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Warsaw, February 4, 2021

MEMORANDUM

for the European Federation of Energy Traders (EFET)

on the enforceability of the close-out netting and collateral provisions of the Cross Product Master Agreement and the EFET Master Netting Agreement.

I. TABLE OF CONTENTS

II. SUMMARY

CPMA/MNA vs. Polish Bankruptcy/Restructuring Law

- The close-out netting provisions of the model Master Agreement in part related to bankruptcy-related events regarding polish counterparty do not work in Poland as under Polish law they are invalid. Thus, the conclusion of the model Master Agreement would generate significant risk concerning the mutual settlement of transactions when opening the bankruptcy proceedings in Poland. **For this reason, we do not recommend concluding model Master Agreement with Polish entities in its current wording.**
- Polish law provides for the statutory termination right, which applies to framework agreements (see sections 2.1.19 -2.1.20). Such right may be applied to each of the Underlying Agreements individually (subject to certain conditions). The use of the statutory termination right should cause the termination of all individual agreements and determining a single amount resulting from their settlement, calculated as provided for in the relevant Underlying Agreement. For details please see section 2.1.15 and our Memorandum on the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements of 7 January 2019 (pages 13-14 and 20-21).
- The model Master Agreement provides a different mechanism, i.e., two-stage settlement under two different types of agreements. During the first stage, only Settlement Amounts resulting from the settlement of transactions concluded under each Underlying Agreement are calculated. In the second stage, it is not individual transactions, but amounts established in the first stage that are settled. The Polish law does not protect that second stage of the settlement in case of bankruptcy-related events.
- To enable the parties to benefit from the statutory termination right, the model Master Agreement must be amended as proposed in Appendix no. 1 hereto. After these changes are made, the parties could terminate all their transactions and settle all the Settlement Amounts using the mechanism provided in the model Master Agreement. As stated above, we do not recommend entering into the Master Agreement with Polish counterparties without making such wording changes.
- If the parties decide not to implement the changes proposed in Appendix no. 1, they could only use the statutory right to terminate each of the Underlying Agreements individually (provided that such Underlying Agreement is protected by such termination right). Each separate Settlement Amount could be then set-off with the other Settlement Amounts, based on unilateral set-off statement (as described in section 2.3.7).
- The right of the non-defaulting party to use the netting clause of the Model Master Agreement would also be enforceable if:

- that party terminates the agreement based on an event unrelated to the bankruptcy, if such termination occurs before the declaration of bankruptcy; or
- that party acquires the right to terminate the agreement, based on an event unrelated to the bankruptcy, before the declaration of bankruptcy, but exercises such right after the declaration of bankruptcy.

CSA vs. Polish Bankruptcy/Restructuring Law

- The provider of Eligible Credit Support may file its claims for repayment of the collateral from the insolvent recipient during the bankruptcy proceedings, among claims of other commercial creditors. The recovery of the entire amount, would usually be possible only if the collateral amount is included in a valid settlement clause, or if the repayment obligation is secured by an additional collateral in rem.
- Insolvency of a provider of Eligible Credit Support causes the Eligible Credit Support to be transferred to the bankruptcy trustee. The trustee must then use the Eligible Credit Support to settle the recipient's claims with priority to other creditors' receivables but can keep up to ~10% of the collateral value. However, in practice, the creditors often settle their claims from the cash collateral themselves. Also, if the recipients' seat is outside Poland (but in the EU), the recipient could settle its claims from the collateral in full using the EU Insolvency Regulation protection.

The choice of law

- The choice of English or German law for each Master Agreement is fully possible and would be recognized in Poland.
- The contractual relations arising under each Master Agreement are valid and enforceable in Poland, as their content does not violate the Polish legal order. However, when deciding on the choice of law, the parties should take into account the basic principles of the contract law as well as limitations resulting from Polish law such as, among other things, the effects of making an invalid legal act or charging interest higher than the maximum mentioned in this Memorandum.

The general enforceability of Credit Support Annexes

- Both CSAs are appropriate forms to create the outright transfer of ownership title to the collateral. The relationships of the parties to each CSA may be arranged at their discretion. In our opinion, concluding CSA, and establishing Eligible Credit Support, is not connected with any formal requirements transpiring from Polish law, in particular the conclusion of CSA does not have to be registered in any official register. Each CSA will constitute a valid obligation of the entities being its parties.
- Eligible Credit Support, other than Letter of credit, complies with security concept reflected in the Polish Act on Certain Security, which may help to enforce the collateral's recipient's rights in Poland. However, for Eligible Credit Support to be recognized as such security, a bank,

investment firm or other financial market entities specified in the Act on Certain Financial Security must be a party to such agreement.

- If a transaction specified in the CSA concluded between a Polish entity and the another entity based outside the EU, EEA or OECD country, they might be classified in accordance with the Polish Foreign Exchange Law as admissible upon receipt of a foreign exchange permit. On the other hand, residents of Poland are no longer required to obtain a foreign exchange permit to undertake acts in law which may result in financial settlement in foreign currency within territory of Poland.

III. SCOPE OF THE OPINION

1.1 Documents to be considered

(a) The Cross-Product Master Agreement published by the Bond Market Association (the "**CPMA Form**") (published February 2000) (**Enclosure 1**);

(b) EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (the "**Schedule**") (**Enclosure 2**) (collectively, the CPMA Form as modified by the Schedule is referred as the "**CPMA**")

(c) The Cross-Product Credit Support Annex to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (the "**CPMA CSA**") (**Enclosure 3**);

(d) The EFET Master Netting Agreement (Version 1.0, published June 2010) (the "**MNA**") (**Enclosure 4**) (collectively the CPMA and the MNA are referred to as the "**Master Agreements**");

(e) The Election Sheet to the EFET Master Netting Agreement (Version 1.0, published June 2010) (**Enclosure 5**);

(f) The Credit Support Annex to the EFET Master Netting Agreement (Version 1.0, published February 2011) (the "**MNA CSA**") (**Enclosure 6**) (collectively, the CPMA CSA and the MNA CSA are referred to as the "**CSAs**").

The Master Agreements and the CSAs are together referred as to the "**Agreements**".

We have not examined any other agreements, instruments, records or other documents, and have not made any other enquiries or investigations in connection with the giving of this opinion.

1.2 Other limitations

This memorandum is limited to Polish law and therefore all analyses and opinions contained in the memorandum concern only Polish law.

We express no opinion as to matters of taxation. We do not render any tax or public liens opinion in this opinion.

We consider the enforceability of each Master Agreement and CSA against: (i) a corporation registered as a company under the laws of Poland; (ii) a bank/credit institution (as defined under

Article 4(1) of the Capital Requirements Regulation; and (iii) an investment firm (as defined under Article 4(1) of EU Directive 2014/65 ("MiFID II").

IV. ASSUMPTIONS AND ELECTIONS

1.1 Assumptions

Only those designated Principal Agreements/Netted Agreements ("**Underlying Agreements**") and the commodities/financial instruments commonly traded thereunder will be covered by the model Master Agreement. On the basis of the terms and conditions of the relevant Master Agreement, the relevant Underlying Agreement (if applicable) and other relevant factors, and acting in a manner consistent with the intentions stated in the relevant Master Agreement and the relevant Underlying Agreement (if applicable) the Parties over time may enter into a number of transactions that are intended to be governed by the Master Agreement either as transactions entered into under the relevant Underlying Agreement or as Uncovered Transactions/Additional Netted Agreements (where such Uncovered Transactions/Additional Netted Agreements will only include long form confirmations incorporating, in substantially their original form, the terms and conditions of the Underlying Agreements identified in either Division 1, Part 1, Section A of the Template Default Elections of the CPMA or in the Additional Netted Agreement Rider at Part III of the MNA Election Sheet). The transactions entered into will include any or all of the transactions described in Annex A to the Instruction Letter of 2 July 2020.

Each Master Agreement, any of Enclosures 1-6, and each Underlying Agreement are enforceable under the laws of England or Germany as the case may be and each counterparty has duly authorized, executed and delivered and has the capacity to enter into each document.

Each Close-Out Event specified as applicable pursuant to: (i) in respect of the CPMA, the Election for Division 1, Part II, Section A of the model Schedule; or (ii) in respect of the MNA, the Election for Section 3.1, Part I of the Election Sheet is an effective and valid Event of Default under the applicable Underlying Agreement.

Eligible Credit Support provided under the each CSA will only take the form of either cash or letters of credit. When addressing any questions relating to the rights of a transferor to retrieve collateral from an insolvent entity, we assume that the transferor is incorporated or organized under the laws of Poland. For questions relating to the rights of a transferee to hold collateral and apply and use that collateral in a close-out netting event, we assume that the transferee is incorporated or organized under the laws of a jurisdiction other than Poland. Cash collateral is denominated in a freely convertible currency and is held under the control of the Transferee.

Both counterparties to each Model Agreement and CSA are corporations of limited liability, partnerships, publicly- owned or quasi-governmental legal entities and not individuals.

The relevant Model Agreement is governed by the laws of England or Germany.

In this opinion, Polish legal concepts are expressed in English and not in their original Polish. The concepts concerned may not be identical to the concepts described by the same English language terms, as they exist under the laws of other jurisdictions.

As used in this opinion, the term “enforceable” means that the Agreement is of a type and form that may be enforced by the Polish courts. It does not mean that each obligation of the Parties contained in the Agreement will be enforced in accordance with their respective terms or in every circumstance, or in foreign jurisdictions or by or against third parties, or that any particular remedy will be available.

In this document we do not discuss the aspects of law governing non-contractual relations or changes in contractual relations following the exit of the United Kingdom from the European Union.

1.2 Elections

As the Master Agreements allow the counterparties to make many different elections and adapt the Agreements to their needs, which would require to opine on an almost unlimited number of permutations, this memorandum is limited to the following elections.

Underlying Agreements

CPMA: Division 1, Part I, Section A / MNA: Section 2.1, Part I of the Election Sheet - The Underlying Agreements selected shall be the GTMA, EFET Power Agreement (Version 2.1(a)/September 21, 2007), EFET Gas Agreement (Version 2.0(a), May 11, 2007), EECS Certificate Master Agreement (Version 1.0/14 December 2013), ISDA Master Agreement (either the 1992 or the 2002 versions). Each of the Underlying Agreements is governed by either English or German law save in respect of the ISDA Master Agreement which is governed by either English, New York, Irish or French law.

Excluded Agreements

CPMA: Division 1, Part I, Section B / MNA: Section 2.1, Part I of the Election Sheet - There shall be no Excluded Agreements.

Uncovered Transactions / Additional Netted Agreements

CPMA: Division 1, Part I, Section C / MNA: Part III of the Election Sheet - Uncovered Transactions / Additional Netted Agreements should be included but all such transactions will be long form confirmations incorporating, in substantially their original form, the terms and conditions of one of the Underlying Agreements identified above save that an Uncovered Transaction / Additional Netted Agreement shall also include confirmations incorporating the short term flat NBP 2015 trading terms and conditions which have not been amended and are therefore not subject to an NBP Master.

Close-Out Events

CPMA: Division 1, Part II, Section A / MNA: Section 3.1, Part 1 of the Election Sheet: - ‘Close-Out Event' means any events that entitle close-out under the Underlying Agreements.

Excluded Events

CPMA: Division 1, Part II, Section B / MNA: Section 3.2, Part 1 of the Election Sheet: - ‘Excluded Events' - the first three boxes will be checked.

Automatic Close-Out of Underlying Agreements

CPMA: Division 1, Part II, Section C / MNA: Section 3.2, Part 1 of the Election Sheet: - In respect of the CPMA, we assume the box is checked and that the rewrite of this provision contained in the Schedule is operative. In respect of the MNA, we assume the box is unchecked.

CPMA: Division 1, Part III / MNA: Section12.1, Part 1 of the Election Sheet: - Additional Acknowledgements and Representations - none.

CPMA: Division 1, Part IV / MNA: Section 12.2, Part 1 of the Election Sheet: - Governing Law - English and German law applies, in the alternative.

CPMA: Division 1, Part VII / MNA: Section 12.2, Part 1 of the Election Sheet: - Assignment. In respect of the CPMA, no election, Section 7 applies but is amended as set out at (a) and (b) of the Election Sheet. In respect of the MNA, Section12.5(A) shall be operative in respect of Party A and Party B.

The following shall apply:

	CPMA: Division 1, Part VIII	**MNA: Election Sheet**
Set-off of Final Net Settlement Amount	10.1	Section 10.1(A)
No Waiver	10.2	Automatically included (see Section 10.8 of the MNA)
Suspension	10.4	Section 10.1(B)
Automatic Early Termination & Adjustment for Bankruptcy	10.5	Section 6.4
Benefit of Credit Support	10.7	Section 9.1
Withholding Final Net Settlement Amount	10.8	No equivalent

CPMA: Division 1, Part X / MNA: Part II of the Election Sheet - no additional terms.

CPMA only: Division 2, to apply as set out in the Schedule.

If individual counterparties choose to move away from the model form of Schedule / Election Sheet upon which the memorandum is based, it will be up to them to satisfy themselves (by obtaining their own supplemental opinions or otherwise) that their particular form of Master Agreement and/or relevant CSA is still valid and enforceable.

V. LEGAL ANALYSIS

1. NETTING / SET-OFF ABSENT AN INSOLVENCY

1.1 Including transaction in Master Agreements

<u>*Opinion on whether a transaction entered into under an Underlying Agreement or an Uncovered Transaction/Additional Netted Agreement would be validly included in each model Master Agreement, assuming either a choice of English or German law as governing such documents*</u>

(save of the trading terms and conditions of the 2015 NBP Master which is governed by English law).

Choice of jurisdiction

1.1.1 The choice of law is determined by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (**"Rome I Regulation"**). The Regulation applies to contractual obligations in civil and commercial matters involving the laws of different countries.

1.1.2 According to Article 3 of the Rome I Regulation, a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract. The parties may also at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under the Rome I Regulation or other provisions of the Rome I Regulation.

1.1.3 The provisions of the Rome I Regulation also include an assessment of the validity of the contract concluded in terms of its content and form.

As regards substantive validity, the rule is that the existence and validity of a contract or one of its clauses is assessed pursuant to the law which, in accordance with the Rome I Regulation, would govern it if the contract or clause were valid.

As regards form, the proper form is:

(i) the form applicable to the contract in accordance with the Rome I Regulation or the law of the country where the contract was concluded (if the persons are in the same country at the time of conclusion),

(ii) the form applicable to the contract in accordance with the Rome I Regulation or the law of the country where either party is at the time of conclusion of the contract or the party is habitually resident (if the persons are in different countries at the time of conclusion of the contract).

1.1.4 It should be borne in mind that, even where a choice of law is made, if all the other elements of the situation at the time of the choice of the governing law are located in a country other than the country whose law has been chosen, the choice made by the parties does not prejudice the application of the provisions of the law of that other country, which cannot be derogated from by a contract. Furthermore, the application of provisions of the law indicated as applicable may be excluded only where such application is manifestly incompatible with the public policy of the state where the court is based.

1.1.5 According to Article 1105 § 1 of the Code of Civil Procedure of 17 November 1964 ("**Code of Civil Procedure**"), the parties to a specified legal relationship may agree in writing (in the original agreement) that any cases arising out of such relationship involving property rights shall fall under the jurisdiction of the courts of a foreign state, thus excluding the jurisdiction of Polish courts if such contract is effective in accordance with the law of that foreign state. It should be borne in mind that the contract must enable proceedings to be brought before a court of a foreign state by both parties to the legal relationship. In the light of Article 1105 § 1 of the Code of Civil Procedure, the parties may submit a case to the jurisdiction of foreign courts and exclude the jurisdiction of Polish courts even if the case has no connection with the foreign state and is entirely concluded in the Polish legal area. It is not permissible for such contract to be concluded primarily in matters falling within the exclusive jurisdiction of Polish courts (if, despite this, such contract is concluded and the court of a foreign state examines the case, its decision is not subject to recognition in Poland). In addition, it is necessary to specify in the contract the legal relationship from which disputes arise or may arise in the future.

1.1.6 In the absence of a prorogation agreement, the provisions of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Regulation 1215/2012**") will apply, particularly Article 7 point 1) a) of the Regulation 1215/2012, in accordance with which, a person domiciled in a member state of the European Union (the "**Member State**") may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question. By the place of performance of the obligation in question should be understood (in the case of the provision of services), the place in a Member State where, under the contract, the services were provided or should have been provided.

1.1.7 Please however note that if the bank account is held in Poland and the agreement on maintenance of the bank account is governed by Polish law, the transfer of funds deposited on the account is effected on the terms of and in accordance with the agreement on bank account maintenance and therefore is governed by the laws of Poland.

1.1.8 Therefore, the parties are free to choose a law to govern their contractual obligation with no need to establish a link between the agreement and the law chosen. In the absence of the choice of law, the agreement shall be governed by the law of the country with which it is most closely connected. Furthermore, the application of provisions of the law indicated as applicable may be excluded only where such application is manifestly incompatible with the public policy of the state where the court is based. In view of the above, there has to be made a basic analysis about each Master Agreement and each CSA compliance with Polish law.

Trading in financial instruments

1.1.9 In accordance with the Act on Trading in Financial Instruments of 29 July 2005, financial instruments include, for example:

(i) options, futures contracts, swaps, forward interest rate contracts and other derivative instruments whose host instrument is a commodity and which are or may be executed by cash settlement at the discretion of one of the parties, not admitted to trading in the financial instruments trading system;

(ii) options, futures contracts, swaps, forward contracts and other derivative instruments, whose host instrument is a commodity and which can be executed by delivery, and which are not intended for trading purposes and have the features of other derivative financial instruments;

(iii) options, futures contracts, swaps, forward interest rate contracts and other derivative instruments relating to climate change, freight rates and inflation rates or other official statistics data, which are or may be executed by cash settlement at the discretion of one of the parties, as well as the derivative instruments referred to in Article 8 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive ("**Regulation 2017/565**"), and other that have the features of other derivative financial instruments.

(iv) emission allowances.

1.1.10 Underlying Agreements, according Annex A to Instruction Letter, in the part where they relate to the above financial instruments, will be contracts for financial instruments. Also, under Underlying Agreements, both transactions on emission allowances and derivative transactions, whose host instruments are, among others, weather indicators and which are settled in cash, will be qualified as financial instrument transactions. Thus, concluding OTC forward transactions that can be settled in cash, will constitute trading in financial instruments and will fall under the ambit of the Act on Trading in Financial Instruments, as well as EU regulations concerning financial instruments, e.g., MIFIR and EMIR (however, with regard to EMIR, emission allowances were not included).

1.1.11 The Rome Regulation applies to contracts for rights arising from financial instruments. The parties may, on the basis of the Rome I Regulation, choose the law applicable to the Underlying Agreement, and the conflict-of-law rules of the Rome I Regulation apply to them.

Nature of each Master Agreement in relation to Underlying Agreements

1.1.12 A framework agreement not related to public procurement is an unnamed agreement, fully admissible under the principle of freedom of contract (Article 353[1] of the Polish Civil Code). It is assumed that a framework agreement is an organizational agreement that implies the obligation to conclude certain contracts in the future. Despite its general nature, it constitutes an obligation binding on the parties. It is most often used in commercial transactions in those obligation relationships where, at the stage of its conclusion, it is not possible or advisable to make final arrangements regarding the rights and obligations of the parties.

1.1.13 CPMA and MNA define, in particular, the rules of Close-Out, calculation of the Settlement Amount, the Net-Set Off Amounts and the Final Net Settlement Amount on the basis of the Underlying Agreements concluded between the parties concerning transactions on commodities, emission allowances or derivatives. The structure of CPMA and MNA is similar to that of framework agreements, but they differ in purpose and scope.

1.1.14 A framework agreement in Polish law is a relationship in which, although the mutual relations between the parties are not clearly defined, the content of the implementation agreements to the framework agreement is made specific. Thus, the framework agreement cannot be performed without additional declarations of intent, which, however, may not change the general principles set forth in the framework agreement or exceed the general limits of the parties' binding obligations.

1.1.15 A framework agreement is the basis for the conclusion of individual contracts and defines the rules for their conclusion. This type of relationship is not a classic obligation contract covering the obligation to perform – a framework agreement does not allow to force the debtor to conclude the implementing contracts. This means that, although the framework agreement is a source of an obligation relationship, it cannot be considered to be a classic contract that obliges a party to provide a performance of direct economic significance, enforceable *in natura* by way of enforcement or substitute performance.

