Dated 28 October 2014

LEGAL OPINION REGARDING THE ENFORCEABILITY OF CLOSE-OUT NETTING AND THE VALIDITY AND ENFORCEABILITY OF COLLATERAL ARRANGEMENTS UNDER THE EFET MASTER NETTING AGREEMENT AND THE TBMA CROSS PRODUCT MASTER AGREEMENT UNDER POLISH LAW

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Your reference

Our reference
WR02002

Ladies and Gentlemen,

Executive summary to the Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of Collateral Arrangements under the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement under Polish Law

This executive summary to the legal opinion on the enforceability of the provisions of the EFET Master Netting Agreement (**EFET Master Netting Agreement**) and the TBMA Cross Product Master Agreement (**TBMA Cross Product Master Agreement**) under Polish Law (**Opinion**) has been prepared at the request of the European Federation of Energy Traders (**EFET**).

The summary is a separate document from the Opinion. It discusses briefly the key issues described in the aforementioned Opinion and does not have or purport to have binding force. For the complete and binding information on the enforceability of the the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement please refer to the Opinion.

All capitalised terms used in this opinion and not defined therein have the meanings given to such terms in the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement.

I hope this executive summary will be of assistance. If you have any questions or comments, please do not hesitate to contact me.

Yours faithfully,

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Partner

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WAR-#1237699-v3

1 The effects of insolvency proceedings on the Master Netting Agreement and the Cross-Product Master Agreement, and transactions arising under the Netted Agreements (in the case of the Master Netting Agreement) and the Principal Agreements (in the case of the Cross-Product Master Agreement)

Enforceability of Early Termination rights as the result of an insolvency-based Close-Out Event

1.1 Under article 83 of the Bankruptcy Law, a contractual clause providing for the termination or modification of a contract in the event of the declaration of bankruptcy in relation to one of the Parties to the contract is invalid.

1.2 Leading commentators take the view that provisions envisaging the termination of a contract in the event of a pre-bankruptcy insolvency-related event in respect of one of the parties to such contract do not fall within the scope of article 83 of the Bankruptcy Law and are, therefore, enforceable and valid.

1.3 We believe that Polish courts should uphold and find the rights of early termination of the Master Netting Agreement and the Cross-Product Master Agreement and all transactions thereunder with respect to pre-bankruptcy insolvency-related events enforceable.

1.4 Article 83 of the Bankruptcy Law does not apply to the termination of the Agreement triggered by an insolvency-related event affecting a Credit Support Provider (to the extent the Credit Support Provider is not a party to the Master Netting Agreement or the Cross-Product Master Agreement). Therefore, the Agreement may be terminated due to an insolvency-related event affecting a Credit Support Provider.

1.5 Article 84 of the Bankruptcy Law provides for certain restrictions that may affect enforceability of contractual provisions in insolvency proceedings. We cannot completely exclude an interpretation (although we do not share it) according to which the Master Netting Agreement's or the Cross-Product Master Agreement's provisions relating to termination and close-out netting would be regarded ineffective against a bankruptcy estate.

1.6 The above analysis presented in section 1.1 - 1.5 applies to both Early Termination and Automatic Termination as they are treated identically in the above context.

1.7 Any valid termination right, pursuant to the above analysis, will apply respectively to the Master Netting Agreement and transactions as set out in § 4.1 of the Master Netting Agreement and Section 2 of the Cross-Product Master Agreement.

1.8 It should be noted that:

(a) should each of transactions under the Netted Agreements (in the case of the Master Netting Agreement) or the Principal Agreements (in the case of the Cross-Product Master Agreement) fall within the scope of the term "financial term operations", "securities lending" or "sale of financial instruments involving undertaking for their repurchase", and

(b) should the Master Netting Agreement or the Cross-Product Master Agreement be categorised as a "master agreement",

in each case within the meaning set out in article 85 of the Bankruptcy Law, a Party would be allowed to terminate the Master Netting Agreement or the Cross-Product Master Agreement and transactions by way of the Early Termination (i.e. by giving the other Party notice) also after the Date of Bankruptcy. In such a case, article 85 section 3 of the Bankruptcy Law would apply and, consequently, even after the Date of Bankruptcy, the solvent Party would be able to terminate, by way of the Early Termination, the Master Netting Agreement or the Cross-Product Master Agreement and each of the transactions. It should be noted, however, that although it is clear under the Bankruptcy Law that financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase may be terminated by any of the parties by giving notice, there are doubts whether Automatic Termination may be applied to such transactions.

Right of official receiver to withdraw from the agreement (cherry picking)

1.9 Pursuant to article 98 section 1 of the Bankruptcy Law, if, on the Date of Bankruptcy, the obligations under a mutual agreement (swaps, "spot" contracts and "forward" contracts and we believe also options shall be recognised as mutual agreements) have not yet been fully or partially performed (unperformed contracts), the official receiver can perform the bankrupt's obligations and demand that the other party performs its obligations; or the official receiver can withdraw from the agreement (a so-called "cherry picking").

1.10 However, under article 85 of the Bankruptcy Law, the official receiver cannot terminate: (i) a master agreement that envisages that transactions for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase are executed in discharge of the master agreement and that the termination of the master agreement results in the termination of all transactions for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase (article 85 section 1) and (ii) financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase, even if such transactions are not executed in discharge of a master agreement (article 85 section 5). Pursuant to article 85 section 3 of the Bankruptcy Law, any of the parties, including the solvent party, can terminate the master agreement and the financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase executed pursuant to the master agreement described in article 85 section 1 of the Bankruptcy Law.

1.11 Article 85 of the Bankruptcy Law includes also provisions concerning the consequences of insolvency for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase in case the operations are not executed in the performance of the General Agreement. After bankruptcy is declared neither the solvent party nor the official receiver can withdraw from such financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase or demand their performance. No obligations under such operations become due and payable on the bankruptcy date. Therefore, it may be argued that a bankruptcy declaration does not affect the existence of such operations and they will continue in force till their execution date.

Termination for non-insolvency based Close-Out Events

1.12 We believe that the right of termination for non-insolvency based Close-Out Events (i.e. Close-Out Events set out in § 3.1 of the Master Netting Agreement other than in § 3.1(C)(III) (f) of the Master Netting Agreement), applicable in such circumstances, create legal, valid and binding obligations of the parties.

1.13 Nevertheless, restrictions provided for in article 84 of the Bankruptcy Law remain relevant with respect to termination for non-insolvency based Close-Out Events (for details see section 1.5 above).

2 Multibranch Parties

Polish Multibranch Party

2.1 Banks and insurance undertakings with their seats in Poland as well as investment undertakings having their centres of main interest in Poland are subject to the Polish insolvency proceedings only. Therefore, conclusions as to enforceability of close-out netting with respect to such entities are the same as in case of Polish entities who conduct activity and have assets only in Poland.

2.2 Non-financial institutions may be subject to the Polish main insolvency proceedings as well as to secondary insolvency proceedings conducted in other countries where they have assets. There are no clear provisions whether close-out netting effected in accordance with Polish bankruptcy law will be recognised with respect to all transactions or only some of them. It may be argued that the close-out netting governed by Polish bankruptcy rules shall only relate to assets which are held in jurisdictions where no secondary insolvency proceedings are conducted. Accordingly, a separate close-out netting procedure would occur in the relevant foreign country, subject to bankruptcy law applicable to such jurisdiction and only with respect to assets located in that foreign country.

Foreign Multibranch Party

2.3 Credit institutions (i.e. banks with their seat in EU outside Poland) shall not be subject to insolvency proceedings conducted in Poland, whereas it is admissible to conduct bankruptcy proceedings in Poland against foreign banks (i.e. banks with their seat outside EU). Only Financial Supervisory Commission may file a petition for bankruptcy of a bank.

2.4 Insurance undertakings with their seat in EU or EFTA countries shall not be subject to insolvency proceedings conducted in Poland, whereas it is admissible to conduct bankruptcy proceedings in Poland against insurance undertakings with their seat outside EU or EFTA. Individual creditors as well as the Financial Supervisory Commission may file a petition for bankruptcy of an insurance undertaking.

2.5 Foreign investment undertakings may be subject to insolvency proceedings conducted in Poland. A creditor of an investment undertaking may file a petition for its bankruptcy.

2.6 Non-financial foreign institutions may be subject to insolvency proceedings conducted in Poland. A creditor of such an entity may file a petition for its bankruptcy.

2.7 Effects of secondary proceedings (i.e. held in Poland as opposed to main proceedings held in the country of centre of main interest) shall be restricted to the debtor's assets situated in the territory of Poland. Any person empowered to request the opening of insolvency proceedings under laws of Poland may request secondary proceedings be opened.

2.8 Although there is no clear provision in Polish law in this respect, it seems possible that close-out netting following termination of the whole Master Netting Agreement or the Cross-Product Master Agreement will be effected separately:

(a) in Poland subject to Bankruptcy Law and only with respect to transactions concluded by the Polish Branch;

(b) in a foreign country, subject to bankruptcy law applicable to the foreign entity and only with respect to transactions concluded by the head office of the foreign entity and other branches located in jurisdictions where there are no secondary insolvency proceedings pending.

3 Collateral

3.1 Under Polish law 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.

3.2 A contract for the transfer of ownership of a property, receivable or other rights shall be effective against the bankruptcy estate if executed in writing with a certified date. Since 20 July 2011, article 84 item 3 provides an exception to this rule. Collaterals established on the basis of the Act on Certain Financial Collaterals and meeting its requirements do not need to be executed in writing with a certified date in order to be effective against the bankruptcy estate. Therefore, transfer of financial instruments governed by the Act on Certain Financial Collaterals shall be effective in bankruptcy regardless of its form. Properly transferred assets shall not be excluded from the bankruptcy estate, but shall be subject to provisions relating to pledged assets, to be applied *mutatis mutandis*. Therefore, it may be argued that in case of bankruptcy estate containing previously assigned assets, the receiver shall liquidate the transferred assets and use obtained money sum to satisfy claims of the transferee secured by the transfer. The receiver may include the remaining amount in the bankruptcy estate only upon full satisfaction of the claim secured by the title transfer.

3.3 There are no special form requirements to create a financial pledge over rights. Therefore, the court might re-characterise an improperly executed transfer of rights into a transfer of rights governed by the Act on Certain Financial Collaterals or financial pledge with a right of use. A right of use means that a pledgee may exercise rights to the pledged asset and dispose of the asset. Following the disposal the pledgee shall be only obliged to replace the collateral with an appropriate equivalent by the time of fulfilment of the obligation secured by the pledge. If an enforcement event occurs, the obligation to return the equivalent collateral may be subject to set-off. Therefore, re-characterisation of the transfer of collateral into a transfer of rights governed by the Act on Certain Financial Collaterals or financial pledge may be regarded as a remedy for a transfer executed without formal requirements which would otherwise be ineffective against the bankruptcy estate.

