial transactions by referring to obligations owed under the relevant transaction. Please refer to the

---

[110] BGH NJW 2002, 892, 892; *Bosch*, Kölner Schrift zur Insolvenzordnung, 2nd ed. (2009), 1027 no. 72. The term spot transaction is also defined in Article 38 para. 2 of Regulation 1287/2006 implementing Directive 2004/39/EC defining a spot contract for the purposes of paragraph 1 as a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

(a) two trading days;

(b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

[111] First, it is argued, that there may be a risk of loss in between signing of a contract and settlement due to market movements similar to forward transactions covered by section 104 para. 2 of the Insolvency Code. Secondly, the wording of section 104 para. 2 of the Insolvency Code only provides for a "specified time or a specified period (has been) agreed for the performance of financial transactions", i.e. requires a specified period or time to be agreed for performance of the obligations does, however, not stipulate a minimum period and therefore only excludes cash transactions. Thirdly, it is argued, that section 104 para. 1 of the Insolvency Code regarding fixed date transactions does not differentiate between forward fixed date transactions and spot fixed date transactions. Finally, it is argued that legislative materials do not reveal any intention of excluding spot transactions from section 104 para. 2 of the Insolvency Code as the provision in general should cover commercial transactions of the financial market. For more details please refer to: *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 nos. 88 *et seq*; *Jahn* in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4th ed. (2011), § 114 no. 140; *Wegener* in: Frankfurter Kommentar zur Insolvenzordnung, 8th ed. (2015), § 104 no. 23; Bosch, Kölner Schrift zur Insolvenzordnung, 2nd ed. (2009), 1027 no. 72; as regards an opposite view: *Meyer* in: Smid, Insolvenzordnung, 2nd ed. (2001), § 104 no. 11.

Annex to this Opinion with respect to specific transaction types. According to the wording of section 104 para. 2 sent. 2 of the Insolvency Code, the enumeration of covered financial transactions is not conclusive (indicated by the words "in particular"). [112] However, if these enumerations were interpreted as mere examples, the scope of section 104 para. 2 of the Insolvency Code could become limitless and the enumerated examples would be arbitrary and unhelpful.[113] The wording of section 104 para. 2 sent. 2 of the Insolvency Code does not provide for any further guidance on how broadly such provision can be construed with respect to any covered financial transactions not explicitly enumerated. Whilst other German legal provisions relating to forwards, futures and options define their scope on the basis of certain elements or building blocks (for example, section 1 para. 11 of the Banking Act) which could be applied to any instruments developed after such provision entered into force, section 104 para. 2 sent. 2 of the Insolvency Code does not follow such modular approach.

As a further consequence of such different approach there is not much value in analysing other German legal provisions to define the scope of section 104 para. 2 of the Insolvency Code. The legislative material, however, shows clearly that the words "in particular" were intended to address any future developments

[112] *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 59.

[113] With respect to generally applicable limitations on the interpretation of general provisions and enumerations intended as statutory examples, see: BGH GRUR 2001, 1181, 1183; *Schünemann*, JZ 2005, 271, 275 with further references. Please also refer to *Zimmer/Fuchs*, ZGR 2010, 597, 625 expressing a rather restrictive view in construing section 104 para. 2 sent. 2 of the Insolvency Code.

with respect to financial transactions. [114] Furthermore, based on the purpose of section 104 of the Insolvency Code to limit the Insolvency Representative's ability to speculate on price or market developments with respect to volatile instruments by not deciding whether to assume or reject any obligations subject to the Selection Right, [115] a court may accept that transactions, which show comparable features to the enumerated financial transactions and in respect of which the same concerns may arise which the legislator has raised to justify the exemptions from the Selection Right under section 104 of the Insolvency Code could be covered by section 104 para. 2 sent. 2 of the Insolvency Code even though not explicitly mentioned. [116] However, a German court will likely balance the impact of any such decision on the Selection Right and the ability of the Insolvency Representative to administer the estate.

Unpaid amounts, *i.e.* amounts that became due and payable before the relevant early termination date and which remain unpaid as of such date, would also fall within the scope of section 104 para. 2 of the Insolvency Code provided that the underlying transaction giving rise to such amounts qualifies as financial transaction and neither party has fully performed its obligations under the respective transaction.

---

[114] BT-Drucksache 12/7302, 168.

[115] BT-Drucksache12/2443, 145; BT-Drucksache 12/7302, note 69 to section 118 para. 1, 167.

[116] *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 52; *Balthasar* in: Nerlich/Römermann, Insolvenzordnung, 26th update. (2014), § 104 no. 40 *et seq.; Kroth* in: Braun, Insolvenzordnung, 6th ed. (2014), § 104 no. 6; *Lüer* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 104 no. 11.

(D) Section 104 of the Insolvency Code and master agreements

Section 104 para. 2 sent. 3 of the Insolvency Code refers to master agreements and provides that, where the contracts involving financial transactions are combined in a master agreement for which it has been agreed that, where reasons for the opening of Insolvency Proceedings exist, it can only be terminated in its entirety, then such contracts are together deemed to form one single mutual agreement within the meaning of sections 103, 104. Section 104 para. 2 sent. 3 of the Insolvency Code therefore extends the scope of section 104 para. 2 sent. 1 and 2 of the Insolvency Code also to such transactions which would normally not constitute financial transactions, since they have been fully performed by a party before the opening of Insolvency Proceedings. However, section 104 para. 2 sent. 3 of the Insolvency Code does not derogate from any other requirements for qualifying as a financial transaction.[117]

According to the single agreement concept contained in § 2.3 of the MNA and, if so selected in Part VIII Section 10.6 of the Commodities Schedule, in the CPMA, the relevant Master Agreement, all Netted Agreements and Individual Contracts entered into under the relevant Master Agreement shall be governed by the terms of such Master Agreement, and such Master Agreement, all Netted Agreements and Individual Contracts form a single agreement between the parties. Therefore, in our view the Master Agreements should qualify as master agreement within the

[117] See *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 141.

meaning of section 104 para. 2 sent. 3 of the Insolvency Code.

According to a view in legal literature[118] the Insolvency Representative's Selection Right is limited by the "single agreement concept" to whether or not assuming or rejecting the master agreement and all transactions entered into thereunder as a whole, even if certain transactions entered into under such master agreement would not qualify as financial transactions. The reason given is that section 104 para. 2 sent. 3 of the Insolvency Code has to be construed as a general rule also applying to section 103 of the Insolvency Code. As a consequence, an Insolvency Representative must acknowledge the "single agreement concept" even if the preconditions of section 104 of the Insolvency Code were not fully met for each transaction and accept termination of the master agreement including covered transactions falling within the scope of application of section 104 of the Insolvency Code as well as outside the scope of its application.

However, in our view, the wording of the provision is contrary to such broad interpretation of the master agreement concept. Section 104 para. 2 sent. 3 of the Insolvency Code explicitly refers to "contracts involving financial transactions" as being treated as a "single agreement". Therefore, this sentence should be construed as merely extending the effect of section 104 para. 2 sent. 1 and 2 to transactions having been fully performed by one of the parties and therefore do not qualify as

[118] *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 144.

"executory contracts" any more. [119] Thus, financial transactions within the meaning of section 104 para. 2 sent. 1 of the Insolvency Code which are entered into under a master agreement will be terminated in accordance with section 104 para. 2 sent. 3 of the Insolvency Code, even if they have been fully performed by one of the parties. A wider interpretation could be considered as a circumvention of section 103 being a mandatory insolvency provision on executory contracts.

(E) Mixed master agreements

If some of the transactions under a master agreement fall within the scope of section 104 para. 2 sent. 2 of the Insolvency Code while other transactions do not fall within the scope of section 104 para. 2 sent. 2 of the Insolvency Code, the question arises whether such a "mixed" master agreement falls within the scope of section 104 para. 2 sent. 2 of the Insolvency Code. We are not aware of any court decision on this question. Among legal commentators, three different views have been discussed: [120] (1) According to the first view, section 104 para. 2 of the Insolvency Code does not apply at all, i.e. one non-qualifying transaction would also prevent the application of section 104 para. 2 of the Insolvency Code for such transactions which would otherwise qualify as financial transactions. (2) According to the second view, the master agreement will be split into two parts

[119] See also *Lüer* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 104 no. 37 *Marotzke* in: Heidelberger Kommentar zur Insolvenzordnung, 7th ed. (2014) § 104 no. 6. Also, *von Hall*, Insolvenzverrechnung in bilateralen Clearingsystemen (2010), p. 152 *et seq*.

[120] See *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 176 *et seqq*.; *Obermüller*, Insolvenzrecht in der Bankpraxis, 8th ed. (2011), no. 8.402 *et seqq*.

where those transactions which qualify as financial transactions (including those transactions under which one of the parties has already fully discharged its obligations) are covered by section 104 para. 2 of the Insolvency Code, whereby those transactions which do not qualify as financial transactions remain outside the scope of section 104 para. 2 of the Insolvency Code and therefore each of them will be individually subject to the Selection Right. (3) According to the third view, section 104 para. 2 of the Insolvency Code applies to all transactions, even if only one or some of the transactions qualify as financial transactions.[121]

In our view, the first view is not convincing as it would negate the exemptions for financial transactions under section 104 para. 2 of the Insolvency Code completely and, thus disregard the purpose of such provision, which is to limit the Insolvency Representative's ability to speculate.[122]

The second and the third view can both be supported by good arguments. The third view is in line with the purpose of section 104 para. 2 of the Insolvency Code, which is to limit the Insolvency Representative's ability to speculate with respect to price sensitive transactions. It is also in line with the single agreement concept which is also implied by the wording of section 104 para. 2 of the Insolvency Code. However, section 104 of the Insolvency Code was enacted as an exemption from the Insolvency Representative's Selection Right under section

---

[121] *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. ed. (2013), § 104 no. 180 *et seq.*; *Obermüller*, Insolvenzrecht in der Bankpraxis, 8th ed. (2011), no. 8.402 *et seqq.*

[122] *Obermüller*, Insolvenzrecht in der Bankpraxis, 8th ed. (2011), no. 8.404.

103 of the Insolvency Code. Generally, exemptions to a rule have to be construed narrowly, and their interpretation must not exclusively refer to the purpose of a statutory provision.[123] The second view is more in line with the wording as the other views, because section 104 para. 2 sent. 3 of the Insolvency Code refers to financial transactions.[124] Section 104 para. 2 sent. 3 of the Insolvency Code does not provide that all transactions entered into under a master agreement are deemed to constitute one single agreement. Rather, it only refers to financial transactions and provides that "such contracts are together deemed to form one single mutual agreement" (emphasis added). Thus, section 104 para. 2 sent. 3 of the Insolvency Code does not intend to privilege any transactions under a master agreement. Rather, its purpose is to exclude financial transactions from the Insolvency Representative's Selection Right [125] and to include financial transactions into the single agreement which would otherwise not be covered by section 104 of the Insolvency Code because one of the parties has already fully discharged its obligation under such transaction. Thus, only those transactions are deemed to form a single mutual agreement, but section 104 para. 2 sent. 3 of the Insolvency Code does not

---

[123] *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 180 therefore propose to exclude master agreements from the application of section 104 of the Insolvency Code, when transactions have been entered into which completely arbitrarily and unrelated to the other transactions ("*völlig sachfremde und willkürliche Verbindungen mit anderen Geschäften*").

[124] Where the wording refers to the "single mutual agreement" it still refers to "such contracts", i.e. financial transactions as referred to at the beginning of section 104 para. 2 sent. 3 of the Insolvency Code.

[125] *Jahn/Fried* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 104 no. 141; see also *Kroth* in: Braun, Insolvenzordnung, 6th ed. (2014), § 104 no. 6; *Lüer* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 104 no. 36.

"convert" such transactions into financial transactions which would, even if they had not been performed by either party, not be covered by section 104 of the Insolvency Code.

To summarise, whilst the first view is not convincing, the second and the third views are both founded, but in balancing the arguments and given that no court decisions are available, we think that the second view has more merits than the third view.[126]

We are not aware of any court precedents discussing whether an invalid insolvency related termination of transaction falling outside the scope of section 104 of the Insolvency Code may "contaminate" the termination of transactions for which an insolvency related termination is permissible (as they generally fall within the scope of application of section 104 of the Insolvency Code), i.e. whether the invalid insolvency related termination would render the termination of all transactions invalid even though the insolvency related termination would be permissible for those transactions which fall within the scope of application of section 104 of the Insolvency Code.127

126 For further background see also *Lüer* in: Uhlenbruck, Insolvenzordnung, 13th ed. (2010), § 104 no. 37 *Marotzke* in: Heidelberger Kommentar zur Insolvenzordnung, 7th ed. (2014) § 104 no. 7 (end). Also, *von Hall*, Insolvenzverrechnung in bilateralen Clearingsystemen (2010), p. 152 *et seq*.

127 According to a view expressed in legal literature (*Andres*, in: Andres/Leithaus, Insolvenzordnung, 2nd ed. (2011), § 119 no. 3), section 119 of the Insolvency Code is a statutory prohibition (*Verbotsgesetz*) within the meaning of section 134 of the Civil Code. Pursuant to section 134 of the Civil Code and to the extent German law applies, any legal transaction (*Rechtsgeschäft*) which violates a statutory prohibition is void (i.e. the relevant insolvency related termination provision is regarded as not validly agreed), unless a contrary intention appears from such statute. However, according to our view, section 119 of the Insolvency Code has to be construed narrowly as it limits the parties' freedom of contract. If section 119 of the Insolvency Code were to be construed as a statutory prohibition of agreements which exclude or limit the application of sections 103 to 118 of the Insolvency Code, the relevant termination right would be void pursuant to

(F) Section 104 of the Insolvency Code and contractual close-out netting provisions

As set out in Paragraph 5.1.1(i)(ii) on pages 68 *et seqq.* above, section 104 of the Insolvency Code should qualify as a "corresponding" statutory termination as referred to by the BGH in its judgement of 15 November 2012[128] and therefore, Parties may agree on insolvency related termination provisions.

However, if according to the contractual termination provision the contract is not terminated prior to the opening of Insolvency Proceedings, section 104 of the Insolvency Code overrides any contractual close-out netting provisions. Thus, section 104 of the Insolvency Code does not generally exclude contractual close-out netting provisions, for example where the early termination falls before the opening of Insolvency Proceedings it is outside the scope of section 104 of the Insolvency Code.

To summarise, fixed date transactions and financial transactions falling within the scope of section 104 of the Insolvency Code are automatically terminated upon the opening of Insolvency Proceedings, unless such transactions have been terminated before. If the relevant financial transaction is included in a master agreement (as referred to in section 104 para. 2 sent. 3 of the Insolvency Code) the scope

---

section 134 of the Civil Code from the point in time such termination right has been agreed. Hence, there would be no room for the application of section 119 of the Insolvency Code, as the contemplated termination of the agreement would already be invalid pursuant to section 134 of the Civil Code. Therefore, in our view section 119 of the Insolvency Code cannot be regarded as a statutory prohibition in the meaning of section 134 of the Civil Code. The better arguments are therefore that section 119 of the Insolvency Code should be treated as procedural insolvency provision.

[128] This view is also taken by *Obermüller*, ZInsO 2013, 476, 480 *et seq*.

of section 104 para. 2 of the Insolvency Code is extended to cover transactions which have already been fully performed by one party. The valuation of Individual Contracts terminated by application of section 104 paras. 1 or 2 of the Insolvency Code must be made in accordance with section 104 para. 3 of the Insolvency Code at the time agreed between the parties, but no later than on the fifth business day upon the opening of the Insolvency Proceedings. However, if the Individual Contracts are terminated before the opening of Insolvency Proceedings, the results of such early termination should be as contractually agreed and therefore, the valuation has to be made at the time contractually agreed between the parties. Section 104 of the Insolvency Code does itself not contain a statutory close-out or set-off provision.[129] Rather, set-off can be exercised in accordance with sections 94 *et seq*. of the Insolvency Code. Where contractual close-out netting complies with these provisions, transactions falling under section 104 para.1 of the Insolvency Code and section 104 para. 2 of the Insolvency Code can be combined in a contractual close-out netting provision.

Individual Contracts which do not fall within the scope of section 104 of the Insolvency Code may be subject to the Insolvency Representative's Selection Right pursuant to section 103 of the Insolvency Code (see Paragraph 5.1.1(i)(ii) on page 68), even if the Master Agreements provide for a termination of such transactions upon the filing for Insolvency Proceedings.

[129] *Von Hall*, Insolvenzverrechnung in bilateralen Clearingsystemen, 2010, 152, 156 *et seq*. considers section 104 para. 2 sent. 3 containing such statutory close-out netting provisions.

(iv) *Challengeability of the entering into the Master Agreements, the entering into the Netted Agreements thereunder, the entering into the Individual Contracts thereunder and the early termination*

The entering into the Master Agreements, the entering into the Netted Agreements thereunder, the entering into the Individual Contracts thereunder and the early termination may be challenged by the Insolvency Representative under sections 129 *et seqq.* of the Insolvency Code upon the opening of Insolvency Proceedings within the insolvency challenge periods as specified in Paragraph 5.1.1(c) on pages 21 *et seqq.* above.

All of the afore-mentioned activities qualify as legal acts within the scope of insolvency avoidance except where early termination occurs as an automatic consequence of the fulfilment of a pre-agreed condition precedent. Our answers under Paragraph 5.1.1(c) on page 21 apply *mutadis mutandis*.

(j) *Assuming the Parties have elected Automatic Termination to apply, are the provisions of the Master Agreements terminating the Netted Agreements including all Individual Contracts upon the occurrence of a Close-Out Event described in § 6.3 of the MNA or Part II.C of the Commodities Schedule enforceable under the laws of Germany or is there a risk that the automatic termination could be challenged by a liquidator, administrator, receiver or third party?*

Our answers under Paragraph 5.1.1(c) on page 21 apply *mutadis mutandis*.