Opinion on Underlying Agreements

1.1.16 The MNA and CPMA in relation to Underlying Agreements will therefore not be typical framework agreements, but complementary agreements that define part of the relationship between their parties. In particular, it will not be possible to assert rights under the CPMA and MNA in the absence of existing claims arising from the original relationship.

1.1.17 Due to the principle of freedom of contract, transactions under Underlying Agreements will be subject to the rules of Master Agreements if the requirements described above are met, in particular the basic principles of concluding contracts and the requirements specified in the regulations on trading in financial instruments are not breached. At the same time, the choice of English or German law, under the Rome I Regulation, is fully possible. In our opinion, the above mentioned premises preventing the choice of law do not occur and thus, it is possible to contractually designate German or English law as the law governing the legal relationship between the parties.

1.2 Enforceability of the Master Agreements

Opinion regarding the legality, validity and enforceability of each model Master Agreement (absent an insolvency of either party) to the netting and set-off of obligations due between the parties:

(i) *under one or more physically settling transactions involving the same commodity or product,*

(ii) *under one or more physically settling energy transactions involving two or more different classes or types of commodity or product, and*

(iii) *under a combination of physically and financially settling transactions (transacted under two or more Underlying Agreements).*

1.2.1 353[1] of the Polish Civil Code, parties to an agreement may construct a contractual relationship between them as they deem proper, provided it is not contrary to:

– the character (nature) of that relationship;

– the mandatory provisions of the law; and/or

– the "principles of community life".

The validity and relationship between Master Agreements and Underlying Agreements are described in detail in sections 1.1.12 - 1.1.15**Błąd! Nie można odnaleźć źródła odwołania.**. The issue of concluding Underlying Agreements in terms of their relationship with Master Agreements and obligations resulting from the nature of financial instruments is described in detail in sections 1.1.9 - 1.1.11.

Maximum interest

1.2.2 The Polish Civil Code prohibits the stipulation in legal acts (including any contractual relationship) of interest exceeding the maximum interest - both of excessive capital interest and excessive interest for delay.

1.2.3 The maximum amount of interest resulting from a legal transaction may not exceed twice the amount of statutory interest, i.e. interest equal to the sum of the reference rate of the National Bank of Poland and 3.5 percentage points. The maximum amount of interest for delay cannot exceed twice the amount of statutory interest for delay, which is equal to the sum of the reference rate of the National Bank of Poland and 5.5 percentage points.

1.2.4 The maximum amount of capital interest (maximum interest) cannot exceed twice the amount of statutory interest (i.e. 7.2% as at 1 September 2020). The maximum interest for delay is twice the statutory interest for delay (i.e. 11.2% as at 1 September 2020).

1.2.5 If the prohibition on stipulation of interest in excess of the maximum interest is violated, there is a contradiction of the legal act (provisions on interest) with the Act. This violation does not render the legal act invalid, but leads to limitation of its effects by the fact that the debtor in this case is only obliged to pay interest in the amount of the statutory maximum interest.

1.2.6 The prohibition on charging excessive interest applies regardless of the parties' choice of governing law.

Notices and Communications

1.2.7 Both Master Agreements provide for a mechanism according to which all notices, declarations or communications sent by one Party to the other are deemed to be received by such other party and are deemed to be effective after a lapse of a certain period of time from a moment of their dispatch (irrespective of their actual delivery to the other party). You should be aware that, under Polish law, such an “assumption of delivery” may not be effective in all circumstances. In particular, it will not be effective in the event that an addressee is able to prove that the actual delivery took place at a time different from the “deemed" time of delivery. In such a situation, a Polish court would probably not uphold the “assumption of delivery", and would rely on the proven date.

1.2.8 However, we believe that the above clause may still have beneficial results for the sender, because, even if it is not fully enforceable, in practice it will shift the burden of proof relating to the time of delivery from the sender to the recipient.

Opinion

1.2.9 It follows from the considerations that the parties to a given agreement, due to the unnamed nature of each Master Agreement, may freely shape the relations between them, while observing the requirements resulting from the above mentioned rules. In our opinion, the contractual relations arising under each Master Agreement are valid and enforceable under Polish law, as their content does not violate the Polish legal order. However, when deciding on the choice of law, the parties should take into account the basic principles of the contract law related to contractual liability, tort liability and limitations resulting from Polish law such as, among other things, the effects of making an invalid legal act or charging interest higher than the maximum.

1.3 Due diligence before entering the Master Agreement

An analysis and opinion regarding the necessity or efficacy of performing any due diligence (i.e., lien searches, filings etc.) prior to a party entering into each model Master Agreement.

1.3.1 Due to the nature of the agreement and Eligible Credit Support, we see no need for a detailed due diligence. However, the standard may be a verification of the other party to the agreement in the Business Register of the National Court Register, containing basic information about commercial companies, including information about the composition of the bodies of such an entity, the manner of representation, shareholders’ interests and possible information on bankruptcy and restructuring and, financial statements available at the location of the competent court. At the same time, legislative plans include the creation as of December 2020 of a National Register of Debtors, containing information on natural persons, legal entities and unincorporated organizational units that have legal capacity - with respect to which restructuring, bankruptcy or secondary bankruptcy proceedings are or have been conducted, or information on the recognition of a decision to open foreign bankruptcy proceedings. It also contains information on possible proceedings in these cases against the shareholders of such a company.

1.3.2 A standard in the analyzed contracts is that, at the conclusion of each model Master Agreement, each of the parties makes representations and warranties concerning, among other things, its ability to conclude the agreement, proper authorization to conclude the agreement by the person concluding it, binding nature of the provisions of the agreement, lack of assignment of rights related to the agreement. In our opinion, the representations and warranties constitute sufficient action of the person concluding the agreement, given that the representations and warranties, regardless of whether or not the agreement specifies the principles of liability, in case of their inconsistency with the facts, should be qualified as a declaration of intent of the party of the agreement and as such they produce legal effects provided for by the law and the content of the legal act within the limits of freedom of contract, defined in art. 353^1 of the Polish Civil Code.

1.3.3 In the case of Eligible Credit Support, security is established by transferring the ownership of the funds to Transferee. In our opinion, such establishment does not require a due diligence as the funds are transferred to the Transferee's bank account. However, if other security such as pledge, mortgage, etc. is established, the solution will be to obtain excerpts from Polish publicly available registers of possible encumbrances on the objects of the security, i.e. the register of pledges or land and mortgage registers (for a mortgage).

1.4 Close-out netting and set-off of claims – general remarks

A general discussion of, and opinion regarding, Polish laws relevant to the concepts of close-out netting and set-off of claims between parties, combinations of accounts or such other terminology as is employed in Poland to address such issues.

1.4.1 Under Polish law, debts can generally be set off by agreement of the parties (contractual set-off) or unilaterally by one party (statutory set-off).

1.4.2 A unilateral set-off can be performed if: (a) both parties are both creditors and debtors with respect to one another; (b) the object of both debts is money or items of the same quality designated only as to their kind (no set-off of monetary claims vs. non-monetary claim is possible); (c) both debts have matured; and (d) both debts may be claimed before a court or other state authority. If set-off is made in bankruptcy proceedings, a creditor must make a set-off statement no later than on the moment when it lodges its claims towards the bankrupt. As a result of the set-off, both debts cancel one another out to the amount of the lesser debt. Unilateral set-off is effected by a declaration made to the other party. The declaration is retroactive from the moment when the set-off first became possible. A set-off can take place against the other party's will and takes effect when the other party receives the declaration. Please find the detailed analysis of this matter in point 2.5.

1.4.3 Polish law refers specifically to "netting clauses" in the Polish Act on Certain Financial Collaterals (implementing Directive 2002/47/EC on financial collateral arrangements), however this law applies only to netting clauses related to claims arising from a financial collateral arrangement, or to claims being the subject of such an arrangement. Such clauses are protected by Polish Bankruptcy law. The Bankruptcy law protects also the close-out netting clauses, even if they do not constitute "netting clauses" with the meaning of Act on Certain Financial Collaterals, however only to the extent that this clauses arise from framework agreements (as defined in the Article 85 of the Polish Bankruptcy Law). Please find the detailed analysis of this matter in point 2.3 and 2.13.

A. CPMA CSA / MNA CSA

1.5 Characteristic of the transfer of Eligible Credit Support

Opinion on whether the laws of Poland characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that such transfer would be re-characterized as intending to create or creating in favour of either party any mortgage, charge, lien, pledge, encumbrance or other security interest in any Eligible Credit Support transferred from one party to the other under each CSA.

1.5.1 According to each CSA, upon demand by a Party (the "**Transferee**") on or promptly following a Valuation Day, the other Party (the "**Transferor**") shall transfer to the Transferee Eligible Credit Support in an amount equal to the amount by which the Credit Support Amount of the Transferee exceeds the Eligible Credit Support held by the Transferee at the Valuation Time (the "**Delivery Amount**"). Subject to clauses relating to dispute resolution, when a Transferor receives a request for Eligible Credit Support, it should transfer to the Transferee the requested Eligible Credit Support not later than close of business on the Local Business Day following such request by either (a) transferring cash to the account of the Transferee or (b) providing a Letter of Credit. Upon demand by the Transferor on or promptly following a Valuation Day, the Transferee shall transfer to the Transferor Eligible Credit Support in an amount equal to the amount by which the Eligible Credit Support held by the Transferee exceeds the Credit Support Amount of the Transferee at the Valuation Time (the "**Return Amount**").

1.5.2 In our view, the Eligible Credit Support concept may resemble partially a form of advanced payment and the so-called deposit under Polish law. Advance payment is a common term, which is not particularly regulated in the law, but whose meaning has become established in practice. The content of the contract determines whether in a given case the parties have agreed on an advance payment or earnest money. An advance payment is defined as a part of the price; it is paid before the performance of the contract, which, after performance, can be credited against the price; otherwise is refundable regardless of the reasons for which the contract was not performed. In the latter case, the advance payment is treated as an undue benefit and is returned due to the fact that the purpose of the performance has not been achieved (the contract has not been performed).

1.5.3 A notion identical to the above, i.e. an advance payment and earnest money is the so-called deposit. The term “deposit” is used in case law in a situation when a specific payment secures the interests of the person paying the deposit; however, at the same time the parties envisage the return of this amount. Guarantee deposits are a special type of deposit. Their essence is to secure the interests of a person who receives such a deposit, that may suffer damage by non-performance or improper performance of an obligation by the other contracting party. A deposit agreement is deemed to be an agreement under which the debtor transfers money or other convertible items to the creditor in order to secure possible claims that may arise from the legal relationship existing between them.

1.5.4 Both advanced payment and deposit are subject to the freedom of contract and establishing them does not raise any particular risks related to the validity of the Eligible Credit Support. Referring to such concepts in case of litigation before Polish courts may help in pursuing the Eligible Credit Support recipient’s rights in Poland.

1.5.5 The agreement on establishing financial security defines the financial receivables subject to security and the security method consisting in:

(a) transfer (optionally subject to buy-back) by the person providing the security to the person receiving the security, of rights to cash, credit claims or financial instruments, or

(b) establishment by the person providing the security in favor of the person receiving the security of a pledge on rights to cash, credit claims or financial instruments (financial pledge), or

(c) establishment of a blockade on the securities account, on a collective account or on another account on which financial instruments not being securities are registered, or on the securities deposit account, under separate regulations.

1.5.6 The Eligible Credit Support concept resembles a transfer of the right to cash without the so-called fiduciary stipulation, i.e. without the obligation of the person receiving the security not to dispose of the secured object in accordance with the Act on Certain Financial Security of 2 April 2004 (the "**Financial Security Act**"). The result of such an action is a definite transfer of the right to the secured object. If the secured claim is satisfied, the person receiving the security will transfer to the person establishing the security an appropriate substitute object or other financial assets that will not constitute a substitute object.

1.5.7 In order for Eligible Credit Support to be recognized as security described in clause 1.5.6, such an agreement must be entered into by the bank, investment fund, investment firm, credit institution, financial institution or clearing agents, etc., as the person giving or receiving the *financial security.*

1.5.8 At the same time, the Act on Financial Security does not provide for any special form for an agreement on collateral transfer of rights, in particular it does not require the contracting parties, e.g. to conclude a contract with an authenticated date. However, the claim related to the obligation of the person receiving the security to transfer the substitute object, resulting from the agreement on establishment of financial security, may be subject to compensation if this obligation has not been performed by the time the basis for execution of the security has occurred.

1.5.9 The financial claim is satisfied up to the value of the pledged object taken over by the pledgee. If the value of the pledged object exceeds the amount of the financial claim, the pledgee is obliged to return the amount of the surplus within three days of the take-over. This period is longer than that provided for in each CSA.

1.5.10 However, even if Eligible Credit Support is considered as a type of financial security, it does not raise significant risks related to the validity of such security.

1.5.11 Security in the form of a Letter of Credit, which is a typical bank guarantee raises doubts about the possibility of recognizing the CSA as a financial security agreement. A Letter of Credit means an irrevocable standby letter of credit payable on demand in a form and substance satisfactory to the Requesting Party and issued by a financial institution whose Credit Rating is at least the rating specified in respect of the Party in the Election Sheet At the same time, a credit claim is understood as a monetary claim resulting from a credit or loan agreement extended by a bank or an authorized credit institution.

1.5.12 In our opinion, the concept of Eligible Credit Support will not be a pledge. Under the Civil Code, pledge means an item being encumbered with a right under which the creditor will be able to claim satisfaction from the pledged object regardless of whose property it has become and with priority over personal creditors of the owner of the object, except for those who have a special priority. The establishment of a pledge on an object requires the conclusion of a pledge agreement and, as a rule, hand-over of the object to the creditor or a third party to which by the parties to the pledge agreement have agreed. The creditor is satisfied, as a rule, according to the regulations on court enforcement proceedings. A plan (manual) pledge should be distinguished from a registered pledge, the establishment of which does not require the object to be handed over, but a constitutive entry in the pledge register, and a financial pledge, the giving or receiving party to which is a bank, financial institution, investment firm, etc.

1.5.13 A pledge is an accessory right, i.e. its existence is closely connected with the existence of the claim which is the basis for its establishment. Although Eligible Credit Support is made to secure the payment of the Final Net Settlement Amount, it is the intention of the parties to pay the funds and transfer their ownership. This is an element which excludes the classification of Eligible Credit Support as a pledge. At the same time, the provisions of each CSA (No Security Interest) directly indicate that it does not constitute a mortgage, pledge or other encumbrance on cash or other objects transferred by the parties under each CSA.

1.5.14 To sum up, Eligible Credit Support is, in our opinion, a security concept reflecting the concept of transfer by the person providing the security to the person receiving the security of the right to cash or credit claims as defined in the Act on Certain Security. However, in order for Eligible Credit Support to be recognized as such security, the bank, investment firm or other entities specified in the Act on Certain Financial Security must be a party to such agreement. The second condition for these security concepts is to exclude a Letter of Credit as a type of security. This type of document is not included in the Act on Certain Financial Security.

1.5.15 The CSA is also a type of a contractual obligation that resembles a an advance payment or earnest money or deposit due to the transfer of ownership of cash and the possible inclusion of such cash in the Settlement Amount.

1.5.16 Due to the principle of freedom of contract expressed in the Civil Code, the relationships of the parties to each CSA may be arranged at their discretion. In our opinion, Eligible Credit Support, also due to the provisions of each CSA (No Security Interest), does not constitute security in kind within the meaning of Polish law. On the other hand, each CSA will constitute a valid obligation of the entities being its parties.

Assuming the transferee receives absolute ownership interest in the Eligible Credit Support, opinion on whether it will need to take any subsequent action to ensure that its title in the Eligible Credit Support continues.

1.5.17 If the subject of the contract obliging a party to transfer ownership fungibles only, the transfer of possession is required in order to transfer the ownership. The same applies if the object of the contract obliging a person to transfer ownership is future items. This provision combines the effect of the transfer of ownership with the transfer of possession if a prior agreement is concluded introducing the obligation to transfer the ownership of certain fungibles or so-called future items. Also if this provision is applied, it is not necessary to conclude a separate agreement with disposing effect in order to achieve the effect of ownership being transferred to the purchaser.

1.5.18 If the agreement transferring the ownership is concluded in performance of an obligation resulting from a prior agreement introducing the obligation to transfer the ownership, from an ordinary provision, from unjust enrichment or from another event, the validity of the agreement transferring the ownership depends on the existence of this obligation. Therefore, an important element is to maintain the validity of each CSA and each Master Agreement constituting the basis for the transfer of funds on their basis.

1.5.19 The absence of a legal basis for the transfer of cash may have the consequence of such transfer being considered as unjust enrichment, which means obtaining a financial benefit without a legal basis at the expense of another person. Such enrichment gives rise to an obligation to hand over the unjustified benefit in kind, or, if this is impossible, to return its value.

1.5.20 A special case of unjust enrichment is the so-called undue benefit. A benefit is understood to mean any intentional and conscious benefit to another person's assets, which from the recipient's point of view can be attributed to an obligation, even if it does not exist or is not valid yet. An obligation arises when the enriched person obtains, without a legal basis, a material benefit as a result of benefit being provided by a person whose property is thus depleted. Lack of legal basis for the performance of such benefit means lack of *causa of* the benefit or its defectiveness.

1.5.21 A benefit is undue if the person who provided it was not obliged at all or was not obliged to the person to whom it was provided. In the former case, the debtor, for example, provides the benefit again, even though it has already been provided and therefore the obligation has expired. The debtor is also not obliged at all if he provides the benefit in the performance of a non-existent legal act.

1.5.22 Both Credit Support Annexes are appropriate forms to create the outright transfer of ownership title to the collateral. If a transaction specified in the CSA concluded between a Polish entity and the another entity based outside the EU, EEA or OECD country, they might be classified in accordance with the Polish Foreign Exchange Law of 27 July 2002 as transactions being transfer of receivables exercised by financial settlement and thus admissible upon receipt of a foreign exchange permit. On the other hand, since 24 January 2009, residents of Poland are no longer required to obtain a foreign exchange permit to undertake acts in law which may result in financial settlement in foreign currency within territory of Poland.

1.6 Exchange of Eligible Credit Support

Opinion on the effect, under the laws of Poland of the right to a providing party incorporated or otherwise organized under the laws of Poland to exchange Eligible Credit Support (for example, by swapping cash for a letter of credit) pursuant to Section 6 of each CSA.

1.6.1 The possibility of establishing a substitute object is provided for in the Act on Financial Security. In accordance with its article 5(3), the agreement may provide for an appropriate substitute object, and in the case of a financial pledge also the establishment of the right to use or satisfy the pledgee by taking over the object of the financial pledge. The agreement may also provide for the replacement of cash, credit claims or financial instruments with other cash, credit claims or financial instruments. As indicated above, there are doubts as to the possibility of replacing cash with a Letter of Credit, due to the typically guarantee-nature of a Letter of Credit. A credit claim is understood as a monetary claim resulting from a credit or loan agreement granted by a bank or an authorized credit institution. It follows from the above that in the event of establishing the security described in more detail in points 1.5.6 - 1.5.11, the replacement of cash with a Letter of Credit would constitute the establishment of a new security, undefined in the regulations.

1.6.2 In the event that each CSA is in no case classified as an agreement on financial security, such replacement will result directly from the freedom of contract and the contractual provisions of each CSA (*Exchange of Eligible Credit Support*) and will not constitute new security.

1.7 Governing law

Opinion on whether the parties' agreement on the governing law of each CSA and their submission to jurisdiction would be upheld under the laws of Poland, and what would be the consequences if they were not.

1.7.1 The governing law issues are described thoroughly in points 1.1 and **Błąd! Nie można odnaleźć źródła odwołania.**.

1.7.2 The Parties' agreement on the governing law and their submission to jurisdiction would be in general upheld in Poland. If invalid or ineffective for whatever reason, the governing law and jurisdiction would be established on the basis of national law or EU law discussed in points 1.1 and **Błąd! Nie można odnaleźć źródła odwołania.**.

1.8 Compliance of each CSA with the mandatory margining requirements

Opinion as to whether under local law of Poland, each CSA complies with any mandatory margining requirements applicable under the laws of Poland.