3.4 If a collateral is replaced by a new one, it might be regarded as an event inherently involving creation of a new security. This would have an important impact on effectiveness of the collateral due to so called "suspect periods" which relate to rules of Polish law providing for ineffectiveness of certain acts in law made by the bankrupt prior to the date the petition for bankruptcy was filed, whereby the bankrupt disposed of assets, paid or secured a non-matured debt. However, the "suspect period" provisions shall not apply to creation of security occurring before the date of declaration of bankruptcy in connection with the financial terms operations or borrowing or sale of financial instruments involving undertaking for their repurchase, referred to in article 85 of the Bankruptcy Law.

3.5 Starting from 20 July 2011 the close-out netting of collaterals shall be recognised also in bankruptcy. The close-out amount would be now calculated not only in relation to derivatives/repos only (as explicitly allowed under Article 85) but also to the claims to return (or be returned) the collateral.

3.6 Possibility of including the claim to return the collateral in calculation of the lump amount arising in accordance with the close-out netting mechanism remains doubtful with respect to the receivables of the security provider for waiver, amendment, revocation or return of Letter of Credit.

4 General Enforceability

4.1 Based on the assumptions and subject to qualifications set out in this opinion, we are of the opinion that each the Master Netting Agreement and the Cross-Product Master Agreement constitutes a legally valid and binding agreement. Unless otherwise stated in this opinion, our review of the Master Netting Agreement and the Cross-Product Master Agreement has not revealed any provisions that apparently violate Polish law.

5 Confirmation Practices

Binding transaction

5.1 Under Polish law parties are free to execute agreements in any form (statutory exceptions relate to the transfer of real property or transfer of an enterprise for example, but not to the sale of electricity or emission allowances). Consequently, as a rule, an oral agreement between the parties leads to the conclusion of a valid and binding contract just as written agreements do. A signature is required only if the need to employ the written is a statutory requirement or was introduced by the parties.

5.2 With respect to agreements on the sale of electricity or emission allowances no requirements as to the form are present.

5.3 Assuming that the confirmation does not modify the contents of the orally pre-agreed transaction under the Netted Agreement (in the case of the Master Netting Agreement) or under the Principal Agreement (in the case of the Cross-Product Master Agreement), the moment of reaching an oral agreement is the moment o the conclusion of an agreement.

5.4 If a contract concluded between business entities without observing the written form is immediately confirmed by one of the parties in a written document addressed to the other party, and such a document contains no amendments or supplements to the contract which significantly amend its contents, the parties are bound by the contract rendered in the wording determined in the confirmation, unless the other party immediately objects to it in writing.

5.5 Reference to the Master Netting Agreement or the Cross-Product Master Agreement is sufficient for the inclusion of the transaction in the Master Netting Agreement or the Cross-Product Master Agreement.

Means of Evidence

5.6 The Polish Civil Procedure Code does not provide for a closed catalogue of means of evidence, therefore anything that may prove the fact in question may be presented in court and will be subject to the courts evaluation. Some means of evidence like witness' statement are regulated more thoroughly.

5.7 A witness' statement is eligible for rendering evidence in court, however, with certain limitations. If a statute or agreement between parties prescribe written form for the legal action (as concluding a transaction) a witness' or parties' hearing on the fact of its conclusion is possible only if the document was lost, destroyed or taken by a third party. A witness' or parties' hearing against the merit of the document is possible only if it does not lead to the circumvention of the provisions on mandatory written form (does not apply to transactions nor the Master Netting Agreement / the Cross-Product Master Agreement) and if for specific reasons the court will hold it necessary.

6 Governing Law, Arbitration and Jurisdiction

6.1 The agreement on the governing law, submission to arbitration or jurisdiction would be in general upheld in Poland.

28 October 2014

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Ladies and Gentlemen,

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

We have been instructed by the European Federation of Energy Traders (**EFET**) to review and opine on the enforceability of the provisions of the EFET Master Netting Agreement (**EFET Master Netting Agreement**) and the TBMA Cross Product Master Agreement (**TBMA Cross Product Master Agreement**) under Polish Law.

In this regard, we refer to the letter of 19 August 2014 from EFET (**Instruction Letter**) and the request asking us to provide legal opinion in relation to the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement, on the terms set out in the Instruction Letter.

All capitalised terms used in this opinion and not defined therein have the meanings given to such terms in the EFET Master Netting Agreement and the TBMA Cross Product Master Agreement.

A. DOCUMENTS TO BE CONSIDERED

For the purpose of this opinion, we have examined the following forms of the documents:

a) EFET Master Netting Agreement (Version 1.0, published June 2010) (Enclosure 1),
b) EFET Master Netting Agreement Guidance Notes (Version 1.0, published 1 June 2010) (**Enclosure 2**),
c) EFET CPMA Cross-Product Master Agreement published by The Bond Market Association (TBMA) (Version 1.0, published 16 February 2000) (**Enclosure 3**),
d) EFET/IECA Commodities Schedule to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003) (**Enclosure 4**),
e) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master agreement (Version 1.0, published 23 June 2003) (**Enclosure 5**),
f) EFET Cross-Product Credit Support Annex to the Master Netting Agreement (Version 1.0, published 1 February 2011) (**Enclosure 6**),
g) EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005) (**Enclosure 7**).

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.

B. GENERAL ASSUMPTIONS

1 General assumptions

1.1 Two counterparties enter into the EFET Master Netting Agreement or the TBMA Cross Product Master Agreement and at least one of the counterparties is incorporated or organized or has its centre of main interest in Poland (**Party A**).

1.2 Party A is a corporation, financial institution or other entity as further described in Appendix A.

1.3 The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement is governed by the laws of Poland.

1.4 Each EFET Master Netting Agreement or TBMA Cross Product Master Agreement and (in case of the TBMA Cross Product Master Agreement) the EFET Cross-Product Credit Support Annex) is enforceable under the laws of any jurisdiction (other than the laws of Poland) and each counterparty has duly authorized, executed and delivered, and has the capacity to enter into, each document.

1.5 The relevant EFET Master Netting Agreement or TBMA Cross Product Master Agreement provides for the inclusion of some or all of the master agreements described in Appendix B, each such master agreement being a Netted Agreement or Principal Agreement.

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

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

2 Limitations of this opinion

2.1 The views expressed in this opinion are based upon the laws of Poland as at the date hereof, and any change in such laws may affect these views. We assume no obligation to advise you of any changes concerning any matter discussed in this opinion, whether or not material, of which we may become aware on or after the date of this opinion.

2.2 We have made no investigation of the laws of any country or jurisdiction other than Poland.

2.3 This opinion is limited to the matters stated herein, and does not extend to and is not to be read as extending by implication to any other matter in connection with the Agreement, or to any other document of a similar nature issued and endorsed by EFET.

2.4 We express no opinion as to matters of taxation.

2.5 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. This opinion may, therefore, only be relied upon under the express condition that any issues of interpretation arising in connection with this opinion will be governed by Polish law and be brought before a Polish court.

2.6 Poland has no rule or precedent upon which one can rely in reviewing or opining on such matters relating to the law, and there is an appreciable likelihood of varying opinions, decisions and interpretations on the same issue of the law by different courts. Thus, rendering of opinions on the law in Poland is less certain by nature than in a jurisdiction, which adopts the principle of precedent.

2.7 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 particular:

(a) where obligations are to be performed in a jurisdiction outside Poland, they may not be enforceable in Poland if their performance would be illegal under the laws of such other jurisdiction;

(b) enforcement may be limited with respect to specific performance, which may not be available where damages are considered to be an adequate remedy;

(c) claims may become barred by prescription, or may be or become subject to set-off or counterclaim;

(d) enforcement may be limited by general principles of equity ("*zasady współżycia społecznego*" and "*społeczno-gospodarcze przeznaczenie prawa*"); in our view, the provisions of the Agreement do not conflict with such principles of equity, although we can not exclude the possibility that a court or arbitral tribunal may take a different view; and

(e) enforcement may be limited if any of the terms of the Agreement violate important public policy of Poland; in this respect, unless otherwise described in this opinion, we are not aware of any principle of public policy or legal order in Poland that would be contradicted by the Master Netting Agreement or the Cross-Product Master Agreement, although it should be noted that in the absence of any legal definition of the term "public policy" or "legal order" and a clear-cut interpretation of those terms stemming from either court decisions or legal doctrine, it is not possible to express a precise and definite view of the exact scope of Polish "public policy".

2.8 Please note that, given the fact that the Master Netting Agreement and the Cross-Product Master Agreement have been drafted in a way to enable the Parties to be as flexible as possible, and given that the Master Netting Agreement and the Cross-Product Master Agreement may be widely amended and modified by selecting from optional provisions and/or by inserting specifically negotiated changes into the Election Sheet, it is impossible to render an exhaustive and final legal opinion that would cover all possible elections and modifications. Therefore, this opinion is limited to the issues addressed therein, which we have reviewed in accordance with your instructions, and which we deemed important to fit the purpose of this document. This opinion does not substitute an independent legal review of any individually negotiated agreement based on the Master Netting Agreement and the Cross-Product Master Agreement, which may be necessary to cover all the particularities of each individual case.

C. ISSUES AND ADDITIONAL ASSUMPTIONS

I. Enforceability of Close-out Netting

1. Winding-up, Insolvency or Attachment

General Overview (including Set-Off):

1.1 General issues related to judicial proceedings in Poland applicable to insolvent debtors

(a) In Poland, issues relating to bankruptcy and reorganisation are regulated by the Law on Bankruptcy and Reorganisation (**Bankruptcy Law**). The Bankruptcy Law came into force on 1 October 2003.

(b) Generally, the Bankruptcy Law distinguishes between bankruptcy proceedings - applicable to insolvent debtors, and reorganisation proceedings - applicable to debtors threatened by insolvency.

1.2 Jurisdiction of Polish courts in insolvency matters

(c) Subject to exceptions related to credit institutions, insurance companies and investments undertaking (as discussed in Section II), as regards the jurisdiction of Polish courts in insolvency matters under the Bankruptcy Law, Polish courts have exclusive jurisdiction in cases where the debtor's centre of main interests is located in Poland. In addition, Polish courts have non-exclusive jurisdiction if a debtor who conducts business activity is domiciled, or has its seat or assets in Poland. In other situations, Polish courts do not have jurisdiction in relation to insolvency matters with respect to a debtor.