(k) *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 MNA) or similar event?*

§ 4.1 of the MNA provides that upon the occurrence of a Close-Out Event in respect of a Party, including a winding-up, insolvency or attachment, the other Party shall be entitled to terminate all transactions under all of its Netted Agreements. In this respect, to avoid "cherry-picking" rights and to ensure that all Individual Contracts entered into under the Netted Agreement (entered into under the MNA or CPMA) are terminated in time pursuant to the MNA and can be set off before the opening of Insolvency Proceedings, it is highly recommendable to choose Automatic Termination pursuant to § 6 of the MNA or pursuant to Part II C of the Commodities Schedule in respect of German counterparties. [130] In this context, it has to be considered whether a grace period such as provided in § 3.1 (C)(III)(d) of the MNA should apply.[131]

(l) *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?*

As set out under above under Paragraph 5.1.1(i)(ii) on page 68, an automatic termination based on non-insolvency related events or on a party's application to commence Insolvency Proceedings against its assets and/or the existence of any material reason for such an application (such as over-indebtedness) is enforceable under German law provided that the relevant Individual Contracts fall within the scope of section 104 of the Insolvency Code. A termination right directly based on an actual opening of Insolvency Proceedings is considered to be legally ineffective (see Paragraph 5.1.1(d)(i)(1) on page 27 *et. seqq.* above).

Subject to our answers given under Paragraph 5.1.1(o) on page 95, if parties intend that the contractual provisions agreed under the Master Agreements, rather than the German mandatory insolvency provisions (where applicable), continue to apply, the parties should agree on an Automatic Termination which triggers sufficiently early enough to prevent the application of mandatory insolvency provisions. For such purposes, Automatic Termination should be triggered upon an application filed for the commencement of Insolvency Proceedings or

---

130 Please note that this recommendation is given from a strict legal perspective given the missing legal certainty to receive information about impending Insolvency Proceedings in time and does not consider any risks or further consequences of an Automatic Termination generally.

131 When granting such a grace period, it should be considered that it is not predictable within which period from the application for the commencement of Insolvency Proceedings an Insolvency Court would issue its order of commencement (*Eröffnungsbeschluss*). From a legal perspective, it should be ensured that Automatic Termination occurs prior to the opening of Insolvency Proceedings.

other bankruptcy proceedings against the assets of any Party as is provided for in § 3.1 (C)(III)(d) of the MNA. However, in order to avoid that Automatic Termination is triggered even if a third party has frivolously filed an application for the opening of Insolvency Proceedings, it is possible to refer to the adverse economic situation of the relevant Party which would either be evidenced if this Party has either filed the application itself or if reference were made to the Party being insolvent or otherwise in a situation which justifies the opening of such proceedings.[132] However, the restrictions on insolvency related termination provisions as set out in Paragraph 5.1.1(i)(ii) on page 68 above would equally apply to an automatic termination, not only where a termination is exercised by notice.

In order to avoid that Automatic Termination is triggered by unsubstantiated or otherwise clearly frivolous petitions for the opening of Insolvency Proceedings, the following wording may be added to the definition of § 3.1 (C)(III)(d) of the MNA: "*and either this Party itself or its competent supervisory authority has presented the petition, or such Party is insolvent or otherwise in a situation which justifies the opening of such proceedings.*"

(m) *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?*

We recommend not to provide for a grace period such as provided in § 3.1 (C)(III)(d) of the MNA, because in such case, a termination (either on the basis of a contractual termination right or by way of Automatic

[132] With respect to credit institutions, financial services institutions or insurance companies, parties may agree upon an Automatic Termination which is triggered on measures taken by the BaFin or any relevant other supervisory authority according to section 46a of the Banking Act or section 89 of the Insurance Supervisory Act if parties are of the view that such measures (in particular the imposition of a ban on payments under section 46a para. 1 sent. 1 no. 1 of the Banking Act or section 89 para. 1 of the Insurance Supervisory Act) may in fact create a risk to netting (taking into account that such measures are taken to stabilise the financial situation of the credit institution, financial services institution or insurance company (sections 46d para. 3 of the Banking Act, 89b para. 3 of the Insurance Supervisory Act)) (please see Paragraph 5.1.1(d)(i)(2) on page 22 above).

Termination) could only become effective after the opening of insolvency proceedings and therefore, not the contractual provisions agreed under the Master Agreements, but rather the German mandatory insolvency provisions (where applicable) would apply (please see Paragraph 5.1.1(o) below).

(n) *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.*

As set out in Paragraph 5.1.1(l) on page on page 93, the Automatic Termination should take effect at the time an application has been filed for the commencement of Insolvency Proceedings or other bankruptcy proceedings against the assets of any Party and this Party has either filed the application itself or is insolvent or otherwise in a situation which justifies the opening of such proceedings.[133]

(o) *Are the provisions in § 8 of the MNA and Section 4 of the CPMA providing for the offsetting of all positive and negative Settlement Amounts in determining the Final Net Settlement Amount enforceable under the laws of Germany or is there a risk that such determination could be challenged by a liquidator, administrator, receiver or third party?*

Upon termination, the Net Settlement Amounts are determined in accordance with the terms of the relevant Netted Agreement. We do not opine on the validity of such aggregation and netting under the Netted Agreement. Any such Net Settlement Amounts determined under the relevant Netted Agreements are "aggregated and netted-off" under § 8.1 MNA.

With respect to the application of German law to the calculation of the Final Net Settlement Amount, we refer to Paragraph 5.1.1(i)(i) on page 63.

---

[133] With respect to credit or financial services institutions or insurance companies, please refer to Paragraph 5.1.1(a) on page 15 above.

(i) *Enforceability of close-out netting*

German law recognises close-out netting in principle. Parties may specify certain events in an agreement upon the occurrence of which payments under such agreement become immediately due. Furthermore, under German statutory law, set-off (*Aufrechnung*) is understood as the mutual discharge of two corresponding obligations of the same nature. The rules relating to set off are contained in sections 387 *et seqq.* of the German Civil Code. According to this provision, a party that demands payment – or of whom payment is demanded – is entitled to unilaterally declare that the debt is extinguished by a set-off provided that the legally defined set-off requirements are met (see Paragraph 5.1.1(g) on page 57).

However, in case of the insolvency of a Party, the enforceability of contractual close-out netting depends on whether there is a statutory exemption from section 103 of the Insolvency Code, which qualifies as a "corresponding" statutory termination right as referred to in the judgement of the BGH dated 15 November 2012[134] (please refer to Paragraph 5.1.1(i)(ii) on pages 68 *et seqq.* above). Even in such case, the enforceability of contractual close-out netting also depends on the point in time when the outstanding transactions are terminated. Even with respect to transactions falling within the scope of section 104 of the Insolvency Code (please refer to Paragraph 4.1.1(i)(iii) on page 68 above), contractual close-out netting provisions are enforceable if the outstanding transactions are terminated and set off prior to the opening of Insolvency Proceedings. In contrast, the statutory close-out netting regime applies if termination of the outstanding transactions takes place at or after the opening of Insolvency Proceedings.

In Germany, the contractual provision of automatic aggregation and set-off of all existing mutual payment obligations of the Parties under the Master Agreements, including payment

[134] BGH WM 2013, 274.

obligations not yet due and payable at this time, upon occurrence of a material reason would be recognised if there is such "corresponding" statutory termination right and if such set-off was effected prior to the opening of Insolvency Proceedings even if Insolvency Proceedings are finally commenced against the assets of one of the Parties (please refer to Paragraph 5.1.1(i)(ii) on page 68). Therefore, if an insolvency related material reason in relation to a Party occurred, which resulted in aggregation and set off according to the Netting Provisions, this would result in a single obligation equalling the balance of all of the mutual payment claims of the Parties.

The right of a Solvent Party to effect set-off after the opening of Insolvency Proceedings is governed by sections 94 through 96 of the Insolvency Code.[135] The extent to which a set-off after

---

[135] An English translation of sections 94 through 96 of the Insolvency Code reads as follows:

"Section 94 – Preservation of the Right to Set off a Claim

If by force of law or on the basis of an agreement a creditor of the insolvency proceedings had a right to set off a claim on the date when the insolvency proceedings were opened such right shall remain unaffected by the proceedings.

Section 95 – Acquisition of the Right to Set off a Claim During the Proceedings

(1) If on the date when the insolvency proceedings were opened one or more of the claims to be set off against each other were conditional, were immature or did not cover similar types of performance such set-off may not be effected before its conditions are met. Sections 41 and 45 shall not apply. Set-off shall be excluded if the claim against which a set-off is to be effected will become unconditional and mature before it may be set off.

(2) Set-off shall not be excluded by the claims being expressed in different currencies or mathematical units if these currencies or mathematical units are freely exchangeable at the place of payment of the claim against which a set-off is to be effected. They shall be converted according to the exchange value applicable to this place at the time of receipt of the declaration of set-off.

Section 96 – Prohibition of Set-off

(1) Set-off shall be prohibited if

a creditor of the insolvency proceedings has become a debtor of the insolvency estate only after the opening of insolvency proceedings;

a creditor of the insolvency proceedings acquired his claim from another creditor only after the opening of insolvency proceedings;

the opening of Insolvency Proceedings is permissible mainly depends on the point in time when the situation giving one party the right to set off comes into existence (*Entstehung der Aufrechnungslage*). This point in time is determined by German substantive civil law.

(1) Existence of a situation giving one party the right to set off at the time of the opening of Insolvency Proceedings

Pursuant to section 94 of the Insolvency Code and subject to the restrictions and prohibitions of set-off pursuant to sections 95 and 96 of the Insolvency Code, a right to set off a claim is preserved after the opening of Insolvency Proceedings if by force of law or on the basis of an agreement the Solvent Party was already entitled to set off the claim at the time the Insolvency Proceedings were opened irrespective of whether or not the declaration to set off the claim was made before or after the opening of such Insolvency Proceedings.

In contrast to the former Bankruptcy Code, the Insolvency Code explicitly preserves rights to set off a claim under valid contractual agreements. With respect to the overall intention of the Insolvency Code in general and the purpose of section 94 of the Insolvency Code in particular, i.e. the aim to protect the legitimate expectations of the creditors of the Insolvent Party, the preservation of contractual rights to set off is

---

a creditor of the insolvency proceedings acquired the opportunity to set off his claim by a transaction subject to challenge;

a creditor with a claim to be satisfied from the debtor's free property is a debtor of the insolvency estate.

(2) Para. 1 as well as section 95 para. 1 sent. 3 shall neither restrict the transfer of financial collateral within the meaning of section 1 para. 17 of the Banking Act nor the set-off of claims and benefits from transfer, payment or assignment agreements between payment services providers and intermediates or orders for transfers of securities included into a payment system as defined by section 1 para. 16 of the Banking Act serving to implement such agreements where set-off is effected at the latest on the day of opening of the insolvency proceedings, if the other part is an operator or participant in the system, the day of opening of insolvency proceedings shall be determined in accordance with the definition of business day as stipulated by section 1 para. 16b of the Banking Act."

criticised[136] since it enables the parties to extend the rights to set off to the detriment of creditors of the Insolvent Party as such agreements might reduce the assets available to (other) creditors in insolvency. Hence, the validity of contractual agreements concerning set-off is called into question by some legal authors[137] that advocate a restrictive interpretation of section 94 of the Insolvency Code according to which agreements concerning set-off may not override prohibitions of set-off that aim at protecting third parties' rights. According to these legal authors, such agreements also have to comply with sections 95 and 96 of the Insolvency Code and might be challenged pursuant to sections 129 *et seqq.* of the Insolvency Code.

However, this restrictive approach particularly applies to agreements deviating from the requirement of mutuality of the claims[138] and should not affect the validity of the contractual provision of automatic aggregation and set-off of all existing mutual payment obligations of the Parties under the transactions where the relevant contractual provisions do not contain a contractual deviation from the requirement of mutuality of the claims.

(2) Statutory deviation from the requirement of similarity of the claims

Pursuant to section 95 para. 2 of the Insolvency Code[139], set-off is not excluded by claims being expressed in

---

[136] *Kroth* in: Braun, Insolvenzordnung, 6th ed. (2014), § 95 no. 24. *Uhlenbruck* in: Uhlenbruck, InsO, 13th ed. (2010), § 94 nos. 8 et seq.

[137] Ibid.

[138] *Schwahn,* NJW 2005, 473, 475.

[139] This provision is generally understood to regulate a question of principle of German insolvency law and, hence, applies to both section 94 of the Insolvency Code and section 95 of the Insolvency Code (*Höhn/Kaufmann*, JuS 2003, 751, 753).

different currencies or mathematical units if these currencies or mathematical units are freely exchangeable at the place of payment of the claim against which the set-off is to be effected.[140] The claims have to be converted according to the exchange value applicable to this place at the time of receipt of the declaration to set-off.

(3) Set-off with voidable claims

In the event an insolvency creditor acquired the right to set off his claim by a transaction which may be challenged as void, set-off is prohibited pursuant to section 96 para. 1 no. 3 of the Insolvency Code. This prohibition applies irrespective of whether or not the Insolvency Representative actually challenged the transaction.

(4) Emergence of a situation giving one party the right to set off after the opening of Insolvency Proceedings

In circumstances where the right to set off emerges after the opening of Insolvency Proceedings, set-off is only permissible if the mutual claims originated before the opening of Insolvency Proceedings. If on the date when Insolvency Proceedings are opened one or more of the claims to be set off against each other are conditional, not yet due or do not cover similar types of obligations, such set-off is not effected before such conditions are met (section 95 para. 1 sent. 1 of the Insolvency Code). Pursuant to section 95 para. 1 sent. 2 of the Insolvency

[140] However, absent any specific agreements between the parties, claims in different currencies are not of similar type and can, thus, not be set-off against each other in accordance with sections 387 of the German Civil Code (KG NJW 1988, 2181).

Code, section 41 of the Insolvency Code[141] concerning claims not yet due at the date when Insolvency Proceedings are opened and section 45 of the Insolvency Code[142] concerning the conversion of certain claims do not apply.

(5) Statutory limitation of set-off

Set-off is excluded if the claim against which a set-off is to be effected becomes unconditional and mature before it can be set-off (section 95 para. 1 sent. 3 of the Insolvency Code). With respect to set-off after the opening of Insolvency Proceedings, timing, therefore, is of fundamental importance. Set-off is permissible if the Solvent Party's claim is unconditional and matures prior to the Insolvent Party's claim or at the same time at the latest. Provided that the contractual close-out netting provision is structured in a way that ensures that claims arising thereunder come into existence at the same time, the statutory limitation pursuant to section 95 para. 1 sent. 3 of the Insolvency Code would not apply.[143]

(6) Prohibition of set-off

Set-off is statutorily prohibited if (i) a creditor in the Insolvency Proceedings has become a debtor of the

[141] An English translation of section 41 of the Insolvency Code reads as follows: "(1) Unmatured claims shall be deemed to be mature. (2) If such claims do not bear interest they shall be discounted at the statutory rate of interest. Thereby they shall be reduced to the amount corresponding to the full amount of such claim if the statutory rate of interest for the period from the opening of the insolvency proceedings to its maturity is added."

[142] In English section 45 of the Insolvency Code reads as follows: "Non-liquidated claims shall be filed at the value estimated for the date when the insolvency proceedings were opened. Claims expressed in foreign currency or in a mathematical unit shall be converted into German currency according to the exchange value applicable at the time of the opening of the proceedings at the place of the payment."

[143] Moreover, section 95 para. 1 sent. 3 of the Insolvency Code has been interpreted restrictively by the BGH (BGH NJW 2005, 3574, 3575 *et seq.*). According to the BGH, section 95 para. 1 sent. 3 of the Insolvency Code does not apply if the Insolvent Party's claim, against which set-off is declared, has become mature and unconditional before the Solvent Party's claim but at the same time was not enforceable due to a right to refuse performance by the Solvent Party against such claim.

insolvency estate only after the opening of Insolvency Proceedings, (ii) a creditor in the Insolvency Proceedings acquired his claim from another creditor only after the opening of Insolvency Proceedings,[144] (iii) a creditor in the Insolvency Proceedings acquired the opportunity to set off his claim by a legal act subject to challenge[145] or (iv) a creditor with a claim to be satisfied from the debtor's free property is a debtor of the insolvency estate (section 96 para. 1 of the Insolvency Code).

(7) Exceptions for systems and the transfer of Financial Collateral

The prohibitions of set-off pursuant to section 95 para. 1 sent. 3 of the Insolvency Code and section 96 para. 1 of the Insolvency Code do neither apply to the transfer of Financial Collateral nor to the set-off of claims and benefits from transfer, payment or settlement agreements introduced into a System where set-off is effected at the latest on the day of opening of the Insolvency Proceedings.

The term System is defined in section 1 para. 16 sent. 1 of the Banking Act which in an English translation reads as follows:

"A system within the meaning of section 24b is a written agreement within the meaning of Article 2 lit a of the Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on Settlement

---

[144] Accordingly, set-off would be generally permissible if a creditor in the Insolvency Proceedings acquired his claim from another creditor prior to the opening of Insolvency Proceedings. However, depending on the circumstances of the case, such acquisition of a claim prior to Insolvency Proceedings could itself be subject to challenge with the consequence that section 96 para. 1 no. 3 of the Insolvency Code applied, i.e. the set-off were invalid (without the need to separately challenge it) as the claim were acquired by a legal act subject to challenge.

[145] This prohibition applies irrespective of whether or not the Insolvency Representative actually challenged the Individual Contract (*Höhn/Kaufmann*, JuS 2003, 751, 753).

Finality in Payment and Securities Settlement Systems (OJ No L 166 of 11 June 1998, p. 45) as amended by Directive 2009/44/EC (OJ No L 146 of 10 June 2009, p. 37) ("**Settlement Finality Directive**"), including an agreement between a participant and an indirectly participating Credit Institution which has been notified by Deutsche Bundesbank or a competent authority of a member state of the EEA to the European Securities and Markets Authority. Systems from third countries are treated similar as the systems referred to in sentence 1 if they largely correspond with the requirements enumerated in Article 2 lit a of the Directive 98/26/EC."

Article 2 lit (a) SFD defines "system" as follows:

"'system' shall mean

– a formal arrangement between three or more participants, excluding the system operator of that system, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants,

– governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and

– designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

Subject to the conditions in the first subparagraph, a Member State may designate as a system such a formal arrangement whose business consists of the implementation of transfer orders as defined in the second indent of (i) and which to a limited extent executes orders relating to other financial instruments, when that member state considers that such a designation is warranted on grounds of systemic risk.

A Member State may also on a case-by-case basis designate as a system such a formal arrangement between two participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, when that member state considers that such a designation is warranted on grounds of systemic risk.