1.8.1 Polish law does not specify precisely the margins and security requirements for transactions in the form of Eligible Credit Support. Detailed rules concerning OTC futures contracts concluded and not cleared by central counterparties are set out in Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on risk mitigation techniques for OTC derivative contracts that are not cleared by a central counterparty ("**Regulation 2016/2251**"). This Regulation is directly applicable in Poland.

1.8.2 In accordance with Article 3 of Regulation 2016/2251, an agreement on the replacement of the security referred to in item (g) of the first subparagraph of Article 2(2) contains at least the following provisions:

(a) levels and type of security required;

(b) separation arrangements;

(c) the compensation package to which the replacement of security refers;

(d) procedures for reporting, confirming and correcting margin calls;

(e) procedures for settling margin calls for each type of recognized security;

(f) procedures, methods, schedule, and allocation of responsibilities in the calculation of margins and security valuation;

(g) occurrences that are considered events of default or termination;

(h) provisions applicable to non-centrally cleared OTC derivative contracts;

(i) provisions applicable to a security replacement agreement.

1.8.3 In accordance with Article 4 of Regulation 2016/2251, the only recognized object of security for such an agreement may be:

(i) cash in the form of funds booked on an account in any currency or similar claims for return of funds, such as money market deposits;

(ii) gold in the form of allocated pure gold bullion of recognized Good Delivery standard*;*

(iii) debt securities issued by the entities listed in Regulation 2016/2251, including central banks, local governments, public sector entities, international organizations, etc., corporate bonds, convertible bonds and shares listed in Regulation 2016/2251.

1.8.4 We draw your attention to the need to take into account all the elements of the contract resulting from the catalog in Article 3 of Regulation 2016/2251 and to analyze whether the Letter of Credit is a recognized object of security for such a contract determined in accordance with the catalog in Article 4 of Regulation 2016/2251.

1.9 Other local law considerations

Opinion on whether there are any other local law considerations that a recipient of Eligible Credit Support should consider in connection with taking and realizing upon the Eligible Credit Support from a providing party incorporated or otherwise organized under the laws of Poland.

Polish Foreign Exchange Law

1.9.1 Under Polish Foreign Exchange Law regulations, restrictions with respect to money transfers to EU member states, Organization for Economic Cooperation and Development (OECD) member states (e.g. the United States of America), and member states of the European Economic Area (EEA) are not applicable. Some restrictions will be applicable to parties from countries outside of the OECD and the EEA.

1.9.2 Under Foreign Exchange Law regulations, restrictions with respect to money transfers to EU member States, Organisation for Economic Cooperation and Development (OECD) member States (e.g. the United States of America) and member States of the European Economic Area (EEA) have been generally abolished. Some restrictions will be applicable to parties from countries outside of these international organisations.

1.9.3 If any Master Agreement or any CSA (and subsequently the Underlying Contracts) is entered into by an entity incorporated in Poland as well as the Polish branch of a foreign entity with parties from countries outside the EU, EEA or OECD, restrictions are applicable to:

(a) the disposal of receivables and other rights, executed upon cash settlement in Poland by parties from countries outside the EU, EEA or OECD;

(b) the purchase of receivables and other rights, executed upon cash settlement by a Polish Entity from parties from countries outside the EU, EEA or OECD.

1.9.4 Payment determined in a foreign currency can be made in PLN unless statutory provisions of law, a judgement or contract require that the payment be made in a foreign currency. In addition, conversion of pecuniary payments expressed in foreign currencies into PLN is to be performed at the average exchange rate published by the NBP and applicable as of the date on which the obligation is due and payable (maturity date), unless statutory provisions of law, a judgment or contract state otherwise. If a debtor is in arrears with payments, the creditor will be entitled to demand from the debtor a payment in Polish zlotys based on the exchange rate published on the payment date.

1.9.5 If a contract is governed by Polish law, amounts payable under that contract are determined in a foreign currency and payments under the contract are to be made in that foreign currency and not in Polish zlotys, the contract must expressly exclude payment in PLN. If amounts payable under the contract are expressed in a foreign currency but are to be paid in Polish zlotys, it needs to be borne in mind that the contract should also describe the procedure for calculating the conversion rate; otherwise the average exchange rate published by the NBP on the maturity date will apply.

Licenses, permits, approvals and other regulatory issues affecting physically settled natural electricity transactions in Poland

(a) The requirement of a local presence in cases in which a foreign entity trades in electricity in Poland

1.9.6 Undertaking and conducting business activity in Poland (defined as a profit-making activity in the field of, among other things, trade or providing services, if it is carried out permanently and in an organized manner) is regulated by a package of bills, so called the Business Constitution for Entrepreneurs, which came into force on 1 September 2017 (Business Constitution).

1.9.7 According to the provisions of the Business Constitution:

1.9.7.1 Foreign entities may conduct business activity in Poland only through establishing a limited liability company, joint stock company, limited partnership or limited-joint stock partnership, or through acquiring shares in such companies;

1.9.7.2 However, foreign entities incorporated in EU member states, in European Economic Area member states not belonging to the European Union, or in states that are not parties to the EEAA but which enjoy the freedom of establishment on the basis of agreements executed by those states with the European Community and its member states, may undertake and conduct economic activity on the same terms and conditions as Polish entities. Thus, they enjoy the right to undertake and conduct their business activity in the same organisational forms that are available for Polish entities. These are, in particular: civil law partnerships, registered partnerships, professional partnerships, limited liability partnerships, limited joint-stock partnerships, limited liability companies and joint-stock companies;

1.9.7.3 Also, in a situation where a foreign business entity wishes to conduct business activity in Poland without establishing a subsidiary seated in Poland, it may establish a branch here. However, for business entities not seated in EU member states, in European Economic Area member states not belonging to the European Union or in states that are not parties to EEAA but which enjoy the freedom of establishment on the basis of agreements executed by those states with the European Community and its member states, there is a requirement of reciprocity from the country where the company is seated. The branch may begin activity upon registration in the National Court Register. Branches do not enjoy separate legal identity from the head office of the business entity in the country of origin, and they may not conduct activities beyond the scope of the activities of the business entity;

1.9.7.4 Foreign business entities may also establish a representative office in Poland. A representative office can only perform advertising and marketing activities of the foreign business entity. The establishment of a representative office is subject to registration in the Register of Representative Offices, kept by the Minister of the Economy.

1.9.8 As explained above, business activity is defined as profit-making activity in the field of, among others, trade, conducted on an ongoing basis and in an organised manner. Therefore, in our view, if a foreign entity conducts its power trading activities with Polish counterparties in such a way that it does not establish any organisational structure within the territory of Poland, it has no assets, business premises, or employees located in Poland, etc., and if sale and purchase agreements with Polish counterparties are concluded outside the territory of Poland and structured in such a way that the delivery/offtake point is located outside Poland (see point 1.9.10 - 1.9.15 below for our views on the issue of "at-the-border" trading), then it could be argued that the above does not constitute conducting business activity in Poland, and therefore no local presence is required.

1.9.9 Any variations from the trading structure described above would have to be carefully examined in order to determine whether they constitute "conducting business activity in Poland" within the meaning of the Business Constitution. If so, a local presence in one of the forms described above would be required (i.e. at least a branch).

(b) The requirement to obtain an electricity trading license

1.9.10 According to the Polish Energy Law, conducting business activity (see point 1.9.6 - 1.9.9) above for an explanation of this term under Polish law) involving electricity trading in Poland requires a licence granted by the President of the Energy Regulatory Authority (the **ERA**). Trade in electricity via an installation of voltage lower that 1 kV owned by the end user and trade in electricity on commodity exchanges, regulated markets and free markets by certain entities including companies running commodity exchanges and commodity brokers does not require a license.

1.9.11 Please also note that the fact of having obtained a licence for conducting business activity in electricity trading in another EU member state would not release an entity interested in starting electricity trading in Poland from the obligation to obtain a local trading licence as well.

1.9.12 The Energy Law defines "trading" as a business activity in the area of the wholesale or retail trade in fuels and energy. "Trading", therefore, certainly includes entering into physically settled transactions for the sale and purchase of electricity. The classification of physically settled Options is not as clear and definite. In the case of those transactions, it is still unsettled under Polish law whether the licensing obligation is triggered by the mere fact of entering into an Option, or only by the actual exercise of a Put or Call Option. To the best of our knowledge, the ERA has never publicly expressed its opinion on the subject. In our view, there are strong arguments that an electricity trading licence is required to exercise an Option, and not to enter into such a contract. Nevertheless, one cannot exclude the risk that the regulator would attempt to exercise its jurisdiction over the latter as well. In order to fully exclude any such risk, entities planning to enter into electricity Options without applying for the licence first could make a formal inquiry to the ERA in this respect.

1.9.13 It is also worth mentioning that, in our view, it is not possible, by setting the place of delivery to be "at the-border", to create an abstract place of performance of an agreement that is "exterritorial" and therefore belongs to neither Poland nor any of its neighbouring countries. There is no such "no man's land" between the two countries, which means that an obligation is either performed in one country or in the other.

1.9.14 To avoid any doubt, the agreements should specify on which side of the border the obligation is to be performed. If the delivery/offtake point would be situated within the territory of Poland, the transaction could fall under a definition of conducting trading in Poland and trigger local licensing obligations.

1.9.15 Under the Energy Law, licences may only be issued to entities seated in EU member states, Switzerland, Turkey or in EFTA member states —parties to the EEAA. In practice, this means that, apart from entities seated in Poland, only foreign entities from the above countries may apply for a licence and conduct business activity in electricity trading in Poland without the need to establish a subsidiary in Poland (the issue of whether such entities are required to trade through a branch registered in Poland is discussed in point 4.2.8.3 a) above; it is important to stress that the ERA, while issuing trading licences, does not currently require applicants to establish such branches in Poland). All other foreign entities, in order to obtain a trading licence, would need to set up a company in Poland first, or incorporate a company in any of the EU member states, Switzerland, Turkey or EFTA member states — parties to the EEAA. Trading licences are issued for a period of between 10 and 50 years. To obtain a licence, an applicant must demonstrate that it has sufficient funds and technical capabilities to carry out a given type of activity. The ERA may make the issue of the licence conditional upon the applicant providing security for possible third party claims resulting from its activity. The form, content and value of the collateral may be negotiated with the ERA (the value usually does not exceed PLN 10 million). Licences are granted (or refused) by the ERA, as a matter of principle within two months at most from the date submission of the application.

(c) Release from the obligation to have electricity tariffs approved

1.9.16 Under the Energy Law, as a rule, licensed energy enterprises are obliged to apply electricity tariffs approved by the ERA. The tariff is a set of prices, and principles for their application, for the sold electric energy. It is arguable whether prices approved in the tariffs are fixed, or merely maximum prices that energy companies are allowed to charge.

1.9.17 Please also note that we believe the above tariff regime should not be applicable to transactions pertaining to the export of electricity from Poland.

1.9.18 As of 1 July 2001, the ERA released enterprises licensed to trade in electric energy from the requirement to submit electricity tariffs for its approval (this exemption did not apply to trading companies holding a license for both the transmission and distribution of electric energy, in relation to the electricity sold to the end users directly connected to their grid).

1.9.19 Therefore, assuming that entities trading in Poland under a EFET General Agreement would be involved purely in trading activities, they would not be subject to the tariff approval requirement with respect to power trading activities. You should also be aware of the fact that the ERA is entitled to revoke the above exemption if it concludes that the circumstances underlying the exemption have ceased to exist (e.g. that competition in the power trading sector is distorted). At present, revoking this exemption seems unlikely.

1.9.20 The ERA's release described above was made in the form of the regulator's "position statement" published on its official website and in its official bulletin (position statement of the President of the ERA, dated 28 June 2001, published in the *Biuletyn Urzędu Regulacji Energetyki* no.4, July 2001). Please note that there are some doubts as to the effectiveness of the release issued in this form. This is because, pursuant to the applicable procedural regulations, the regulator should have issued and delivered individual administrative decisions to each of the energy enterprises obliged to submit tariffs for approval. The ERA, contrary to the literal wording of the relevant provisions of the Energy Law, has chosen not to do so. Potentially, this may create a risk for the interested energy enterprises intending to make use of the release and apply unapproved prices. This is because, without an individual decision in this respect, it is not entirely certain that the position statement applies to them, and therefore whether they were actually exempted. At the same time, the Energy Law provides for obligatory fines on energy enterprises that apply prices without following tariff approval procedures.

1.9.21 In our opinion, the above risk could be avoided by obtaining written confirmation from the ERA on the application of the position statement to a given trading company. In any case, the risk connected with not having such a confirmation is somehow mitigated by the fact that most of the power generators and traders in Poland have assumed that the regulator's position statement constituted a release within the meaning of the relevant provisions of the Energy Law, and from 2001 we have not heard of any fines imposed on such companies for not having an approved electricity tariff.

1.9.22 Please note that in November 2007 the President of the ERA started the process of issuing ex officio individual decisions to all electricity trading companies holding licences to trade electricity in Poland on their release from the obligation to submit the electricity tariffs for regulatory approval. Later on, the President of the ERA decided to change the scope of the release by excluding the sale of electricity to household customers. Some of the suppliers selling electricity to households appealed against this decision claiming that the electricity market, including household customers, should be freed after 1 July 2007. In one of its judgement, dated 20 September 2011, the Supreme Court stated that the plaintiff (a trading company being also the supplier of last resort) was free of the tariff approval obligation, also with respect to households, since the position statement of the President of the ERA, dated 28 June 2001 was published.

1.9.23 The current legal situation is complex. You should, however, assume that currently no sale of electricity, save for sale to household customers, requires tariffs approved by the regulator. The safest solution for entities holding a license to trade in electricity in Poland is to have this confirmed in an individual decision issued by the President of the ERA, however, the abovementioned ruling of the Supreme Court should provide additional comfort with this respect.

(d) The applicability of an obligation to purchase renewable energy certificates

1.9.24 The Energy Law imposes obligations on energy enterprises engaged in trading electricity and selling this electricity to end users in Poland, to purchase tradable renewable energy certificates in an amount specified in secondary legislation. This obligation also applies to: (i) end customers who are members of a commodity exchange (within the meaning of the Law on Commodity Exchanges) with respect to transactions executed on the commodity exchange in an end customer's own name; and (ii) brokerage houses, with respect to transactions executed on a commodity exchange on behalf of end customers. Such certificates are issued to renewable generators by the ERA. Energy enterprises burdened with the above purchase obligation can alternatively pay a substitute fee to the National Fund for Environmental Protection.

1.9.25 In view of the above, entities selling electricity to Polish counterparties under the EFET General Agreement will not be bound to purchase the certificates, as long as the purchasers are wholesale energy traders and not end users (defined by the Energy Law as "entities who are purchasing power in order to cover their own needs"). It is important to note that the term "end user" as defined in the Energy Law encompasses both household and industrial customers.

1.9.26 In order to mitigate the risk connected with the purchase obligation being triggered by the act of selling electricity directly to end users, it may be advisable to secure that a EFET General Agreement entered into with a Polish counterparty includes an express representation that it is not an "end user" within a meaning of the Energy Law. Such a representation may be especially important in case of dealings with distribution companies. This is because, for technical reasons, distribution companies may use part of such energy for their own needs, e.g. to cover transmission losses. Therefore, with respect to a party interconnected to power grids in Poland, § 21 (I) could have a following wording:

"(I) it does not accept electricity to be purchased under this Agreement as an end user *("odbiorca końcowy")* within the meaning of the Energy Law dated of 10 April 1997;".

(e) Obligation of electricity generators to sell electricity publicly

1.9.27 Pursuant to the recent amendment to the Energy Law, on 1 January 2019 the new wording of Article 49a of the Energy Law entered into force and imposed on power generators in Poland the obligation to sell 100% of generated electricity (i) on a commodity exchange (as defined in the Polish Law on Commodity Exchanges), (ii) on a platform organised by an entity running a regulated market (as defined in the Polish Law on Trading in Financial Instruments) in Poland, (iii) on an organised trading platform (as defined in the Polish Law on Trading in Financial Instruments) organised by an entity running a commodity exchange (as defined in the Polish Law on Commodity Exchanges) in Poland or (iv) within the framework of single day-ahead and intraday coupling conducted by designated electricity market operators within the meaning of Commission Regulation (EU) 2015/1222 dated 24 July 2015 laying down guidelines on capacity allocation and congestion management.

1.9.28 Prior to 1 January 2019 the above obligation was limited to 30% of electricity produced within a year.

1.9.29 Article 49a of the Energy Law does not apply to, among other things, the sale of electricity (i) generated in cogeneration with the average annual conversion efficiency higher than 52.5% (as defined in the relevant secondary legislation), (ii) generated using renewable energy sources, (iii) generated in a generation unit with a total installed capacity not exceeding 50 MW, (iv) necessary for power grid operators for the fulfilment of their duties, (v) produced by units which started production after 1 July 2017 and sold in order to discharge long term commitments related to the financing of investments in electricity generation.

The impact of the Law on Trade in Allowances for Emission of Greenhouse Gases and Other Substances

1.9.30 The Law on Trade in Allowances does not provide for any license or similar requirements with respect to trade in allowances (there are permit requirements for installation operators, which do not affect the enforceability of the EFET General Agreement).

B. MODEL CPMA COMBINED WITH THE CPMA CSA / MODEL MNA COMBINED EITH THE MODEL CSA

1.10 Including collateral in a Final Net Settlement Amount

Opinion on whether Section 11 of the CPMA CSA / Section 12 of the MNA CSA is valid to the extent that it provides for the Base Currency Equivalent of all the Eligible Credit Support provided under each CSA on the Determination Date to be included in the calculation of the Final Net Settlement Amount.

Opinion on including collateral in a Final Net Settlement Amount

1.10.1 If the security is recognized as financial security, involving the transfer to the person receiving the security of the right to cash, credit claims or financial instruments, the

Act on Financial Security directly provides for the possibility of security from the object of the pledge, which takes place at the moment the basis of the security realization occurs. There are no contraindications to including the amount of the security in the Final Net Settlement Account if its settlement takes place at the time the security is realized and the person receiving the security informed the other party about its realization.

1.10.2 If each CSA is not a financial security, but another unnamed agreement, such inclusion will result directly from the content of the agreement and constitute performance of the contractual obligation.

Settlement currency

1.10.3 Payment determined in a foreign currency can be made in PLN unless statutory provisions of law, a judgment, or contract require that the payment be made in a foreign currency. In addition, conversion of pecuniary payments expressed in foreign currencies into PLN is to be made at the average exchange rate published by the NBP and applicable as of the date on which the obligation is due and payable (maturity date), unless statutory provisions of law, a judgment or contract state otherwise. If a debtor is in arrears with payments, the creditor is entitled to demand from the debtor a payment in PLN based on the exchange rate published on the payment date.

1.10.4 If a contract is governed by Polish law, amounts payable thereunder are determined in a foreign currency and payments under the contract are to be made in that foreign currency and not in PLN, the contract has to expressly exclude payment in PLN. If amounts payable under the contract are expressed in a foreign currency but are to be paid in PLN, it has to be borne in mind that the contract should also describe the procedure for calculating the conversion rate; otherwise the average exchange rate published by the NBP on the maturity date will apply.

1.11 The changes to the opinion in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent

Opinion on whether the opinions expressed on: (i) the CPMA and the CPMA CSA; and (ii) the MNA and MNA CSA would change in the event that the parties agree to place the Eligible Credit Support with an independent third party collateral agent rather than a party to each Master Agreement and relevant CSA.

1.11.1 Under Polish law, the concept of a security agent is not directly regulated. However, there are three main structures through which a security agent performs its functions, i.e. indirect intermediation, power of attorney and coordination of consortium members' activities. Indirect intermediation is the most common concept. An indirect intermediate is a person who performs a legal transaction in his/her own name but on someone else's account. The effects of the performed act, consisting in the acquisition of rights or incurring liabilities, affect his assets, while being in a separate contractual relationship (internal relationship), based on which he is obliged to transfer to that person the rights acquired for him, and that person is obliged to take over the liabilities incurred by him (release him from debt towards a third party).

1.11.2 In external relations with the persons who have established the security and third parties, only the so-called agent is entitled. The internal (obligation) relationship, which regulates his position towards the replaced parties, is established on the basis of a separate agreement.