(d) The Bankruptcy Law provides rules on the legal effects in Poland of bankruptcy proceedings conducted abroad in relation to a debtor that has certain assets in Poland. In order for such foreign proceedings to have legal effects in Poland, they must be recognised by a Polish court. Once a decision of a foreign authority is formally recognised by a Polish court, all proceedings in Poland regarding assets of the bankrupt are automatically suspended and the bankrupt is deprived of the right to manage and make dispositions with respect to its assets unless the management of its assets has been vested in the bankrupt. The right to manage the bankruptcy estate in Poland is generally vested in a foreign administrator. Foreign decisions on declaration of bankruptcy do not normally prevent Polish courts from declaring bankruptcy. However, once foreign bankruptcy proceedings are recognised, bankruptcy declared in Poland will relate only to assets located in Poland.

(e) Poland became a member state of the European Communities - now the European Union (**EU**) on 1 May 2004, and therefore Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (**EU Insolvency Regulation**) applies directly in Poland.

(f) The EU Insolvency Regulation applies only to debtors whose centre of main interests is located in an EU member state. The EU Insolvency Regulation is not applicable where the centre of main interests of the debtor is located outside the EU.

(g) The EU Insolvency Regulation envisages two types of insolvency proceedings: (i) the main insolvency proceedings, which may affect all creditors and property of the debtor, and (ii) secondary insolvency proceedings, which affect only creditors and property of the debtor that is located in a member state different from that where the main proceedings may be conducted. The EU Insolvency Regulation also provides uniform rules to determine the governing law for issues arising in such insolvency proceedings.

(h) The main insolvency proceedings can be opened in the member state where the centre of main interests of the debtor is located. Except where the EU Insolvency Regulation provides otherwise, the laws of the member state where the proceedings are initiated govern the main proceedings. Thus, the laws of that state determine all matters of procedure and matters of substantive law.

(i) Under the EU Insolvency Regulation, a court decision initiating the main insolvency proceedings is automatically, by virtue of the EU Insolvency Regulation, recognised in all other member states. Automatic recognition means that, except in a member state where secondary insolvency proceedings are initiated, initiating the main insolvency proceedings has the same effect in all EU member states as it has in the member state where the main proceedings are initiated.

(j) Once the main insolvency proceedings have been initiated, secondary insolvency proceedings may be initiated by the liquidator acting in the main insolvency proceedings, or by any local creditor. There is no requirement to prove any of insolvency tests in order to commence secondary insolvency proceedings.

1.3 <u>General issues related to bankruptcy proceedings</u>

(a) As regards bankruptcy proceedings under the Bankruptcy Law, the basic bankruptcy proceedings are connected with the liquidation of the assets of the debtor (**Liquidation Bankruptcy**). However, if it is possible that by means of a composition creditors would be able to recover a greater amount than as a result of Liquidation Bankruptcy, the debtor can be declared bankrupt with an option of entering into a composition (**Composition Bankruptcy**). The type of bankruptcy proceedings declared is determined by the court in a decision on the declaration of bankruptcy. Depending on the circumstances, one type of bankruptcy proceedings can be converted into the other type during the course of the bankruptcy proceedings.

(b) The Bankruptcy Law envisages two tests allowing for a debtor to be established as insolvent and declared bankrupt. The basic test for the declaration of bankruptcy is the debtor's failure to discharge its due debts ("commercial test"). With respect to debtors that are legal entities or organisational units without legal personality but with legal capacity, an additional test for the declaration of bankruptcy is over-indebtedness. In this case, the term "over-indebtedness" means that debts exceed the value of the assets of the debtor ("balance sheet test"). In such circumstances, bankruptcy can be declared even if the debtor discharges its current debts.

(c) It is also important to note that not all types of debtors can benefit from bankruptcy proceedings under the Bankruptcy Law. Under the Bankruptcy Law, in principle, the following individuals and entities can be declared bankrupt:

(i) individuals, legal entities or organisational units without legal personality, but with legal capacity, who conduct business activity or who conduct professional activity on their own behalf; and

(ii) individuals who do not conduct business activity and who became insolvent due to extraordinary circumstances and for reasons beyond their control.

(d) Pursuant to article 6 of the Bankruptcy Law, the following entities cannot be declared bankrupt, even if they conduct business activity:

(i) the State Treasury of Poland (i.e. the Polish State);

(ii) local governments;

(iii) public health care entities;

(iv) institutions and legal persons formed by virtue of the general legislative acts unless stipulated otherwise therein (in particular, such stipulation was introduced in reference to the Polish public postal operator "Poczta Polska" and therefore "Poczta Polska" could be declared bankrupt) and/or formed in performance of the duty imposed by such acts (please note that generators or electricity suppliers who are state-owned companies do not constitute such type of entities);

(v) individuals running an agricultural farm; and

(vi) higher education schools.

(e) A debtor can be declared bankrupt by a commercial court with jurisdiction over the debtor's centre of main interests. Bankruptcy proceedings can be commenced only at the initiative of an entity entitled to do so, generally the debtor or any of its creditors. The debtor is required to file a petition for bankruptcy with the relevant court within two weeks from the date when the relevant basis for declaring the debtor bankrupt (described in Section I, par. (b) above) arose. The same time limit applies to any person authorised to represent a legal entity or an organisational unit without legal personality but with legal capacity.

(f) Upon receiving a petition for bankruptcy, the relevant court must decide whether to declare the debtor bankrupt or to reject the petition. The court is required by the Bankruptcy Law to reach this decision within two months from the date of receiving the petition for bankruptcy. If the petition for bankruptcy is accepted and the debtor declared bankrupt, the court issues a decision in which it determines the type of bankruptcy proceedings, i.e. whether it shall be Liquidation Bankruptcy or Composition Bankruptcy. The date on which the court issues the bankruptcy decision is the date of bankruptcy (**Date of Bankruptcy**). Therefore, the Bankruptcy Law distinguishes between two different points in time (taking into account their legal effects on creditors):

(i) the date of filing a petition for bankruptcy; and

(ii) the Date of Bankruptcy.

1.4 <u>Selected legal effects of a declaration of bankruptcy</u>

(a) A declaration of bankruptcy results in certain legal effects both in relation to the bankrupt itself and its creditors. Such legal consequences take effect from the Date of Bankruptcy in accordance with the zero hour rule, i.e. from the Date of Bankruptcy. Further, these effects will relate to the bankrupt, its assets and debts, as well as to any proceedings pending that involve the bankrupt. Last but not least, the legal effects of bankruptcy will vary depending on the type of bankruptcy proceedings, i.e. depending on whether it is Liquidation Bankruptcy or Composition Bankruptcy. Under both bankruptcy regimes, as of the Date of Bankruptcy, the bankrupt's assets become the bankruptcy estate.

(b) As regards Liquidation Bankruptcy, from the Date of Bankruptcy the bankrupt is deprived of its right to manage, use and dispose of those items of assets that have been included in the bankruptcy estate. The official receiver ("*syndyk*") administers the bankruptcy estate. Assets included in the bankruptcy estate cannot be encumbered with any limited right *in rem*, and limited rights *in rem* cannot be entered in any public register, except for a mortgage that was filed for registration before six months preceding the date of filing the petition for bankruptcy.

(c) With respect to Composition Bankruptcy, the court administrator ("*zarządca*") administers the bankruptcy estate. In exceptional cases the bankrupt itself can exercise the administration of the bankruptcy estate, under the supervision of a court supervisor ("*nadzorca sądowy*"). The assets of the bankruptcy estate can be encumbered with a limited right *in rem*, if accepted by the court administrator or the court supervisor.

(d) From the Date of Bankruptcy, the bankrupt is deprived of its capacity to be a party to pending proceedings involving the assets included in the bankruptcy estate. As of that moment, such proceedings can only be conducted by, or against, a competent bankruptcy officer (receiver, court supervisor or administrator, as the case may be). Additionally, court and administrative enforcement proceedings and proceedings to secure claims are suspended from the Date of Bankruptcy.

(e) A declaration of Liquidation Bankruptcy results in important legal effects in relation to the bankrupt's contractual obligations. Generally, from the Date of Bankruptcy the bankrupt's monetary debts that are not yet due become payable, and non-monetary debts are converted into monetary debts and become payable on the Date of Bankruptcy. What is more, from the Date of Bankruptcy, interest ceases to accrue on debts payable by the bankrupt, save for amounts payable that are secured by limited rights *in rem*. Additionally, the rules governing setting off mutual claims are mandatorily modified.

(f) As regards Composition Bankruptcy, a declaration of bankruptcy results in legal consequences that differ from those connected with a declaration of Liquidation Bankruptcy. Generally, from the Date of Bankruptcy, the bankrupt and the court administrator (or the court supervisor, as the case may be) cannot discharge debts that are, by virtue of the Bankruptcy Law, covered by composition. Additionally, the rules governing setting off of mutual claims are mandatorily modified. Further, selected contracts concluded with the bankrupt cannot be terminated without consent from the council of creditors.

(g) With respect to both bankruptcy regimes, article 83 of the Bankruptcy Law stipulates that any provisions in agreements that modify or terminate a legal relationship to which the bankrupt is a party in the event that bankruptcy is declared, are legally invalid. Additionally, pursuant to article 84 section 1 of the Bankruptcy Law, any provisions in agreements to which the bankrupt is a party that prevent or impede attaining the objective of bankruptcy proceedings are ineffective against the bankruptcy estate. Article 84 of the Bankruptcy Law in a wording given above came into force on 2 May 2009. Before that date, based on the previous wording of article 84 of the Bankruptcy Law, it was deemed that any actions taken by a solvent party from the Date of Bankruptcy were prohibited, that is the solvent party was not allowed to withdraw nor terminate an agreement to which a bankrupt was a party. As we read in official reasons to the act changing the wording of article 84 of the Bankruptcy Law, the above rigorous interpretation was in contradiction to the purpose of article 84 of the Bankruptcy Law. Article 84 section 1, as it reads now, allows the solvent party to take all actions provided for in the agreement to which the bankrupt is a party as long as it does not prevent or impede attaining the objective of bankruptcy proceedings. It shall be noted that the condition of "not preventing or impeding attaining the objective of bankruptcy proceeding" is vague and shall be assed case by case. Since the new wording of article 84 section 1 of the Bankruptcy Law came in force, it has not been interpreted in significant cases or in legal literature.