An arrangement entered into between interoperable systems shall not constitute a system."

(ii) *Challenging the determination of the Final Net Settlement Amount*

In order to be challenged by the Insolvency Representative under sections 129 *et seqq.* of the Insolvency Code, the determination of the Final Net Settlement Amount would have to be qualified as legal act (see also under Paragraph 5.1.1(c) on page 21 above).

The agreement on the automatic occurrence of the set-off is contractually agreed between the Parties at the time of entering into the Master Agreement. Therefore, it may be argued that the determination of the Final Net Settlement Amount merely constitutes a factual determination of an existing claim arising out of a set-off and could, thus, not be challenged separately. Accordingly, the Insolvency Representative could merely deny the amount of the claim determined by the Solvent Party in accordance with section 176 of the Insolvency Code. However, as the determination of the Final Net Settlement Amounts stipulates to what extent claims of either party have extinguished by way of set-off (*Tilgungswirkung der*

Aufrechnung), one cannot fully exclude that such determination would be considered a legal act itself by an Insolvency Representative and that an insolvency court will follow such view.

(p) *Do the laws of Germany recognize that the Close-Out applies to all Individual Contracts? Would we need the single agreement concept (as provided for in § 2.3 of the MNA and, if so selected in Part VIII Section 10.6 of the Commodities Schedule, in the CPMA) 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 and some and not all Individual Contracts thereunder might impact termination and close out rights generally, as well as subsequent rights to terminate transactions remaining under the Master Agreements following a previous Partial Close-Out.*

Regarding the applicability of German law to the Netting Provisions of the Master Agreements, please refer to Paragraph 5.1.1(i)(i) on page 63. We do not opine on the enforceability of the early termination of the Netted Agreements and the determination of any net settlement amounts under the Netted Agreements.

Assuming that the Master Agreements and the Individual Contracts are subject to German substantial insolvency law, in particular sections 103 *et seqq.* of the Insolvency Code,[146] where a material reason has occurred in relation to a Party and the date of early termination falls before the opening of the Insolvency Proceedings or the point in time the BGH has considered decisive in its decision of 15 November 2012,[147] by referring to the point in time when, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected *(mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*), the Parties may

[146] Whether or not substantial German insolvency laws are applicable in this context depends on the relevant conflict of law provisions, see in more detail in Paragraph 5.2.1 on pages 101 *et seq*. below.

[147] BGH WM 2013, 274.

determine which Individual Contracts are subject to the Close-Out irrespective of whether or not the Parties have agreed to apply the single agreement concept as set forth in § 2.3 of the MNA and, if so selected in Part VIII Section 10.6 of the Commodities Schedule, in the CPMA. However, with respect to an insolvency-related early termination triggered before the opening of Insolvency Proceedings and upon an early termination triggered by section 104 of the Insolvency Code upon the opening of Insolvency Proceedings, the single agreement concept may be relevant with respect to section 104 para. 2 sent. 3 of the Insolvency Code as sent. 3 extends the scope of section 104 para. 2 sent. 1 and 2 of the Insolvency Code also to such transactions which would normally not fall within the scope of sections 103 and 104 of the Insolvency Code, since they have been fully performed by a party before the opening of Insolvency Proceedings (please refer to Paragraph 5.1.1(i)(iii)(3)(D) on page 84).

The early termination and, if applicable, close out netting of some Individual Contracts would in our view not prevent the later termination of the Master Agreements and the termination and close out netting of the remaining Individual Contracts provided that such Individual Contracts have not been terminated under mandatory insolvency laws.

(q) *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 the Commodities Schedule) enforceable under the laws of Germany or could the calculation or demand of such amount in a foreign currency be challenged by a liquidator, administrator, receiver or third party?*

After the opening of Insolvency Proceedings, cash payment claims against an Insolvent Party in a currency other than Euro must be converted into Euro at an exchange rate applicable at the place of performance at the time of the opening of the Insolvency Proceedings (section 45 of the Insolvency Code).

According to the BGH, the official exchange rate applicable on the date of the opening of Insolvency Proceedings at the place of payment applies whereby the place of payment is the place where the

Insolvency Proceedings have been opened. [148] With respect to enforcement proceedings, however, it is proposed that cash payment claims in a currency other than Euro are converted at the official conversion rate on the date and at the place of payment.[149]

(r) *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?*

With respect to close out netting, the Insolvency Code does generally not distinguish between different types of counterparties. However, specific restrictions may apply to different types of counterparties under corporate and regulatory laws.

For example, according to section 93 para. 6 sent. 1 of the Capital Investment Code, claims against an investment management company and claims belonging to the separate assets (*Sondervermögen*, as defined in section 1 para. 10 of the Capital Investment Code), cannot be set off against each other. However, according section 93 para. 6 sent. 2 of the Capital Investment Code, this does not prohibit a set-off of claims under a master agreement.

With respect to insurance companies, section 77 para. 2 sent. 2 of the Insurance Supervisory Act limits the possibility of set-off against claims belonging to the "cover assets" *(Sicherungsvermögen)* of an Insurance Company.

---

[148] BGH NJW 1989, 3155 (on the KO); *Andres*, in: Nerlich/Römermann, Insolvenzordnung, 27th update (2014), § 45 no. 4; see, however, *Bitter*, in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2013), § 45 no. 20).

[149] *Bach*, in: Beck'scher Onlinekommentar ZPO, 15th ed. (1 January 2015), § 722 no. 27.

5.1.2 Non-insolvency related Close Out Events

(a) *Please discuss and advise on the issues outlined above under 5.1.1(o) on page 95 et seq., 5.1.1(p) on page 105 et seq. and 5.1.1(q) on page 106 in the context of non-insolvency related Close Out Events.*

§ 3 1 (C) of the MNA provides for several Close Out Events which are not directly related to the insolvency of a Party. Such non-insolvency related Close Out Events are - *inter alia* - Non Performance, Cross Default and Acceleration, Failure to Deliver or Accept, *Force Majeure* and breach of a Representation and Warranty.

Section 2.1 of the CPMA does not enumerate certain Close Out Events. Rather, it refers to the relevant Close Out Events of the Netted Agreements entered into thereunder and provides a right to terminate all Netted Agreements upon the occurrence of such Close Out Event under the Netted Agreements. We do not opine on the validity of the Close out Events under the Netted Agreements, including whether any amendments made to the Netted Agreement by the Master Agreements are valid and enforceable.

With respect to the termination of the Master Agreements due to non-insolvency related Close Out Events, our opinion on the enforceability of § 8 of the MNA and Section 4 of the CPMA set out under Paragraph 5.1.1(o) on page 95 *et seq.* above, on the enforceability of the Netting Provisions, as set out under Paragraph 5.1.1(i)(i) *et seq.* and 5.1.1(i)(iii) *et seq.* above, as well as on the counterparty's obligation to pay the amount of any compensation claim in Euro, USD or GBP, as set out under Paragraph 5.1.1(q) on page 106 also applies in the context of non-insolvency related Close Out Events.

(b) *Are the rights of the Terminating Party to terminate and close-out the Master Agreements, the Netted Agreements and all Individual Contract entered into thereunder enforceable in accordance with the terms of the Master Agreements, irrespective of the insolvency of Party A?*

As set out in Paragraph 5.1.2(a) above, the Netting Provisions of the Master Agreements are enforceable. This is irrespective of the insolvency of Party A.

5.2 Multibranch Parties

5.2.1 Overview of German international insolvency law

Whether or not German insolvency courts have jurisdiction for opening Insolvency Proceedings over the assets of a Party depends on the rules governing the relevant proceedings. The international scope of application of Insolvency Proceedings and any Provisional Insolvency Proceedings is governed by the EU Insolvency Regulation, Article 102 of the German Introductory Act to the Insolvency Code (*Einführungsgesetz zur Insolvenzordnung*), sections 3, 335 *et seqq.* of the Insolvency Code and sections 46d to 46f of the Banking Act

(a) *Scope of application of the EU Insolvency Regulation*

The EU Insolvency Regulation applies to insolvency proceedings as specified in Article 1 para 1, Annex A of the EU Insolvency Regulation. The EU Insolvency Regulation is not applicable, *inter alia*, to insolvency proceedings concerning insurance companies, credit institutions [150], investment undertakings (*Wertpapierfirmen*) [151] which provide services involving the holding of funds or securities for third parties, and collective investment undertakings (*Organismen für gemeinsame Anlagen*) [152] (Article 1 para 2 of the EU Insolvency

---

[150] Article 1 para 1 of the EU Insolvency Regulation refers to credit institutions generally but since the EU Insolvency Regulation must be construed in light of applicable European law, we take the view that it only refers to credit institutions as defined under Article 4 para 1 point 1 CRR, i.e. an undertaking whose business is to take deposits or other repayable funds from the public and to grant credits for its own account. Under German law, such credit institutions are defined in section 1 para 3d of the Banking Act as CRR Credit Institutions.

[151] No definition of "investment undertaking" is provided in the EU Insolvency Regulation but Article 4 para 1 no. 1 of the European Parliament and Council Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and the Council and repealing Council Directive 93/22/EEC as amended (OJ No L 145 of 30 April 2004, "**MiFID**") defines the term "investment firm" to include any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis (see also *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings, no. 59 and *Brinkmann*, in: *Schmidt*, Insolvenzordnung, 18th ed. (2013), Art. 1 EUInsVO no. 7). The German language versions of both the EU Insolvency Regulation and the MiFID use the term "*Wertpapierfirma*" which confirms this interpretation.

[152] The term "collective investment undertaking" means, in accordance with Article 1 para 2 of the Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws,

Regulation). The European Court of Justice ("**ECJ**") takes the view that the application of provisions of the EU Insolvency Regulation does not generally depend on the existence of a cross-border link (*grenzüberschreitenden Bezug*) to another EU member state (other than Denmark) unless a relevant provision of the EU Insolvency Regulation expressly requires such link.[153]

Within this scope of application, the courts of the EU member states (other than Denmark[154]) where the "centre of main interests" of a debtor is situated may open main insolvency proceedings (as specified in Annex A of the EU Insolvency Regulation). In case of a legal entity, the place of the registered office is deemed to be the centre of its main interests in the absence of proof to the contrary (Article 3 para 1 of the

---

regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (OJ No L 302 of 17 November 2009, "**UCITS Directive**") undertakings (i) the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and (ii) the units of which are, at the request of the holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets ("**UCITS**"). This interpretation is based on the assumption made by *Virgos/Schmit* (Report on the Convention on Insolvency Proceedings, nos. 56 *et seq.*) according to which the rationale behind the exceptions provided in Article 1 para 2 of the EU Insolvency Regulation is to exclude such entities, which are subject to specific EU regulations and supervision by regulators in their respective member states. Investment Companies which qualify as UCITS are regulated and supervised in accordance with the UCITS Directive and, hence, they are excluded from the scope of application of the EU Insolvency Regulation. From our point of view, this general analysis should prevail despite the wording under the EU Insolvency Regulation which might lead to the conclusion that the term "collective investment undertaking" within the meaning of the EU Insolvency Regulation corresponds to the equivalent term in Article 3 of the UCITS Directive according to which it is used for certain collective investment undertakings which do not qualify as UCITS as defined in the UCITS Directive. *Brinkmann*, in: *Schmidt*, Insolvenzordnung, 18th ed. (2013), Art. 1 EUInsVO no. 7 also takes the view that the reference to collective investment undertakings in the EU Insolvency Regulation is a reference to the definition in Article 1 point 2 of the UCITS Directive. It must be noted, however, that due to the lack of court precedents dealing with this issue a certain degree of uncertainty remains.

[153] Judgment of 16 January 2014, Case C-328/12, *Ralph Schmid v Lilly Hertel*, NJW 2014, 610, 611 *et seq.* Several legal commentators have taken the view that the application of the EU Insolvency Regulation does generally require a cross-border link. See *Kindler*, in: Münchener Kommentar BGB, 6th ed. (2015), VO (EG) 1346/2000 Article 1 no. 23; *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings, no. 11. See also the overview given by *Reinhart*, in: Münchener Kommentar zur Insolvenzordnung, 2nd ed. (2008), Art. 1 EUInsVO nos. 15 *et seq.*

[154] As regards Denmark, the autonomous German international insolvency law provisions pursuant to sections 335 *et seq.* of the Insolvency Code apply.

EU Insolvency Regulation). These proceedings are generally governed by the law of the EU member state where such proceedings are opened. They are, with regard to other EU member states, international in scope being effective in all EU member states unless secondary proceedings are opened in another EU member state. The only main insolvency proceedings permitted under Annex A of the EU Insolvency Regulation under the laws of Germany would be Insolvency Proceedings.

If the "centre of main interests" of a debtor is in an EU member state (other than Denmark), under Article 3 para 2 of the EU Insolvency Regulation, the courts of another EU member state (other than Denmark) may open "territorial proceedings" or, after the opening of main proceedings, "secondary proceedings" in the event that such debtor possesses an "establishment" (for a definition of which term please refer to the next paragraph (i)) within the territory of such other EU member state. The applicable law of such territorial or secondary insolvency proceedings is the law of that other EU member state. However, territorial or secondary insolvency proceedings are limited in scope to the debtor's assets located in that EU member state and will, thus, not extend beyond the EU member state where they are opened. Furthermore, under Article 3 para 3 of the EU Insolvency Regulation, secondary proceedings are limited to winding-up proceedings.

As a result of the implementation of the Winding-Up Directive, the opening of secondary or territorial insolvency proceedings is excluded in respect of CRR Credit Institutions (section 46e para 2 of the Banking Act). Insolvency Proceedings may only be opened by the competent authorities of the home state (*Herkunftsmitgliedsstaat*) of such CRR Credit Institutions.

(b) *Jurisdiction of German insolvency courts within the scope of application of the EU Insolvency Regulation*

As to the jurisdiction of German insolvency courts within the scope of application of the EU Insolvency Regulation the following distinctions have to be made:

(i) *The centre of main interests of the Insolvent Party is in Germany*

If the centre of main interests of the Insolvent Party is in Germany, an Insolvency Proceeding is instituted in Germany with respect to the Insolvent Party irrespective of whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of a branch office or any other assets of the Insolvent Party in such jurisdiction. An Insolvency Representative appointed in Germany in relation to an Insolvent Party would include transactions (regardless of the branch from which they were entered into) in the calculation of amounts owed to and from the Insolvent Party and would recognise the Netting Provisions, subject to sections 103 and 104 of the Insolvency Code (see Paragraph 5.1.1(i)(iii) on page 75).

(ii) *The centre of main interests of the Insolvent Party is in an EU member state other than Germany or Denmark and the Insolvent Party has an establishment in Germany*

Where the centre of main interests of the Insolvent Party is in an EU member state other than Germany or Denmark and the Insolvent Party has an establishment (within the meaning of the EU Insolvency Regulation) in Germany, the German insolvency courts have jurisdiction in respect of such assets of the Insolvent Party which are situated in Germany. An establishment is defined as any place of operations where the debtor carries out a non transitory economic activity with human means and goods (such term including branch offices) (Article 2 (h) of the EU Insolvency Regulation).

(iii) *The centre of main interests of the Insolvent Party is in an EU member state other than Germany or Denmark and the Insolvent Party has no establishment in Germany*

Where the centre of main interests of the Insolvent Party is in an EU member state other than Germany or Denmark and the Insolvent Party has no establishment (within the meaning of the EU Insolvency Regulation) in Germany, the German insolvency courts have no jurisdiction in respect of such Insolvent Party.

(iv) *Situation of payment claims*

Payment claims are deemed to be situated in the country in which the debtor of such claim has the centre of its main interests (Article 2 (g) of the EU Insolvency Regulation). Therefore, if the centre of main interests of the Solvent Party is in another EU member state (other than Denmark), and there are secondary proceedings under the EU Insolvency Regulation in respect of the Insolvent Party in that EU member state, then the claims of such Insolvent Party against the Solvent Party would be deemed under the EU Insolvency Regulation to be situated outside of Germany. The Insolvency Representative would be required to defer to the jurisdiction of the insolvency representative appointed in such other EU member state in relation to such claims (to the extent they have not been extinguished at the time of opening of Insolvency Proceedings).

(c) *Jurisdiction of German insolvency courts outside the scope of application of the EU Insolvency Regulation*

As to the jurisdiction of German insolvency courts outside the scope of application of the EU Insolvency Regulation the following distinctions have to be made:

(i) *The Insolvent Party is not a CRR Credit Institution or an European insurance company*

In case the Insolvent Party is not an CRR Credit Institution or an European insurance company having its place of general jurisdiction in Germany, Insolvency Proceedings are opened in Germany with respect to the Insolvent Party irrespective of whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of a branch of the Insolvent Party in such jurisdiction. In case of a legal entity, the place of general jurisdiction is the registered seat. If the centre of that legal entity's independent business activity is located elsewhere (e.g. if the management is located at a place different to the registered seat) such place determines the competent insolvency court (section 3 of the Insolvency Code). Therefore, if the centre of an independent business activity of the Insolvent Party is located outside Germany, the German insolvency courts have no jurisdiction except for the opening of (separate) insolvency proceeding (which is limited in its scope to the assets of the Insolvent Party situated in Germany).

(ii) *The Insolvent Party is an CRR Credit Institution or an European insurance company*

In case the Insolvent Party is a CRR Credit Institution or an European insurance company, the opening of secondary or territorial insolvency proceedings is excluded (section 46e of the Banking Act, section 88 para. 1b of the Insurance Supervisory Act). Insolvency Proceedings may be opened in Germany only if Germany is considered to be the home member state, which is the case if the main office (*Hauptniederlassung*) is located in Germany (section 1 para. 4 of the Banking Act (which implements Article 2 of the Winding-Up Directive in connection with Article 4 para. 1 no 43 CRR); section 6 para. 1 of the Insurance Supervisory Act (which implements Article 1 sent. 1 (c) and Article 6 sent. 2 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive) and Article 1 (e) and Article 4 of the Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance).