1.11.3 In typical cases, a security agent is not obliged to transfer the acquired rights to the entities for which he performs this function, but only to administer the security and to transfer the revenues received from its realization.

1.11.4 At the same time, in the case of a registered pledge, the law directly provides for the establishment of a so-called pledge administrator. A similar concept exists in the case of a mortgage. In order to secure several claims of different entities with a mortgage to finance the same undertaking, the creditors appoint a mortgage administrator. The administrator may be one of the creditors or a third party.

1.11.5 The establishment of a security agent does not directly affect the nature of the legal relationship resulting from each Master Agreement and each CSA, but only the need to regulate the relationship and the possible ways of settling claims between the parties to these agreements. Thus, such a solution will not change our opinion presented in the clauses above.

2. NETTING / SET-OFF IN THE CONTEXT OF AN INSOLVENCY

In answering the following questions, we assume that after entering into a transaction and prior to its maturity, an entity incorporated in Poland becomes the subject of voluntary or involuntary insolvency proceedings in Poland and, subsequent to the commencement of the insolvency proceedings, either that entity or an insolvency official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the confirmations representing unprofitable transactions for the insolvent party.

A. MODEL CPMA / MODEL MNA

2.1 Non-automatic termination

Assuming the parties have not selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule to the CPMA / Section 6.1 of the MNA Election Sheet) and/or none of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in Poland, opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all the transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of Poland.

No, the provisions referred to in the question would not be enforceable in Poland. A clause permitting the termination of an agreement in the event of the opening of one party's

insolvency proceeding, or filing an insolvency petition regarding such party is invalid. As Master Agreement cannot be deemed as the framework agreement within the meaning of Article 85 of the Bankruptcy Law, its non-defaulting party would also not have the statutory right to terminate it upon the initiation of a bankruptcy/restructuring proceeding. However, if certain modifications are made to the Master Agreement, the parties would have a statutory right to termination.

Termination based on contractual provisions

2.1.1 In Polish law, according to Article 83 of the Bankruptcy Law[1], contractual provisions that stipulate amendments or termination of the agreement **if a bankruptcy petition is filed** or **bankruptcy is declared** are invalid.

2.1.2 Any provisions that make a direct or indirect reference to such events should be considered invalid. An example of the latter are clauses referring to such events as, for instance, the appointment of an insolvency officer (an insolvency administrator, a bankruptcy trustee) or an arrangement with creditors.

2.1.3 However, the legal literature argues that clauses relating to events immediately preceding the declaration of bankruptcy are permitted. Such events include, for example, delays in payment or decline in the financial situation, as well as threated or actual insolvency. In our view, such clauses are generally acceptable.

2.1.4 Both provisions triggering an automatic modification of an agreement as a result of such event and those that grant the parties a possibility of unilateral modification are invalid. This refers, for instance, to termination clauses granting the right to terminate an agreement.

2.1.5 The invalidity contemplated in Article 83 of the Bankruptcy Law is absolute and takes effect upon the execution of an agreement. Thus, it is not necessary to take any additional measures to invalidate it. The provisions are invalid regardless of whether bankruptcy or restructuring proceedings are actually initiated.

2.1.6 As a rule, the invalidity affects only a specific contractual provision which is in conflict with the law. However, it is possible that if a contractual clause is considered as one without which the parties would not have concluded the agreement, the entire agreement will be deemed invalid.

2.1.7 In addition, under the Restructuring Law[2], provisions that make an amendment or termination of a legal relationship dependant on events such as:

[1] The Bankruptcy Law of 28 February 2003 (Dz.U.2019.498 as amended) (the "Bankruptcy Law").
[2] The Restructuring Law of 15 May 2015 (Dz.U.2019.243 as amended) (the "Restructuring Law").

2.1.7.1 filing a request for accelerated arrangement proceedings or opening such a proceedings (which, by analogy, applies to arrangement proceedings and remedial proceedings);

2.1.7.2 filing a request for approval of, or approving, an arrangement (which also applies to the simplified restructuring proceedings introduced in connection with the COVID-19 pandemic);

are invalid.

2.1.8 Those provisions of the Restructuring Law have a similar wording to Article 83 of the Bankruptcy Law. Therefore, the above comments concerning the Bankruptcy Law will also apply mutatis mutandis here.

2.1.9 In view of the above, the provisions of the model Master Agreement, permitting the termination of Underlying Agreements in the event of the counterparty’s bankruptcy or restructuring may prove to be invalid (subject to further comments).

2.1.10 An example of clauses that may be found invalid are the MNA provisions permitting termination if one of the parties:

(a) makes a general assignment, arrangement or composition with or for the benefit of its creditors - § 3.1(C)(lll)(c);

(b) institutes or has instituted against it a proceeding seeking a judgement of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors’ rights, or a petition is presented for its winding-up or liquidation and, if specified in the Election Sheet, is not withdrawn, dismissed, discharged, stayed or restrained within such period as specified in the Election Sheet - § 3.1(C)(lll)(d)

(c) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets - § 3.1(C)(III)(f).

2.1.11 Article 83 of the Bankruptcy Law will not apply if termination or modification of an agreement is made dependent upon bankruptcy of a third party, e.g., a Credit Support Provider. Such clauses will be valid.

2.1.12 The legislation discussed here does not limit the right to terminate an agreement even after a bankruptcy/restructuring proceeding is initiated if the reason for such termination is an event that is not bankruptcy-related and took place before such proceeding initiation (see section 2.7).

<u>Termination based on statutory provisions</u>

2.1.13 We believe that the model Master Agreement with its current wording is not a framework agreement within the meaning of Article 85 of the Bankruptcy Law. However, it may be recognized as such if certain modifications discussed in section 7 are made. Thus, below we are discussing how the agreement would work if such modifications were made.

2.1.14 The Parties will have the right to terminate the model Master Agreement and all the Underlying Agreements when the counterparty is declared bankrupt if the model Master Agreement is deemed to be a framework agreement within the meaning of Article 85 of the Bankruptcy Law. Since there is a similar provision in the Restructuring Law, the following comments will apply to restructuring proceedings accordingly.

2.1.15 Within the meaning of those legal provisions, a framework agreement should meet three conditions, that is:

2.1.15.1 It should concern specific agreements concluded **in performance of the framework agreement**;

2.1.15.2 The specific agreements should involve **financial term operations, loans or a repo transaction involving financial instruments**;

2.1.15.3 **The termination of the framework agreement results in the termination of all related specific agreements**;

2.1.16 According to Article 85(2) of the Bankruptcy Law, "financial term operations" are transactions for which a price, exchange rate, interest rate or index has been determined – and in particular, the purchase of currencies, securities, gold or other precious metals, commodities, or rights, including agreements based only on a price differential, options and derivative rights – concluded as at an agreed date or for an agreed term, in market trading.

2.1.17 In our view, there is a high risk that the model Master Agreement will not be recognized as a framework agreement within the meaning of Article 85 of the Bankruptcy Law. This is because:

(a) The object of the model Master Agreement are other framework agreements, and not specific agreements – specific agreements concluded on the basis of the Underlying Agreements are the object of the model Master Agreement only indirectly;

(b) The model Master Agreement does not include provisions permitting its termination – by law, such provision must be a part of the framework agreement and must result in the termination of all specific agreements concluded under that framework agreement.

However, under the model Master Agreement only individual Underlying Agreements may be terminated, and not the model Master Agreement itself, which is necessary for Article 85 of the Bankruptcy Law to apply. According to §4.1 of the MNA and Section 2 of the CPMA, if certain events take place and continue, the party may terminate Underlying Agreements, but not the model Master Agreement itself.

2.1.18 In the case of the framework agreement within the meaning of Article 85 of the Bankruptcy Law each of the parties has the right to terminate it upon the initiation of a bankruptcy/restructuring proceeding. However, the legal provision permitting such termination may be interpreted in two ways.

2.1.19 According to the first approach, those regulations do not exclude the application of Article 83 of the Bankruptcy Law. Clauses referred to in that Article will be invalid regardless of whether the model Master Agreement is recognized as a framework agreement within the meaning of Article 85 of the Bankruptcy Law.

2.1.20 However, based on that legal provision the parties have a statutory right to terminate the agreement as a result of the declaration of one party's bankruptcy. This right is independent of whether the parties have incorporated such possibility in the agreement as long as the agreement meets the conditions stipulated in sections 2.1.15.1 - 2.1.15.3. In our view, there are better arguments in favour of this approach and it agrees with the wording of the law. We believe that this how Article 85 of the Bankruptcy Law should be interpreted.

2.1.21 According to the second interpretation, Article 85 of the Bankruptcy Law provides that it is a specific provision in relation to Article 83 of the Bankruptcy Law. This means that as a result of that Article certain contractual provisions which otherwise would be considered invalid, may still be enforceable.

2.1.22 If an agreement provides only for the right to terminate an agreement as a result of the declaration of one party's bankruptcy, such differentiation will not have any practical significance. In that case, in the event of bankruptcy, the parties retain their right which may be exercised either as a contractual or a statutory right. It will, however, be different with respect to the automatic termination (see comments to section 2.2).

2.2 Automatic termination

Assuming the parties have selected Automatic Close-Out of each Underlying Agreement (Division 1, Part II, Section C of the Schedule / Section 6.1 of the MNA Election Sheet) and/or ***all*** *of the Underlying Agreements provide for automatic early termination upon certain insolvency events to apply to the entity incorporated in Poland, opinion on whether the provisions of each model Master Agreement permitting the non-defaulting party to terminate all the Underlying Agreements (including Uncovered Transactions / Additional Netted Agreements, if applicable) and all transactions done under them upon the insolvency of its counterparty would be enforceable under the laws of Poland.*

A clause providing for automatic termination of an agreement in the event of one party's bankruptcy is invalid even if the model Master Agreement is deemed to be a framework agreement within the meaning of Article 85 of the Bankruptcy Law. As such, that clause would not be enforceable in Poland. However, if certain modifications are made to the Master

Agreement, the parties would have a statutory right to termination. Please see Annex 1 hereto for the respective wording proposals.

2.2.1 According to Article 83 of the Bankruptcy Law, contractual clauses providing for a modification or termination of a contract to which the bankrupt is a party in the event a bankruptcy petition is filed or bankruptcy is declared, are invalid. This Article definitely applies to a clause introducing an automatic termination as a result of the counterparty's bankruptcy. All comments made in sections 2.1.1 - 2.1.12 also apply here.

2.2.2 Whether a clause will be effective under Article 85 of the Bankruptcy Law (if the model Master Agreement is deemed to be a framework agreement within the meaning of that Article) will depend on its interpretation (see comments in sections 2.1.19 - 2.1.22).

2.2.3 If we accept that Article 85 of the Bankruptcy Law is a specific provision to Article 83 of the Bankruptcy Law, then to be consistent it will be necessary to assume that a clause resulting the automatic termination of all Underlying Agreements and all transactions done under them will be valid.

2.2.4 If, however, we conclude that Article 85 of the Bankruptcy Law introduces only a statutory right to terminate, then the automatic termination clause will be invalid. In our view, this is the correct interpretation of that Article.

2.2.5 Thus, there is a high risk that the clause of the model Master Agreement providing for automatic termination as a result of declaration of bankruptcy will be invalid. This is particularly true in view of the concerns we have expressed about the possible recognition of the model Master Agreement as a framework agreement within the meaning of Article 85 of the Bankruptcy Law. Yet, if modifications to the model Master Agreement described in section 6.1 are made, it will be possible to terminate the agreement on the basis of Article 85(3) of the Bankruptcy Law.

2.2.6 Since there are similar provisions in the Restructuring Law, the above conclusions will apply mutatis mutandis to restructuring proceedings with the participation of one of the parties.

2.3 Final Net Settlement Amount

Opinion on whether the provisions of each model Master Agreement provide for the calculation of a single Final Net Settlement Amount (see Sections 3 and 4 of the CPMA / Section 7 and 8 of the MNA) upon the insolvency of a counterparty would be enforceable in an insolvency of a party that is organized under the laws of Poland.

The provisions of the model Master Agreement, to the extent they permit the settlement between the parties and calculation of the Final Net Settlement Amount after the declaration of bankruptcy, are invalid provided that Underlying Agreements are terminated on the basis

of the model Master Agreement. As such these provisions would not be enforceable in Poland. If, however, the Underlying Agreements are terminated on the basis of the statutory right, then the settlement mechanism included in the Master Agreement may apply to such amounts.

2.3.1 Contractual provisions will be enforceable if the settlement between the parties is made and the Final Net Settlement Amount is calculated before the initiation of a bankruptcy/restructuring proceeding as a result of an event not related to bankruptcy/restructuring.

2.3.2 If, however, the settlement is to be made as a result of termination in connection with the initiation of bankruptcy/restructuring proceedings, then the Bankruptcy Law and the Restructuring Law expressly permit only settlement clauses incorporated into framework agreements meeting the conditions laid down in Article 85 of the Bankruptcy Law and Article 250 the Restructuring Law. If the model Master Agreement is recognised as a framework agreement within the meaning of those Articles, then the mechanism of settlement and Final Net Settlement Amount calculation will be valid and enforceable.

2.3.3 However, a standard mechanism described in those Articles provides for the termination and settlement of individual specific agreements which concern transactions described in it. The object of the model Master Agreement are Underlying Agreements, which are framework agreements, and this is different from what is contemplated in the legal regulations. It is only under the Underlying Agreements that specific agreements, referred to in in Article 85 of the Bankruptcy Law, are concluded.

2.3.4 The settlement mechanism stipulated in the model Master Agreement provides that in the case of a certain event the party who has the right to terminate an Underlying Agreement may also terminate all other agreements concluded under the model Master Agreement. The consequence of that is a two-stage settlement. During the first stage only Settlement Amounts resulting from the settlement of transactions concluded by the parties are calculated.

2.3.5 In the second stage it is not individual transactions but amounts resulting from the settlement of each Underlying Agreement that are settled. That is how the Final Net Settlement Amount is calculated.

2.3.6 The above supports the argumentation that the safe-harbour clause, referred to in Article 85 of the Bankruptcy Law, will not apply to the model Master Agreement. Therefore, there is a high risk that the clause permitting the settlement of individual Settlement Amounts in the event of declaring bankruptcy of one of the parties will be invalid as inconsistent with Article 83 of the Bankruptcy Law (see comments in sections 2.1.1 - 2.1.12).

2.3.7 However, individual Underlying Agreements could still be terminated (after the opening of the bankruptcy proceedings) on the basis of the statutory right stipulated in Article 85(3) of the Bankruptcy Law if they meet the criteria indicated in section 2.1.15. In such a case, pursuant to Article 85(4) of the Bankruptcy Law amounts resulting from their settlement may be set off by a unilateral set-off statement. Then, limitations on setting off claims in a bankruptcy proceeding will not apply.

2.3.8 Since there are similar provisions in the Restructuring Law, the above conclusions will apply mutatis mutandis to restructuring proceedings with the participation of one of the parties.

2.4 Early termination, close-out netting and Final Net Settlement Amount

Opinion on whether or not early termination, close-out netting or the calculation and payment of a Final Net Settlement Amount under the provisions of each model Master Agreement are voidable, challengeable or in any way vulnerable to deletion by a liquidator or any third party if insolvency procedures are later opened against a party that is organized under the laws of Poland.

As a rule, settlement between the parties and the calculation and payment of the Final Net Settlement Amount before declaration of bankruptcy do not give rise to the risk of being challenged by the bankruptcy trustee, unless the termination of the Master Agreement is invalid.

2.4.1 The following comments concern only the situation when the contract is terminated and Final Net Settlement Amount is paid before the opening of bankruptcy/restructuring proceedings. As regards the comments concerning the application of the settlement mechanism after the opening of proceedings, see comments in point 2.3 above.

2.4.2 There are certain provisions in Polish law designed to protect creditors against detrimental acts of a debtor. In particular, these are:

(a) *Actio Pauliana*, regulated in articles 527 - 534 of the Polish Civil Code[3],

(b) articles 127 – 130a of the Bankruptcy Law, and

(c) articles 304-305 of the Restructuring Law.

Avoidance of contracts under Polish Civil Code

2.4.3 *Actio Pauliana* is a legal instrument of general application because it is not confined to Bankruptcy or Restructuring Proceedings[4]. Pursuant to article 527 of the Polish Civil

[3] The Civil Code of 23 April 1964, consolidated text of 10 May 2018 (Dz.U.2018.1025 as amended).
[4] But can be used also by insolvency/restructuring officials in insolvency and remedial proceedings.

Code, any act in law which has the effect of being both “detrimental” to creditors and by which a third party has gained a “benefit” can be declared ineffective if:

(i) the debtor acted deliberately to the detriment of creditors, and

(ii) the third party was aware of that fact - or should have known if it had exercised (appropriate) due diligence.

2.4.4 Knowledge of the debtor acting to the detriment of creditors is imputed to the third party if it had “a close relationship” with the debtor or had a “permanent economic relationship” with the debtor. A “permanent economic relationship” certainly does exist if parties enter into regular transactions, especially if this happens over a long period.

2.4.5 Nevertheless *actio pauliana* cannot be used to challenge fulfilment of an existing obligation what is widely accepted by the courts. The only exemption to that rule is when the insolvent party fulfils its obligation in a changed form (e.g. transfer a real estate instead of cash). This means that a payment of the Final Net Settlement Amount in connection with application of a close-out netting clause is not an action of the debtor that can be deemed detrimental to the creditors as long as the debtor fulfils an obligation in its original form.

Avoidance of contracts under the Bankruptcy Law

2.4.6 The Bankruptcy Law envisages certain voidability provisions applicable in insolvency proceedings. We believe that most of these provisions will not apply in case of payment of the Final Net Settlement Amount.

2.4.7 However, there is a risk that Article 127 section 3 of the Bankruptcy Law will apply. It provides that the debtor’s payment of a non-matured debt within six months before a petition for bankruptcy is filed is ineffective towards the bankruptcy estate. It means that **the payment of a validly accelerated and then matured debt should not be treated as the payment of immature debt**.

2.4.8 However, article 127 section 3 will apply if the acceleration of maturity occurs based on a clause invalid under Article 83 of the Bankruptcy Law (see comments in point 2.3). This will result in the payment of the debt, the maturity of which has been accelerated on the basis of an invalid contract provision, not protected by a safer-harbour clause (Article 85 of the Bankruptcy Law). Such payment may be considered ineffective.

2.4.9 Pursuant to the second sentence of article 127 section 3 of the Bankruptcy Law, a person who has received payment may demand that these acts be deemed effective towards the bankruptcy estate, if it was not been aware of the existence of grounds for bankruptcy.

Avoidance of contracts under the Restructuring Law

2.4.10 In restructuring proceedings avoidance actions are available only to an administrator established in remedial proceedings. In the case of other proceedings, there are no similar provisions which would envisage the unenforceability of certain actions.

2.4.11 Article 304 section 1 of the Restructuring Law provides for a claim of the administrator similar to that regulated in article 127 section 1 of the Bankruptcy Law. Therefore, our comments made above in that regulation are repeated here. We believe that the calculation and payment of Final Net Settlement Amount will not be considered ineffective based on this provision.

2.5 Cross Category Netting

Opinion on any applicable issues that need to be considered as to the enforceability of netting between physical and financial transactions or various categories of physical products.

Cross Category Netting is possible only as contractual set-off. However, it must not lead to circumvention of laws imposing certain limitations on netting in bankruptcy/restructuring proceedings.

2.5.1 Under Polish law claims may, as a rule, be set-off, in two ways:

(a) based on an agreement between parties – a contractual set-off;

(b) unilaterally by one of the parties – a statutory set-off.

Statutory set-off

2.5.2 Conditions for a statutory set-off referred to in Article 498(1) of the Civil Code are as follows:

(a) Two opposing claims exist – each party must at the same time be a creditor and a debtor towards the other;

(b) Both claims are of the same type – it is possible to set off only money or the same things in the same amount;

(c) Both claims must be mature – even though the legal provision is clear here, both the legal doctrine and the case law agree that it is enough for the claim of the party making the set-off to be due and payable;

(d) Both claims must be challengeable – even though the legal provision is clear here, both the legal doctrine and the case law agree that it is enough for the claim of the party making the set-off to be challengeable. A challengeable claim is a claim enforceable in court. Thus, as a rule, the claim must not be, for instance, barred by statutes of limitation.