(h) Article 85 of the Bankruptcy Law sets out an exception to the principles set forth in articles 83 - 84 of the Bankruptcy Law. Namely, article 85 section 3 stipulates that any of the parties can terminate a master agreement and, as a result, any financial term operations, borrowing or sale of financial instruments involving undertaking for their repurchase executed under such master agreement. Pursuant to article 85 section 1 *in principio* of the Bankruptcy Law, this exception applies provided that the master agreement envisages that transactions for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase are executed in discharge of the master agreement and that the termination of the master agreement results in the termination of all transactions for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase (for a detailed discussion of article 85 of the Bankruptcy Law please refer to 1.7 below). The above requirement according to which the termination of the master agreement must result in the termination of all transactions for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase in order to fall under article 85 of the Bankruptcy Law is fulfilled with respect to the Master Netting Agreement or the Cross-Product Master Agreement since pursuant to §5.1 of the Master Netting Agreement and the Cross-Product Master Agreement, with effect from the Early Termination Date the Parties shall be released from an obligation to make payment and/or performance in respect of all transactions, and all existing duties and obligations of the Parties shall be replaced by the obligation of one Party to pay the Settlement Amount to the other Party calculated in accordance with § 7 of the Master Netting Agreement and Section 3. of the Cross-Product Master Agreement which are in line with article 85 of the Bankruptcy Law.

(i) Please note that Article 85 shall not be interpreted in such a way that only master agreements which provide exclusively for termination procedures resulting in the termination of all transactions for financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase fall under its scope. There might be other termination procedures agreed by the parties (i.e. procedures which do not result in the termination of all individual transactions). Such master agreements will still meet requirements set out in article 85. The only consequence it that termination procedures under which individual transactions are not terminated will not benefit from article 85.

1.5 General issues related to reorganisation proceedings

(a) The Bankruptcy Law provides for special proceedings applicable to a debtor threatened by insolvency (**Reorganisation Proceedings**). These proceedings only apply to business entities registered in the Polish National Court Register that discharge their debts but, based on a reasonable assessment of their economic situation, where it is obvious that they will become insolvent in the near future, and only if such entities satisfy some additional conditions (in summary: they have not been in Reorganisation Proceedings in the previous two years or in bankruptcy or composition proceedings in the previous five years). The process of Reorganisation Proceedings is monitored by a court supervisor.

(b) Reorganisation Proceedings are commenced after a business entity files a declaration with the relevant court, regarding the initiation of reorganisation proceedings, and attaches a reorganisation plan. Then, the business entity announces this declaration in the Official Court and Commercial Journal (*Monitor Sądowy i Gospodarczy*). The date of making the announcement is the date on which Reorganisation Proceedings are commenced.

(c) Reorganisation has the following legal effects on creditors:

(i) the repayment of the business entity's debts is suspended;

(ii) the accrual of interest is suspended;

(iii) the setting off of claims is regulated by the relevant regulation applicable to Composition Bankruptcy;

(iv) in principle, pending enforcement proceedings and proceedings to secure claims conducted against the business entity are suspended and new proceedings cannot be instituted; and

(v) the business entity cannot dispose of, or encumber its property, excluding assets sold in the ordinary course of business.

1.6 <u>Brief discussion of Polish insolvency laws applicable to mutual agreements</u>

Liquidation Bankruptcy

(d) For the purposes of Liquidation Bankruptcy, transactions on the sale of electricity are usually classified as mutual agreements (*umowy wzajemne*). This classification applies to swaps, "spot" contracts and "forward" contracts. It is not clear whether an option can be categorised as a mutual agreement under the Bankruptcy Law, however, there are strong arguments to suggest it is.

(e) Pursuant to article 98 section 1 of the Bankruptcy Law, if, on the Date of Bankruptcy, the obligations under a mutual agreement have not yet been fully or partially performed (**Unperformed Contracts**), the official receiver can perform the bankrupt's obligations and demand that the other party perform its obligations; or the official receiver can withdraw from the agreement .

(f) Pursuant to article 98 section 2 of the Bankruptcy Law, the solvent party to an Unperformed Contract has the right to request, by sending a notice with a certified date (such a certification can be made for example by a notary public), that the official receiver either performs or withdraws from the Unperformed Contract within three months from receiving the solvent party's request.

(g) Further, pursuant to article 99 of the Bankruptcy Law, if the official receiver withdraws from the agreement, the solvent party is not entitled to demand the return of the discharged performance; the solvent party can only enforce its right for mutual performance and damages, if any, in the course of the bankruptcy proceedings and distribution of the bankruptcy estate.

(h) Following the Date of Bankruptcy, the solvent party to an Unperformed Contract is allowed to withdraw (*odstąpienie*) from such contract in accordance with provisions of the Civil Code on mutual agreements (articles 487 - 497 of the Civil Code). Such a right of withdrawal is conditional upon the official receiver's failure to perform the bankrupt's obligations under the Unperformed Contract. It shall be noted that the legal effect of the withdrawal made pursuant to relevant provisions of the Civil Code is that the parties shall return to each other everything they already received under the mutual agreement.

(i) Referring to the new wording of article 84 section 1 of the Bankruptcy Law (see Section I, 1.9(q) – (u)) we can not exclude the possibility that certain rights to terminate or modify the legal relationship with the bankrupt ascribed to a solvent party under an agreement will be enforceable even after the Date of Bankruptcy.

Composition Bankruptcy, Reorganisation Proceedings

(j) The Bankruptcy Law does not provide for specific provisions related to mutual agreements in Composition Bankruptcy nor in Reorganisation Proceeding.

(k) Remarks made on article 84 section 1 of the Bankruptcy Law in relation to Liquidation Bankruptcy remain unchanged in Composition Bankruptcy and in Reorganisation Proceedings.

1.7 <u>Brief discussion of Polish insolvency laws applicable to financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase</u>

(a) Pursuant to article 85 section 5 of the Bankruptcy Law (which applies to both Liquidation Bankruptcy and Composition Bankruptcy), the official receiver (or court administrator or court supervisor, as applicable) can not Cherry Pick financial term operations or agreements pertaining to borrowing or sale of financial instruments involving undertaking for their repurchase, even if such transactions are not executed in discharge of a master agreement, as described in article 85 section 1 of the Bankruptcy Law. Additionally, pursuant to article 85 section 3 of the Bankruptcy Law, any of the parties, including the solvent party, can terminate the master agreement and the financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase executed pursuant to the master agreement described in article 85 section 1 of the Bankruptcy Law.

(b) Pursuant to article 85 section 2 of the Bankruptcy Law, the term "financial term operations" means operations with an agreed price, exchange rate, interest rate or index – in particular, the purchase of foreign currencies, securities, gold or other precious metals, commodities or rights, including contracts for notional settlement only, options and derivatives – executed for an agreed date or term, in market trade. It seems that, although the defined term refers exclusively to financial term operations, the defining expression covers not only financial term operations but also commodity term operations, ("(...) the purchase of (...) gold or other precious metals, commodities or rights (...)").

(c) There is no case law on the interpretation of the above definition. There are, however, two conflicting views on the above in jurisprudence. On the one hand, there is a view that commodity term transactions fall within the scope of the term "financial term operations" under article 85 section 2 of the Bankruptcy Law (broad interpretation). As we understand it, it is based on the wording of the defining expression. On the other hand, there is a view that commodity term transactions do not fall within the scope of the term "financial term operations" (narrow interpretation). In this case the argument is that the defined term "financial term operations" seems to suggest that only financial transactions fall within its scope. This view seems to be confirmed by the intention of the legislators expressed during legislative sessions of the Polish Parliament, when the legislators were convinced that only financial term operations could benefit from special treatment under article 85 of the Bankruptcy Law. An additional argument is that legislative exceptions to general rules cannot be extended by way of interpretation.

(d) In this discussion, we are inclined to follow the broad interpretation. However, the issue is new in Poland and has not been finally settled in the legal literature. Also, no court decisions are available addressing the issues of interpretation of the above provisions. In view of the above, for the purposes of the analysis laid down below, we have described the effects of a party's insolvency on forward, physically settled electricity transactions in case they are treated as not being "financial term operations" as defined in article 85 section 2 of the Bankruptcy Law. However, in the relevant sections we also briefly describe how the situation would change if such transactions were treated as a "financial term operations". In a judgement, dated 16 February 2012 the Supreme Court has not expressed any view with respect to the meaning of this term, moreover it stated that the this term has not yet been well defined in legal literature as well as its relation to the term financial instrument has not been precisely established.

(e) The Act on trading in financial instruments dated 29 July 2005 (**Financial Instruments Law**) provides for a broad definition of "financial instruments", generally covering securities and other financial instruments. Within the definition there exist *inter alia* the following sub-categories related to commodities:

  (i) options, futures, swaps (...), and any other derivative contracts relating to commodities that are settled in cash or may be settled in cash at the option of one of the parties;

  (ii) options, futures, swaps and any other derivative contracts relating to commodities that are physically settled provided that they are traded on a regulated market or a multilateral trading facility;

  (iii) options, futures, swaps, forwards and any other derivative contracts relating to commodities that are physically settled, not traded on a regulated market or a multilateral trading facility, not being for commercial purposes and which have the characteristics of other derivative financial instruments;

  (iv) options, futures, swaps (...) and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that are settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures, which have the characteristics of other derivative financial instruments.

(f) Since all transactions listed in Appendix C are traded over-the-counter, it is clear that transactions will not fall under the sub-category stipulated in section (ii) and (iii) above. However, it is very likely that transactions listed in Appendix C hereto will be encompassed by the remaining sub-categories listed above and therefore such transactions will be classified as "financial instruments".

Reorganisation Proceedings

(g) It could also be argued that article 85 section 3 of the Bankruptcy Law applies to reorganisation proceedings mutatis mutandis.

1.8 Legal character of contracts listed in Appendix C

(a) In general, transactions set out in Appendix C can be classified under the Bankruptcy Law as "financial term operation", "securities lending transaction" or "transaction for the sale of financial instruments with undertaking of its repurchase".

(b) The Bankruptcy Law distinguishes between term and spot transactions by way of defining "financial term operations" as operations with an agreed price, exchange rate, interest rate or index – in particular, the purchase of foreign currencies, securities, gold or other precious metals, commodities or rights, including contracts for notional settlement only, options and derivatives – executed for an agreed date or term, in market trade. Therefore, spot transactions are agreements executed at a current market price. As a result, option, swap and forward transactions set out in Appendix C will be classified as a term operation provided that they are executed at an agreed price (other than a current market price) for an agreed date. A period of time between entry into a transaction and its settlement does not determine whether an operation is spot or forward. It shall be noted that distinction between spot and term transactions is relevant only with respect to article 85 of the Bankruptcy Law.

(c) The Bankruptcy Law does not provide a definition of the term "financial instruments" and this term is defined under the Act on Financial Instruments. In general, the term of the "financial instruments" is defined in line with the Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (MiFID I Directive) and includes "securities" (*papiery wartościowe*). The "securities lending transaction" and "transaction for the sale of financial instruments with undertaking of its repurchase" shall mean respectively transaction for lending the securities (transaction listed under item 35. *Securities Lending Transaction* in Appendix C) or its sale whereby the seller has the right of its repurchase (transactions listed under item 6. *Buy / Sell-Back Transaction* and item 34. *Repurchase Transaction* in Appendix C).