(iii) *Secondary or territorial insolvency proceedings*

Secondary or territorial insolvency proceedings can be commenced in Germany under section 354 para. 1 of the Insolvency Code if the debtor has an establishment in Germany (with respect to the exception for CRR Credit Institutions see the preceding item 5.2.1(c)(ii) on page 114). Where the Insolvent Party has no establishment in Germany, a sufficient basis for separate proceedings in Germany under the Insolvency Code is also provided in respect of assets located or deemed to be located in Germany upon request of a creditor, if such creditor provides evidence for its "special interest" in the opening of German territorial proceedings due to the fact that it would have worse prospects (*erheblich schlechter stehen*) for the settlement of its debt in the non-German proceedings (section 354 para. 2 of the Insolvency Code).[155]

If territorial or secondary insolvency proceedings are opened in Germany, they take precedence over the non-German insolvency proceedings in relation to those assets of the Insolvent Party which are situated in Germany. Such territorial or secondary insolvency proceedings and, thus, the applicability of the German insolvency law rules set out above are, however, limited in scope to the debtor's assets in Germany.

(iv) *Situation of payment claims*

Payment obligations are assets deemed to be located in Germany if they are payable by the debtor out of Germany to the Insolvent Party. Therefore, only payment obligations which are payable by the Solvent Party out of Germany are assets deemed to be located in Germany and could provide a sufficient basis for separate Insolvency Proceedings in relation to such Insolvent Party.

(d) *Netting under German international insolvency law*

As to the netting under German international insolvency law the following distinctions have to be made:

(i) *With respect to netting under German international insolvency law within the scope of the EU Insolvency Regulation the following applies:*

(1) Scope of the *lex fori concursus* rule (Article 4 of the EU Insolvency Regulation)

When applicable, Article 4 of the EU Insolvency Regulation provides that the law applicable to insolvency proceedings and their effects are the law of the EU member state in which the proceedings are

[155] According to legal commentators this provision has to be applied restrictively (*Wenner* in: Mohrbutter/Ringstmeier, Handbuch der Insolvenzverwaltung, 9th ed. (2015), § 20 no. 71.

opened. Insolvency proceedings are opened in the jurisdiction where the centre of main interests of the Insolvent Party is located except where there is another, more specific, provision within the EU Insolvency Regulation itself – subject to any secondary proceedings. Secondary proceedings are governed by the law of the EU member state (other than Denmark) in which they are opened (Article 3 para. 2, 28 of the EU Insolvency Regulation).

Cases where rights may be immunised from the effects of insolvency law are, for example, "rights *in rem*" over assets outside the jurisdiction where the insolvency proceedings are conducted (Article 5 of the EU Insolvency Regulation) and rights of set-off permitted by the law applicable to the insolvent debtor's claim (Article 6 of the EU Insolvency Regulation). Insolvency law is subordinated to some other system of law where the rules of payment or settlement systems and financial markets (Article 9 of the EU Insolvency Regulation) apply.

(2) Conflict of law rule regarding insolvency set-off

Under the EU Insolvency Regulation set-off is permitted in each of the two following situations:

(A) if it is permitted under the insolvency[156] laws of the jurisdiction in which insolvency proceedings have been opened in relation to the insolvent

[156] According to many legal commentators in Germany (*Reinhart* in: Münchener Kommentar zur Insolvenzordnung, 2nd ed. (2008), Article 4 EuInsVO no. 3; *Haß/Herweg* in: Haß *et al.*, EU-Insolvenzverordnung (2005), Article 4 no. 32; *Gottwald* in Insolvency Regulation only concerns set-off restrictions that stem from the insolvency law of the jurisdiction in which insolvency proceedings have been opened. The scope of the *lex fori concursus* thus would be limited to such laws. The general legal requirements relating to set-off (e.g. in Germany sections 387 *et seq.* of the German Civil Code), however, are determined according to the usual conflict of law rules (e.g. the Rome I Regulation with respect to contracts entered into after 17 December 2009 or Article 32 para. 1 no. 4 of the Introductory Code to the German Civil Code regarding claims having come into existence prior to such date, which are applicable as if there were no insolvency proceedings).

debtor (Article 4 para. 2 (d) of the EU Insolvency Regulation) or

(B) if it is permitted by the law applicable to the insolvent debtor's claim (Article 6 para. 1 of the EU Insolvency Regulation).[157]

Article 6 para. 1 of the EU Insolvency Regulation establishes an insolvency conflict of law rule regarding insolvency set-off as an exception to the *lex fori concursus* rule as set forth by Article 4 para. 1 of the EU Insolvency Regulation. In relation to (A), the laws of Germany would be applicable in the case of Insolvency Proceedings being opened by a court in Germany. In relation to the situation mentioned under (B), set-off will be allowed if it is permitted under the laws[158] governing the Master Agreements and relevant Individual Contracts.

In this respect, it is disputed in Germany whether or not close-out netting arrangements fall within the scope of application of Article 6 para. 1 of the EU Insolvency Regulation.

From its wording, it appears that Article 6 para. 1 of the EU Insolvency Regulation does not include close-out netting arrangements as the term "set-off" only covers one element of close-out netting but does not refer to other integral parts such as the early (closing out) termination of transactions or the valuation and conversion of the terminated transactions into claims which are eligible for being set off. In discussing the

[157] Article 6 of the EU Insolvency Regulation reads as follows: "The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim."

[158] This includes insolvency law, e.g. in Germany sections 94 *et seq.* of the Insolvency Code (see Paragraph 5.1.1(o)(i) on page 67 above) (*Kindler* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 5th ed. (2010), § 340 no. 8, *Gruber* in: Haß *et al.*, EU-Insolvenzverordnung (2005), Article 6 no. 9; *Reinhart* in: Münchener Kommentar zur Insolvenzordnung, 2nd ed. (2008), Article 6 EuInsVO no. 9).

purpose of Article 6 para. 1 of the EU Insolvency Regulation, it is, however, argued that such article is interpreted broadly to include close-out netting arrangements. Such interpretation is largely justified by the needs of financial market participants to choose the insolvency law applicable to close-out netting. [159] However, besides the broad interpretation of Article 6 para. 1 of the EU Insolvency Regulation to cover such need, a systematic interpretation of such article argues against the inclusion of close-out netting arrangements.

Recital 27 of the EU Insolvency Regulation in connection with Article 9 of the EU Insolvency Regulation clarify that the European legislator distinguishes between set-off and netting agreements and that the latter is only exempt from the *lex fori concursus* rule of Article 4 para. 1 of the EU Insolvency Regulation if agreed in the context of a system. [160] Moreover, the European legislator uses the terms set-off and netting agreements differently in other relevant EC legal acts as well.[161]

To summarise, following the wording of Article 6 para. 1 of the EU Insolvency Regulation and the use of terminology by the European legislator, the proper interpretation of Article 6 para. 1 of the EU Insolvency Regulation appears to be that close-out netting arrangements are not covered by such article and therefore fall within the scope of application of Article 4 para. 1 of the EU Insolvency Regulation, i.e. are governed by the law applicable to insolvency

[159] See European Financial Markets Lawyers Group, Protection for Bilateral Insolvency Set-off and Netting Agreements under EC Law, October 2004, nos.72 *et seq.*

[160] Recital 27 and Article 9 of the EU Insolvency Regulation refer to payment systems and financial markets rather than to contractually agreed close-out netting arrangements. Furthermore, Article 25 of the Winding-Up Directive refers to netting agreements rather than to set-off arrangements.

[161] The Winding-Up Directive contains, in addition to the general rule regarding set-off (Article 23 para. 1), a specific rule in respect of "netting agreements" (Article 25).

proceedings of the EU member state in which the proceedings are opened.

(3) Effects of Articles 6 para. 2 and 4 para. 2 (m) of the EU Insolvency Regulation

Pursuant to Article 4 para. 2 (m) of the EU Insolvency Regulation, the law of the member state opening the insolvency proceedings (*lex fori concursus*) determines the rules relating to the voidness, voidability or unenforceability of legal acts which are detrimental to all creditors. Article 6 para. 2 of the EU Insolvency Regulation provides that the protection for set-off pursuant to Article 6 para. 1 of the EU Insolvency Regulation does not preclude actions for voidness, voidability or unenforceability as referred to in Article 4 para. 2 (m) of the EU Insolvency Regulation. Consequently, Article 6 para. 2 of the EU Insolvency Regulation preserves the ability of the *lex fori concursus* to declare the provision void despite the protection in Article 6 para. 1 of the EU Insolvency Regulation.[162]

(4) Article 13 of the EU Insolvency Regulation

Pursuant to Article 13 of the EU Insolvency Regulation, the rules relating to voidness, voidability or unenforceability of the EU member state in which the proceedings have been opened would not apply where the person who benefited from an act detrimental to all the creditors provides proof that (i) the said act is subject to the law of an EU member state other than that of the EU member state of the opening of proceedings,

[162] Contrary to the explicit wording of Article 6 para. 2 of the EU Insolvency Regulation, it is, however, argued that the set-off of claims has absolute protection under Article 6 para. 1 of the EU Insolvency Regulation even where the agreement creating the right to set off was itself vulnerable as a preference (see European Financial Markets Lawyers Group, Protection for Bilateral Insolvency Set-off and Netting Agreements under EC Law, October 2004, pages 27 *et seq.* (nos. 84 *et seq.*)).

and (ii) that such law does not allow any means of challenging that act in the relevant case.

(ii) *With respect to netting under German international insolvency law outside the scope of the EU Insolvency Regulation the following applies:*

(1) Principles of German international insolvency law

Under German international insolvency laws, section 335 of the Insolvency Code provides that insolvency proceedings and their effects are, in general, governed by the laws of the jurisdiction in which the proceedings have been opened (this principle is also provided by Article 4 of the EU Insolvency Regulation). However, the Insolvency Code provides for some exceptions to this principle.

With respect to insolvency proceedings instituted in a jurisdiction other than Germany, section 351 of the Insolvency Code (see also Article 5 of the EU Insolvency Regulation) provides that rights *in rem* of creditors or third parties in assets of the insolvent estate will not be affected by the foreign proceedings provided that the relevant assets are situated in Germany at the time of the opening of the foreign proceedings and such right *in rem* entitles the creditor or, as the case may be, the third party to segregation of the relevant asset from the insolvency estate (*Aussonderung*) or separate satisfaction (*Absonderung*).

Section 338 of the Insolvency Code[163] provides that any right to declare set-off is not affected by the opening of

---

[163] An English translation of section 338 of the Insolvency Code reads as follows: "The right of an insolvent party to exercise a set off right shall not be affected by the opening of insolvency proceedings if under the laws of the jurisdiction governing the claim of the insolvency debtor the insolvent party is entitled to the set off at the time the insolvency proceedings are opened."In English section 339 of the Insolvency Code reads as follows: "The validity of legal acts may be challenged if the requirements for insolvency avoidance are met in accordance with the laws of the jurisdiction in which the insolvency proceedings have been opened, unless the party against which the challenge is instituted (*Anfechtungsgegner*) provides evidence that the

Insolvency Proceedings, provided that such right exists in accordance with the law governing the relevant claim of the Insolvent Party at the time the Insolvency Proceedings are instituted, and section 339 of the Insolvency Code provides that the validity of specific legal acts may be challenged if the requirements for doing this in insolvency proceedings are met in accordance with the law governing the insolvency proceedings, unless the party whose acts are to be challenged provides conclusive evidence that the relevant act is governed by the laws of another state and cannot be challenged thereunder.

(2) Effect of section 340 para. 2 of the Insolvency Code on the Netting Provisions

Where the EU Insolvency Regulation does not apply,[164] section 340 para 2 of the Insolvency Code provides that the effects of insolvency proceedings on "netting agreements" (*Schuldumwandlungsverträge und Aufrechnungsvereinbarungen*) are governed by the law applicable to such agreements, implementing Article 25 of the Winding-Up Directive into German law.[165] Even though section 340 para 2 of the Insolvency Code does

relevant act is governed by the laws of another jurisdiction and such act can in no ways be challenged under the laws of such jurisdiction."

[164] Section 340 para 2 of the Insolvency Code applies in each case in which the EU Insolvency Regulation does not apply, i.e. if the insolvent Customer is excluded from the EU Insolvency Regulation's scope of application pursuant to Article 1 para 2 or if the Insolvency Proceedings do not have a cross-border effect within the European Union.

[165] Article 25 of the Winding-Up Directive has been amended by Article 117 of the EU Bank Recovery and Resolution Directive and should as from now be construed as referring to netting agreements within the meaning of Article 2 para 1 no. 98 of the EU Bank Recovery and Resolution Directive. Pursuant to Article 130 para 1 of the EU Bank Recovery and Resolution Directive all provisions including Article 117 of the EU Bank Recovery and Resolution Directive amending the Winding-Up Directive must be implemented into national law until 1 January 2015. Even though the wording of Article 25 of the Winding-Up Directive has been amended the wording of section 340 of the Insolvency Code was left unchanged but presumably was considered sufficient to address the change of the Winding-Up Directive. However, we construe the scope of section 340 of the Insolvency Code still on its wording rather than based on the changes implemented by Article 25 of the Winding-Up Directive as amended.

not provide any guidance on the interpretation of the term "netting agreement", we believe that a German court should when construing such provisions also refer to other legal provisions such as Article 25 of the Winding-Up Directive, Article 296 para 2 lit (a) CRR, Article 2 para 1 no. 98 of the EU Bank Recovery and Resolution Directive, section 104 para. 3 of the Insolvency Code or section 2 para 3 no. 43 lit. (a) of the Resolution Act, respectively.[166]

According to our interpretation of section 340 para. 2 of the Insolvency Code, the Netting Provisions take effect in accordance with the substantive insolvency laws of the country the laws of which have been chosen by the parties to govern the Master Agreements.

Section 340 para. 2 of the Insolvency Code provides for the effects of Insolvency Proceedings on repurchase agreements (*Pensionsgeschäfte*) within the meaning of section 340b of the Commercial Code as well as on netting agreements (*Schuldumwandlungsverträge und Aufrechnungsvereinbarungen*) to be governed by the law applicable to that agreement. Even though section 340 para. 2 of the Insolvency Code does not provide any guidance on the interpretation of the term "netting agreement",[167] the legislative history reveals that master agreements within the meaning of section 104 para. 2

[166] The aforementioned provisions are using different terms but we believe that they substantially address netting agreements (*Schuldumwandlungsverträge und Aufrechnungsvereinbarungen*) as referred to in section 340 para 2 of the Insolvency Code; see Article 25 of the Winding-Up Directive (*Saldierungsvereinbarung*), Article 296 CRR (*vertragliche Nettingvereinbarung*), Article 2 para 1 no. 98 of the EU Bank Recovery and Resolution Directive (*Close-out Saldierungsvereinbarung*) and section 2 para 3 no. 43 lit. (a) of the Resolution Act (*Close-out Nettingvereinbarung*).

[167] With respect to the German terminology please see Paragraph 5.1.1(h) on page 39 above and BT-Drucksache 15/16, 20.

sent. 3 of the Insolvency Code fall within the scope of section 340 para. 2 of the Insolvency Code.[168]

Furthermore, as set out under Paragraph 5.1.1(i)(iii)(3)(D) on page 84 above, the Master Agreements should qualify as master agreements within the meaning of section 104 para. 2 sent. 3 of the Insolvency Code. Thus, in our view, the Master Agreements should also qualify as a netting agreement within the meaning of section 340 para. 2 of the Insolvency Code. However, there are no court decisions yet giving further guidance as to the scope and interpretation of this provision.

It is not entirely clear to which set of rules the wording "law of the country which governs such agreements" refers. Basically, section 340 para. 2 of the Insolvency Code could refer to (i) the substantive insolvency laws of the jurisdiction that has been chosen by the parties to govern the relevant agreement,[169] (ii) the substantive contract law of the jurisdiction that has been chosen by the parties to govern the relevant agreement[170] or (iii) directly to the terms of the relevant agreement without any regard to the substantive insolvency or contract laws.[171]

Since the wording of section 340 para. 2 of the Insolvency Code does not provide any clear guidance as to its interpretation, both the legal history and the context of this provision have to be taken into account.

---

[168] BT-Drucksache 15/16, 20; see also *Gottwald/Kolman* in: Insolvenzrechtshandbuch, 5th ed. (2015), § 133 no. 86.

[169] *Tashiro* in: Braun, Insolvenzordnung, 6th ed. (2014) § 340 nos. 3 and 4; *Jahn* in: Münchener Kommentar zur Insolvenzordnung, 2nd ed. (2008) § 340 no. 6.

[170] *Kindler* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 6th ed. (2015), § 340 no. 5 (*lex causae*); *Stephan* in: Heidelberger Kommentar zur Insolvenzordnung, 7th ed. (2014), § 340 no. 6.

[171] This interpretation is supported by *Schneider* in: Kohler/Obermüller/Wittig, Kapitalmarkt – Recht und Praxis, Gedächtnisschrift für Ulrich Bosch (2006), 211.

Section 340 para. 2 of the Insolvency Code implements Article 25 and 26 of the Winding-Up Directive into German law.[172] However, the wording of the Winding-Up Directive is not precise either. With respect to the relevant context of the Winding-Up Directive, in particular European Council Directive (EC) 2002/47 on Financial Collateral Arrangements, the European legislator apparently aims at protecting the expectation of parties to a close-out netting agreement that their agreement will remain enforceable after the opening of insolvency proceedings. When implementing the Winding-Up Directive into German law, the German legislator expressly referred to this intention behind the Winding-Up Directive and emphasised the necessity to ensure predictability[173] regarding the applicable laws.

However, the realisation of this purpose does not require an extension of the parties' freedom of contract in a way that conflicts with the principles of insolvency law. Moreover, the wording of section 340 para. 2 of the Insolvency Code refers to the laws of the country instead of merely referring to the provisions of the contract. Therefore, the effectiveness of close-out netting arrangements in netting agreements would not only be a matter of the terms of the netting agreement as agreed between the parties (without any reference to substantive insolvency laws) pursuant to section 340 para. 2 of the Insolvency Code.

An interpretation according to which section 340 para. 2 of the Insolvency Code would refer to the contract law of the jurisdiction that has been chosen by the parties to govern the relevant agreement is not convincing. As section 340 para. 2 of the Insolvency Code is an

---

[172] For insurance companies please see Article 22 and 23 of the Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings.

[173] BT-Drucksache 15/16, 19 *et seq.*

insolvency conflict of law provision, the better arguments are with those who claim that this section refers to insolvency law rather than to contract law.