2.5.3 A statutory set-off may be made by way of a unilateral notice of set-off given to the other party.

2.5.4 As a result of such set-off, claims are netted up to the amount of the lower-value claim. The set-off notice has a retroactive effect as of the time when the set-off became possible. The practical effect is that no interest on set-off claims will accrue.

2.5.5 The above rules would apply if it were necessary to make a statutory set-off of settlement amounts under different Underlying Agreements terminated on the basis of the statutory right. This would be the case in the event of invalidity of the model Master Agreement provisions permitting termination as a result of applying Article 83 of the Bankruptcy Law. Then, cross category netting would be impossible.

Contractual set-off

2.5.6 Claims may also be set off by way of contractual set-off. It is not subject to limitations laid down in Article 498 of the Civil Code. In such case the parties make the set-off relying on the principle of freedom of contract in Polish law. In view of the above, the conditions, effects or timing of set-off are determined by the parties.

2.5.7 The above means that unlike statutory set-off, in the case of contractual set-off it is possible to set off claims arising from both financial and physical transactions.

2.5.8 A set-off, also in the form of cross category netting, made before the opening of bankruptcy/restructuring proceedings would be valid under Polish law.

Limitations on set-off in bankruptcy proceeding

2.5.9 Both bankruptcy law and restructuring law impose certain limitations on set-offs by parties to an agreement. Under the bankruptcy law they are as follows:

(i) Both claims to be set off must exist on the date of bankruptcy declaration (the creditor’s claim against the bankrupt becomes automatically due and payable upon declaration of bankruptcy);

(ii) The set-off involves the total amount of the bankrupt’s claim while the creditor’s claims only up to the principal claim plus interest accrued until the date of bankruptcy declaration;

(iii) Set-off is not permitted if the bankrupt’s debtor acquires a claim after bankruptcy has been declared or has acquired it during the last year before bankruptcy declaration date, and has been aware of the existence of a basis for bankruptcy declaration;

(iv) Set-off is not permitted if the creditor becomes the bankrupt’s debtor after the bankruptcy declaration date;

(v) A set-off notice must be given no later than at the time of the lodgement of claims.

Limitations on set-off in restructuring proceeding

2.5.10 As regards the Restructuring Law, limitations are such that set-off is not permitted if the creditor:

(i) becomes the debtor's debtor after the date of opening accelerated arrangement proceedings;

(ii) being the debtor's debtor, becomes, after the date of opening accelerated arrangement proceedings, its creditor by acquiring by way of assignment or endorsement a claim that arose before the date of opening accelerated arrangement proceedings.

2.5.11 Furthermore, a set-off notice should be given no later than within thirty days of the date of the opening of accelerated arrangement proceedings.

2.5.12 Those comments apply to arrangement and remedial proceedings accordingly.

2.5.13 However, the limitations apply only to a set-off made after bankruptcy declaration/opening of restructuring. This means that before that claims may be set off in accordance with relevant contractual provisions interpreted in the light of the agreement's governing law.

2.5.14 In addition, according to the opinion expressed by most of legal scholars, those limitations on set-off apply only to statutory set-off. However, the professional legal literature expresses the view that those limitations also need to be taken into consideration by parties in connection with contractual set-off. There is also an opinion that contractual set-offs made after declaration of bankruptcy are not possible at all. In our view, such conclusions are too far-fetched, though we believe that contractual set-off must not be used to circumvent statutory limitations on set-off. Such set-offs would be deemed invalid.

2.5.15 This means that cross category netting is possible under the agreement provided that it meets the conditions stipulated in the Bankruptcy Law and the Restructuring Law.

2.5.16 Limitations on set-offs after declaration of bankruptcy will not apply to a netting clause incorporated into a framework agreement contemplated in Article 85(1) of the Bankruptcy Law. According to that Article, if an agreement is terminated by one of the parties, the settlement mechanism still applies. Also, the clause described in Article 85a of the Bankruptcy Law remains. However, it will be possible to apply this Article only if modifications are made to the model Master Agreement as discussed in section 6.1.

2.5.17 It is irrelevant in the context of contractual settlements under the settlement clause in the model Master Agreement whether:

– transacted objects are traded under one or more than one Underlying Agreement;

– the objects of transactions to be set off are different or the same products;

– physical or financial transactions are performed under one or more than one Underlying Agreement.

2.6 Base Currency other than legal currency of Poland

Assuming that the parties have selected a Base Currency (Division 1, Part VI of the CPMA Schedule and section 8.3(C) of the MNA Election Sheet) other than the legal currency of Poland in which the insolvent party is organized, opinion on whether payment of the Final Net Settlement Amount in that currency would be enforceable under the laws of Poland.

Payment of the Final Net Settlement Amount in such currency would be enforceable subject to the relevant rules of satisfying the creditors in bankruptcy/restructuring proceedings.

2.6.1 Under Polish law it is possible to settle transactions in any currency chosen by the parties in an agreement. Thus, the parties may – in accordance with the agreement – make settlements both in Polish zlotys and in a foreign currency.

2.6.2 A payment denominated in a foreign currency may, however, be made in the Polish currency unless legal provisions, a judgement or agreement require the payment to be made in a foreign currency. Thus, to exclude settlements in the Polish currency (if such settlement is made in Poland), it is necessary to make an express stipulation to that effect in the agreement.

2.6.3 If amounts payable under an agreement are expressed in a foreign currency but are to (or can) be paid in the Polish currency, the agreement should also describe the procedure for calculating the exchange rate. Otherwise, the average exchange rate announced by the National Bank of Poland on the due date will apply.

2.6.4 Notwithstanding the above, according to Article 251 of the Bankruptcy Law, any foreign currency claim is placed on the list of creditors in bankruptcy proceedings after conversion into Polish currency. The amount is then converted at the average exchange rate announced by the National Bank of Poland on the day of the declaration of bankruptcy, or in the absence of such rate, at the average market price on that day.

2.6.5 Claims in bankruptcy proceedings are settled in PLN, and not in a foreign currency. However, the above does not change the nature of the claim, i.e., it does not make it a claim in PLN. For example, if the same claim is pursued against its guarantor, or if the bankruptcy proceedings are discontinued, the claim should be satisfied in its original currency.

2.6.6 The situation is similar under the Restructuring Law. A foreign currency claim is included in the list of creditors in restructuring proceedings after conversion into the Polish currency. However, the payment of such claim as part of the arrangement takes place in a foreign currency unless the arrangement proposals provide otherwise.

2.7 **Enforceability of the Master Agreements**

Opinion on whether the rights of a party are enforceable in accordance with the terms of each model Master Agreement, irrespective of the insolvency of the entity incorporated in Poland.

The rights of the non-defaulting party are enforceable in accordance with the terms of each model Master Agreement if:

- **that party terminates the agreement based on an event unrelated to the bankruptcy if such termination occurs before the declaration of bankruptcy;**
- **that party acquires the right to terminate the agreement before the declaration of bankruptcy, but exercises such right after the declaration of bankruptcy.**

2.7.1 As regards the termination of Underlying Agreements and the settlement between the parties following the declaration of bankruptcy of one of them, see comments in sections 2.1 - 2.3.

2.7.2 However, on the basis of the model Master Agreements, the parties may terminate individual Underlying Agreements and settle mutual claims also as a result of events not related to bankruptcy. In such case, the enforceability of these provisions will depend on when the agreements are terminated.

2.7.3 The parties may terminate the Underlying Agreements exercising the right under the model Master Agreement, based on an event unrelated to the bankruptcy if such termination occurs before the declaration of bankruptcy. There is no provision of the Polish Bankruptcy Law that would prohibit such termination. This means that Polish bankruptcy/restructuring law will not apply in such a situation. This also follows indirectly from Article 7 of the EU Insolvency Regulation. Whether such solution may be used should therefore also be assessed from the perspective of the governing law of a given agreement.

2.7.4 However, the parties may acquire the right to terminate the agreement before the declaration of bankruptcy and for various reasons not exercise it immediately. Both the case law and the legal literature have raised doubts as to whether in such case the parties may exercise this right after the declaration of bankruptcy. The above comments will apply accordingly in the context of the Restructuring Law.

2.7.5 In our view, despite the declaration of bankruptcy or the opening of the insolvent party's restructuring, the solvent party will retain its right to terminate such agreement and settle its claims against the other party regardless of the declaration of bankruptcy of one of them. Such a conclusion also follows from one of the decisions of the Supreme Court.[5] However, the settlement clause will be effective as long as it does not contradict the limitations on set-offs resulting from the Bankruptcy Law and Restructuring Law (see comments to section 2.5).

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[5] Supreme Court's judgement 9.8.2016, II CSK 733/15.

2.7.6 As in the scenario described above the agreement is terminated as a result of an event unrelated to bankruptcy, our conclusions do not depend on the recognition of the model Master Agreement as a framework agreement within the meaning of Article 85 of the Bankruptcy Law or Article 250 of the Restructuring Law.

2.8 Governing law

Opinion on whether the parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will be upheld in Poland, and the consequences if it were not.

The parties' agreement on governing law of each model Master Agreement and submission to jurisdiction will be generally upheld in Poland. If, on the day of the declaration of bankruptcy, an arbitration proceeding has not been opened, with the consent of the judge-commissioner, the trustee may waive the arbitration clause.

Choice of law

2.8.1 The member states of the European Union, including Poland, are bound by Regulation No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (**the "Rome I Regulation"**).

2.8.2 As provided for in Article 3 of the Rome I Regulation, a contract is governed by the law of the parties' choice. The parties may include a contractual provision regarding the law applicable either to the whole agreement or to a specific part.

2.8.3 However, it also results from the Rome I Regulation that in certain situations the law chosen by the parties may not be applicable despite the choice made in accordance with Article 3 of the Regulation.

2.8.4 The parties' choice is without prejudice to the application of rules of law which cannot be derogated from by a choice of the law of another country where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen.

2.8.5 The parties' choice of a particular law of another country is also without prejudice to the application of the overriding mandatory provisions of the law of the forum. This category includes i.a. rules on the protection of public interests. Additionally, in accordance with the EU Insolvency Regulation, the law applicable to the conditions for the opening of insolvency proceedings, their conduct and their closure will be the law of the country of the opening of insolvency proceedings.

2.8.6 In Polish law, the limitation of application of the law chosen by the parties will also apply under the so-called public policy clause. It means that the foreign law will not be applied if its application would have effects contrary to the basic principles of the Polish legal system.

2.8.7 In practice the above means that the provisions of the Polish Bankruptcy and Restructuring Law will apply even if they are contrary the provisions of the governing law chosen for the agreement. There are, however, no other mechanisms in the Polish bankruptcy and restructuring proceedings which could lead to challenging of the choice of law made by the parties.

Jurisdiction

2.8.8 Jurisdiction issues will be resolved with reference to Council Regulation No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**the "Brussels I Regulation Bis"**).

2.8.9 In accordance with Article 25 of the Brussels I Regulation Bis, the parties may agree on jurisdiction of a court or courts of a chosen member state. This court will have exclusive jurisdiction to settle any disputes that arise from or in connection with their legal relationship, unless the parties decide otherwise. Jurisdiction of courts of the member state in question may also be excluded due to substantial invalidity of the contract under the law of this member state.

2.8.10 The agreement conferring jurisdiction is to be concluded in one of the following forms:

(i) in writing or evidenced in writing,

(ii) in a form that complies with practices established between the parties,

(iii) with regard to international trade or commerce, in a form that complies with usage of which the parties are or ought to have been aware and which is widely known to the parties to the contract of the type involved in such trade or commerce.

2.8.11 The clause specified in the model Master Agreement, as executed in writing, fulfil the requirements set forth in the Brussels I Regulation Bis.

2.8.12 In addition, pursuant to Article 147 of the Bankruptcy Law and Article 311(3) of the Restructuring Law, the provisions concerning the ex officio suspension of proceedings apply to proceedings before the arbitration courts:

(a) where the proceedings concern bankruptcy estate, arrangement estate or estate in remedial proceedings and bankruptcy has been declared or secondary insolvency proceedings have been opened or an administrator has been appointed in restructuring proceedings;

(b) if a mandatory administrator has been appointed in a bankruptcy proceeding or a provisional administrator in a proceeding for opening a remedial proceeding, and the proceeding relates to collateralised assets.

2.8.13 A court will resume the proceeding ex officio when the reason for suspension ceases to exist.

2.8.14 What is more, if, on the day of the declaration of bankruptcy, an arbitration proceeding has not been opened, with the consent of the judge-commissioner, the trustee may waive the arbitration clause. He may do so if pursuing a claim before an arbitration court hinders the liquidation of the bankruptcy estate, in particular if the state of the estate makes it impossible to cover the costs of opening and conducting proceedings before the arbitration court.

2.9 Impact of EU Insolvency Regulation

*Opinion on whether, pursuant to the EU Parliament and Council Regulation No. 2015/848 of 20 May 2017 (the "**EU Insolvency Regulation**") most provisions of which became directly applicable in all Member States as from 26 June 2017, a bankruptcy court in Poland would apply the laws relevant to close-out netting and set-off of the governing law of each Master Agreement if they differ from the analogous insolvency laws of Poland. In addition, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, opinion on whether the close-out netting and/or set-off provisions under each Master Agreement would nevertheless become valid by operation of the EU Insolvency Regulation*

As a general rule, a Polish insolvency court will apply Polish regulations on close-out netting and set-off subject to the following comments. A protection under Article 9 of the EU Insolvency Regulation may be given to set-off clauses included in the MNA and CPMA, if the Underlying Agreements are terminated based on the MNA/CPMA before the declaration of bankruptcy, or based on Article 85(3) of the Bankruptcy Law after the declaration of bankruptcy. If a given Underlying Agreement is invalid, a settlement clause cannot apply to claims under that agreement but will apply to claims arising from the valid agreements.

Scope of application of EU Insolvency Regulation

2.9.1 The rules discussed in the other parts of the memorandum will apply when both parties to the agreement will have a COMI in Poland. If the solvent party is based outside Poland but in the European Union, its rights will also be governed by the EU Insolvency Regulation. However, the EU Insolvency Regulation does not apply to bankruptcy proceedings of credit institutions or investment firms.

2.9.2 According to Article 7 EU of the Insolvency Regulation, the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened. That law determines the conditions for opening proceedings, their conduct and their closure. The Regulation, when referring to insolvency proceedings, applies to the following Polish procedures:

(i) bankruptcy proceedings;

(ii) proceedings for approval of arrangement, including simplified restructuring proceedings (see also comments in sections 8);

(iii) accelerated arrangement proceedings;

(iv) arrangement proceedings;

(v) remedial proceedings.

2.9.3 Article 7(2) of the EU Insolvency Regulation also lists examples of matters in which the law of the state in which proceedings are opened applies. They include, among others, the conditions under which set-offs may be invoked, and the effects of insolvency proceedings on current contracts to which the debtor is party.

2.9.4 The EU Insolvency Regulation does not expressly protect all netting clauses. In our view, Article 12 EU Insolvency Regulation does not serve this purpose. According to Recital (71) to the Regulation, the objective behind this article is to protect netting clauses among others on the regulated financial markets of the Member States. In our view, this means the article does not apply to agreements made outside a regulated market, such as MNA/CPMA and agreements under those Master Agreements.

2.9.5 However, Article 9(1) provides that the opening of insolvency proceedings does not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim. This provision also applies to a contractual set-off, but does not expressly refer to close-out netting, either.

Article 9 of the EU Insolvency Regulation vs. CPMA/MNA

2.9.6 Close-out netting differs from ordinary set-off. It consists of two elements, i.e., rights to:

(a) terminate an agreement as a result of the occurrence of a triggering event;

(b) settle mutual claims under different transactions by calculating a single net amount due to the other party.

2.9.7 There are doubts whether Article 9 of the EU Insolvency Regulation applies to close-out netting. They are justified in particular when the termination of the MNA/CPMA, and with it of the Underlying Agreements, is not permitted under the safe harbour clause provided for in Article 85(3) of the Bankruptcy Law (see sections 2.1 and 2.2). If it were not possible to terminate the Underlying Agreements on the basis of MNA/CPMA, there would also be no obligation to pay the Settlement Amount under each Closed-Out Agreement. **This means that Article 9 of the EU Insolvency Regulation does not protect the Close-Out Netting mechanism under the MNA/CPMA when there is no valid termination of the Underlying Agreements before declaring bankruptcy of one party.**

2.9.8 Nevertheless, a **similar effect to the Close-Out Netting mechanism based on the MNA/CPMA will be possible if the Underlying Agreements are terminated based on the MNA/CPMA before the declaration of bankruptcy.** This will be the case if the termination is based on a valid Close-Out Event clause (i.e. a Close-Out Event clause not relating to the opening of bankruptcy/restructuring proceedings or the filing of a bankruptcy/restructuring petition). In such case **it will be possible to exercise the right to set off under the MNA (Article 4) or CPMA (§10.1A).** This right will be protected by Article 9 of the EU Insolvency Regulation if it complies with the law applicable to the CPMA/MNA.

2.9.9 In addition, the **solvent party may terminate any of the Underlying Agreements on the basis of the safe harbour clause under Article 85(3) of the Bankruptcy Law**. In such case, it will also be **possible to exercise the right of set-off under the MNA (Article 4) or CPMA (§10.1A),** on the same basis as in section 2.9.8 above. Additionally, a set-off of the parties' claims in such a case is permitted under Art. 85(4) of the Bankruptcy Law.

2.9.10 However, it is possible that using the mechanism described in section 2.9.8 above will not achieve the same effect as relying on CPMA/MNA. This will be the case, for example, when the Underlying Agreement covered by the Master Agreement will not concern financial term operations within the meaning of Article 85 of the Bankruptcy Law. Then such an agreement will not be subject to the statutory safe-harbour clause under Article 85(3) of the Bankruptcy Law. The solvent party will not be able to terminate such an agreement or include the Settlement Amount under such agreement in the set-off provided for in the CPMA/MNA.

<u>Invalidity of Underlying Agreement</u>

2.9.11 If a given Underlying Agreement is invalid, claims under that agreement will not be eligible for a settlement clause. This will be the case even if the model Master Agreement is deemed to be a framework agreement within the meaning of Article 85 of the Bankruptcy Law.

2.9.12 In such case, if the governing law of the agreement so provides, one or both parties will have a claim(s) for reimbursement of the amount resulting from the invalidity of the agreement. However, such claim will arise from a legal relationship other than the Underlying Agreement and cannot be considered to be covered by the settlement under the Master Agreement.

2.10 Impact of the insolvency on the enforceability of the Master Agreements – general comments

<u>A general discussion of, and opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of the model Master Agreement.</u>

The mere declaration of bankruptcy or the opening of restructuring proceedings will have a number of implication for the operation of the model Master Agreement and individual Underlying Agreements.

2.10.1 There are a number of provisions in Polish bankruptcy law under the very fact of declaring one of the parties to the agreement bankrupt have certain consequences. The first of these is Article 91 of the Bankruptcy Law, which refers to the obligations of the parties, which existed at the date of the declaration of bankruptcy but were not yet due.

2.10.2 It provides that monetary obligations of the bankrupt, the payment of which has not yet occurred, become due and payable on the date of declaration of bankruptcy.

2.10.3 In addition, in accordance with Article 92 of the Bankruptcy Law, interest due only for the period until the date of the declaration of bankruptcy may be satisfied from the bankruptcy estate. After the declaration of bankruptcy, interest no longer accrues.

2.10.4 Since the provisions of the Master Agreement in its current form may prove to be invalid, the above comments apply only to claims resulting from Underlying Agreements, that is, for instance, claims for payment of Settlement Amounts. Both Article 91 of the Bankruptcy Law (accelerated maturity) and Article 92 of the Bankruptcy Law (making it impossible to charge interest on these amounts after the declaration of bankruptcy) may apply in this case.

2.10.5 The declaration of bankruptcy also affects the possibility of set-off of claims between the bankrupt and its creditors. These issues, however, are described in detail in section 2.5 and concern both the Bankruptcy Law and the Restructuring Law.