(d) It is not clear whether option transactions set out in Appendix C can be categorised as mutual agreements under the Bankruptcy Law. The only inconsistency in treatment can theoretically take place with respect to the status of option transactions set out in Appendix C from the Date of Bankruptcy in the case of Liquidation Bankruptcy. This is connected with the status of mutual agreements in Liquidation Bankruptcy. Articles 98 - 99 of the Bankruptcy Law specifically regulate the status of mutual agreements. In particular, under article 98 of the Bankruptcy Law, the official receiver is entitled to Cherry Pick Unperformed Contracts. If option transactions set out in Appendix C were classified as mutual agreements then they would fall under the scope of articles 98 - 99 of the Bankruptcy Law. If they were not classified as mutual agreement then they would not fall under the scope of articles 98 - 99 of the Bankruptcy Law. In this scenario, the official receiver would not be allowed to Cherry Pick unperformed option transactions set out in Appendix C.

(e) Type of an underlying instrument in the transactions does not affect the conclusions thereof.

1.9 Enforceability of early termination (insolvency-based Close-Out Events)

(a) §4.1 of the Master Netting Agreement and Section 2 of the Cross-Product Master Agreement provide that, if a Close-Out Event with respect to a Party has occurred and is continuing, the other Party (**Terminating Party**) may terminate respectively the Master Netting Agreement and the Cross-Product Master Agreement and the transactions under respectively the Netted Agreement (in the case of the Master Netting Agreement) or the Principal Agreements (in the case of the Cross-Product Master Agreement) by giving the other Party notice (**Early Termination**).

(b) Further, pursuant to the third sentence of §4.3 of the Master Netting Agreement, with effect from the Early Termination Date the Parties shall be released from an obligation to make payment and/or performance in respect of all transactions under the Netted Agreements, and all existing duties and obligations of the Parties shall be replaced by the obligation of one Party to pay the Settlement Amount to the other Party calculated in accordance with §7 of the Master Netting Agreement. The release from obligations and their replacement by the obligation to pay the Settlement Amount, as set out in the Master Netting Agreement, mean that the transactions under the Netted Agreements are terminated and a new obligation to pay the Settlement Amount is created. The same conclusion applies to the Early Termination under the Cross-Product Master Agreement.

(c) § 3.1 of the Master Netting Agreement specifies certain situations falling within the scope of the term Close-Out Event, whereby the Terminating Party has the right to Terminate due to occurrence of the Close-Out Event. Close-Out Events under the Cross-Product Master Agreement are specified in the Principal Agreements to the extent not excluded under Part II of Schedule to the Cross-Product Master Agreement.

(d) Further, pursuant to § 6 of the Master Netting Agreement and Section 2.1 of the Cross-Product Master Agreement, the parties may also opt for Automatic Termination, whereby, upon the occurrence of a Close-Out Event, the Terminating Party need not send the other party a notice of the designation of an Early Termination Date and the Early Termination Date in such event shall be as specified in the Election Sheet. Such Automatic Termination will have the same legal effect as envisaged in the Master Netting Agreement and the Cross-Product Master Agreement with respect to the Early Termination.

(e) Due to the occurrence of a Close-Out Event pursuant to § 3.1 of the Master Netting Agreement Agreement or pursuant to the Cross-Product Master Agreement "close-out netting" will take place. "Close-out netting" in this case is composed of two elements:

(i) the termination of respectively the Master Netting Agreement and the Cross-Product Master Agreement and all the transactions ("close-out"); and

(ii) the release from further payment, and/or performance in respect of all the transactions and the replacement of existing duties and obligations of the Parties with the obligation of one Party to pay the Final Net Settlement Amount ("netting").

Bankruptcy proceedings

(f) As explained in Section 1.1 above, the Bankruptcy Law only came into force on 1 October 2003. Additionally, it should be noted that the regulation under articles 83 - 84 of the Bankruptcy Law is a novelty compared to the previous Polish regulation in this regard. The old bankruptcy law did not expressly invalidate contractual provisions envisaging the termination of a contract in case of a declaration of bankruptcy with respect to one of the parties to such contract. The analysis made in this point relates to both bankruptcy regimes, i.e. Liquidation Bankruptcy and Composition Bankruptcy since the same regulation applies.

(g) Under article 83 of the Bankruptcy Law, it is clear that a contractual clause providing for the termination or modification of a contract in the event of the declaration of bankruptcy in relation to one of the Parties to the contract is invalid. However, this ban does not apply to the termination of the Master Netting Agreement / the Cross-Product Master Agreement and transactions effected thereupon triggered by an insolvency-related event affecting a Credit Support Provider (to the extent the Credit Support Provider is not a party to the Master Netting Agreement / the Cross-Product Master Agreement). Therefore the Master Netting Agreement / the Cross-Product Master Agreement may be terminated due to an insolvency-related event affecting a Credit Support Provider. The analysis below concerns only the termination of the Master Netting Agreement / the Cross-Product Master Agreement due to an insolvency-related event affecting one of the Parties.

(h) There is no relevant case law and no prevailing opinion among commentators on the status of contractual provisions envisaging the termination of a contract in the event of a pre-bankruptcy insolvency-related event in respect of one of the Parties to the contract, i.e. any of the events specified in § 3.1(C)(III) (b) – (i) of the Master Netting Agreement taking place before the Date of Bankruptcy.

(i) It seems that leading commentators take the view that provisions envisaging the termination of a contract in the event of a pre-bankruptcy insolvency-related event in respect of one of the parties to such contract do not fall within the scope of article 83 of the Bankruptcy Law and are therefore enforceable and valid. Their main argument is that this contractual provision is not expressly excluded by article 83 of the Bankruptcy Law. Taking this view, the parties could effectively provide that certain circumstances preceding the Date of Bankruptcy, such as over-indebtedness, a failure to pay debts as they become due, etc., entitle the other party to terminate an agreement.

(j) It should be noted, however, that we have certain doubts regarding the enforceability of contractual provisions envisaging termination triggered by filing a petition for bankruptcy in relation to one of the parties to the contract, or any other event taking place in the period from filing such petition to the Date of Bankruptcy. These events are:

  (i) as listed in the first part of § 3.1(C)(III) (c) of the Master Netting Agreement, where there is a link between the right to terminate and a Party making a general assignment, arrangement or composition with or for the benefit of its creditors;

  (ii) as listed in the first part of § 3.1(C)(III) (d) of the Master Netting Agreement, where there is a link between the right to terminate and a Party instituting or having instituted against it proceedings seeking a declaration of insolvency or bankruptcy, or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights; and

  (iii) listed in § 3.1(C)(III) (f) of the Master Netting Agreement, where there is a link between the right to terminate and a Party seeking or becoming 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 of its assets.

(k) From the point of view of the Bankruptcy Law, the events mentioned above can be deemed to have taken place at the moment of filing the petition for bankruptcy. In addition, it can be argued that filing a petition for bankruptcy is very closely related to the declaration of bankruptcy of the Party and necessarily precedes the declaration of bankruptcy, and thus should be treated as equivalent to the declaration of bankruptcy. However, though there are some doubts, it seems to us that such contractual provisions (termination triggered by filing a petition for bankruptcy) may be enforceable since they are not expressly mentioned in article 83 of the Bankruptcy Law. This view is shared by one of the leading commentators.

(l) Finally, we should emphasise that there is also a view expressed by one of the commentators that contractual provisions envisaging termination of a contract in the event of pre-bankruptcy insolvency-related circumstances are unenforceable since they aim to circumvent article 83 of the Bankruptcy Law.

(m) In summary, we believe that Polish courts should uphold and find the rights of early termination of the Master Netting Agreement and all transactions effected thereunder as provided in § 3.1(C)(III) (b) – (i) of the Master Netting Agreement with respect to pre-bankruptcy insolvency-related events enforceable.

(n) Finally, in our view separate consideration should be given to certain aspects of § 3.1(C)(III) (f) of the Master Netting Agreement. This clause states that a Close-Out Event can also consist of an event where a Party "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". This regulation will cover events that take place as a result of a declaration of bankruptcy being made by the court, e.g. the appointment of the official receiver ("*syndyk*"), court administrator ("*zarządca*") or court supervisor ("*nadzorca sądowy*"). Such events fall within the scope of article 83 of the Bankruptcy Law. Consequently, the right of termination associated with § 3.1(C)(III) (f) of the Master Netting Agreement, to the extent that it relates to events taking place on or after the Date of Bankruptcy of the Party, would be invalid.

(o) The above analysis applies to both Early Termination and Automatic Termination. They are treated identically in the above context.

(p) Any valid termination right, pursuant to the above analysis, will apply respectively to the Master Netting Agreement or the Cross-Product Master Agreement and transactions effected on their basis as set out in §4.1 of the Master Netting Agreement and Section 2 of the Cross-Product Master Agreement. Under the Bankruptcy Law, the Parties do not need the Single Agreement concept in order to preserve the enforceability of the Early Termination rights described above. Nevertheless, we believe that the provisions of the Master Netting Agreement or the Cross-Product Master Agreement relating to the Single Agreement concept need not to be removed from their texts.

(q) From the point of view of assessment of enforceability under Polish law of provisions of the Master Netting Agreement or the Cross-Product Master Agreement relating to the procedure of Early Termination, also article 84 of the Bankruptcy Law as in force from 2 May 2009 is of material importance. Until 2 May 2009, the regulation set forth in article 84 of the Bankruptcy Law was interpreted as a basis for excluding, after the declaration of bankruptcy, any acts in law leading to the variation or expiration of a legal relationship to which the bankrupt was a party. In accordance with the present wording of article 84 section 1 of the Bankruptcy Law, if any provision of an agreement to which the bankrupt is a party prevents or hinders the attainment of the objective of bankruptcy proceedings, then such provision is ineffective against the bankruptcy estate.

(r) As article 84 section 1 of the Bankruptcy Law only came into force relatively recently, its interpretation has not yet been the subject of legal commentaries or judicial decisions.

(s) Article 84 section 1 of the Bankruptcy Law provides for a sanction of ineffectiveness of a contractual provision where such provision prevents or hinders the attainment of the objective of bankruptcy proceedings. Examination of a contractual provision vis-à-vis article 84 section 1 of the Bankruptcy Law consists in checking whether such provision, if enforced during the bankruptcy proceedings, would prevent or hinder the attainment of the objective of bankruptcy proceedings.

(t) The criterion of "preventing or hindering the attainment of the objective of bankruptcy proceedings" is not a clear-cut criterion. It can be expected that its content will, in time, be shaped by legal scholars and judges. It seems that the key issue is to identify the objectives of the bankruptcy proceedings. Traditionally, it is generally considered that the purpose of bankruptcy proceedings is to satisfy, as fully as possible, the rights of creditors, and, if possible, to preserve the bankrupt's business.