In the context of an insolvency, the realisation of legal certainty and predictability not only is in the interest of the parties to a contractual agreement, but also in the interest of all insolvency creditors. Therefore, section 340 para. 2 of the Insolvency Code should be interpreted as referring to the substantive insolvency laws of the country the laws of which have been chosen by the parties to govern the relevant agreement. This interpretation of section 340 para. 2 of the Insolvency Code is in accordance with its wording, its context and its purpose without conflicting with the general principles of insolvency law.

However, we note that, as far as we are aware, the interpretation of section 340 para. 2 of the Insolvency Code has not been the subject of any court decision yet.

5.2.2 **German Multibranch Party**

(a) *Additional assumptions*

For the purposes of Paragraph 5.2.2, we assume that one party to the Master Agreements (Party A) has entered into Individual Contracts under the Netted Agreements through offices in Germany as well as through one or more branches located abroad. After entering into these Individual Contracts and prior to the maturity thereof, Party A becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Germany.

(b) *Would there be any change in our conclusions reached under Paragraphs 5.1.1 or 5.1.2 above based upon the fact that Party A has conducted business under some or all Netted Agreements on a multibranch basis prior to its insolvency?*

If the main Insolvency Proceedings are opened in Germany, such main Insolvency Proceedings in Germany would be universal, which means that the Individual Contracts entered into by non-German branches of

Party A are included in the Insolvency Proceedings. Therefore, a single compensation claim is calculated in the main Insolvency Proceedings in Germany, provided, however, that German law cannot prevent that under the insolvency laws of another jurisdiction secondary insolvency proceedings are opened.

(i) *Opening of main Insolvency Proceedings in Germany*

(1) In case the EU Insolvency Regulation is applicable

If the EU Insolvency Regulation applies (please refer to Paragraph 5.2.1(a) on page 109), Insolvency Proceedings are instituted in Germany with respect to Party A, because Party A has its centre of main interest in Germany (Paragraph 5.2.1(b)(i) on page 111 *et seq.* above).[174] This applies irrespective of whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of a branch office or any other assets of the Insolvent Party in such jurisdiction. An Insolvency Representative appointed in Germany in relation to Party A would include all transactions entered into under the Netted Agreement (regardless of the branch from which they were entered into) in the calculation of amounts owed to and from the Insolvent Party and would recognise the Netting Provisions and sections 103, 104 of the Insolvency Code (see item 5.1.1(i)(iii) on page 26).

(2) In case Party A is a CRR Credit Institution or a German insurance company

In case Party A is a CRR Credit Institution or a German insurance company, the main insolvency proceedings are also opened in Germany (please refer to Paragraphs 5.2.1(a) on page 109 *et seq.* 5.2.1(c)(ii) on page 114).

---

174 Please refer to the general assumption set out in Paragraph 4.1(a) above.

(3) In case the EU Insolvency Regulation is not applicable and Party A is not an CRR Credit Institution or an European insurance company

If the EU Insolvency Regulation does not apply and Party A is not a CRR Credit Institution or an European insurance company, insolvency proceedings are instituted with respect to Party A in the jurisdiction where Party A has its general place of jurisdiction. This applies irrespective of whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of a branch office or any other assets of the Insolvent Party in such jurisdiction (please refer to Paragraph 5.2.1(c)(i) on page 113). In case of a legal entity, the place of general jurisdiction is the registered seat, except that if the centre of that legal entity's independent business activity is located elsewhere (for example, if the management is located at a place different to the registered seat) such place determines the competent insolvency court (section 3 para. 1 sent. 2 of the Insolvency Code). Therefore, as the centre of main interest of Party A is in Germany (please refer to the assumption in Paragraph 4.1(a) on page 9), the main insolvency proceedings will be opened in Germany.

(ii) *Recognition of foreign secondary insolvency proceedings*

If payment claims of Party A are deemed to be situated in a jurisdiction other than Germany (please refer to Paragraphs 5.2.1(b)(iv) on page 113 and 5.2.1(c)(iv) on page 115), the secondary insolvency proceeding opened in such other jurisdiction are recognised in Germany within the limits of section 343 para. 1 sent. 2 of the Insolvency Code[175] and Article

[175] An English translation of section 343 para. 1 of the Insolvency Code reads as follows:

"(1) The opening of foreign insolvency proceedings shall be recognised. This shall not apply

1. if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law;

16 of the European Insolvency Regulation, which require the recognition of such proceedings only if the relevant court had jurisdiction. If under the insolvency proceeding in such other jurisdiction, the Netting Provisions of the Master Agreements are not enforceable, then, even if the Master Agreements has been terminated prior to the opening of the main Insolvency Proceeding in Germany, the Insolvency Representative will not enforce the payment claims that are situated in such other jurisdiction. The net payment claim of Party A under the relevant Master Agreement, if any, will be decreased accordingly.

(c) *Would the MNA and, if so selected in Part VIII Section 10.6 of the Commodities Schedule, the CPMA be treated as a single unified agreement by the German receiver under the laws of Germany, regardless of the treatment of the MNA or CPMA or transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable?*

If claims under the Individual Contracts governed by the Master Agreements become the subject of a secondary insolvency proceeding, and the single agreement concept is not recognised in such proceeding, the Master Agreements would not be treated as a single unified agreement by the German Insolvency Representative, to the extent such secondary insolvency agreements are recognised in Germany.

5.2.3 **Foreign Multibranch Party**

(a) *Additional assumptions*

As instructed, we assume that a company, a credit institution, a financial services institution, an insurance company or any other similar financial institution covered by this Opinion ("**Party F**") incorporated, organised or having its centre of main interest in a country ("**Country H**") other than Germany has entered under the some or all Netted Agreements into Individual Contracts both through its home office and through one or more branches located in other

2. where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights."

countries including in each case a branch of Party F located in and subject to the laws of Germany (the "**German Branch**").

After entering into these Individual Contracts and prior to the maturity thereof, Party F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H.

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

(i) *In case the EU Insolvency Regulation is applicable*

If the EU Insolvency Regulation is applicable to the insolvency of Party F (please refer to Paragraph 5.2.1(a) on page 109), the German Branch would qualify as an "establishment" of Party F in Germany (please refer to Paragraph 2.5 on page 3. Hence, a secondary insolvency proceeding (Article 3 para. 3 of the EU Insolvency Regulation) may be opened by a German insolvency court after the opening of the main insolvency proceeding in Country H, or a territorial insolvency proceeding may be opened absent a main insolvency proceeding in Country H (Article 3 para. 2 of the EU Insolvency Regulation). Such secondary insolvency or territorial insolvency proceeding would be limited to the assets of Party F which are situated in Germany (please refer to Paragraph 5.2.1(b)(ii) on page 112). Claims of Party F are deemed to be situated in Germany if the debtor of such claim has the centre of its main interests in Germany, as determined in Article 3 para. 1 of the EU Insolvency Regulation. In case of a company or legal person, the place of the registered office is presumed to be the centre of its main interests in the absence of evidence to the contrary (please refer to Paragraph 5.2.1(b)(iv) on page 113). This applies irrespective of whether or not such claims arise from transactions which were entered into by an establishment of Party F in Germany.

(ii) *In case Party F is a CRR Credit Institution or an European insurance company*

In case Party F is a CRR Credit Institution or a European insurance company, the EU Insolvency Regulation is not applicable (please refer to Paragraph 5.2.1(a) on page 109). Only the insolvency courts or other relevant authorities in the home member state of such CRR Credit Institution or European insurance company may open an insolvency proceeding (section 46e para. 1 sent. 1 of the Banking Act; please refer to Paragraph 5.2.1(c)(ii) on page 114). Therefore, even though Party F has an establishment in Germany, no secondary insolvency proceeding will take place in Germany.

(iii) *In case the EU Insolvency Regulation is not applicable and Party F is not a CRR Credit Institution or an European insurance company*

In case the EU Insolvency Regulation is not applicable and Party F is not a CRR Credit Institution or an European insurance company, sections 335 to 358 which provide for the conflicts of law rules of the Insolvency Code apply. German insolvency courts may open a secondary insolvency proceeding (section 354 of the Insolvency Code) in addition to the insolvency proceeding in Country H or, absent such insolvency proceeding in Country H, a territorial insolvency proceeding (section 354 para. 1 of the Insolvency Code). Such secondary insolvency or territorial insolvency proceeding would be limited to the assets of Party F which are situated in Germany. Payment claims are deemed to be situated in Germany if Party F as debtor thereunder has its registered office in Germany (in case Party F is a corporation) or if Party F's place of residence is in Germany (please refer to Paragraph 5.2.1(c)(iv) on page 115).

(c) *If there were separate proceedings in Germany with respect to the assets and liabilities of the German Branch, would the receiver or liquidator in Germany and the German courts, based on the facts* *above, include Party F's position under the Netted Agreement, in whole or in part, among the assets of Germany and, if so, would the receiver or liquidator and the German courts recognise the close-out netting provisions of the Master Agreements in accordance with their terms? The most significant problem arising would be if a German receiver, liquidator or court considering a single Master Agreement were to require a counterparty of the German Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the German Branch to the liquidator or receiver of the German Branch, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same Master Agreement. In considering this issue, please assume that close-out netting under the relevant Master Agreement would be enforced in accordance with its terms in the proceedings for Party F in Country H.*

If, according to the principles set out in Paragraph 5.2.3(b) on page 129 *et seq*. above, separate Insolvency Proceedings are opened in Germany, such separate Insolvency Proceedings cover all assets of the debtor situated in Germany (for the situation of payment claims, please refer to Paragraphs 5.2.1(b)(iv) on page 113 and 5.2.1(c)(iv) on page 115). Therefore, separate insolvency estates are created, despite the single agreement concept provided for in § 2.3 of the MNA and, if so selected in Part VIII Section 10.6 of the Commodities Schedule, in the CPMA.

Potentially, an Insolvency Representative considering a single Master Agreement might require a counterparty of the German Branch of Party F to pay the mark-to-market value of Individual Contracts entered into with the German Branch to the insolvency estate in Germany, while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Individual Contracts with Party F under the same Master Agreement. However, this risk does not exist if at the time the secondary Insolvency Proceeding in Germany is opened, the relevant Master Agreement has been closed out already (and no claims under the Individual Contracts remain) and such close-out netting is recognised under German conflicts of law rules (please refer to Paragraph 5.2.1(d) on page 115).

(d) *Would it make any difference if Party F has no branch located in Germany, but has assets in Germany?*

If Party F does not have an establishment in Germany,[176] but has assets in Germany, a secondary Insolvency Proceeding may be opened in Germany, if a creditor has a particular interest in the opening of such Insolvency Proceeding, in particular, if such creditor would be in a substantially worse position if no secondary Insolvency Proceedings were opened. The opening of secondary Insolvency Proceedings in Germany on the basis of assets of the debtor in Germany has been controversially discussed.[177] However, the mere fact that a claim is situated in Germany may already allow the opening of a secondary Insolvency Proceeding in Germany.

5.3 Collateral under the Credit Support Annexes

5.3.1 Additional assumptions

In this Paragraph 5.3, as instructed, we assume that at least one of the counterparties entering into the Credit Support Annexes is incorporated or organised or has its centre of main interest in Germany ("**Party A**"). Although the Credit Support Annexes are bilateral forms in that they contemplate that each party may be required to post collateral to the other, we assume that (i) Party A is at all times the transferor (the "**Transferor**") and Party B the transferee (the "**Transferee**") under the Credit Support Annexes and (ii) that under the Credit Support Annexes, the collateral is owned by Party A or that Party A is authorised and empowered to transfer ownership in the collateral.

The counterparties agree that Eligible Credit Support includes cash and Letters of Credit (as defined in the Credit Support Annex). Cash is denominated in a

[176] For a discussion of the term "establishment" see *Kindler* in: Münchener Kommentar zur Insolvenzordnung, 3rd ed. (2014), § 354 no. 7. According to Article 2 lit h of the EU Insolvency Regulation, "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

[177] Pursuant to Article 3 para. 2 of the EU Insolvency Regulation, a secondary insolvency proceeding can be opened only for an establishment; the EU Insolvency Regulation does not provide for jurisdiction based on the situation of assets. However, section 354 para. 2 of the Insolvency Code recognises that a secondary Insolvency Proceeding may be opened in Germany due to the location of assets in Germany (*Paulus,* DStR 2005, 334, 339; this position is criticised by *Wenner* in: Mohrbutter/Ringstmeier, Handbuch der Insolvenzordnung, 9th ed. (2015), § 20 no. 71.

freely convertible currency (specified as "Base Currency" or "Eligible Currency" in section 14.10 or section 14.11 of the Credit Support Annex) and is held in an account under the control of Party B.

5.3.2 **Questions to be opined on**

(a) *Under the laws of Germany, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the Credit Support Annexes?*

Under German conflict of law rules regarding the transfer of cash, one has to distinguish between cash held in a bank account and cash in the form of money bills or coins: Where the ownership in cash is transferred or where a security interest is created in cash and such cash is held in a bank account, German conflict of law rules refer to the law governing the account relationship between the bank and the payee (in this event the cash is represented by the payee's claim against the bank maintaining his account in regard of the cash transferred).

Last but not least, the assignment of claims for the payment of money and the creation of a security interest in such claims, as well as the effects of such assignment or creation, are governed by the law which governs such claims.

(b) *Would the laws of Germany 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-characterisation?*

In the case of a Letter of Credit, no assets are transferred. Therefore, the following paragraphs consider the situation where Cash is given as Eligible Credit Support. For Cash, we assume that the Eligible Credit Support is paid to the Transferee and not to any third party.

It should be noted that the Credit Support Annexes provide only for an obligation to transfer the title but not for the actual transfer of title. Therefore, when granting or substituting Eligible Credit Support, both Parties need to ensure that all necessary steps will be taken separately so that the title in the relevant assets will pass. The transfer of title itself is subject to mandatory conflict of law provisions (see the respective German conflict of law provisions outlined in Paragraph 5.3.2(a) on page 133 above).

Pursuant to section 3 of the Credit Support Annexes, the Transferor (as defined in section 3 para. 1 of the Credit Support Annexes) is obliged to transfer cash into the account of the Transferee (as defined in section 3 para. 1 of the Credit Support Annexes) specified in section 13 of the 2003 CSA and in section 14 of the 2011 CSA and any Excess Credit Support (as defined in section 4 para. 1 of the Credit Support Annexes) must be retransferred by the Transferee to the Transferor in accordance with section 4 of the Credit Support Annexes. Section 7 para. 1 of the Credit Support Annexes provides that all right, title and interest in and to any Eligible Credit Support must be transferred from the Transferor to the Transferee.

Cash credited to an account is represented by the repayment claim of the relevant account holder against the entity maintaining the account, such as a bank or a custodian. Hence, under German law, a security interest over cash credited to an account is established by creating a security interest in the relevant repayment claim of the account holder against the relevant account bank. However, where the account is held in the name of the secured party, any transfer of cash made into such account *prima facie* constitutes an asset of the secured party and it would not be necessary to create a security interest over such account. In other words, where the cash is transferred into an account opened in the name of the secured party it is treated as a transfer of "ownership" (*Vollrechtsübertragung*),[178] rather than as a security interest (*Sicherheit* or *beschränkt dingliches Recht*). Where the cash is booked in an account held in the name of the security provider, a security interest over such account needs to be created.[179]

---

178 Transfer of ownership arrangements as a security have been recognised by German statutory law (section 1 para. 17 of the Banking Act) following the implementation of the Financial Collateral Directive.

179 Where an account is held in the name of the account holder but for the account of another person, for example a fiduciary account (*Treuhandkonto*), the secured party should verify whether the account holder may dispose of such account and validly create a security interest over such account and, as the case may be, the relevant beneficiary under such account has approved the creation of the security interest. If the secured party is aware that the account is a fiduciary account (*offenes Treuhandkonto*), the German courts take the

Generally under German law, different types of security over assets can be created, such as a security interest in the Cash balance on an account such as a pledge (*Pfandrecht*), [180] a transfer for security purposes (*Sicherungsabtretung*) and a transfer of ownership. Section 7 of the Credit Support Annexes indicates that the parties have no intention of establishing a pledge, but to transfer Cash balances by way of "outright transfer" to a Transferee's account.

Thus, the payment of Cash by the Transferor into an account of the Transferee under the Credit Support Annex should neither qualify as a pledge nor as a transfer for security purposes but as a "transfer of ownership" in the Cash.

In the unlikely event that the courts of Germany would re-characterise the transfer of Cash under the Credit Support Annexes as a creation of a security right other than a transfer of "ownership" the transfer of the Cash would not be void due to a lack of registration since there is no such requirement under German law.

However, if the account to which the Cash has been transferred is maintained in a jurisdiction other than Germany, the laws of that other jurisdiction should be checked to ensure that the transfer would not be re-characterised with possibly adverse effects (please see Paragraph 5.3.2(a) on page 133).

(c) *Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein*

---

view that generally the account holder and the secured party did not wish to create a security interest in the beneficiary's assets booked into the account and construe the relevant agreements accordingly. If the secured party is not aware that the account is a fiduciary account (*verdecktes Treuhandkonto*), the secured party can acquire a security interest in the account. However, when a secured party later becomes aware the relevant account is a fiduciary account, it might be held not to enforce a security interest acquired in such account or exercise any set-off rights and the failure of the secured party to respond to a notice indicating that the relevant account is a fiduciary account may lead a German court to conclude that the secured party has implicitly waived its security (BGH WM 1990, 1954, 1955; BGH WM 1996, 249, 251; *Hadding/Häuser*, in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4th ed. (2011), § 37 nos. 43 *et seq.*). This means that even if security interests have been validly created over a fiduciary account because it was created without the knowledge of the secured party, these can subsequently be frustrated by making a person that has taken such security subsequently aware of the fiduciary nature of the account.

[180] Pledges of rights are subject to sections 1273 *et seq.* of the German Civil Code.

continues? Are there any requirements in Germany 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?

Under the laws of Germany, no further action such as, for instance, filing a registration, a notification, stamping, or notarisation is required to enforce or continue such ownership.

However, if the account to which the Cash has been transferred is maintained in another jurisdiction the laws of that jurisdiction should be checked to verify that there are no procedures that must be followed to enforce or continue such ownership interest.