2.10.6 Given the risk that the model Master Agreement will not be considered as a framework agreement within the meaning of Article 85 of the Bankruptcy Law, the bankruptcy trustee may have the right to withdraw from that agreement. This will be the case if, on the day of the declaration of bankruptcy, the agreement has not been performed in full.

2.10.7 However, the administrator's right to rescind from an agreement in remedial proceedings requires the agreement to be reciprocal. The Master Agreement cannot be regarded as a reciprocal agreement, so the administrator in remedial proceedings will not be able to rescind it.

2.10.8 The trustee's powers will be of great importance in practice if one of the parties acquires, before declaration of bankruptcy, the right to terminate Underlying Agreements on the basis of the model Master Agreement. The possibility of exercising such a right will then depend on whether a party does so before the right of withdrawal is exercised by the trustee. If the trustee decides to rescind this agreement earlier, it will thus deprive the solvent party of its right to terminate the Underlying Agreements under the Master Agreement. Consequently, the solvent party will not be able to exercise its right of set-off under the CPMA/MNA.

2.10.9 However, the trustee will not be entitled to rescind Underlying Agreements if they are covered by the safe harbour clause under Article 85 of the Bankruptcy Law. In such a case the solvent party will be able to terminate the Underlying Agreements pursuant to Article 85(3) of the Bankruptcy Law and settle those agreements on the basis of the close-out netting mechanism they provide for. **The solvent party will also be able to set off its claims against those of the insolvent party arising in connection with the termination of Underlying Agreements pursuant to Article 85(4) of the Bankruptcy Law (even if the trustee rescinds the CMPA/MNA).**

2.10.10 The opening of proceedings may also have certain effects if the parties conclude Underlying Agreements and transactions under the Underlying Agreements by submitting and accepting an offer. Then, if the other party does not accept the offer made by the bankrupt before the declaration of bankruptcy, the offer is not binding on the bankruptcy estate. In such a situation, an additional confirmation of the agreement by the trustee is necessary to effectively conclude the agreement between the parties. However, if the other party accepts the offer before the declaration of bankruptcy, the bankrupt is bound by the offer submitted by it and the agreement is concluded by the parties. The claim resulting from such an agreement may be pursued by the creditor in bankruptcy proceedings.

2.10.11 The effect of bankruptcy will also be that, after that time, all agreements to which the bankrupt party is a party should be concluded by the trustee. This applies, for example, to new Underlying Agreements and to new transactions concluded on the basis of Underlying Agreements.

2.10.12 The similar effects also concern the restructuring proceedings. In arrangement proceedings and accelerated arrangement proceedings, there will be appointed the court supervisor. In simplified restructuring proceedings, there will be appointed the arrangement supervisor. In such a case, for the execution of any new agreements beyond the ordinary management, the debtor should obtain the consent of the arrangement/court supervisor. Besides, in case of remedial proceedings, all new agreements (at least beyond the ordinary management) shall be concluded by the administrator who directly manages the debtor's assets.

2.11 Uniform default events

An analysis and opinion regarding the advisability in Poland of using each model Master Agreement to impose uniform default events across all types and categories of trades (effectively superseding the default terms of underlying master agreements or deal documentation) as opposed to allowing such underlying default provisions to operate for their respective categories of trades even if to do so might permit close-out and set-off of some trades governed by the relevant Master Agreement, but not others.

The introduction of a uniform catalogue of termination events will be advisable, provided that a contractual provision does not contradict Article 83 of the Bankruptcy Law.

2.11.1 The advisability of introducing such provisions depends on whether the model Master Agreement can be considered a framework agreement within the meaning of Article 85 of the Bankruptcy Law. The introduction of a uniform catalogue of termination events for individual agreements would support the argument that it is the MNA/CPMA and not the Underlying Agreements that constitutes the framework agreement for all transactions concluded under the Underlying Agreements. This would be the case if the fulfilment of the condition resulted also in the Master Agreement being terminated. It is a characteristic of a framework agreement within the meaning of Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law that termination of the framework agreement terminates all specific agreements entered into in performance of that agreement.

2.11.2 Because of this, it may be more advantageous for the parties to introduce a uniform catalogue of events into the model Master Agreement, which will make it possible to terminate both the Master Agreement and the Underlying Agreement.

2.11.3 Then, the parties, in the event that bankruptcy is declared or restructuring proceedings are opened, will have the right to terminate the framework agreement and thus all specific agreements concluded in its performance, while retaining the settlement mechanism provided for by them.

2.11.4 In addition, the introduction of the right to terminate all other agreements if one of them is terminated is possible and in principle effective. Such a mechanism must not, however, lead to circumvention of Article 83 or Article 85 of the Bankruptcy Law.

2.11.5 A provision that would permit the termination of all other agreements in the event that one of the Underlying Agreements is terminated under Article 85(3) of the Bankruptcy Law would therefore be invalid. Such a provision would indirectly refer to the declaration of bankruptcy.

B. CPMA CSA / MNA CSA

2.12 Suspect periods

Opinion on whether an entity duly organized or incorporated under the laws of Poland (or its administrator, provisional liquidator, receiver, trustee or other similar official) will be able to recover any transfer of Eligible Credit Support made to the transferee during a certain "suspect period" preceding the date of the insolvency that makes the recovery vulnerable to being treated as preferential or otherwise suspect (or other similar treatment) by such official and therefore subject to avoidance. Opinion on whether the substitution of Eligible Credit Support by a counterparty during this period would invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing.

In our view, the transfer of Eligible Credit Support should not be considered invalid because it secures transactions eligible for the statutory exception. In addition, if the collateral is

provided in the form of a letter of credit, no legal provisions on unenforceability will apply. The same conclusions apply to the substitution of Eligible Credit Support.

Cash collateral

2.12.1 Certain actions carried out to the detriment of creditors may be ineffective if they are carried out within a certain period prior to the opening of bankruptcy or restructuring proceedings. The comments made in section 2.4 above will apply to such actions.

2.12.2 However, there is an exception concerning a certain category of transfers in both the Bankruptcy Law and the Restructuring Law. According to that exception, legal provisions on unenforceability do not apply to security instruments established before opening proceedings for certain transactions.

2.12.3 Transactions secured by the collateral include financial term operations, loans of financial instruments or the sale of financial instruments referred to in Article 85(1) of the Bankruptcy Law and Article 250(1) of the Restructuring Law. This means that this provision refers to transactions made on the basis of specific agreements concluded by the parties in the performance of the framework agreement referred to in those regulations.

2.12.4 **In our view, the transfer of Eligible Credit Support made in connection with securing the above-mentioned transactions may be covered by the exception. We believe that it can be considered as collateral in connection with individual transactions under Underlying Agreements.** Of course, this will only be the case if these transactions are included in the list given in the Articles mentioned above.

2.12.5 Then, such a transfer cannot be considered ineffective under the Bankruptcy Law or Restructuring Law. Importantly, however, the provision does not preclude the possibility of assessing such action under the *Actio Pauliana* regulations (see comments in sections 2.4.3 - 2.4.5). In practice, the application of this provision is very unlikely and limited to situations where the transfer would take place between related parties.

2.12.6 Furthermore, the exception is irrelevant when determining whether it is possible to apply legal regulations on non-enforceability to collateral securing transactions which cannot be classified as financial term operations, such as, for example, spot transactions.

2.12.7 The exception only applies to collaterals. This means that for other matters – e.g. the payment of a non-matured debt arising from financial term operations (for instance, by set-off against collateral at the request or with the consent of the insolvent party), the provisions on non-enforceability will apply.

2.12.8 We believe that there is a high risk that the replacement of collateral may be considered as the creation of new collateral. In that case, the provisions on non-enforceability will apply to such collateral. Therefore, if the replacement is made within the "suspect period" referred to in the legislation, it may be considered ineffective.

2.12.9 However, if we consider the transfer of Eligible Credit Support to constitute collateral referred to in Article 127(4) of the Bankruptcy Law and Article 304(5) of the Restructuring Law, such replacement will also be covered by the exception. The replacement of such collateral, even if it is deemed to constitute new collateral, will therefore be effective.

2.12.10 Hence, in our view, the risk of the collateral being unenforceable is low because:

(i) It is the claims arising from Underlying Agreements that are secured in economic terms – as indicated by the definitions in the CSA – and such collateral is eligible for the exception of Article 127(4) of the Bankruptcy Law;

(ii) Even assuming that claims for payment of Final Net Settlement Amount under the model Master Agreement are secured, these claims do not exist at the time the security is established because the agreement has not been terminated. Therefore Article 127(3) of the Bankruptcy Law does not apply because this provision only renders ineffective the security of claims existing at the time the security was created.

Security in the form of letter of credit

2.12.11 In Polish law, as a rule, two legal relationships are established under a letter of credit. First, it is an agreement between a bank and a principal under which the principal places an order to open the letter of credit with the bank. The second is the relationship between the principal's bank and the beneficiary of the letter of credit, on the basis of which the bank is obliged to pay the collateral amount when, for instance, certain documents are presented.

2.12.12 Assuming that letters of credit are also regulated in this way under the governing law of the CSAs, neither the provisions on unenforceability nor the possibility of withdrawal by the trustee under Article 98 of the Bankruptcy Law will apply to them.

2.12.13 This is because collateral in the form of a letter of credit is formally based on a relationship between the (bankrupt) collateral provider and the bank, and not directly the beneficiary. The obligation to pay out is only a bank's abstract own commitment towards the beneficiary.

Opinion on whether the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of each CSA during any applicable "suspect period" described above is subject to avoidance, either because it will be considered to relate to an antecedent or pre-existing obligation or for some other reason.

In principle, the security of non-matured debt that existed before the security was provided may be ineffective. That risk does not affect the security of a future obligation, or obligation

granted at the time of incurring the obligation. The legislation also provides for unenforceability where the collateral amount would significantly exceed the secured claim. However, if collateral is provided on market terms then we can see no risk of unenforceability.

2.12.14 According to the Bankruptcy Law the security of non-matured debt established within 6 months prior to the declaration of bankruptcy is ineffective (see section 2.4). Also the provisions of the Restructuring Law on unenforceability will have a similar effect. However, the Restructuring Law refers to collateral which was not established directly in connection with the performance for the debtor's obligation and was established within one year prior to the opening of the remedial proceedings.

2.12.15 According to the above-mentioned legislation, as indicated in the legal literature, the sanction of unenforceability applies to collateral of non-matured debt, which already existed. The security, both under the Bankruptcy Law and the Restructuring Law, is therefore effective if it concerns a future debt, and also if it was granted at the time of incurring the obligation.

2.12.16 In addition, such collateral will also be effective if it relates to matured debt regardless of whether established at the time of incurring the obligation or later. However, under the Restructuring Law, the effectiveness of such collateral will depend on whether, in exchange for the collateral, the debtor receives a specific benefit (e.g. an extension of the payment deadline).

2.12.17 The unenforceability stipulated in the Bankruptcy Law also depends on the awareness of the party in whose favour the collateral is established. The unenforceability sanction depends on whether such party was aware of the existence of grounds for declaring bankruptcy. If not, it may demand that these actions be considered effective.

2.12.18 The amount of the collateral itself is also important in this context. According to Article 304(4) of the Restructuring Law, security instruments are void in the part which exceeds the value of the secured claim by more than half. This provision is valid only in the remedial proceedings and applies to actions carried out during a year prior to submitting the application for opening the remedial proceedings.

2.12.19 If there is a disproportion between the collateral amount and the amount of the secured claim, this may also give rise to a risk that the trustee or administrator may argue that collateral secures also other claims. In our view, however, if the collateral is provided in accordance with mark-to-market provisions, there is very little risk of such allegations being raised.

2.12.20 In addition, our comments on non-applicability of the unenforceability sanction in the case of securing transactions involving, inter alia, financial term operations are also valid here (see sections 2.12.1 -2.12.11). In such case, it will be irrelevant whether the collateral concerned debt that was not due and whether that debt already existed prior establishing the security, or what the amount of the collateral itself is. The collateral will still be valid and effective.

2.13 Impact of the insolvency on the enforceability of the CSAs – general comments

A general discussion of, and opinion regarding, whether or not the mere institution of proceedings seeking a judgment of insolvency and/or the opening of the proceedings has any implication on the enforceability or operation of each CSA.

Declaration of bankruptcy or opening of restructuring proceeding involves a number of consequences that we have described below.

Form of agreement necessary to preserve the effectiveness of the security provided

2.13.1 The bankruptcy law sets out the conditions which must be met by an agreement establishing security involving the transfer of ownership of an asset, claim or other right in order to be effective towards bankruptcy estate. According to Article 84(2) of the Bankruptcy Law, such an agreement is effective in relation to the bankruptcy estate if it has been concluded in writing with a certified date.

2.13.2 This provision refers only to the collateral established by the bankrupt, and not in the bankrupt's favour.

2.13.3 However, according to Article 84(3) of the Bankruptcy Law a written form with a certified date is not required for an agreement establishing financial collateral under the Act on Certain Financial Collaterals.[6] The Act refers to several kinds of collateral established by specific institutions, such as the Polish central bank, investment firms or banks and credit institutions.

2.13.4 The categories of security instruments referred to in the Act include:

(i) the collateral assignment of a right to cash, credit claims or financial instruments;

(ii) the establishment of a financial pledge;

(iii) the establishment of a blockade on a securities account.

2.13.5 In addition, the Act on Certain Financial Collaterals itself stipulates that collaterals in the form of a financial pledge and the establishment of a blockade do not require the conclusion of an agreement with a certified date.

Conditions for including the claim for reimbursement of the collateral amount in the settlement mechanism

2.13.6 Following declaration of bankruptcy the close-out amount could be calculated also to the claims resulting from the collateral under article 85a of the Bankruptcy Law. It

[6] Act of 2 April 2004 on Certain Financial Collaterals (consolidated text of 2020.01.22 in Dz.U.2020.103).

provides that the declaration of bankruptcy of the debtor is without prejudice to rights arising from any close-out netting provision in the contract referred to in the Polish Act on Certain Financial Collaterals.

2.13.7 In the case of the CSA, this clause involves the inclusion of claims resulting from the CSA into the Final Net Settlement Amount.

2.13.8 However, the clause will only apply to collateral established under the CSA if it is established in accordance with the Act on Certain Financial Collaterals (see comments in Section 1.5). The enforceability of such a clause is only preserved if the agreement in which the netting clause is contained is entered into:

(i) before the date of bankruptcy declaration;

(ii) on the day of the declaration of bankruptcy, but before a court decision declaring bankruptcy is issued;

(iii) on the date of the declaration of bankruptcy, but after a court decision declaring bankruptcy has been issued if the party accepting the collateral can confirm that it was not and could not have been aware of the declaration of bankruptcy.

2.13.9 It remains doubtful whether remaining close-out netting provisions which do not meet requirements set forth in the Polish Act on Certain Financial Collaterals are enforceable. That is because they are not covered by article 85a of the Bankruptcy Law and there is a risk that they could not be treated as financial term operations or borrowing or sale of financial instruments involving an undertaking to repurchase them.

2.13.10 Article 85 of the Bankruptcy Law may have been intended to cover only per se derivatives, and not any transactions entered into to secure claims arising under derivatives.

2.13.11 Nevertheless, there are certain arguments that close-out netting mechanisms indicated in article 85 of the Bankruptcy Law cover collaterals too.

2.13.12 However, the enforceability of including claims for the return of collateral into Final Net Settlement Amount depends on the overall effectiveness of the settlement clause contained in the Master Agreement (see comments in Section 2.3).

<u>The trustee's right to rescind CSA; performance of the CSA during bankruptcy or restructuring</u>

2.13.13 In practice, the question whether it is possible for the trustee to rescind the CSA will only be relevant if the claim for return of the collateral amount is not settled in accordance with the settlement clause. This may be the case if:

(a) collateral established under the CSA will not meet the conditions indicated in the Act on Certain Financial Collaterals;

(b) collateral established under the CSA cannot be settled under Article 85 of the Bankruptcy Law because such clause is invalid.

2.13.14 The declaration of bankruptcy, in principle, entitle the trustee to withdraw from agreements concluded by the bankrupt, which have not been performed in whole or in part. Such right includes reciprocal agreements and other agreements, including a guarantee deposit agreement, which is very similar in design to the CSA.

2.13.15 There is a risk that the trustee will exercise his right and rescind the CSA with effect from the date of the declaration of bankruptcy by exercising his right under Article 98(1c) of the Bankruptcy Law, as this is a non-reciprocal agreement. Such a right is independent of whether the bankrupt is the beneficiary of the collateral or the person providing it.

2.13.16 The rescission would result in no further obligation for the trustee to provide collateral by transferring an appropriate amount of Eligible Credit Support. Moreover, it could result in having to repay the amount paid by the bankrupt before the declaration of bankruptcy.

2.13.17 Since, in the course of the remedial proceedings, the administrator can only rescind mutual agreements, such a risk does not exist if this proceedings are opened.

2.13.18 Once bankruptcy has been declared, even if the agreement is not completed, in practice it will not be possible to request the trustee to transfer the relevant amounts to Eligible Credit Support, either. This is because the trustee should use the cash of the bankruptcy estate to cover the costs of the bankruptcy or to satisfy debts incurred before the bankruptcy. Naturally, providing collateral in the form of appropriate cash transfers is outside the scope of these activities.

2.14 Insolvency of a recipient of Eligible Credit Support

An analysis of local law issues surrounding the insolvency of a recipient of Eligible Credit Support, when the recipient of the Eligible Credit Support is an entity based in Poland, with the provider of the Eligible Credit Support being an entity based outside Poland. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in Poland can bolster or characterize the nature of the providing party's rights to that Eligible Credit Support.

(a) What rights does the providing party have against such an asset located in Poland upon the insolvency of the recipient party?

(b) Are there other steps that the providing party should be taking to minimize its risk and best protect such an asset?

A claim for repayment of the collateral amount may be filed in bankruptcy proceedings, either on a par with other claims of the bankrupt or with priority (unless the trustee rescinds the CSA). This depends on whether such a claim arises before or after the declaration of

bankruptcy. In order to secure the party providing collateral, it is possible to include the collateral in a settlement clause or to establish additional collateral in rem.

2.14.1 A claim for the return of collateral may fall within the scope of the settlement clause (see notes in Section 2.13).

2.14.2 However, if the claim for the return of the collateral could not be covered by close-out netting due to the failure to comply with the requirements set out in Section 2.13, it may be treated as a simple monetary claim.

2.14.3 A claim for repayment of the collateral amount may arise already upon conclusion of the security agreement and provision of the collateral by one of the parties if the governing law of the CSA so provides. However, such claim will not yet be due and payable, and its due date depends on the proper performance of the secured obligation or the expiry of a certain period.

2.14.4 The creditor will then have to file its claim which will be settled in the course of bankruptcy proceedings.

2.14.5 If, under the law applicable to the CSA, the resulting claim for the repayment of the collateral amount arises only at the time of its termination, such claim, if it arises after the declaration of bankruptcy, should nevertheless be satisfied on an ongoing basis from the bankruptcy estate.

2.14.6 In our view, it all depends on the wording of a given agreement and its interpretation in accordance with the governing law of the agreement.

2.14.7 If the trustee rescinds the CSA (see pts 2.13.13 - 2.13.18 above) the party who provided the collateral will, most probably, not be able to claim it back in full. This is due to the wording of Article 99 of the Bankruptcy Law, which deals with the consequences of a notice of rescission submitted by a bankruptcy trustee. In such a situation, the creditor would be able to pursue claims resulting from losses incurred only by filing a claim. It will then be satisfied in accordance with the general rules of the bankruptcy law. Its claim would be included in the second category together with other (pre-bankruptcy) commercial obligations.

2.14.8 The declaration of bankruptcy will also limit the possibility of claiming interest on collateral amount held by the bankrupt. This is due to the limitation described in Article 92(1) of the Bankruptcy Law. It states that the bankrupt's assets may be used to satisfy interest on the claims due from the bankrupt for the period until the date of declaring bankruptcy.

2.14.9 For better protection of a collateral provider, the parties could include the claim for repayment of the collateral amount in the settlement mechanism contained in the framework agreement within the meaning of Article 85 of the Bankruptcy Law. This amount is currently included in the calculation of the Final Net Settlement Amount, but such mechanism is already incorporated into the model Master Agreement, which at present is not a framework agreement within the meaning of Article 85 of the Bankruptcy Law. The parties could also supplement the agreement with a provision which would expressly provide for the repayment of the collateral amount if it has not been used and the obligation secured by it has been discharged.