(u) The issue of enforceability of provisions of the Master Netting Agreement or the Cross-Product Master Agreement relating to Early Termination comes down to answering the question whether enforcement of the Early Termination procedure during bankruptcy proceedings would frustrate the objectives of such proceedings. We cannot completely exclude an interpretation (although we do not share it) according to which the provisions of the Master Netting Agreement or the Cross-Product Master Agreement relating to termination and close-out netting would be regarded as preventing or hindering the attainment of the objective of bankruptcy proceedings, and therefore ineffective. Our opinion is based, inter alia, on the explanatory statement to the law amending article 84 of the Bankruptcy Law, which points to the exclusion of transferability of bankrupt's things and rights as an example of a provision preventing or hindering the attainment of the objective of bankruptcy proceedings. Should such provision be respected during the bankruptcy proceedings, this would deprive the receiver of his basic power, i.e. the power to sell bankruptcy estate assets. In our opinion, enforcement of the provisions relating to Early Termination will not trigger such consequences.

(v) It needs to be pointed out that even if a contractual provision is classified as preventing or hindering the attainment of the objectives of bankruptcy proceedings, this will not affect the validity of such provision. This means that as long as there are no bankruptcy proceedings pending, such provision is fully enforceable. This is what makes the sanction provided for in article 83 of the Bankruptcy Law distinct from that provided for in article 84 section 1 of the said law.

(w) Subject to par (x) below, it should be noted that:

(i) should each of transactions under the Netted Agreements (in the case of the Master Netting Agreement) or the Principal Agreements (under the Cross-Product Master Agreement) fall within the scope of the term "financial term operations", or "borrowing or sale of financial instruments involving undertaking for their repurchase" and

(ii) should the Master Netting Agreement and the Cross-Product Master Agreement be categorised as a "master agreement",

in each case within the meaning set out in article 85 of the Bankruptcy Law, a Party would be allowed to terminate the Master Netting Agreement and the Cross-Product Master Agreement and transactions by way of the Early Termination (i.e. by giving the other Party notice) also after the Date of Bankruptcy. In such a case, article 85 section 3 of the Bankruptcy Law would apply and, consequently, even after the Date of Bankruptcy, the solvent Party would be able to terminate, by way of the Early Termination, the Master Netting Agreement or the Cross-Product Master Agreement and each of the transactions effected on their basis. It should be noted, however, that although it is clear under the Bankruptcy Law that financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase may be terminated by any of the parties by giving notice, there are doubts whether Automatic Termination may be applied to such transactions. Pursuant to article 83 of the Bankruptcy Law any provisions in agreements that modify or terminate a legal relationship to which the bankrupt is a party in the event that bankruptcy is declared are legally invalid. Automatic Termination provisions fall under the scope of the above article. We do not find exceptions to this rule in relation to Automatic Termination under article 85 of the Bankruptcy Law pursuant to which parties are allowed to terminate agreements which does not encompass automatic termination.

(x) It should be noted that there are doubts as to the applicability of article 85 of the Bankruptcy Law in the case the Master Netting Agreement or the Cross-Product Master Agreement provides for both spot and term transactions. It may be argued that article 85 of the Bankruptcy Law relates to master agreements under which only financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase can be concluded. As a result, the Master Netting Agreement or the Cross-Product Master Agreement, which allows for both spot and term operations, would not fall within the scope of article 85 of the Bankruptcy Law. We do not share the above approach. We are of the opinion that master agreement relating to both spot and term operations are regulated by article 85 of the Bankruptcy Law.

However, application of article 85 of the Bankruptcy Law is limited to transactions classified as financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase. In such a case, only financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase would be settled according to Early Termination procedure. In relation to transactions classified as spot transactions general regulations of the Bankruptcy Law would apply instead of article 85 of the Bankruptcy Law.

Reorganisation Proceedings

(y) We believe that there is high probability that Polish courts applying the general principle set out in articles 83 - 84 of the Bankruptcy Law to reorganisation proceedings mutatis mutandis.

(z) It should therefore be assumed that a contractual provision envisaging the termination of a contract in the event of commencing reorganisation proceedings in relation to one of the Parties to the contract is invalid. Thus, any events with respect to the Credit Support Provider who is not a Party to the Master Netting Agreement or the Cross-Product Master Agreement are irrelevant with regard to the analysis below.

(aa) Further, there are doubts as to the enforceability of contractual provisions envisaging termination triggered by filing a declaration on reorganisation by one of the parties to the contract. In this context it would constitute one of the events listed in the first part of § 3.1(C)(III) (d) of the Master Netting Agreement, and connect the right to terminate with a Party instituting or having instituted against it proceedings seeking a declaration of insolvency or bankruptcy, or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights. It may be argued that such an event is very closely related to the formal commencement of reorganisation in relation to the Party, and necessarily precedes the commencement of reorganisation, and thus should be treated as equivalent to the commencement of reorganisation.

(bb) In our view, it is also doubtful whether § 3.1(C)(III) (f) of the Master Netting Agreement is enforceable in the event of the reorganisation of a Party. This clause states that Close-Out Event can also consist of an event where a Party "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." As regards reorganisation, this clause will cover events that take place as a result of commencing reorganisation, e.g. the appointment of a court supervisor ("*nadzorca sądowy*"). Such events could be treated as falling within the scope of article 83 of the Bankruptcy Law and therefore found invalid. Consequently, the termination right connected with § 3.1(C)(III) (f) of the Master Netting Agreement, to the extent that it relates to events taking place on or after the commencement of reorganisation, would be invalid.

(cc) The above analysis applies to both Early Termination and Automatic Termination. They are treated identically in the above context.

(dd) Any termination right, permissible pursuant to the above analysis, will apply to the Master Netting Agreement / the Cross-Product Master Agreement and transactions effected on their basis as set out in §4.1 of the Master Netting Agreement and Section 2 of the Cross-Product Master Agreement. Under the Bankruptcy Law, the Parties do not need the Single Agreement concept in order to preserve the enforceability of Early Termination rights described above. Nevertheless, we believe that the provisions of the Master Netting Agreement and the Cross-Product Master Agreement relating to the Single Agreement concept need not to be removed from its text.

(ee) Finally, please refer to the analysis in par. (w) above for the scenario under which transactions can benefit from the status of financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase under article 85 of the Bankruptcy Law.

Related issues

1.10 <u>Opinion on whether or not the termination of the Master Netting Agreement or the Cross-Product Master Agreement, the calculation of the Termination amount and/or its payment is voidable, challengeable or in any way capable of being invalidated, deleted, frozen, stayed or otherwise retroactively impacted by a liquidator, receiver, court or any third party</u>

(a) Polish law envisages certain provisions that are designed to protect creditors against detrimental acts by a debtor. In particular, those are:

(i) *Actio Pauliana*, regulated in articles 527 – 534 of the Polish Civil Code (**Civil Code**); and

(ii) articles 127 - 130 of the Bankruptcy Law.

(b) *Actio Pauliana* is a legal instrument of general application because it is not confined to Bankruptcy Proceedings or Reorganisation Proceedings.

(c) Pursuant to article 527 of the Civil Code, any act in law which has the effect of being both "detrimental" to creditors and one 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 using (appropriate) due diligence.

(d) If the third party knew or should have known (had it exercised due care) that the debtor was acting deliberately to the detriment of creditors, then such benefit can be subject to a "claw-back" in favour of the affected creditors.

(e) 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 (article 527 § 3) or had a "permanent economic relationship" with the debtor (article 527 § 4). A "permanent economic relationship" certainly does exist if parties enter into regular transactions, especially if it happens over a long period of time, or if the parties are bound by a single but long-term agreement regarding the continuous delivery of commodities or services in exchange for regular payments. The mere execution of the Master Netting Agreement or the Cross-Product Master Agreement without entering into any Individual Transactions, or with only a limited number of irregular transactions between the parties, probably would not qualify as a "permanent economic relationship".

(f) One of the provisions of article 527 stipulates that acts are "detrimental" to creditors if the debtor becomes insolvent or insolvent to "a greater degree". It should be noted, however, that a challenge by creditors is only a challenge against an agreement to the extent that it operates against their interests – the relevant agreement will not be set aside against all parties, but only against the challenging creditor (if successful). Finally, whether a creditor of any of the Parties can justify its claim in accordance with this provision can be ascertained only in relation to a specific situation.

<u>Avoidance of contracts under the Bankruptcy Law</u>

(g) The Bankruptcy Law envisages certain voidability provisions applicable to Liquidation Bankruptcy on the following terms:

(i) First of all, pursuant to article 127 section 1 of the Bankruptcy Law, acts in law made by the bankrupt for one year prior to the date the petition for bankruptcy is filed, whereby the bankrupt disposed of assets, shall be ineffective against the bankruptcy estate if such acts were made without payment, or with payment if the value of bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the bankrupt or a third party. In our view, it is possible, though unlikely, that a Polish court may find that, with respect to the calculation and payment of the Settlement Amount, the value of the bankrupt Party's performance grossly exceeds the value of the performance received by the bankrupt;

(ii) Further, pursuant to the first sentence of article 127 section 3 of the Bankruptcy Law, the bankrupt's payment of a non-matured debt within two months before a petition for bankruptcy is filed is ineffective against the bankruptcy estate. It seems that the payment of an accelerated and then matured debt should not be treated as the payment of immature debt. Thus, assuming that the Master Netting Agreement or the Cross-Product Master Agreement and each transactions are terminated, and the debtor effects payment of the Settlement Amount within this period, it seems to us that payment of the Settlement Amount is not ineffective, since at the payment date it was mature and payable. However, there is no case law or jurisprudence in this regard that would enable us to confirm this;

(iii) 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 against the bankruptcy estate, if it had not been aware of the existence of grounds for bankruptcy.

1.11 <u>Opinion on whether the EU Insolvency Regulation affects Polish conflict of laws if the Parties chose law other than the laws relevant to the insolvent Party</u>

(a) Opinion in this Section is based in the assumption that the Master Netting Agreement or the Cross-Product Master Agreement is governed by any law (including English, German or Polish law).

(b) There is no case law or jurisprudence in this regard in Poland, which makes it very hard to interpret the relevant provisions of the EU Insolvency Regulation.

(c) Pursuant to article 4 section 1 of the EU Insolvency Regulation the law applicable to insolvency proceedings and their effects shall be the law of the state in which proceedings are commenced. Pursuant to article 4 section 2 item (d) of the EU Insolvency Regulation, the law of the state in which proceedings are commenced shall, in particular, determine the conditions under which set-off may be invoked. Furthermore, article 6 section 1 of the EU Insolvency Regulation states that commencing insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim. Point (25) of the preamble of the EU Insolvency Regulation clarifies that, if a set-off is not permitted under the law of the state in which proceedings are opened, a creditor should, nevertheless, be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In our situation, it would mean that if a set-off was not permitted by the Bankruptcy Law, then the creditor would nevertheless be entitled to the set-off if it was permitted under the law applicable to the the Master Netting Agreement / the Cross-Product Master Agreement.