(d) *What is the effect, if any, under the laws of Germany of the right to substitute collateral pursuant to section 6 of the Credit Support Annexes? Does the presence or absence of consent to substitution by the counterparty have any bearing on this question?*

Subject to the approval of the Transferee, under section 6 of the Credit Support Annexes the Transferor is entitled to replace, in whole or in part, any Eligible Credit Support provided under the Credit Support Annexes by other Eligible Credit Support of the same or higher value. Under German law, the contractual obligation or right to the re-transfer of title has to be distinguished from the actual re-transfer of such title.

The right of the Transferor to exchange Eligible Credit Support (for example, by swapping Euros for United States Dollars) pursuant to section 6 of the Credit Support Annexes is a contractual right only. Where the transfer of Eligible Credit Support itself is governed by German law, in order to effect an valid *in rem* transfer (*dingliche Übertragung*) for a substitution, an additional agreement on the re-transfer of the relevant assets to be replaced by the Transferee to the Transferor and an additional agreement on the transfer of the assets newly provided as Eligible Credit Support by the Transferor to the Transferee is required because each of such transfers needs to be made in compliance with the applicable German law requirements to validly transfer title to such asset (including any additional activities such as transfer of possession or a book entry). Thus, if the Transferee refuses to actually re-transfer the respective assets to the Transferor, the title to the relevant assets remains with the Transferee, even if the Transferee is under a contractual obligation pursuant to section 6 of the Credit Support Annexes to re-transfer such asset.

(e) *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 CPMA or section 4 and 5 of the MNA, together with section 11 of the 2003 CSA or section 12 of the 2011 CSA. Assuming that Sections 4 of the CPMA and Section 4 and 5 of the MNA are valid and enforceable in Germany insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, are section 11 of the 2003 CSA and section 12 of the 2011 CSA 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 CPMA or Section 8 of the MNA?*

According to sections 11 and 12 of the Credit Support Annexes, the value of all Eligible Credit Support provided under the Credit Support Annexes must be included in the Final Net Settlement Amount to be determined pursuant to Section 4.4 (a) of the CPMA as "an amounts payable" by the Transferee or pursuant to § 8 of the MNA, as the "difference" between the two offsetting aggregate amounts calculated under the relevant Netted Agreements. The inclusion of such Eligible Credit Support in the calculation of the net amount payable under sections 11 and 12 of the Credit Support Annexes as "*an amount payable*" or the "*difference between the two offsetting aggregate amounts*" upon early termination would be recognised, because under the principle of freedom of contract, the parties are generally free to agree on which claims are included in the netting arrangement, subject to general limitations on contractual netting and set-off (please see Paragraph 5.1.1(g) on page 57).

The provision of section 11 of the Credit Support Annexes, pursuant to which Eligible Credit Support is applied to a Settlement Amount by way of contractual set-off, will be recognised, subject to restrictions to the right to set off after the opening of Insolvency Proceedings; see Paragraph 5.1.1(i)(iii) on page 75.

(f) *Are the rights of Party B enforceable in accordance with the terms of the CPMA and the Credit Support Annexes, irrespective of the insolvency of Party A?*

If Party A has provided Cash Collateral in the form of a full title transfer prior to the commencement of Insolvency Proceedings, Party B is regarded as the person entitled to such Cash Collateral. As set out above, it is unlikely that the courts of Germany would re-characterise the transfer of Cash under the Credit Support Annexes as a creation of a security right other than a transfer of "ownership" (please refer to Paragraph 5.3.2(b) on page 133).

However, such transfer of Cash Collateral is subject to the general challenge in insolvency rules, subject to an exception for margin collateral (please refer to Paragraph 5.1.1(c) on page 21).

Upon the opening of the Insolvency Proceedings the Insolvency Representative is vested with Party A's right to manage and transfer the insolvency estate (section 80 para. 1 of the Insolvency Code). Therefore, if following the commencement of Insolvency Proceedings, Party A transfers an object forming part of the insolvency estate, such transfer is legally invalid (section 81 para. 1 sent. 1 of the Insolvency Code).

If the debtor transferred an object forming part of the insolvency estate on the day on which the Insolvency Proceedings were opened, such transfer is presumed to have been effected after the opening of the Insolvency Proceedings. However, provided that at least Party B qualifies as a credit or financial services institution, including (without limitation) financial institutions within the meaning of Article 1 para. 2 (d) of the Financial Collateral Directive, any transfer by the debtor in respect of Financial Collateral (*Finanzsicherheiten*) within the meaning of section 1 para. 17 of the Banking Act (please refer to footnote 10 on page 5 above) following the opening of insolvency proceedings is, subject to general avoidance rules (please refer to Paragraph 5.1.1(c) on page 21), legally valid if it occurred on the day of the opening and the other party proves that he was neither aware of nor had to be aware of the opening of the proceedings (section 81 para. 3 of the Insolvency Code).

(g) *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 Credit Support Annexes 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?*

Following the commencement of Insolvency Proceedings, any transfer of Cash Collateral is invalid, subject to an exception applicable to Financial Collateral which is transferred on the day on which the Insolvency Proceedings are opened (please refer to Paragraph 5.3.2(f) on page 138).

As further set out in Paragraph 5.3.2(f) on page 138, the transfer of Cash Collateral prior to the commencement of Insolvency Proceedings is subject to the general by applicable challenge in insolvency rules as the transfer is a legal act, subject to an exception for margin collateral. Thus, transfer of Eligible Credit Support under the provisions of the Credit Support Annexes could be challenged by an Insolvency Representative during insolvency challenge periods (please see Paragraph 5.1.1(c) on page 21 for a discussion of the relevant insolvency challenge periods and for an exception for margin collateral).

Under German law, substitution of collateral whereby the collateral provider can re-claim particular securities and replace them with other securities of equivalent value is considered as a transaction consisting of various legal acts based on the declared intention of the security provider such as the conclusion of the collateral agreement providing for collateral substitution, each withdrawal of particular securities and each replacement of securities with other securities of equivalent value each of which is principally subject to challenge in insolvency under German insolvency law. Hence, each substitution is deemed to consist of two transfers that need to be made in compliance with the applicable requirements to validly transfer title to such asset and principally is subject to new insolvency challenge periods.

(h) *Are the Credit Support Annexes in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Germany in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the Credit Support Annexes? For example, are there any other requirements such as those mentioned under Paragraph 5.3.2(b) on page 133?*

As set out in Paragraph 5.3.2(a) on page 133, we understand that under the terms of the Credit Support Annexes, only cash or Letters of Credit qualify as Eligible Security.

In the case of a Letter of Credit, no assets will be transferred. In case of the transfer of cash collateral, the Credit Support Annexes are in an appropriate form to provide the basis for a legal obligation for a transfer of "ownership" (*Vollrechtsübertragung*) (please refer to 5.3.2(b) on page 138). To actually transfer the ownership in certain assets additional requirements may need to be fulfilled (such as the transfer of possession or any book entries).

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

We do not have other specific recommendations on the subject of collateral but we are happy to discuss any topics related to collateral not yet covered by this Opinion to develop further issues to be addressed.

5.4 **General enforceability**

5.4.1 *Are the MNA, the CPMA and the Credit Support Annexes enforceable under the laws of Germany in accordance with its own terms? We are especially interested in provisions that you may believe infringe upon the ordre public in Germany and that may be challenged by the courts in Germany irrespective of the law that governs the MNA, the CPMA and the Credit Support Annexes.*

Subject to the reservations under Paragraphs 5 and 6 and elsewhere in this Opinion, the MNA, the CPMA and the Credit Support Annexes, once executed between Parties, are enforceable under the laws of Germany. We do not opine whether the Netted Agreements and Individual Contracts are enforceable.

There is a general risk that the provisions of the MNA, the CPMA and the Credit Support Annexes may qualify as standard business conditions and may be invalidated due to Sections 305 to 310 of the German Civil Code if governed by German law.

These provisions apply to contractual terms which have not been negotiated individually but are applied by one of the contracting parties as standard business conditions. The term "standard business conditions" means pre-formulated contractual conditions imposed by one party on another. In general terms, the restrictive statutory provisions on the use of standard business conditions would apply if one party incorporates general terms and conditions which have not been negotiated, for example, where one party uses standardised contracts such as the Master Agreements.

However, if both parties respectively use the same master agreement, for example the MNA and the CPMA, as their respective standard terms, the risk that the provisions of the German Civil Code on standard business conditions are applicable is significantly reduced. The majority of commentators in legal literature holds that if both parties to an agreement mutually refer to the same standard business conditions and mutually request their introduction into the contract, sections 305 to 310 of the German Civil Code do not apply to such terms and conditions.[181] Although we generally share this view, it is also important to note that there is some uncertainty on whether the courts will follow this argument with regard to the Master Agreements as well, because there are insufficient court precedents regarding this question[182], and because some legal commentators suggest that sections 305 to 310 of the German Civil Code also apply to standard business conditions which are commonly used by both parties to a contract.[183] In particular where the counterparty to a master

---

[181] *Grüneberg* in: Palandt Bürgerliches Gesetzbuch, 74th ed. (2015), § 305 no. 13; *Ulmer* in: Ulmer/Brandner/Hensen, AGB-Gesetz, 11th ed. (2011), § 305 no. 29; *Wolf* in: Wolf/Horn/Lindacher, AGB-Gesetz, 6th ed. (2013), § 305 no. 32.

[182] The *OLG Düsseldorf* subscribes to the majority view in legal literature, OLG Düsseldorf NJW 1994, 59.

[183] This has been discussed in particular with regard to standard business conditions in the construction business, but the same reasoning might be applied to master agreements such as the Master Agreements. Please refer to: Staudinger/Schlosser (2006) § 305 no. 31; *Schlechtriem* in: Festschrift für Konrad Duden (1977), 576 *et. seq.*; *Sonnenschein*, NJW 1980, 1489, 1491 *et seq.*

agreement is a new and inexperienced market participant, it is quite possible that German courts would hold and rule accordingly that such party deserves protection under sections 305 to 310 of the German Civil Code.

Notwithstanding the aforementioned exemption, to the extent that agreements will only be concluded with a person pursuing its commercial or independent professional activities as entrepreneur (*Unternehmer*) within the meaning of section 14 of the German Civil Code or with private or public law legal entities, sections 305 to 310 of the German Civil Code apply to a limited extent. If the MNA, the CPMA or the Credit Support Annexes are entered into with one of the afore-mentioned type of counterparties, sections 308 and 309 of the German Civil Code specifying certain generally prohibited clauses will not apply. Nevertheless, the agreement must not alter substantial principles of German law or lead to consequences that are either surprising, overly disadvantageous or expressed in an unclear way (sections 305c and 307 of the German Civil Code).[184] In this respect, the legal principles expressed in the prohibition of certain clauses according to sections 308 and 309 of the German Civil Code must still be taken into account. If the relatively strict requirements of such provisions are not met, the standard business conditions concerned are null and void and the rules of statutory law apply. A severability clause replacing the invalid contractual provision with a contractual provision achieving an effect coming as close a legally possible to the effect of the invalid provision would be equally void.

However, such risk generally exists with respect to clauses qualifying as standard business conditions and it is not uncommon to see such or comparable provisions applied by parties.

If the result of the application of a foreign law (e.g. as governing the relevant agreements) contradicts the fundamental idea of the corresponding German legal provisions and the understanding of righteousness of the German public in a way that the application of such foreign law is to be considered unbearable, a German court would not apply such foreign law contravening the so-called *ordre public*.[185] This principle of *ordre public* is, however, only

---

[184] BGH NJW 2007, 3774; BGHZ 89, 363; BGHZ 90, 273.

[185] BGHZ 50, 370, 375; BGH ZIP 1992, 1256, 1264.

applied in very severe cases[186] and, if governed by a law different from German law, the provisions of the MNA, CPMA and the Credit Support Annexes should regularly not qualify as contravening the German *ordre public*.

However, whether or not the *ordre public* is infringed depends on the circumstances of the specific case with a view to all aspects of the relevant foreign law, the application of which is to be considered.

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

We recommend to conduct authority and capacity checks for each counterparty to ensure that the counterparty has obtained all authorisations required to enter into the relevant transaction (for example, board resolutions) and that the signatory is authorised to sign the relevant transaction on behalf of the counterparty. If an advisory relationship exists with the relevant counterparty, it is necessary to observe the general regulatory requirements applicable to investment advice and the obligations applicable in case of an advisory relationship (*anleger- und objektgerechte Beratung*).

5.5 Confirmation practice

5.5.1 Additional assumptions

In this Paragraph 5.5, we furthermore assume that as far as the confirmation practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make oral reference to a Netted Agreement when concluding the relevant Individual Contract over the phone and (ii) refer to a Netted Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Individual Contracts (in whichever form, including telex, telefax, SWIFT, electronic confirmation or position matching service or other means of electronic transmission). Parties may or may not use matching systems (like EFET eCM, MarkitWire or DTTC DS Match) to electronically match and exchange confirmations. We do not opine on any related regulatory obligations.

---

[186] See for example OLG Köln, VersR 2007, 553 *et seqq.* on an exclusion of liability under the laws of Taiwan even for cases of gross negligence not contravening the German *ordre public*.

5.5.2 Binding individual contract

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

If governed by German law, Individual Contracts may be concluded in any form in accordance with the form provisions of the relevant Netted Agreement unless otherwise agreed between the Parties. Under German law, no specific formal requirements, such as a notarisation requirement, do generally apply.

In case the relevant Individual Contract is concluded orally, the Parties may agree on producing a written document for merely evidentiary purposes. Such Confirmation sets out in writing the contents of an Individual Contract that has already (i.e. prior to the drafting of the Confirmation) been concluded orally. For merely evidentiary purposes, however, any conceivable text version that is suitable for documentary evidence and that can be permanently stored – including e-mails and telefaxes would suffice.

The parties may agree on the use of certain communication standards to be used for the electronic matching of confirmations. No specific German law provision objects the use of electronic matching systems.

Unless otherwise agreed between the Parties, there is no general requirement under German civil law to sign documents in written form. However, in case a Party is a German entity established under public law, such party may be obliged under applicable law, to enter into the Netted Agreements and the Individual Contracts entered into thereunder in written form.

If the Parties would only be satisfied with a Confirmation that complies with the more stringent written signature requirements, it would be recommendable to specify the agreed-upon formal requirements in more detail and, in particular, to include an explicit reference to a (handwritten) signature. It is further recommendable to include in the relevant form provision of the relevant Netted Agreement a reference to the EFET Electronic Confirmation Matching System and the EFET Electronic Confirmation Agreement as a means of confirming a transaction.

(b) *At what point in time does an Individual Contract agreed upon orally become legally binding or enforceable?*

An Individual Contract is legally enforceable once agreed upon orally. However, the Parties may be required to provide documents in writing following the conclusion of the contract for evidential purposes (see our answer under Paragraph 5.5.2(c)/page 145 below).

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

Since the Parties will have entered into the Confirmation already orally, a written Confirmation sent to either counterparty after the oral conclusion of the agreement in principle does not alter or amend such agreement and would merely be of declaratory nature.

However, pursuant to the German law doctrine of a commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*) – which, in the absence of a deviating agreement between the Parties or a different commercial practice, would most likely also apply here – the terms stipulated in such commercial letter of confirmation will prevail. The Confirmation will qualify as a commercial letter of confirmation if it states that an agreement has been reached orally and that the terms of such agreement are confirmed in such letter.

If such Confirmation qualifies as a commercial letter of confirmation and its terms deviate from the content of the terms agreed orally, the provisions contained in the Confirmation will generally prevail if the recipient remains silent,[187] *i.e.* does not object immediately.

This may apply even if the party which sends the Confirmation requests the recipient to countersign, because the sender of the Confirmation may request the countersignature only for evidentiary purposes.[188]

---

[187] BGHZ 7, 187, 189; BGH WM 2007, 303, 305.

[188] BGH WM 2007, 303, 305; BGH NJW 1964, 1269, 1270.

Thus, the terms of the Confirmation are deemed to be accepted, unless the recipient objects immediately, that is without undue delay (*unverzüglich*) within the meaning of section 121 of the German Civil Code. The time frame allowed thereunder depends on the usual time in which a counterparty can be expected to review and react to a confirmation. General court decisions – which, however, do not specifically deal with commodity contracts – allows for one to three business days;[189] however, an objection within an even shorter period of time might be required in the specific context of power trading, in particular where performance under the contract must commence within a short period of time.

The aforementioned principles do not apply if the party sending the Confirmation knows that the Confirmation is incorrect,[190] or if the Confirmation deviates from the orally agreed terms to such an extent that the silence on behalf of the recipient cannot reasonably be construed as a consent to such terms.[191]

(d) *Is the reference to a Netted Agreement sufficient for the inclusion of the Individual Contract in the Netted Agreement?*

In the event the Parties to the Master Agreements enter into an Individual Contract orally, (such as over the telephone), or otherwise, (e.g., through an electronic trading or matching system), and make reference to it being an Individual Contract for the purpose of a Netted Agreement and assuming that the Individual Contract and the Netted Agreement are governed by German law, such Individual Contract would be validly included in the relevant Netted Agreement as we understand that the Parties intend to include such Individual Contract under the Netted Agreement and the Parties' corresponding agreement should prevail over the terms of the Netted Agreement.

---

189 BGH NJW 1962, 246, 247; BGHZ 70, 232, 234.

190 *Schmidt* in: Münchener Kommentar zum Handelsgesetzbuch, 3rd ed. (2013), § 346 no. 162; BGH WM 1955, 1284.

191 *Schmidt* in: Münchener Kommentar zum Handelsgesetzbuch, 3nd ed. (2013), § 346 no. 163; BGH NJW 1954, 105, 105; BGHZ 40, 42, 45; BGHZ 101, 357, 365 = NJW 1988, 55, 57; BGH NJW-RR 2001, 680, 681; BGH NJW 1994, 1288.

Assuming the Individual Contract is not governed by German law, under German conflict of law rules, the law governing the relevant Individual Contract and the Netted Agreement would also determine the circumstances under which such Individual Contract may be included in the relevant Netted Agreement.

Subject to the above, an Individual Contract is also validly included in the relevant Netted Agreement if the Parties orally enter into such Individual Contract without any reference to the Netted Agreement between them, but subsequently confirm the Individual Contract in writing, via telex, facsimile, SWIFT, or other means of electronic transmission by using one of the sample Confirmations attached to the Netted Agreement or by otherwise referring to the Individual Contract as a Individual Contract for the purposes of the Netted Agreement between the Parties.