2.14.10 In addition, the parties could establish a certain collateral in rem to secure a claim for repayment of the collateral amount. Such collateral in rem could comprise, for example, specific assets of a debtor or a third party.

2.15 Insolvency of a provider of Eligible Credit Support

An analysis of the rights and obligations of an insolvent party organized in Poland with respect to Eligible Credit Support held by a recipient party organized outside Poland. If title vests in the recipient because of an outright transfer of Eligible Credit Support, is there any way that a bankruptcy court in Poland can undermine or re-characterize the nature of the recipient's rights to that Eligible Credit Support?

In such case, the collateral amount should be transferred to the trustee and the claim of the beneficiary of the guarantee should be settled from the collateral in the 1st place, taking into account the possibility of assigning 10% of the collateral amount to the costs of proceedings. In practice however, the creditors often settle their claims from the cash collateral before counting it towards the repayment of their claims against the bankrupt. If the recipient is based outside Poland but on the territory of one of the Member States, its rights would be protected in accordance with Article 8 of the EU Insolvency Regulation, which could let the recipient avoid the above regulation.

2.15.1 A claim for the return of collateral may, on the one hand, fall within the scope of the settlement clause (see comments in sections 2.13). However, the following considerations apply if the amount is not settled under this mechanism.

2.15.2 In the case of bankruptcy declaration, as a rule property not belonging to the bankrupt's assets is excluded from bankruptcy estate. However, the provisions on exclusion from the bankruptcy estate do not apply to property, receivables and other property rights transferred by the bankrupt to the creditor to secure the claim.

2.15.3 In such case, statutory provisions concerning pledges and claims secured by pledges apply accordingly to collateralised property and to the claims secured by a pledge. The court has no authority to change the nature of a legal relationship and create a pledge in place of the collateral granted.

2.15.4 However, as a result of this provision, collateral will be treated like a pledge. As a result, it will be necessary to deliver to the trustee the collateral amount, from which the trustee will be able to allocate up to 10% of the amount for the costs of proceedings. In practice, there are doubts whether this legal provision applies to the funds from such collateral as property physically located outside the debtor's enterprise. Financial institutions and banks often settle directly from the amount of such collateral, counting it towards the repayment of their claims against the bankrupt.

2.15.5 In the case of restructuring proceedings, a creditor whose claim is secured in kind (also by transferring to the creditor the ownership of an asset, claim or other right) may agree to the arrangement. However, this provision does not apply to claims secured by a security deposit, which in that case are always covered by the arrangement. However, the creditor will be entitled to satisfy its claim from the security deposit.

2.15.6 If the collateral recipient is based outside Poland but on the territory of one of the Member States, its rights may be protected in accordance with Article 8 of the EU Insolvency Regulation. There are however doubts as to whether Article 8 of the EU Insolvency Regulation also applies to cash. This is not expressed explicitly in the provision. In our view there are several arguments in favour of this interpretation. One is, for example, the wording of Article 2(9)(iii) of the EU Insolvency Regulation[7] or the judgment of the Court of Justice of 16 April 2015, Case C-557/13.

2.15.7 Therefore we believe that the right to satisfy a claim against collateralised property is additionally protected by Article 8 of the EU Insolvency Regulation. It provides that the opening of insolvency proceedings does not affect the rights in rem of creditors or third parties in respect of the debtor's assets, which are situated within the territory of another Member State at the time of the opening of proceedings. So, if the cash collateral is held in bank outside Poland, and its recipients' seat is also outside Poland, the recipient could settle its claims from the collateral disregarding Polish insolvency regulations.

C. MODEL CPMA COMBINED WITH THE CPMA CSA / MODEL MNA COMBINED WITH THE MNA CSA

2.16 Enforceability of the rights of the transferee of Eligible Credit Support

Opinion on whether the rights of the transferee of Eligible Credit Support would be enforceable in accordance with the terms of: (i) the model CPMA and the CPMA CSA; and (ii) the model MNA and the MNA CSA, irrespective of the insolvency of the providing party incorporated or otherwise organized under the laws of Poland.

2.16.1 The MNA CSA is part of, complements and changes the MNA, and the CPMA CSA is part of, complements and changes the CPMA. These annexes are integral parts of the model agreements.

2.16.2 The Transferor, under the CPMA CSA and the MNA CSA, at the demand of the Transferee on or promptly following the Valuation Day should transfer to the

[7] According to which the 'assets' within the meaning of the EU Insolvency Regulation mean, *i.a.*, cash held in account with a credit institution. It may then be argued that "assets" within the meaning of Article 8 of the Regulation should include cash in bank.

Transferee Eligible Credit Support in an amount equal to the amount by which the Credit Support Amount of the Transferee exceeds the Eligible Credit Support held by the Transferee at the Valuation Time. Eligible Credit Support demanded but not received by a Party prior to a Valuation Time is deemed to be held by it, provided that the transfer of such Eligible Credit Support is due on or after such Valuation Time. Eligible Credit Support means either cash or a letter of credit.

2.16.3 According to the §7 of the CPMA CSA and MNA CSA, each party agrees that all right, title and interest in and to any Eligible Credit Support or Interest Amount which it transfers to the other party will be vested in the Transferee free and clear of any liens, claims, charges or encumbrances or any other interest of the Transferor or of any third person.

2.16.4 In our opinion, this provision is an important obligation of Transferor under Polish law and is enforceable by Transferee. This obligation is subject to the general rules of contracting obligations under Article 353^1 of the Polish Civil Code. According to this provision, the contracting parties may establish a legal relationship at their discretion, as long as the content or purpose of the relationship does not conflict with the nature of the relationship, the law or the principles of community life. A detailed analysis of the obligations arising from the CPMA and the CPMA CSA model and the MNA and MNA CSA model can be found in Chapter 1.

2.17 Close-out netting/set-off – general comments regarding Polish insolvency law

A general discussion of, and opinion regarding, Polish insolvency laws, and any relevant terminology with an emphasis on law and precedent applicable to the concepts of close-out netting and set-off of claims between parties, and:

(a) how generally applicable statutory or common law set-off (or similar) rights could interact with the contractual netting and set-off rights contained in each Master Agreement, each CSA and each Master Agreement as modified by the relevant CSA;

2.17.1 With regard to the CSA, a claim for the return of the collateral amount may be settled by applying the settlement mechanism contained in the agreement if feasible. Otherwise, such claim would, depending on the case, be subject to the general rules of the Bankruptcy Law and Restructuring Law described in Sections 2.13 - 2.15.

2.17.2 However, the Polish legislation concerning contractual as well as statutory set-off and limitations on set-offs because of bankruptcy or restructuring proceedings have been described in detail in section 2.5 above.

2.17.3 **The parties could use both a contractual mechanism and statutory set-off** to set off Settlement Amounts in the context of mutual settlements in connection with termination of their respective agreements.

2.17.4 In such case, there is a certain preference for the solvent counterparty in terms of its claim, which results from a positive balance of mutual settlements between the parties. The lawmakers expressly permit setting off such claim despite the limitations resulting from Article 93 of the Bankruptcy Law, but only if it results from the settlement of a framework agreement within the meaning of Article 85 of the Bankruptcy Law. Such claim may be set off against the remaining Settlement Amounts as well as against the bankruptcy estate's claim on some other account.

2.17.5 However, such set-off would not be necessary if the model Master Agreement were deemed as a framework agreement within the meaning of Article 85 of the Bankruptcy Law and Article 250 of the Restructuring Law. Then individual Settlement Amounts would be settled in accordance with the provisions of the agreement creating one Final Net Settlement Amount, which may also be set off against claims on some other account.

2.17.6 The amount resulting from the settlement between the parties may be set off by both the debtor against whom the proceedings are conducted and the creditor.

(b) *applicable law which might have an impact on the respective priorities assigned to such rights by a court in Poland; and*

2.17.7 In insolvency proceedings, a claim for a Final Net Settlement Amount (or the Settlement Amount if the model Master Agreement would not be recognized as the master agreement under polish Bankruptcy and Restructuring Law) could be either:

– a privileged receivable that is satisfied by the insolvency trustee among other debts of the bankruptcy estate, or

– an ordinary commercial receivable that is satisfied as a 2nd-rank claim, amongst other trade receivables and tax receivables.

2.17.8 The first approach was followed by the Supreme Court in a judgment of 19 March 2015, case no. IV CSK 429/14. This approach was however broadly criticized in legal writings. We agree with the authors who criticized this judgment and are of the opinion that such amount should be an ordinary commercial receivable.

2.17.9 In restructuring proceedings, a claim for such amount could be either:

– a claim that arises after restructuring proceedings are opened – that would not be included in the arrangement and should be satisfied when it became due and payable;

– a claim that arises before opening of the proceedings – and thus included in the arrangement.

2.17.10 According to some authors, whether the claim would be included in the arrangement depends on moment of termination of the agreement. If the agreement was terminated before opening of the restructuring proceedings the claim would be included in the arrangement. Otherwise if the agreement was terminated once the proceedings are opened the claim as not included in the arrangement should be satisfied in full (with no reduction) when it became due and payable.

(c) *specifically, whether the EU Insolvency Regulation affects local jurisdiction conflict of law rules such as overruling local jurisdiction insolvency laws if the parties to the Master Agreement have opted for a jurisdiction other than the jurisdiction relevant to the insolvent party. In particular, opinion on whether or not a bankruptcy court in Poland would apply the EU Insolvency Regulation to close-out netting and/or set-off such that it would apply the governing law of the Master Agreement or CSA as the law applicable to close-out netting and/or set-off or whether it would seek to apply local law in its stead;*

2.17.11 See comments to sections 2.8 and 2.9.

(d) *whether, on the assumption that one or more Underlying Agreements is not valid, binding and enforceable in accordance with its own respective terms and conditions, the close-out netting and/or set-off provisions under each Master Agreement when combined with the relevant CSA would nevertheless become valid by operation of the EU Insolvency Regulation; and*

2.17.12 See comments to section 2.9. The settlement clause only provides for settlement of claims arising from individual agreements and not those arising from unjust enrichment or settlement of an invalid agreement. Therefore, it could not cover such claims.

(e) *whether the laws of Poland consider set-off and close-out netting as separate or similar rights.*

Close-out netting consists of two parts, i.e. termination of the agreement and set-off of claims resulting from it. It is a contractual set-off.

2.17.13 There are two types of set-off in Polish law: statutory set-off that may be made by way of a unilateral action, or a contractual set-off resulting from an agreement between the parties (see more in Section 2.5).

2.17.14 Due to the specific limitations and effects stipulated for statutory set-off alone, it differs to a certain extent from close-out netting. Close-out netting is not affected, for example, by limitations on the uniformity of claims submitted for setting off or their maturity.

2.17.15 In addition, a declaration of statutory set-off made by a party has a retroactive effect from the time when the set-off became possible. One of the effects of such mechanism is that no interest is charged on the claims to be set off.

2.17.16 However, close-out netting is very similar to a contractual set-off. Limitations on statutory set-offs do not apply here. Such set-off is made only on the basis of an agreement concluded by the parties, which is possible due to the principle of freedom of contract under Polish law.

2.17.17 This means that such set-off may be made even in the case of a claim involving the performance of different obligations (pecuniary vs. non- pecuniary) and those to which different entities are entitled (see more in section 3 below).

2.17.18 However, the difference between set-off and close-out netting is that close-out netting is made up of two elements. In addition to setting off mutual claims, close-out netting also involves the possibility of terminating the agreement due to the occurrence of certain events concerning the counterparty. Therefore, close-out netting is a broader right than set-off.

2.17.19 The close-out netting element, which consists of setting off mutual claims, is therefore a kind of contractual set-off. Before the declaration of bankruptcy, it may be applied in the case of termination of the agreement and activation of the settlement clause. After the declaration of bankruptcy, it takes place in the case of settlement of a framework agreement, in accordance with Article 85(3) of the Bankruptcy Law or Article 250(4) of the Restructuring Law.

3. CROSS AFFILIATE NETTING AND SET-OFF - SUMMARY

3.1.1 Polish law provides for two main types of "set-off", also called compensation. The first type is regulated in Articles 498-505 of the Polish Civil Code, called a statutory or unilateral set-off. It consists in the submission by the party concerned of a declaration of intent regarding the set-off. Another form of "compensation" is a relationship defined as a contractual set-off based on the parties' agreement. However, this terminology is not established in practice, in which the terms "set-off", "compensation" and "recompense" are often used interchangeably. From the point of view of civil law, netting or set-off will be clauses on the deduction of claims, which are intended to constitute a method of performance of the obligation established by the parties.

3.1.2 Although a "contractual" set-off, also called bilateral, made on the basis of an agreement concluded between the creditors is not covered by a separate legal regulation, the admissibility of concluding such agreements results from the general principle of freedom of contract, and this stance is established in the Polish legal system. In a contractual set-off, the parties may, in a manner different from that resulting from the regulation of Article 498 et seq. of the Civil Code, formulate the prerequisites, effects or method of set-off. In particular, the subject of contractual set-off may be heterogeneous, not yet mature, future claims, as well as those resulting from natural obligations, i.e., not subject to appeal. Such an agreement makes it possible to make property transfers between the parties, most often as a result of the transfer of receivables, takeover and release from debt and leads in consequence to their obligations being cancelled with ex nunc effect.

3.1.3 At the same time, business practice has shaped the so-called multilateral compensation agreements (contracts) with the participation of many entities, leading to non-cash debt cancellation. Such agreements enable property transfers between the parties, most often as a result of transfer of claims, debt take-over and debt cancellation, and consequently lead to their obligations being cancelled with *ex nunc* effect.[8] The nature of such multilateral agreements lies, among other things, in the fact that on the one hand they are multiparty agreements and, on the other hand, within them there exist bilateral contractual relations between the direct counterparties, based on the legal ties only existing between them.

3.1.4 In business transactions, there are also agreements providing for a set-off by a third party (the so-called financial intermediary), which, on the one hand, organizes a group of entities accepting compensation in a multi-entity arrangement, and, on the other hand, in the absence of a link between the participants in the chain of these entities, acts himself in this role as a debtor of the subsequent entity and, at the same time, a creditor of the preceding entity, in the interest of which, based on an internal relationship, it provides the compensation (cf. e.g. the judgment of the Polish Supreme Court of 20 December 2005, V CSK 68/05, LEX No. 171286).

3.1.5 Such agreements, under Polish law, are legally binding obligations of the parties, provided that the general requirements for entering into legal relations are observed. An important condition for the existence and validity of a multilateral compensation agreement is a material and legal basis for making compensation, i.e. the existence of a legal relation on the basis of which the compensation of receivables and liabilities of the parties to the agreement is made. In particular, it is worth to point out the so called "compensation chains", in which concluded agreements are of apparent nature and on the basis of article 83 of the Polish Civil Code, they are invalid.

4. MULTI-BRANCH PARTIES

Opinion in the case of a counterparty that has entered into transactions under a Master Agreement as a multi-branch party:

(a) *whether there would be any change in conclusions expressed in points 2.1 - 2.16.1 above concerning the enforceability of close-out netting under each Master Agreement and each Master Agreement combined with the relevant CSA;*

[8] A. Janiak. *Art. 498*. In: A. Kidyba. *Civil Code. Commentary. Volume III. Obligations - general part*, edition II. LEX, 2014.

Comments in sections 2.1 - 2.16.1 also apply if bankruptcy proceedings can be conducted only in Poland.

4.1.2 Our previous conclusions remain unchanged with respect to multibranch entities that are subject to Polish insolvency proceedings only, irrespective of the fact that they have assets outside Poland. This refers to banks with their seats in Poland and to investment undertakings with their centres of main interest in Poland (whether or not such entities would have branches in or outside EU).

4.1.3 In the case of other entities (which may be subject to Polish insolvency proceedings as well as to secondary insolvency proceedings conducted in other countries where they have assets), close-out netting conducted in accordance with Polish law will be effected only with respect to Underlying Agreements that relate to assets held in Poland and other jurisdictions where no secondary insolvency proceedings are pending.

4.1.4 As the EU Insolvency Regulation can be applied both to insolvency and restructuring proceedings the comments mentioned above may be applied also to the restructuring proceedings.

(b) *whether separate proceedings could be brought in Poland with respect to assets and liabilities of the overseas branch located in Poland of a counterparty organized or incorporated outside Poland upon the commencement of insolvency proceedings against the counterparty in that outside jurisdiction;*

In the case of credit institutions and investment firms, such proceedings may be conducted if the entity has its registered office outside the EU but also holds assets in Poland. In the case of other entities, if they have their registered office in one of the Member States, the initiation of bankruptcy proceedings in Poland is possible if the entity has a branch in Poland (within the meaning set forth in the EU Insolvency Regulation).

Credit institutions and investment undertakings

4.1.5 Credit institutions (i.e. banks) and investment undertakings with their seat in the EU are not subject to insolvency proceedings conducted in Poland.

4.1.6 Only the Financial Supervisory Commission or Bank Guarantee Fund may file a petition for bankruptcy of a bank. As the investment undertakings are subject to general regime of Bankruptcy Law both creditor and debtor may file the petition in bankruptcy.

4.1.7 This means that there will be no separate insolvency proceedings with respect to such counterparty assets in Poland or its Polish branch, provided that such counterparty is an institution with its seat in the EU.

4.1.8 The Bankruptcy Law does not prohibit Polish courts from conducting insolvency proceedings with respect to banks and investment undertakings having their seats outside EU. In the case of such foreign entities having a branch only in Poland and not in any other EU Member State, a general insolvency regime for Polish banks or investment undertakings, as the case may be, will apply.

Other entities

4.1.9 In cases of entities having their seats in EU Member States, the EU lnsolvency Regulation applies. According to article 3 of the EU lnsolvency Regulation, Polish courts have jurisdiction to open insolvency proceedings (secondary proceedings) against a debtor having its centre of main interests in other EU Member State only if the debtor has a branch in Poland. The effects of secondary proceedings are restricted to the assets of the debtor situated in the territory of Poland. In such case also our conclusions made in points 2.1 - 2.16.1 should be limited to the assets located in the territory of Poland.

4.1.10 If that entity has its seat outside the EU an entity is subject to the general Polish bankruptcy regime.

4.1.11 Opening of secondary proceedings may be requested by any person empowered to request the opening of insolvency proceedings under the laws of Poland, and therefore under the Polish Bankruptcy Law local creditors may initiate secondary proceedings.

(c) *in the event that proceedings are brought in Poland with respect to the assets and liabilities of the branch located in Poland, whether or not the administrator, provisional liquidator, receiver, trustee or other similar official and/or the courts in Poland would include the counterparty's position under its Underlying Agreements or underlying transactions among the assets of its branch and, if so, recognize their respective close-out and netting provisions in accordance with their terms.*

Close-out netting following termination of the Underlying Agreements could be effected separately in Poland subject to the Bankruptcy Law and only with respect to Underlying Agreements concluded by the Polish Branch.

4.1.12 Under article 3 sec. 2 of the EU lnsolvency Regulation, if the centre of main interest of the debtor is located outside Poland, the bankruptcy proceedings conducted by the Polish court relate only to the debtor's assets located in Poland. However, this rule applies only in relation to a debtor to which the EU lnsolvency Regulation applies, hence excluding entities operating in the financial sector.

4.1.13 The scope of such assets should be determined in accordance with the definition indicated in Article 2 point. 9 EU Insolvency Regulation. This provision defines the "state where the asset is located" depending on the type of asset.

4.1.14 We assume, for the purpose of further analysis, that rights under Underlying Agreements concluded by the Polish Branch of the counterparty are located in Poland. Therefore, only receivables arising under Underlying Agreements of the counterparty's

Polish Branch will be included in the assets being subject to Polish insolvency proceedings. Receivables arising under Underlying Agreements of counterparty's main centre of interests will not be subject to Polish insolvency proceedings.

4.1.15 Although there is no clear provision in Polish law in this respect, it seems probable that close-out netting following termination of the Underlying Agreements will be effected separately:

(i) in Poland subject to the Bankruptcy Law and only with respect to Underlying Agreements concluded by the Polish Branch;

(ii) in other country, subject to bankruptcy law applicable to the counterparty's head office and only with respect to Underlying Agreements concluded by counterparty's head office and its other branches where there are no secondary insolvency proceedings pending.