(d) The above rule does not, however, relate expressly to close-out netting as a legal principle different from the set-off. We understand that close-out netting is composed of two elements:

(i) the termination of the Master Netting Agreement or the Cross-Product Master Agreement and transactions (close-out), and

(ii) replacing performances under transactions effected on the basis of the Netted Agreements (in the case of the Master Netting Agreement) or the Principal Agreements (on the basis of the Cross-Product Master Agreement) with an obligation of one Party to pay the amount established as the Final Settlement Amount (netting).

(e) We, therefore, have serious doubts as to whether close-out can benefit from the carve-out provided for in article 6 section 1 of the EU Insolvency Regulation. It is highly probable that

Polish courts will not allow close-out to benefit from article 6 section 1 of the EU Insolvency Regulation.

(f) It shall be noted that EU Insolvency Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and to collective investment undertakings. Notwithstanding this similar solutions applying to credit institutions and insurance undertakings have been provided by the EU Insolvency Directive which has been implemented in the Bankruptcy Law. Special provisions with this respect, applicable to banks and insurance undertakings acting on a cross-border basis, have been adopted in article 467 and 467^1 of the Bankruptcy Law. Article 467^1 of the Bankruptcy Law contains a rule reflecting the rule of article 6 section 1 of the Insolvency Regulation, i.e. it provides that the declaration of bankruptcy will not affect the right of a creditor to set off its claims towards the bankrupt bank against the claims of the debtor if the set-off is allowed under the laws applicable to the claims of the bankrupt bank. However, an important novelty comes from article 467, providing that the netting operation (*kompensowanie*) shall be governed by the law governing contractual obligations, which is applicable to these contracts. Thus it may be argued, that with respect to banks and credit institutions conducting activity on a cross-border basis, the admissibility of close-out netting - if acknowledged in a foreign jurisdiction - is less doubtful.

1.12 Opinion on whether there is publicly available information that would confirm that the filing of proceedings seeking a judgment of insolvency, recognizing the filing of proceedings seeking a judgment of insolvency by a bankruptcy court, declaring of bankruptcy and/or any other stages of bankruptcy proceedings took place?

(a) According to Act on National Court Register (*Ustawa o Krajowym Rejestrze Sądowym*) dated 20 August 1997 (**Act on National Court Register**) the following information and facts related to insolvency matters are subject to disclosure in National Court Register (publicly admissible register):

(i) commencement of a Reorganisation Proceedings;

(ii) declaration of bankruptcy made by a court;

(iii) securing of a debtor's assets in bankruptcy proceedings by way of appointing an interim court supervisor or a compulsory administrator;

(iv) dismissal of a bankruptcy petition due the fact that assets of the insolvent debtor are not sufficient to satisfy the costs of proceedings.

(b) It shall be noted that entries made in the National Court Register are, in principle, additionally subject to disclosure in the Official Court and Commercial Journal.

(c) According to Act on National Court Register annual financial reports are required to be filed with a court and are publicly admissible.

(d) It shall be noted that documents containing information subject to disclosure in the National Court Register may be filed with the National Court Register with a delay and there may be a delay in the relevant notice appearing on the files.

Opinion on legal character of emission allowances rights

(e) The legal classification of emissions allowances is not clearly specified by Polish law. Pursuant to the Law on Trading in Rights to Emit Greenhouse Gases and other Substances into the Atmosphere (**Law on Trading in Emissions Allowances**) a "right to emit", in relation to greenhouse gases, is a right to introduce into the atmosphere, over a specified period of time, 1 Mg of CO_2 or an amount of a another greenhouse gas being equivalent to 1 Mg of CO_2, and it is a right that is transferable and can be freely disposed of. Pursuant to the Commission

Regulation, dated 18 November 2011, establishing a Union Registry for the trading period commencing on 1 January 2013 and subsequent trading periods, an allowance is a fungible, dematerialised instrument that is tradable on the market. Based on the current status of the legislation, emissions allowances should not be treated as financial instruments within the meaning of the Financial Instruments Law. However, it shall be noted that emission allowances are recognised as financial instruments under MiFID II.

(f) Based on the Law on Trading in Emissions Allowances, the National Centre for Balancing and Management of Emissions has been appointed. It administers and manages the Polish National Allowances Registry.

(g) It has to be noted that there are opinions of Polish commentators supported by the stance of Polish Accounting Standards Committee that rights to emit greenhouse gases, granted to a specific entity, should be numbered among the assets of the entity, and in particular the intangible assets. According to the Law on the Principles of Executing the State Treasury's Rights, this categorisation results in the state-owned legal entities being obliged to obtain permission from the Minister responsible for the State Treasury for the performance of legal transactions related to the transfer of assets, if their market value exceeds the Polish Zloty equivalent of EUR 50 000, calculated on the basis of the mid-exchange rate announced by the National Bank of Poland on the day on which permission was requested. A legal transaction performed in breach of this obligation is invalid. However, Polish state-owned legal entities, in response to their application for permission, obtained information from the Ministry that no such permission is required. The official standpoint of the Ministry of the subject matter has not been issued.

1.13 <u>Termination for non-insolvency based Close-Out Events</u>

<u>*Enforceability of Early Termination for a Close-Out Event (other than due to insolvency)*</u>

(a) Under the general principle of freedom of contract, expressly provided for in article 353^1 of the Civil Code, parties to an agreement may construct a contractual relationship between them as they deem proper, provided it is not contrary to:

(i) the character (nature) of such a relationship;

(ii) the mandatory provisions of the law; and/or

(iii) the "principles of social coexistence".

(b) Without going into a detailed discussion of the above limitations on the freedom of contract principle, and subject to the qualification described in par. (d) below, we believe that the right of termination for non-insolvency related Close-Out Events (i.e. Close-Out Events set out in § 3.1 of the Master Netting Agreement other than in § 3.1(C)(III) (f) of the Master Netting Agreement), applicable in such circumstances, create legal, valid and binding obligations of the parties and are enforceable.

(c) However, there are some doubts under Polish law as to the enforceability of an "assumption of delivery" (see par. (d) below), which may affect the mechanism for setting an Early Termination Date in § 5.1 (b) of the Master Netting Agreement. Therefore, in order to avoid any doubts in this respect, we recommend that any notice of Early Termination specify such Early Termination Date as a date occurring after actual delivery takes place (e.g. upon a delivery date).

(d) § 12.6 of the Master Netting Agreement and Section 8. of the Cross-Product Master Agreement 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. 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.

(e) It shall be noted that considerations made in Section I, 1.9(q) – (u) above with respect to article 84 of the Bankruptcy Law remain applicable to termination for non-insolvency based Close-Out Events.

1.14 Enforceability of close-out netting provisions in the event of Early Termination for Close-Out Events (other than due to insolvency)

(f) For the reasons given in Section I, 0 above, we are of the opinion that the close-out netting provisions in §§ 3 - 7 of the Master Netting Agreement and Sections 2 – 3 of the Cross-Product Master Agreement, applicable in the event of Early Termination for non-insolvency related Close-Out Events, create legal, valid and binding obligations of the parties and are enforceable.

1.15 Netting and set-off

A general description of limitations in Polish Law applicable to set-off of claims (both in an Early Termination scenario and otherwise)

(a) 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).

(b) A unilateral set-off can be performed if:

(i) both parties are both creditors and debtors with respect to one another (requirement of reciprocity);

(ii) the object of both debts is money or things of the same quality designated only as to their kind;

(iii) both debts are mature; and

(iv) both debts may be claimed before a court or other state authority (however, legal commentators argue that this requirement should refer only to the receivable of the party performing the set-off).

(c) As a result of the set-off, both debts shall cancel one another 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 second party's will and becomes effective when the second party receives the declaration.

(d) Please also note that there are some limitations applicable to a set-off of receivables towards State Treasury. In view of the current structure of the Polish energy market and the potential Polish counterparties to the Master Netting Agreement or the Cross-Product Master Agreement, we believe that the applicability of such specific rules in practice of use of the Master Netting Agreement or the Cross-Product Master Agreement in Poland is highly unlikely, and therefore we do not deal with them.

Set-off between Parties (of claims arising under the Master Netting Agreement or the Cross-Product Master Agreement)

(e) Set-off of claims arising under the Master Netting Agreement (in accordance with § 8 of the Master Netting Agreement) and the Cross-Product Master Agreement (in accordance with Section 4 of the Cross-Product Master Agreement) is enforceable between the Parties to the Master Netting Agreement and the Cross-Product Master Agreement, subject only to the general limitations/qualifications applicable to set-off as set out in Section I, 0 above.

Set-off between Parties (of claims arising outside the Master Netting Agreement or the Cross-Product Master Agreement if contractually provided for in an amendment to the Master Netting Agreement or the Cross-Product Master Agreement)

(f) Set-off of claims arising outside the Master Netting Agreement or the Cross-Product Master Agreement is enforceable between the Parties to the Master Netting Agreement or the Cross-Product Master Agreement, subject only to the general limitations/qualifications applicable to set-off as set out in Section 0 above.

Set-off between Affiliates or Credit Support Providers of Parties (if contractually provided for in an amendment to the Master Netting Agreement or the Cross-Product Master Agreement)

(g) Set-off of a third party claim requires a relevant agreement to be entered into with the third party.

Differentiation between set-off and close-out netting under Polish Law

(h) Polish law refers specifically to "netting clauses" in the Law on Certain Financial Collaterals (implementing Directive 2002/47/EU 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.

1.16 Payment of the Final Net Settlement Amount in a foreign currency

(a) 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 restriction will be applicable to parties form countries outside of these abovementioned international organisations.

(b) If the Master Netting Agreement or the Cross-Product Master Agreement (and subsequently the transactions effected under the Netted Agreements or the Principal Agreements) is entered into by a Polish Entity (defined for the purposes of this Section as 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:

(i) the disposal of receivables and other rights, which execution is done upon cash settlement in Poland by parties from countries outside the EU, EEA or OECD;

(ii) the purchase of receivables and other rights, which execution is done upon cash settlement by Polish Entity from parties from countries outside the EU, EEA or OECD.

(c) If transactions are concluded between a Polish Entity and another entity based in the EU, EEA or in an OECD country, it is possible to settle such transactions in any "convertible" currency. A list of convertible currencies is specified in the relevant secondary legislation and currently covers 127 currencies, including EUR, USD and GBP. Settlements in any other currencies require a prior foreign exchange permit from the President of the National Bank of Poland (**NBP**). The above requirements could only affect the use of the Master Netting Agreement or the Cross-Product Master Agreement if the parties choose to settle in a currency other than EUR.