5.5.3 **Means of Evidence**

Assuming there is a dispute with respect to the existence or the terms or conditions of an Individual Contract, 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?

(a) *Taped recording*

Under German law, the recording of telephone conversations is generally not permissible without the consent of the all participants of the conversation. According to section 201 para. 1 of the German Criminal Code (*Strafgesetzbuch*), it is a criminal offence to unlawfully record conversations, to use such recordings or to make such recordings available to third parties. This offence is punishable by imprisonment not exceeding three years or a fine. Furthermore, such recordings may also breach contractual obligations and duties and may also constitute a breach of the obligations assumed as an employer *vis-à-vis* the employees who have not consented to the recording. Subject to narrow exceptions, recordings which have been illegally obtained without the consent of the participants of the conversation may not be produced as evidence in civil actions.[192]

However, it is permissible to seek and obtain prior consent to the recording of telephone conversations. In such case, each participant to the conversation has to consent to the recording of the conversation, as well as to the use of the recording for evidentiary purposes and to distributing the recording to third parties. The Parties may represent that their employees have given their consent[193]. In such case, the recording Party may generally rely on such representation. In this context it is recommended that the representation is obtained in writing.

From a technical point of view, in order to comply with the restrictions under German law, *i.e.* to record only those conversations for which a consent has been given, a telephone system would be required that identifies incoming calls and routes them depending on whether the caller is identified as having consented to the recording of its conversations or not, to recording in the first alternative and not recording in the absence of a consent.

---

192 BGHZ 27, 284; BGH NJW 1982, 277, 278; BGH NJW 1988, 1016; OLG Hamm NJW-RR 1996, 735. Similar principles have been developed in connection with witness evidence of third persons who listened to telephone conversations as requested by one participant without disclosing their attendance to the other participants, BVerfG NJW 2002, 3619, 3622 *et seq.*; BGH NJW 2003, 1727, 1729.

193 The German Central Credit Committee (*Zentraler Kreditausschuss*) has agreed with the BaFin, the *Deutsche Bundesbank* and the German Association of Employers in the Private Banking Industry (*Arbeitgeberverband des privaten Bankgewerbes*) on a concept which serves as a framework for the recording of telephone conversation in the interbank trading business. Based on this concept, the so-called *Grundsatzvereinbarung* dated February/March 1993 for interbank business on the recording of telephone conversations relating to cash, foreign exchange, securities and derivatives trading has been signed. Under this *Grundsatzvereinbarung*, German credit institutions, on the one hand, have obliged themselves to inform their counterparties about the intended recording and, on the other hand, to obtain consent from all employees of their trading departments. After such consent has been given, telephone conversations can be recorded. This *Grundsatzvereinbarung* is, however, limited in its scope. It applies only to the banks which are members of the said associations. So far, it has not been extended in scope by an agreement with other counterparties. Furthermore, it applies only to telephone conversations in the trading area of a bank.

(b) *Witness statement; e-mail or other electronic message or transaction entry system; facsimile*

Witness statements, e-mails or other messages derived from electronic message or transaction entry systems and facsimiles are eligible for rendering or otherwise properly introducing evidence of the agreed terms of the Individual Contract in court.

As far as electronic communication of employees is concerned, employers should ask their employees to consent in writing to the monitoring of their business e-mails and – if necessary – to their use as forensic evidence (subject to compliance with specific data protection requirements). Thus, the risk that German law enforcement authorities raise allegations in connection with sections 43 and 44 Federal Data Protection Act (unlawful violations of provisions of the Federal Data Protection Act) can be mitigated.

Under the German Code of Civil Procedure (*Zivilprozessordnung*), all forms of possible evidence are of equal rank.[194] The court has to assess, based on the entire content of the court proceedings and all evidence submitted, whether a Party's submission (*e.g.* regarding the agreed terms of the Individual Contract) is true or not.

Regarding this decision, the German courts enjoy broad discretion (*Grundsatz der freien Beweiswürdigung*) pursuant to section 286 of the German Code of Civil Procedure.

However, if the piece of evidence was obtained unlawfully, it may not be admissible in court. This applies usually and subject to only few exceptions in connection with violations of privacy. In this case, the right of privacy is violated not only by taking the evidence unlawfully, but also by presenting it in court and thus additionally disclosing the sensitive information to third parties.

5.6 Core Provisions

5.6.1 *Would any of the elections contemplated by the MNA, the CPMA or the Credit Support Annexes change the substance of your conclusions reached under*

---

[194] *Prütting* in: Münchener Kommentar zur Zivilprozessordnung, 4th ed. (2013), § 286 no. 13.

Paragraph 5.1 and Paragraph 5.2.? As far as the Credit Support Annexes are concerned, you should in particular discuss the effect of electing to allow substitution with or without consent.

In the Election Sheet to the MNA and in the Schedule to the CPMA the Parties may agree on a customisation of provisions in the Master Agreements and include additional provisions to the Master Agreements. If the relevant Master Agreement is governed by German law (please refer to Paragraph 5.2.1 on page 109), whether such elections and additional provisions change the substance of our conclusions reached under Paragraph 5.1.1 on page 15 and Paragraph 5.1.2 on page 108, depends on the contents of such elections and additional provisions. Generally, such elections and additional provisions should not affect the conclusions reached under Paragraph 5.1.1 on page 15 and Paragraph 5.1.2 on page 108 regarding the enforceability of close-out netting provided that such inclusion would not have the effect of modifying or affecting the operation or implementation of any Core Provision (as defined in Paragraph 5.6.2 below).

Clause 6 of the Credit Support Annexes provides that "Subject to the approval of the Transferee (not unreasonably to be withheld), the Transferor may replace, in whole or in part, any Eligible Credit Support provided under this Annex by Eligible Credit Support of the same or higher Value. The Transferee shall have no obligation to transfer the Eligible Credit Support which it holds until it has received the replacement Eligible Credit Support."

If the parties agree to modify this provision and to allow an exchange of Eligible Credit Support without the approval of the Transferee (such modification may be implemented in section 14(14) (Additional Provisions) of the 2003 CSA and section 15(14) of the 2011 CSA), the substance of our conclusions reached under Paragraph 4.1 on page 15 and Paragraph 4.2 on page 109 would not change.

5.6.2 *Considering your conclusions reached under Paragraph 5.1.1 on page 15 and Paragraph 5.1.2 on page 108, what are the provisions of the Master Agreements that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Paragraph 5.1.1 on page 15 and Paragraph 5.1.2 on page 108 (each such provision a "**Core Provision**")?*

We understand that "**Core Provisions**" are such provisions of the Master Agreements which are so essential that a material alteration thereof could affect the enforceability of the contractual close-out netting as achieved by the Netting Provisions.

(a) *Core Provisions of the MNA*

Following such understanding and subject to the opinions given in Paragraph 5.1.1(c) on page 21, the assumptions set out under Paragraph 4 on page 9 and the reservations set out under Paragraph 6 on page 154, we identify the following provisions of the MNA as Core Provisions:

(i) § 3.1 para. 1 (C), § 2 para. 1 and para. 3, § 4, § 7 and § 8 of the MNA; and

(ii) all defined terms relevant for these provisions, in particular contained in Annex 1 to the MNA and related to the sections of the MNA as set out under Paragraph 5.1.1 on page 15 et seq. through Paragraph 5.1.2 on page 108 above.

A modification to any provision of the MNA that is not a Core Provision would generally not affect the conclusions reached in Paragraph 5.1.1(c) on page 21 *et seq.* above regarding the enforceability of close-out netting provided that such modification would not have the effect of modifying or affecting the operation or implementation of any Core Provision.

An inclusion of Additional Provisions in the Election Sheet to the MNA should not affect the conclusions reached in Paragraph 5.1.1(c) on page 21 regarding the enforceability of close-out netting provided that such inclusion would not have the effect of modifying or affecting the operation or implementation of any Core Provision.

(b) *Core Provisions of the CPMA*

(i) Following the above understanding of Core Provisions and subject to the opinions given in Paragraph 5.1.1(c) on page 21, the assumptions set out under Paragraph 4 on page 9 and the reservations set out under Paragraph 6 on page 154, we identify Sections 2.1, 3 and 4.1 of the CPMA and all defined terms relevant for these provisions as Core Provisions.

(ii) An inclusion of Additional Provisions in the Schedule to the CPMA should not affect the conclusions reached in Paragraph 5.1.1(c) on page 21 regarding the enforceability of close-out netting provided that such inclusion would not have the effect of modifying or affecting the operation or implementation of any Core Provision.

5.7 Governing law, arbitration and jurisdiction

5.7.1 *Would the Parties' agreement on the governing law, submission to arbitration or jurisdiction (Section 12 of the MNA and Section 6 of the CPMA) be upheld in Germany, and what would be the consequence if it were not?*

(a) *Governing law*

Regarding the Parties' agreement on the governing law, please refer to Paragraph 5.1.1(i)(i) on page 63.

(b) *Recognition of arbitral award*

An arbitral award on a civil matter rendered on the basis of the arbitration clause contained in the Master Agreements will be recognised by a German court in accordance with sections 1059 *et seqq*. of the German Code of Civil Procedure (*Zivilprozessordnung*). Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that

(i) the parties to the respective contract were, under the applicable law, under some incapacity, or the arbitration clause under the respective contract was not valid under the law to which the parties have subjected it, or, failing any indication thereof, under German law; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitral tribunal or of the arbitration proceedings or was otherwise unable to present its case; or

(iii) the award is about a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration clause under the respective contract, or, failing such agreement, was not in accordance with German law, and it can be assumed that such deficiency influenced the award;

or if the German court finds that

(v) the subject matter of the dispute is not capable of settlement by arbitration under German law; or

(vi) the recognition or enforcement of the award would be contrary to the German *ordre public*; or

(vii) in case of a foreign arbitral award, any grounds for refusal of recognition and enforcement under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards apply.

An order for the enforcement of a foreign arbitral award on a civil matter will be issued by a German court provided that the aforementioned requirements for recognition (see lit. (b) above) are met and provided further that the party interested in the enforcement has filed for enforcement of the arbitral award with the competent court in Germany in compliance with applicable legal requirements for such filings, including but not limited to the submission of the relevant documentation.

5.8 Other Provisions

5.8.1 *Recommendations that you would like EFET member companies to consider (for example to fully optimise the Master Agreements for a specific purpose such as to support limited trading between two entities both organised and doing business solely in Germany).*

If any single section in the Master Agreements were illegal or unenforceable, such unenforceability or illegality would, under the laws of Germany, not undermine the Netting Provisions, unless the unenforceability or illegality was so material that the relevant Master Agreement would not have been entered into if it had not contained these provisions (section 139 of the German Civil Code).

6. RESERVATIONS

6.1 General

In this Opinion "enforceable" or any word of similar import means that an obligation is of a type which the German courts generally enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the Master Agreements. In particular the following has to be taken into account:

6.1.1 Any enforcement of the Master Agreements in Germany is subject to the rules of civil procedure arising by operation of law as applied by the courts or other competent authority of Germany which may, *inter alia*, require the translation of foreign language documents into the German language.

6.1.2 In the event that an enforcement action is initiated in this jurisdiction in respect of a judgment in a foreign currency (including German court judgments rendered in connection with the enforcement of foreign court judgments) the sum claimed in such action may have to be converted in Euro. If a party defaults on a payment obligation which expressly requires such party to make payment in an agreed currency and such requirement is expressed in a certain prescribed manner, the sum claimed in an enforcement action need not be converted into Euro at the time such action is filed; in such case, the claim may be discharged by converting the judgement currency into Euro at the exchange rate prevailing on the date of payment. However, with respect to bankruptcy, insolvency, liquidation, moratorium, reorganisation, reconstruction or similar proceedings, German law may require that all claims or debts are converted into Euro at an exchange rate determined by the court at a date related thereto, such as the date of the opening of Insolvency Proceedings.

6.1.3 A determination, calculation or certificate of any party to each Agreement as to any matter provided for therein might in certain circumstances be held by a German court not to be final, conclusive and binding (for example, if it could be shown to have been incorrect or to have any other unreasonable or arbitrary basis or not to have been made in good faith) notwithstanding the provisions of the relevant document.

6.1.4 The choice of a foreign law to govern each Agreement would not be recognised or upheld if such choice would conflict with the mandatory law of another jurisdiction which is the only jurisdiction with a connection to the relevant Agreement.

6.1.5 A German court may refuse to give effect to any provision of the Master Agreements (a) for the payment of expenses in respect of the costs of enforcement (actual or contemplated) of unsuccessful litigation brought before a German court or where the court has itself made an order for costs, (b) which would constitute an agreement to agree for the purposes of German law, (c) which would involve the enforcement of foreign tax or criminal laws, or (d) which would be inconsistent with German public policy.

6.1.6 In some circumstances, a German court will not give effect to a provision of an agreement which provides that, in the event of any invalidity, illegality or unenforceability of any provision of such agreement or omission therein the remaining provisions thereof shall not be affected or impaired or the omission shall be corrected, particularly if to do so would not accord with public policy or would require that the German court make a new contract for the parties or would contravene the intention of the parties to such agreement (i.e. the relevant German court establishes that the parties would not have entered into such agreement without the illegal provision being agreed between them which may be found to be the case by the German court under circumstances where the invalid, illegal or unenforceable provision is a material provision).

6.1.7 Any action brought against any person in the German courts will be subject to the rules and procedures of the German courts, including the power of a German court to order a plaintiff in an action, being a party not ordinarily resident in Germany, to provide security for costs and to appoint a process agent (*Zustellungsbevollmächtigten*) in Germany.

6.1.8 There is no final judicial precedent in Germany for holding facsimile or e-mail communications legal, valid and binding in all circumstances (in particular where there is a statutory requirement for written form, a signature by way of a facsimile signing has been held insufficient to satisfy such requirement). Notwithstanding this, where there are no particular statutory or contractual requirements as to the form of communication (unless - in the latter case - the requirement of actual receipt has been validly waived), any communication actually received by the addressee will be deemed validly given (widerlegbare Vermutung).

6.1.9 The authenticity or completeness, and therefore the value as evidence, of any message or data in electronic form (even if saved on a medium of data storage) is in principle capable of being challenged as evidence in German courts on *inter alia* the grounds that (i) it may be altered and/or (ii) the sender thereof cannot be certified, and/or (iii) the date and time of its issue can be manipulated.

6.1.10 On the basis of section 2(b) of Article VIII of the International Monetary Fund Agreement, as interpreted and applied by German courts, an obligation which is contrary to the exchange control regulations of another member state of the International Monetary Fund may not be enforceable in Germany.

6.1.11 Any transfer of rights or payment in respect, or other performance, of an obligation under the Master Agreements, any Netted Agreement or any Individual Contract involving the government of any country which is currently the subject of United Nations or European Union sanctions, any person or body resident in, incorporated in or constituted under the laws of any such country or exercising public functions in any such country or any person or body controlled by any foregoing or by any person acting on behalf of any of the foregoing may be subject to restrictions pursuant to such sanctions as implemented in German law.

In respect of cross-border cash payments the notification requirements under the Foreign Trade Act (*Außenwirtschaftsgesetz*) and the Foreign Trade Regulation (*Außenwirtschaftsverordnung*, "**AWV**") need to be observed. The reports have to be submitted to the Deutsche Bundesbank using the applicable notification forms. With regard to payments this is usually done via the banks involved in the execution of such payments. A failure to do so would, however, by no means endanger the validity of the respective transaction. From 31 December 2009, starting with the position held on 31 December 2010, entities resident in Germany are subject to a new reporting requirement under the AWV. Pursuant to section 62 para. 1 and 4 of the AWV outstanding accounts or accounts payable vis-à-vis foreign business partners exceeding EUR 500,000,000 have to be reported to the Deutsche Bundesbank on an annual basis by 20 February of the following year by using the printed form "Z 5b".

6.1.12 Pursuant to section 395 of the German Civil Code, a set-off against a claim of the Federal Republic, a German Federal State, a municipality or an association of municipalities (*Kommunalverband*) is only permissible if the performance is to be effected to the same fund (*Kasse*) from which the claim of the party which declares the set-off is to be paid.

6.1.13 Any provision of the Master Agreements which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any Party or any other person may be ineffective.

6.1.14 A German court might hold that any provision in the Master Agreements stating that a representation or communication shall be deemed to have been made or delivered or which reverses the burden of proof is void or voidable.

6.1.15 A provision requiring a Party to represent that a Netted Agreement or Individual Contract is legal, valid and binding may be unenforceable to the extent that it applies to provisions of such Netted Agreement or Individual Contract which are not legal, valid and binding.

6.1.16 A German court might hold that, irrespective of the provisions of the Master Agreements, any waiver of or amendment to the Master Agreements agreed between the respective parties is valid whether or not given or made in writing or orally or implied by subsequent conduct of the relevant parties.

6.1.17 With respect to the doctrine of *ultra vires*, the capacity of a legal entity governed by public law to validly enter into a legally binding agreement may be limited under German law. Public law entities may principally only enter into transactions that fall within their scope of competence and functions (*Wirkungskreis*) as defined by a special law or by law enacted by a sovereign such as the Federal Republic or a federal state. If a public law entity purports to enter into a contract under private law that is beyond or exceeding its statutorily specified powers, such a contract might be considered as ultra vires and therefore null and void. There is a risk that a court may decide that the concept of ultra vires is also applicable to municipalities. In contrast, the states or the Federal Republic, when acting under private law, should not be restricted by the principle of ultra vires. Provided that the ultra vires doctrine is applicable, it applies regardless of the good faith of the counterparty or any representation to the contrary. As a rule, ultra vires measures are unenforceable. They may not be ratified. Furthermore, no claims for damages might be raised either (for example, claims based on misrepresentation) and any collateral provided has to be returned.

6.1.18 Under German law, the Federal Republic, the Federal States, municipalities and public law entities in their capacity as party to the Master Agreements do not enjoy an absolute right of sovereign immunity from legal proceedings, the execution of a judgment or an attachment. However, the procedural law provides for special provisions as regards legal proceedings against entities governed by public law and the execution of a judgement against such an entity might either be restricted or be subject to special requirements such as the consent of the supervisory authority.