4.1.16 This position is justified by the fact that the Polish Bankruptcy Law applies only to assets located in Poland, and thus only to transactions concluded by a Polish Branch.

4.1.17 Since an insolvency official appointed in Polish secondary insolvency proceedings of the Polish Branch would have to operate based on the Polish Bankruptcy Law, they would most probably:

(i) acknowledge a claim for a Settlement Amount – if such amount was negative for the Polish Branch;

(ii) pursue a claim for a Settlement Amount against the counterparty of the Polish Branch – if such amount was positive for the Polish Branch.

Additional assumptions

For the purposes of addressing the multi-branch issues at point (a) we assume that a counterparty is incorporated or organized in Poland but may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered overseas offices in other jurisdictions. For the purposes of addressing the multi-branch issues at paragraph (b) and (c) below, we assume that an overseas counterparty is incorporated or organized outside Poland by may have one or more Underlying Agreements or underlying transactions that have been entered into by branches or other duly registered offices in Poland.

5. CSA SPECIFIC PERMUTATIONS.

In relation to each of the questions in points 2.1 - 2.16.1 above, the assumption is that the providing party is a counterparty incorporated or otherwise organised in Poland. Below is an analysis of the answers to the questions indicated above, assuming instead that:

(a) The providing party is a branch located in Poland of a bank organised outside of Poland;

5.1.2 No bankruptcy proceedings may be conducted in Poland in relation to a branch of a bank which has its registered office in one of the EU countries. It does not matter in this case that the branch of this bank has its registered office in Poland. Therefore, the comments in sections 2.1 - 2.16.1 do not apply in such case.

5.1.3 If a branch of a bank that has its registered office outside the EU is a party to the agreement, bankruptcy proceedings may be conducted in Poland. Therefore, the comments made in sections 2.1 - 2.16.1 will apply mutatis mutandis, but bearing in mind that the proceedings are limited to the debtor's assets in Poland. To that extent, Polish Bankruptcy Law will also apply.

5.1.4 There is no regular restructuring proceedings for banks. Instead, they are covered by the Bank Guarantee Fund Act, the deposit guarantee scheme and forced restructuring. This procedure is also known as resolution.

5.1.5 This procedure applies to domestic banks and branches of foreign banks established outside the EU. It does not apply to branches of banks established in the EU. It is very different from a regular restructuring proceedings. However, the description of this procedure goes beyond the scope of this opinion.

(b) *The providing party is neither incorporated nor otherwise organised in nor a branch located in Poland, but has assets in Poland;*

5.1.6 In the case of an entity based in the EU, which does not have a branch in Poland, bankruptcy proceedings cannot be opened. Therefore, comments made in sections 2.1 - 2.16.1 will not apply.

5.1.7 However, bankruptcy proceedings may be opened if an entity has only assets in Poland, but they may only concern an entity having its registered office outside the EU. Such proceedings are limited to the debtor's assets located in Poland. The provisions of the Polish bankruptcy law will also apply to this extent. The comments made in sections 2.1 - 2.16.1 will also be appropriately limited.

(c) *None of the above applies to the providing party (that is, it has no connection with Poland), but the margin was issued by the government of Poland or comprises cash in the lawful currency of Poland.*

5.1.8 The mere fact that a margin has been issued by the Polish government, or that its amount is expressed in Polish currency, does not constitute a sufficient link to allow bankruptcy or restructuring proceedings to be conducted against a foreign entity. In view of the above, the comments made in sections 2.1 - 2.16.1 will not apply.

6. GENERAL VALIDITY OF EACH CPMA AND EACH CSA AND THE CHOICE OF LAW AND JURISDICTION

6.1 Choice of law

6.1.1 The choice of law is determined by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (**"Rome I Regulation"**). The Regulation applies to contractual obligations in civil and commercial matters involving the laws of different countries. Choice of law issues are described thoroughly in Point 1.1.

As regards substantive validity, the rule is that the existence and validity of a contract or one of its clauses is assessed pursuant to the law which, in accordance with the Rome I Regulation, would govern it if the contract or clause were valid.

As regards form, the proper form is:

(i) the form applicable to the contract in accordance with the Rome I Regulation or the law of the country where the contract was concluded (if the persons are in the same country at the time of conclusion),

(ii) the form applicable to the contract in accordance with the Rome I Regulation or the law of the country where either party is at the time of conclusion of the contract or the party is habitually resident (if the persons are in different countries at the time of conclusion of the contract).

6.1.2 It should be borne in mind that, even where a choice of law is made, if all the other elements of the situation at the time of the choice of the governing law are located in a country other than the country whose law has been chosen, the choice made by the parties does not prejudice the application of the provisions of the law of that other country, which cannot be derogated from by a contract. Furthermore, the application of provisions of the law indicated as applicable may be excluded only where such application is manifestly incompatible with the public policy of the state where the court is based.

6.1.3 In the absence of a prorogation agreement, the provisions of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“**Regulation 1215/2012**”) will apply, particularly Article 7 point 1) a) of the Regulation 1215/2012, in accordance with which, a person domiciled in a member state of the European Union (the “**Member State**”) may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question. By the place of performance of the obligation in question should be understood (in the case of the provision of services), the place in a Member State where, under the contract, the services were provided or should have been provided.

6.1.4 Please however note that if the bank account is held in Poland and the agreement on maintenance of the bank account is governed by Polish law, the transfer of funds deposited on the account is effected on the terms of and in accordance with the agreement on bank account maintenance and therefore is governed by the laws of Poland.

6.2 Judgments recognition

6.2.1 Judgments handed down in EU Member States in civil and commercial cases may be recognised pursuant to Regulation 1215/2012.

Regulation 1215/2012 applies in in civil and commercial cases regardless of the type of court. Within the meaning of the Regulation 1215/2012, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. This term includes provisional, including protective, measures ordered by a court or tribunal which by virtue of the Regulation 1215/2012 has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

6.2.2 According to Article 36(1) of the Regulation 1215/2012, a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required. A party who wishes to invoke in a Member State a judgment given in another Member State shall produce:

(i) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(ii) a certificate for the purpose of recognition or enforcement of the judgment in another Member State of the European Union issued in accordance with annex I to the Regulation 1215/2012.

6.2.3 In accordance with Article 46 of the Regulation 1215/2012, on the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds for refusal of recognition is found to exist, i.e. if:

(i) such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed;

(ii) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(iii) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(iv) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

(v) if the judgment conflicts with exclusive jurisdiction rules.

6.2.4 According to Article 52 of the Regulation 1215/2012, under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.

6.2.5 Rulings of European Union Member State courts and settlement and official documents originating from these states, covered with the scope of application of Regulation 1215/2012, if there is possibility to execute them, are enforcement titles according to the Article 1153[14] of the Code of Civil Procedure. Please note that there is no need to apply for a separate court decision.

6.2.6 In exceptional cases, if a judgment contains a measure or an order which is not known under the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests. In this case, according to the Article 1153[16] of the Code of Civil Procedure, the enforcement body shall issue a decision on the adaptation, or, if a need arise, the enforcement officer may request the court to issue such decision.

6.3 Arbitration

6.3.1 Under Polish law it is possible to refer disputes arising from the contract to local or international arbitration.

6.3.2 Submitting a dispute to arbitration requires a written agreement. It can be concluded after a dispute has arisen. In the Polish context, the clear advantages of arbitration are:

(i) flexibility in choice of type of arbitration/venue (including national or international arbitration)

(ii) flexibility in choice of tribunal (ad-hoc or permanent)

(iii) flexibility in choice of arbitrator

(iv) speed and efficiency

(v) procedural flexibility

(vi) confidentiality

(vii) international recognition and enforcement of arbitral awards.

6.3.3 If litigation commenced before arbitration, the defendant can object to it on the basis of an arbitration agreement. The case will then will be dismissed on formal grounds (exclusion of common court jurisdiction). Unless there are grounds for the award to be set aside by the court, the same dispute cannot be settled through litigation.

6.3.4 Recourse against arbitral awards is available, but will be granted only in very specific and limited circumstances (e.g. manifest violation of substantive or procedural law that effects the outcome). Thus, generally speaking, challenging an arbitral award is rather difficult and rare. After recognition by a common court, a national arbitral award has legal force equal to a state court judgment.

6.3.5 International arbitral awards require recognition by a Polish court generally in line with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). A recognized arbitral award constitutes a proper basis for enforcement against the debtor.

6.4 General validity and opinion

6.4.1 Given the analysis carried out in points 1 and 2, each CPMA and each CSA will be legally binding on the parties under Polish law.

6.4.2 The Parties' agreement on the governing law, submission to arbitration or jurisdiction would generally be upheld in Poland. If invalid or ineffective for whatever reason, the governing law and jurisdiction would be established on the basis of national law or EU law discussed above.

7. OTHER PROVISIONS

Are there any other provisions of either Master Agreement or either CSA that, given a choice of the laws of Poland, either:

(a) *need to be revised in order to be enforceable in Poland; or*

(b) *the legal efficacy of which could be materially improved upon or optimized with different wording (given such provision's apparent intent)?*

We believe that in order to ensure the efficacy of the model Master Agreement, it is necessary to introduce certain modifications presented below.

7.1.1 In line with the comments made in sections 2.1 - 2.3, there is a serious risk that the key provisions of the Master Agreement may be invalid unless the current wording is changed. This applies in particular to provisions which introduce the right to terminate the agreement in the event of bankruptcy or restructuring of the counterparty or submission of an application to open bankruptcy/restructuring proceedings.

7.1.2 We therefore believe that it could be advisable to introduce a number of changes to both the MNA and the CPMA to bring these agreements in line with the requirements of Article 85 of the Bankruptcy Law so that they can be recognised as a framework agreement within the meaning of that Article. The introduction of these modifications would reduce the risk of preventing the settlement of Underlying Agreements in accordance with the rules of the Master Agreements. Please refer to Annex 1 hereto for the respective wording proposals.

7.1.3 However, we would like to point out that due to the nature of the model Master Agreement, which regulates the cooperation of the parties under other framework agreements, it is not possible to introduce changes that would completely exclude the risk of voiding its provisions. This is because it is simply an additional agreement regulating the rights of the parties to settle the amounts resulting from the settlement of agreements. The framework agreement, on the other hand, in Polish law is a relationship in which, although the mutual relations between the parties are not specified, the content of implementation agreements to the framework agreement is specified. The model Master Agreement does not contain any provisions regulating the content of individual transactions, which, as we understand it, are concluded only at the level of individual Underlying Agreements.

7.1.4 The first change we propose is to introduce a provision that would indicate that the subject of the model Master Agreement is not framework agreements, but instead the individual transactions concluded in execution of these framework agreements. In addition, the parties could confirm that the model Master Agreement is a framework agreement for all transactions concluded under the Underlying Agreements. However, the terms of these transactions would be set out in separate framework agreements.

7.1.5 The second change is the introduction of a provision directly into the model Master Agreement allowing for its termination and thus the close-out of all specific agreements concluded under the Underlying Agreements. The current provisions do not provide for the possibility of terminating it. They merely indicate that if certain events take place, the parties will be able to terminate some or all of the Underlying Agreements.

7.1.6 The consequence of the termination of this agreement should additionally be the termination of all specific agreements concluded on its basis, i.e. after the change indicated in section 7.1.4 above, of all transactions.

7.1.7 The purpose of the above modifications would be to bring about a situation where it can be argued that both the model Master Agreement and the Underlying Agreements constitute a single framework agreement (within the meaning of Article 85 of the Bankruptcy Law) for individual specific agreements concluded under the Underlying Agreements. That way, the risk of unforeseen legal effects as described in sections 2.1 – 2.3 of the Memorandum can be reduced.

7.1.8 The changes to the Master Agreement which would be in line with the above remarks are proposed in Appendix no. 1 hereto.

8. RECENT & PENDING DEVELOPMENTS:

Any recent or anticipated future developments in the laws, rules and/or regulations of Poland or those of the European Union that may affect the laws of Poland and any of the opinions that have been provided in respect of each Master Agreement and each CSA.

Directive 2019/1023 excludes from the scope of "safe harbour provisions" certain contracts concluded out of the exchange and necessary for the operation of the debtor's business.

8.1.1 We believe that Article 7(6) of the Directive 2019/1023 of the European Parliament and of the Council of 20 June 2019 will prevent the use of close-out netting clauses in the restructuring proceedings if:

(a) such clause is included in contracts for the purchase of gas/energy necessary for the operation of the debtor's business, and

(b) the contract was concluded out of exchange or other market (in a direct transaction between two parties).

8.1.2 In the case of such contracts, the possibility of using the close-out netting clauses will be excluded upon the opening of the restructuring proceedings.

8.1.3 As a result, changes to the Restructuring Law will be necessary. Currently, its provisions enable the use of close-out netting clauses, after the opening of restructuring proceedings, in a wide range of contracts.

8.1.4 In practice this would mean that the insolvent party's performance under such contracts would be subject to a moratorium and a stay of enforcement. Also, in one type of restructuring proceedings (remedial proceedings) the administrator would be entitled to use its cherry picking right (a right to rescind unprofitable contracts).

8.1.5 However, in all types of restructuring proceedings, a solvent party should still be able set-off its claims with the insolvent debtor's claims based on statutory provisions of law.

In the case of hard Brexit, there may be conflicts of jurisdiction and disputes over the application of the relevant insolvency law.

8.1.6 We do not yet know the possible provisions of the agreement governing the relationship between the parties after the transitional period, i.e. after 31.12.2020. We will therefore limit our comments to a scenario of the UK leaving the EU without any agreement, the so-called hard Brexit. Then all European legislation referred to in this memorandum will cease to apply to the UK. This concerns such acts of law as: (i) Rome I Regulation, (ii) Brussels I Bis Regulation, and (iii) EU Insolvency Regulation.

8.1.7 In addition, the legislation applicable to entities based in the EU Member States will not apply to entities based in the UK.

8.1.8 The choice of law applicable to an agreement or the choice of jurisdiction is adapted in Polish law to the EU law. Therefore, in the light of Polish law, the relevant provisions of the model Master Agreement in this respect will remain valid.

8.1.9 However, there is a risk as regards the scope of application of Polish law in the context of possible bankruptcy of one of the parties to the agreement. Currently, according to Article 3 of the EU Insolvency Regulation, the Member State within the territory of which the centre of the debtor's main interests is situated has jurisdiction to open insolvency proceedings. The courts of another Member State have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings are then restricted only to the assets of the debtor situated in the territory of the latter Member State.

8.1.10 In the case of Brexit, despite the fact that, from the point of view of Polish law, the Polish insolvency court will have jurisdiction to open insolvency proceedings for debtor having COMI in Poland, and will be able to apply Polish law in this respect, other conclusions may arise from British law. This may lead to the opening of simultaneous insolvency proceedings for the same debtors in Poland and in the UK, and further – to unforeseeable legal consequences.

The opening of a restructuring proceedings, introduced into law because of COVID-19, may come as a surprise to the other party to the agreement, as it is not preceded by a restructuring application and the court order.

8.1.11 Due to potential solvency problems arising from the negative effects of COVID-19, the lawmakers introduced a new type of restructuring proceedings on 24 June 2020. This is the so-called simplified restructuring proceedings, which refers to the proceedings for approval of the arrangement with certain changes resulting from the act of law.

8.1.12 The main change from the normal proceedings for the approval of an arrangement is that by initiating this proceedings, the debtor receives immediate protection from creditors. This includes both the suspension of ongoing executions and the prohibition of initiating new ones. However, what is important is that it is only a temporary measure. The simplified restructuring proceedings can only be used until 30 June 2021.

8.1.13 To open that simplified restructuring proceedings it is not necessary to submit a prior application for the opening of the restructuring proceedings nor to obtain a court order. Making an announcement in the official journal (*Monitor Sądowy i Gospodarczy*) will suffice to obtain the protection from creditors. This means that a counterparty may be surprised by the opening of such proceedings against the other party.

In Poland, the obligation to file for bankruptcy in cases of insolvency caused by COVID-19 is currently suspended.

8.1.14 In Poland, the deadline for filing an application for bankruptcy has been extended to 30 days after the end of the epidemic if insolvency was due to COVID-19. This applies to insolvency cases arising after 13 March 2020. This means that in the above mentioned cases there is no obligation to file a bankruptcy petition for the duration of the epidemic.

8.1.15 However, postponing the deadline for filing a bankruptcy petition does not preclude the declaration of bankruptcy earlier if the debtor or creditor so requests or the opening of restructuring proceedings.

9. FINAL NOTES

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 prior written approval.

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APPENDIX NO. 1

PROPOSED AMENDMENTS TO THE MODEL MASTER AGREEMENT

AMENDMENTS TO CPMA

Amendment to section 1 by adding the section 1.3 to the agreement as follows:

"**1.3. The subject of the Agreement**

The subject of the Agreement is to establish the rules for Closing Out individual transactions concluded in performance of the Principal Agreements and this Agreement, the terms of which are set out in Principal Agreements. For avoidance of doubts, the Agreement and Principal Agreements together constitute a framework agreement for all transactions covered by Principal Agreements."

Amendment to section 2 by changing the wording of section 2.1 as follows:

"2.1 **Right to Close Out**

If any of the following events has occurred and is continuing:

(a) a Close-Out Event in respect of a Party under the terms of a Principal Agreement,

(b) a representation or warranty made or repeated by a Party hereunder proves to have been incorrect or misleading in any material respect when made or repeated, or

(c) a Party is in violation of a covenant made hereunder,

then, the Party which has the right to Close Out the Principal Agreement referred to in paragraph (a) above or the Party to whom the representation, warranty or covenant was made as referred to in paragraph (b) or (c) above (in each case, the "**Closing-Out Party**") shall be entitled to:

(a) terminate the Agreement, which will cause

(b) Close-Out of all (but not fewer than all) of the Principal Agreements which in the good faith judgment of the Closing-Out Party legally may be Closed Out under applicable law by providing a Close-Out Notice under Section 2.2(a) hereof, except that no Close-Out Notice shall be required for the Close-Out of any Principal Agreement which has been Closed Out by its terms prior to the delivery of a Close-Out Notice. For the purposes of paragraph (a) above, a Close-Out Event under the terms of a Principal Agreement will be deemed to be continuing until the earlier of such time as the conditions that constituted the Close-Out Event under such Principal Agreement cease to exist or the Settlement Amount that is due and payable under such Principal Agreement has been paid in full. Each Principal Agreement is hereby amended accordingly."

AMENDMENTS TO MNA

<u>Amendment to § 2 by changing the wording of § 2.3 as follows:</u>

"**2.3. The subject of the Agreement**

The subject of the Agreement is to establish the rules for Closing Out individual transactions concluded in performance of the Netted Agreements and this Agreement, the terms of which are set out in Netted Agreements. For avoidance of doubts, the Agreement and Netted Agreements together constitute a framework agreement for all transactions covered by Netted Agreements."

<u>Amendment to § 4 by changing the wording of § 4.1 as follows:</u>

"1. **Termination and Close-Out of the Netted Agreements.** If a Close-Out Event has occurred and is continuing in respect of a Party, then the other Party (the "**Terminating Party**") shall be entitled to:

(a) terminate the Agreement, which will cause

(b) Close-Out of all transactions under all of its Netted Agreements, and, if applicable, the Netted Agreements themselves (and if any such Netted Agreement is itself a single transaction, such Netted Agreement itself) by providing a Termination Notice under § 5.1 (***Termination Notice***); and provided further, that no Termination Notice shall be required for the Close-Out of any Netted Agreement and its underlying transactions which have been Closed-Out automatically by, as applicable, either the Netted Agreement's own terms or the terms of this Master Netting Agreement set forth in § 6 (***Customization of Automatic Termination Rights***). A Close-Out Event will be deemed to be continuing until the earlier of such time as the conditions that constituted the Close-Out Event cease to exist or the payment in full of any amount that has become due and payable, as applicable, hereunder or under the terms of all relevant Netted Agreements, as the result of the occurrence of such Close-Out Event. Each Netted Agreement is hereby amended accordingly."

<u>Additionally, the parties cannot select § 4.2 of the Election Sheet to the MNA i.e "Reservation of Right to Terminate Less Than All Netted Agreements (Non-Global Close-Out)".</u>