6.1.19 We express no opinion as to whether any party has complied with any applicable provisions of Title II of the Regulation EU No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**")[195] as amended, any delegated or implementing acts adopted under EMIR, the provisions of the Banking Act, the German Securities Trading Act (*Wertpapierhandelsgesetz*) or the German Exchange Act (*Börsengesetz*) which were amended or enacted to implement EMIR, or any regulations adopted thereunder in respect of anything done by it in relation to or in connection with any of the Opinion Documents other than provisions on which we expressly opine. However, Article 12 para 3 EMIR provides that any infringement of the rules under Title II EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the Opinion Documents or Transactions invalid or unenforceable.

6.2 Application of Foreign Law

6.2.1 If any obligation is to be performed in a jurisdiction outside Germany, it may not be enforceable in Germany to the extent that performance would be illegal or contrary to public policy under the laws of the other jurisdiction and a German court may 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.

6.2.2 Where the Master Agreements are not governed by German law,

(a) A German court may give effect to mandatory provisions (i.e. provisions regarded as crucial for a country's safeguarding of its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their

[195] OJ No L 201 of 27 July 2012, p. 1.

scope, irrespective of the law otherwise applicable to the Master Agreements or any Individual Contract (Article 9 para. 1 of the Rome I Regulation) of the law of the country where the obligations arising out of the Master Agreements or any Individual Contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful (Article 9 para. 3 of the Rome I Regulation).

(b) A German court may apply the overriding mandatory provisions of German law (Article 9 para. 2 of the Rome I Regulation) irrespective of the choice of foreign law in the Master Agreements.

(c) A German court may refuse to apply the choice of law in the Master Agreements if such application is manifestly incompatible with the public policy of Germany (Article 21 of the Rome I Regulation).

(d) A German court shall have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (Article 12 para. 2 of the Rome I Regulation).

(e) Where all other elements relevant to the situation at the time that the Master Agreements or any Individual Contract were entered into are located either in another state or in one or more Member States of the European Union, the relevant German court may apply the provision of such state's law or the law of the European Union (as the case may be), which cannot be derogated from by agreement (Article 3 paras. 3 and 4 of the Rome I Regulation).

6.3 Additional reservations regarding agreements governed by German law

6.3.1 The German law principle of *Treu und Glauben* (section 242 of the German Civil Code) requires that contracts are performed in good faith. Actions *contra bonos mores* may provide certain rights in favour of a contracting party or may render contracts or commitments void or voidable. In addition, public policy may lead to "equitable" rights being upheld in German courts or may render contracts or commitments void or voidable or may lead to the recharacterising of such contracts or commitments and German courts may declare provisions providing for strict liability invalid.

6.3.2 If a German court considers it impossible or unduly burdensome for obligations to be performed the debtor is discharged from performing such obligation; the debtor may however be held liable for damages.

6.3.3 In some circumstances, a German court will not give effect to any provision of the Master Agreements which provides that, in the event of any invalidity, illegality or unenforceability of any provision of such Master Agreement or omission therein the remaining provisions thereof shall not be affected or impaired or the omission shall be corrected, particularly if to do so would not accord with public policy or would require that the court make a new contract for the parties or would contravene the intention of the parties to such Master Agreement (i.e. the relevant court establishes that the parties would not have entered into the Master Agreement without the illegal provision being agreed between them which may be found to be the case by the court under circumstances where the invalid, illegal or unenforceable provision is a material provision).

6.3.4 Claims may become time-barred under the German Civil Code or may be or become subject to the defence of set-off or to counterclaim.

6.3.5 If a party defaults on a payment obligation which expressly requires such party to make payment in an agreed currency and such requirement is expressed in a certain prescribed manner, the sum claimed in an enforcement action need not be converted into Euro at the time such action is filed; in such case, the claim may be discharged by converting the judgement currency into Euro at the exchange rate prevailing on the date of payment. However, with respect to bankruptcy, insolvency, liquidation, moratorium, reorganisation, reconstruction or similar proceedings, German law may require that all claims or debts are converted into Euro at an exchange rate determined by the court at a date related thereto, such as the date of the opening of Insolvency Proceedings.

6.3.6 Where any person is vested with a discretion or may determine a matter in its opinion, German law may require that such discretion is exercised reasonably or that such opinion is based on reasonable grounds.

6.3.7 Under section 193 of the Civil Code, unless the parties have agreed otherwise, any obligation which would have to be performed on a day which would be an official holiday at the place where the performance is to take place, is to be performed instead on the next possible business day at such place.

6.3.8 Generally, a claim cannot be validly assigned under German law if the creditor and the debtor of the claim have contractually restricted the assignment of the claim. The assignment of a claim which contravenes a contractually agreed restriction on assignment will be invalid. However, under an exception contained in section 354a of the Commercial Code, the assignment of monetary claims (i.e. claims for the payment of money) governed by German law cannot effectively be contractually excluded if the underlying agreement constitutes a commercial transaction (*Handelsgeschäft*) for both contracting parties or if the debtor is a public law entity or public law fund (section 354a para. 1 of the Commercial Code). However, pursuant to section 354a para. 2 of the Commercial Code, section 354a para. 1 of the Commercial Code is no longer applicable to receivables resulting from a loan agreement which has been entered into after 18 August 2008 by a lender which is a credit institution. Such monetary claims can be validly assigned notwithstanding a contractual restriction on assignment in the underlying contract provided that the debtor under such claim may pay to the original creditor with the effect of discharging the obligation unless the assignment was notified to him. Notwithstanding that German courts would not enforce restrictions on the assignment of monetary claims to the extent to which section 354a of the Commercial Code provides that they are not enforceable, that same section allows the debtor of an assigned claim to pay and discharge its obligations to the original creditor, even if the debtor is notified of the assignment of its debt obligation.

From our point of view, the single agreement concept (contained in § 2.3 of the MNA and, if so selected in Part VIII Section 10.6 of the Commodities Schedule, in the CPMA) would not constitute a statutory prohibition of assignment pursuant to section 399 of the German Civil Code pursuant to which the assignment of contractual rights is prohibited if such an assignment would lead to an alteration of the subject matter of the contract (section 399 alternative 1 of the German Civil Code). This provision applies primarily to contractual obligations the content of which is predominantly influenced by the person of the creditor such as personal claims or claims based on an agreement characterised by an exceptional amount of mutual trust which is not given under derivative transactions.

6.3.9 If any person expressed to be a Party to the Netted Agreement or an Individual Contract knew or should reasonably have known that any representation, warranty or statement in any Netted Agreement or Individual Contract was incorrect, inaccurate or incomplete or any covenant was or could reasonably be expected to be impossible to fulfil, such person will be limited in enforcing its rights under the Netted Agreement or under the Individual Contract.

6.3.10 Pursuant to section 248 of the German Civil Code (but subject to section 355 of the Commercial Code) any provision obliging a debtor to pay interest on interest (compound interest) is void. This provision renders void compound interest provided for in any Master Agreement and all similar provisions in the Master Agreement relating to default interest and indemnities in respect thereof. However, pursuant to section 289 of the German Civil Code, a debtor may be liable for damages incurred due to its late payment of interest. Such damages would have to be proven.

6.3.11 A German court might hold that any provision in the Master Agreements stating that a representation or communication shall be deemed to have been made or delivered or which reverses the burden of proof is void or voidable.

6.3.12 A provision requiring a Party to represent that a Netted Agreement or Individual Contract is legal, valid and binding may be unenforceable to the extent that it applies to provisions of such Netted Agreement or Individual Contract which are not legal, valid and binding.

6.3.13 **Standard Business Conditions**

The regulations on standard business conditions pursuant to sections 305 to 310 of the German Civil Code would apply in certain circumstances to the Master Agreement, any Netted Agreement or any Individual Contract. We would like to draw your attention in particular to the following specific aspects of these regulations on standard business conditions:

(a) The protection provided by sections 305 *et seq.* of the German Civil Code for the benefit of the counterparty of the user of standard business conditions (the "**Counterparty**") applies not only if the Counterparty is a consumer, but also if such Counterparty is an entrepreneur (*Unternehmer*); however, the standard of protection for entrepreneurs is not as high as the standard of protection provided to consumers;

(b) provisions contained in standard business conditions may be set aside by a court as invalid without a possibility to reduce its content to a valid provision, pursuant to sections 305b to 307 of the German Civil Code, if they are (a) surprising to the Counterparty (section 305c of the

German Civil Code), (b) conflicting with a provision specifically negotiated with the Counterparty (section 305b of the German Civil Code), (c) are intended to circumvent any provision contained in sections 305 to 307 of the German Civil Code (section 306a of the German Civil Code) or (d) are contrary to good faith, inappropriately disadvantageous to the detriment of the Counterparty; in this respect the German Civil Code provides for an assumption that a standard business condition is (in particular without limitation) inappropriately disadvantageous to the detriment of the Counterparty if such provision contravenes the fundamental principles of a statutory provision from which it derogates or constrains fundamental rights and obligations which arise out of the specific nature of the respective contract in such a way that the achievement of the purpose of such contract is at danger (section 307 of the German Civil Code). However, although the main provisions on standard business conditions in sections 308 and 309 German Civil Code do not apply directly with respect to entrepreneurs, most infringements of the provisions contained therein count as an infringement of section 307 German Civil Code. Please note that the standard of good faith employed under section 307 of the German Civil Code is higher than the standard of good faith referred to in Paragraph 6.3.1 on page 159 above;

(c) if a provision contained in standard business conditions is unclear, then such lack of clarity will be to the detriment of the user of the standard business conditions and not to the detriment of the Counterparty (section 305c para. 2 of the German Civil Code);

(d) standard business conditions may be subject to challenge by individual Counterparties or by way of class actions before the German courts;

(e) where standard business conditions are in a language other than the German language and no German translation has been provided at the time that the Counterparty accepts such standard business conditions or if standard business conditions are otherwise non-transparent, there is a possibility that German courts will set aside provisions which favour the party using such standard business conditions, in particular, on the basis of lack of transparency; and

(f) severability clauses (*salvatorische Klauseln*) in standard business conditions pursuant to which an invalid, illegal or unenforceable provision is to be replaced by the parties with a provision which comes as close as legally possible to the commercial intentions of the invalid, illegal or unenforceable provisions are invalid (section 306 para. 2 of the German Civil Code).

7. **ADDRESSEES AND PURPOSE**

This Opinion is addressed exclusively to EFET and its members 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 persons without EFET's and Clifford Chance's prior written approval. This opinion may be made available by EFET members who have subscribed to the EFET Legal Module to the appropriate regulatory authorities.

Yours faithfully,

Dr. Marc Benzler

CLIFFORD CHANCE DEUTSCHLAND LLP

ANNEX 1
TRANSACTIONS UNDER THE NETTED AGREEMENTS

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

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

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

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price 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.

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).

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).

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).

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.

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.

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as 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.

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

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

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.

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

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

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

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

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

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a 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.

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.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity of shares of an issuer to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, 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.

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

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

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).

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.

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.

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.

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

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

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

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

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.

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.

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.

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.

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.

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

ANNEX 2
MASTER AGREEMENTS COVERED BY THE MNA OR THE CPMA

Energy Trading Master Agreements

1. European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2007), sponsored by the European Federation of Energy Traders (EFET)

2. European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2000), sponsored by the European Federation of Energy Traders (EFET)

3. European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2007), sponsored by the European Federation of Energy Traders (EFET)

4. European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2003), sponsored by the European Federation of Energy Traders (EFET)

5. UK Grid Trade Master Agreement (version June 2004), sponsored by the Futures and Options Association (FOA)

6. 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

7. ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2004

8. ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2001

9. International Emissions Trading Master Agreement (version 2010/2011), sponsored by the International Emissions Trading Association (IETA)

10. Emissions Trading Master Agreement for the EU Scheme (version 2008), sponsored by the International Emissions Trading Association (IETA)

11. Emissions Trading Master Agreement for the EU Scheme (version 2005), sponsored by the International Emissions Trading Association (IETA)

12. Emissions Trading Master Agreement for the EU Scheme (version 2002), sponsored by the International Emissions Trading Association (IETA)

13. US Master Power Purchase & Sale Agreement (version 2000), sponsored by the Edison Electric Institute

14. 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)

15. 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)

16. Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2005), sponsored by GasEDI

17. Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2000), sponsored by GasEDI

Derivatives Master Agreements

1. Financial Energy Master Agreement (version 2000), sponsored by the Nordic Association of Energy Traders (NAET)

2. ISDA 2002 Master Agreement, sponsored by the International Swaps and Derivatives Association, Inc.

3. 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the International Swaps and Derivatives Association, Inc.

4. 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), sponsored by the International Swaps and Derivatives Association, Inc.

5. 1987 Interest Rate and Currency Exchange Agreement, sponsored by the International Swaps and Derivatives Association, Inc.

6. Australian version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the Australian Financial Markets Association (AFMA)

7. New Zealand version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border)

8. German Rahmenvertrag für Finanztermingeschäfte (version 2001), sponsored by the German Banker's Association

9. German Rahmenvertrag für Finanztermingeschäfte (version 1994), sponsored by the German Banker's Association

10. Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung

11. Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 1994), sponsored by the Schweizerische Bankiervereinigung

12. French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version July 2007), sponsored by the Fédération Bancaire Française (FBF)

13. French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédération Bancaire Française (FBF)

14. French Convention-Cadre AFB Relative Aux Operations Sur Instruments Financiers à Terme (version), sponsored by the Association Française des Banques (AFB)

15. Spanish Contrato Marco De Operaciones Financieras (versión 1997), sponsored by the Asociación Española de Banca Privada (AEB)

16. Dutch Raamovereenkomst voor Financiële Derivaten (RFD), sponsored by the Nederlandse Vereniging van Banken (NVB)

17. Japanese Bond Option Agreement, sponsored by the Japan Securities Dealers Association (JSDA)

18. Mexican Contrato Marco para Operaciones Financieras Derividas

19. Mexican Contrato Normativo para la realización de las operaciones de Intercambio

20. Mexican Master Agreement for Entering into Dollar against Mexican Peso Forward Transactions

21. US Master Securities Forward Agreement (version 1996), sponsored by The Bond Market Association (TBMA)

22. US Master OTC Options Agreement (version 2000), sponsored by The Bond Market Association (TBMA)

23. US OTC Option Transactions – U.S. Treasury Securities Master Dealer Agreement (version August 1989), sponsored by the Public Securities Association (PSA)

24. UK International Currency Options Market Agreement (ICOM) sponsored by the British Bankers' Association (BBA)

25. UK Foreign Exchange and Options Master Agreement (FEOMA), sponsored by the British Bankers' Association (BBA)

26. UK International Foreign Exchange Master Agreement (IFEMA), sponsored by the British Bankers' Association (BBA)

27. The 1994 International Bullion Master Agreement (IBMA) (version June 1994), sponsored by the London Bullion Market Association and the Foreign Exchange Committee

28. European Master Agreement for Financial Transactions (EMA) (edition January 2004), sponsored by the Banking Federation of the European Union (FBE)

29. European Master Agreement for Financial Transactions (EMA) (edition January 2001), sponsored by the Banking Federation of the European Union (FBE)

Securities Lending Master Agreements

1. Global Master Securities Lending Agreement (GMSLA) (version 2010), sponsored by the International Securities Lending Association (ISLA)

2. Global Master Securities Lending Agreement (GMSLA) (version 2000), sponsored by the International Securities Lending Association (ISLA)

3. Master Equity & Fixed Interest Stock Lending Agreement (MEFISLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)

4. Master Gilt Edged Stock Lending Agreement (GESLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)

5. Overseas Securities Lender's Agreement (OSLA) (version 1995), sponsored by the International Securities Lending Association (ISLA)

6. Overseas Securities Lender's Agreement (OSLA) (version October 1994), sponsored by the International Securities Lending Association (ISLA)

7. Overseas Securities Lender's Agreement (OSLA) (version February 1994), sponsored by the International Securities Lending Association (ISLA)

8. US Master Securities Loan Agreement (version 2000), sponsored by The Bond Market Association (TBMA)

9. US Master Securities Loan Agreement (version May 1993), sponsored by the Public Securities Association (PSA)

10. Canadian Securities Loan Agreement, sponsored by the Investment Dealers Association of Canada (IDAC)

11. German Rahmenvertrag für Wertpapierleihgeschäfte

12. German Rahmenvertrag für Wertpapierdarlehen (version 1999)

13. French Contract Cadre de Prêts des Titres (version 2007), sponsored by the Association Francaise des Professionnels des Titres (AFTI)

14. French Contract Cadre de Prêts des Titres (version), sponsored by the Association Francaise des Professionnels des Titres (AFTI)

15. Australian Master Securities Lending Agreement (version November 2003), sponsored by Australian Securities Lending Association Ltd. (ASLA)

16. Australian Master Securities Lending Agreement (version December 2002), sponsored by Australian Securities Lending Association Ltd. (ASLA)

17. Australian Master Securities Lending Agreement (version April 1997), sponsored by Australian Securities Lending Association Ltd. (ASLA)

18. New Zealand Master Repurchase Securities Lending Agreement

19. Japanese Basis Agreement Concerning Stock Lending Transactions, sponsored by the Japan Securities Dealers Association (JSDA)

Repurchase Master Agreements

1. Global Master Repurchase Agreement (GMRA) (version October 2000), sponsored by The Bond Market Association (TBMA) and the International Securities Market Association (ISMA)

2. Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA)

3. Global Master Repurchase Agreement (GMRA), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA) (version November 1992)

4. US Master Repurchase Agreement (MRA) (version September 1996), sponsored by The Bond Market Association (TBMA)

5. US Master Repurchase Agreement (MRA) (version 1987)

6. Canadian Repurchase/Reverse Repurchase Transaction Agreement

7. Australian version of the Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Australian Financial Markets Association (AFMA)

8. New Zealand version of Global Master Repurchase Agreement (GMRA) (version 1995)

9. German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2005)

10. German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2002)

11. German Rahmenvertrag für echte Pensionsgeschäfte (version 1997)

12. French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2007), sponsored by the Fédération bancaire française (FBF)

13. French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2003), sponsored by the Fédération bancaire française (FBF)

14. French Convention-cadre Relative Aux Opérations de Pensions Livriée, sponsored by the Association du Forex et des Trésoriers de Banque (AFTB)

15. Japanese Bond Lending Agreement, sponsored by the Japan Securities Dealers Association (JSDA)

16. Japanese Basic Agreement Concerning Gensaki Transactions of Bonds, Japan Securities Dealers Association (JSDA).

***