(d) Payment determined in a foreign currency can be made in PLN unless statutory provisions of law, judgment or contract require making such payment in a foreign currency. In addition, conversion of pecuniary payments expressed in foreign currencies into PLN are to be made at the average exchange rate published by the NBP and applicable as of the date when the obligation is due and payable (maturity date), unless statutory provisions of law, judgment or contract state otherwise. In case 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.

(e) 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 such foreign currency and not in Polish zlotys, the contract shall 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, one should remember that the contract should also describe the manner of calculating the conversion rate; otherwise an average exchange rate published by the NBP on the maturity date will apply.

1.17 <u>Implementation of the EMIR Regulation into Polish law</u>

(a) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (the **EMIR Regulation**) as a European Union regulation is directly effective in Poland since 16 August 2012 without the requirement for further implementation in the form of primary legislation (act of parliament) of secondary legislation. However, legislation setting out sanctions for non-performance or improper performance of undertakings of counterparties under the EMIR Regulation in the form of amendment to the Act on Financial Instruments is net yet in force.

II. Multibranch Parties

1. Polish Multibranch Party

1.1 Additional assumptions

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

1.2 Issues to be discussed

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

(a) 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 and insurance undertakings with their seats in Poland and to investment undertakings with their centres of main interest in Poland. It may be argued that in 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 transactions that relate to assets held in Poland and other jurisdictions where no secondary insolvency proceedings are pending. The reasoning for these conclusions is clarified below.

(b) The answer to the above question depends on whether the insolvency proceedings are conducted only in Poland or simultaneously in Poland and abroad, which is related to the status of Party A:

(i) Polish banks having their branches outside Poland shall be subject to Polish insolvency proceedings only. This is due to fact that:

(A) In accordance with article 455 of the Bankruptcy Law, the bankruptcy estate shall include the bankrupt's assets located in the territory of EU and EFTA. This provision applies to Polish banks conducting activities in EU or EFTA;

(B) With respect to Polish banks carrying activities outside Poland in countries of other EU or EFTA Member States it shall be noted that in accordance with article 382 of the Bankruptcy Law, Polish courts shall have exclusive jurisdiction in bankruptcy proceedings of entities having centres of main interest in Poland. We assume, for the purpose of this opinion, that Polish banks will have their centres of main interest in Poland. However, if the centre of main interest of a Polish bank is located neither in Poland nor in EU or EFTA, then due to article 380 section 4 of the Bankruptcy Law in connection with article 455, Polish bankruptcy proceedings shall cover only those assets of such Polish bank that are located in Poland, EU or EFTA;

(ii) Polish insurance undertakings having their branches outside Poland shall be subject to Polish insolvency proceedings only. Here the same reasons apply as with respect to banks (article 455 of Bankruptcy Law applies *mutatis mutandis* to insurance undertakings);

(iii) Investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings, having their centres of interest in Poland and having their branches outside Poland shall be subject to Polish insolvency proceedings only. This is due to fact they are subject to the above discussed article 382 of Bankruptcy Law;

(iv) Other Polish entities are subject to the 1346/2000 Regulation. Therefore, courts of another EU Member State have jurisdiction to open secondary insolvency proceedings against such entities if they have establishment within territory of that Member State.

(c) Where Party A is subject to insolvency proceedings in Poland only, our conclusions reached in under C.I.1 and C.I.2 will remain unchanged, but are subject to the following reservations that, enforceability of close-out netting can be affected if exclusivity of Polish bankruptcy proceedings is not recognised outside Poland. Such scenario seems unlikely within the EU, since relevant authorities within EU are bound by 1346/2000 Regulation, Directive 2001/24/EU of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (**Credit Institutions Insolvency Directive**) and Directive 2001/27/EU of the European Parliament and the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings (**Insurance Undertakings Insolvency Directive**);

(d) Where Party A is subject to secondary insolvency proceedings outside Poland, according to the 1346/200 Regulation such foreign bankruptcy proceedings shall relate to assets located in the relevant jurisdiction. This leads to conclusion that the bankruptcy proceedings conducted by the Polish court shall relate only to assets of Party A located in Poland and in other jurisdictions where there are no secondary insolvency proceedings pending. Although there is no clear provision in Polish law with this respect, it seems probable that as a result a close-out netting following termination of the whole Master Netting Agreement or the whole Cross-Product Master Agreement will be effected separately:

(i) in Poland subject to Bankruptcy Law and only with respect to assets located in Poland and other jurisdictions where there are no secondary insolvency proceedings pending;

(ii) in a relevant foreign country, subject to bankruptcy law applicable for such jurisdiction and only with respect to assets located in that foreign country.

This position is justified by the fact that secondary insolvency proceedings shall apply only to assets located in jurisdiction where they are pending.

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

(a) The vagueness of Polish and European regulations prevents us from giving a definite answer to this question. As indicated above, it appears that in most cases, if bankruptcy proceedings are to be conducted with respect to the same entity in multiple jurisdictions, secondary proceedings pending in each country will cover only assets located in such country. Although there are no provisions regulating this matter, it may be argued that accordingly close-out netting will be restrained only to assets located in a jurisdiction where secondary proceedings are pending, whereas in Poland it will cover assets located in Poland and each jurisdiction where there are no secondary proceedings pending. Thus, even the concept of a single unified agreement would not help to conduct one close-out netting operation only in one country.

2. Foreign Multibranch Party

2.1 Additional assumptions

(a) A corporation, a bank, an investment services provider, an insurance company, an investment fund management company or any other similar financial institution (**Party F**) incorporated, organized or having its centre of main interest in a country (**Country H**) other than Poland has entered under some or all Netted Agreements or Principal Agreements into transactions both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Poland (the **Polish Branch**).

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

2.2 Issued to be discussed

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

Answers to the above questions depend on status of Party F and therefore they will be divided into separate sections.

<u>Foreign banks and credit institutions</u>

(a) <u>Credit institutions (i.e. banks with their seat in EU) shall not be subject to insolvency proceedings conducted in Poland, whereas it is admissible to conduct bankruptcy proceedings in Poland against foreign banks (i.e. banks with their seat outside EU). Only Financial Supervisory Commission may file a petition for bankruptcy of a bank;</u>

(b) In its Part III, Bankruptcy Law contains Title II, Section III entitled "Bankruptcy Proceedings in respect of credit institutions, foreign banks and Polish banks carrying activities abroad". According to article 451 of the Bankruptcy Law this Section provides for special bankruptcy regime in case of:

(v) Declaration of bankruptcy of a Polish bank, if it carries on activity also outside Poland in a EU Member State or States or in a European Free Trade Agreement (EFTA) Member State or States - parties to the European Economic Area Agreement;

(vi) Declaration of bankruptcy, opening of arrangement proceedings or other similar proceedings in respect of **a credit institution if it carries on activity in Poland**;

(vii) Declaration of bankruptcy, opening of arrangement proceedings or other similar proceedings in respect of **a foreign bank, if the foreign bank carries on activity in Poland and at least in one EU Member State or European Free Trade Agreement (EFTA) Member State - a party to the European Economic Area Agreement**.

(c) According to the Banking Law credit institutions (i.e. according to definition contained in the Banking Law: banks with their seat in the EU Member State other than Poland) may carry their activities in Poland either through their branches or by way of cross-border activities. Foreign banks may carry their activities in Poland through their branches. Thus, Party F incorporated in EU (and thus classified as a credit institution) having its branch in Poland will always meet the criteria of article 451 of the Bankruptcy Law. A foreign bank (thus incorporated outside EU) having its branch in Poland will meet the criteria of article 451 of the Bankruptcy Law provided that in addition it carries on activity in at least one EU Member State or EFTA Member State other than Poland.

(d) According to article 453 of the Bankruptcy Law Polish courts shall not have jurisdiction in bankruptcy cases of credit institutions conducting business activities or having their assets in Poland. This article is in line with the Credit Institutions Insolvency Directive. This means that there will be no separate insolvency proceedings with respect to Party F assets in Poland or its Polish branch, provided that Party F is a credit institution with its seat in EU;

(e) Bankruptcy Law does not prohibit Polish courts from conducting insolvency proceedings with respect to foreign banks. It provides for certain amendments to the general regime with respect to foreign banks meeting criteria of article 451 (i.e. foreign banks carrying activity in Poland and at least in one EU Member State or European Free Trade Agreement (EFTA) Member State - a party to the European Economic Area Agreement). In case of foreign banks having its branch only in Poland and not in any other EU or EFTA Member State, a general insolvency regime for Polish banks shall apply;

(f) By operation of article 426 of the Bankruptcy Law only the Financial Supervisory Commission (*Komisja Nadzoru Finansowego*) may file a bankruptcy petition concerning a bank.

Insurance undertakings

(a) Insurance undertakings with their seat in EU or EFTA countries shall not be subject to insolvency proceedings conducted in Poland, whereas it is admissible to conduct bankruptcy proceedings in Poland against insurance undertakings with their seat outside EU or EFTA. Individual creditors as well as the Financial Supervisory Commission may file a petition for bankruptcy of an insurance undertaking;

(b) In its Part III, Bankruptcy Law contains Title III, Section II titled "Bankruptcy Proceedings in respect of insurance undertakings and branches thereof having their seats in EU Member States or European Free Trade Agreement (EFTA) Member States - parties to the European Economic Area Agreement". According to article 481 of the Bankruptcy Law this Section provides for special regime in case of:

(i) Declaration of bankruptcy of a Polish insurance undertaking, if it carries on activity also outside Poland in a EU Member State or States or in a European Free Trade Agreement (EFTA) Member State or States - parties to the European Economic Area Agreement;

(ii) Declaration of bankruptcy, opening of arrangement proceedings or other similar proceedings in respect of **a foreign insurance undertaking having its seat in a EU Member State or States or in a European Free Trade Agreement (EFTA) Member State or States - parties to the European Economic Area** Agreement, if it carries on activity in Poland;

(iii) Declaration of bankruptcy, opening of arrangement proceedings or other similar proceedings in respect of a foreign insurance undertaking, having its seat in a state which is not a EU Member State or a European Free Trade Agreement (EFTA) Member State - party to the European Economic Area Agreement, if the **foreign insurance undertaking carries on activity in Poland and at least in one EU Member State or European Free Trade Agreement (EFTA) Member State - a party to the European Economic Area Agreement**.

Thus, Party F incorporated in EU or EFTA, having its branch in Poland will always meet the criteria of article 481 of the Bankruptcy Law. Party F incorporated outside EU and EFTA, having its branch in Poland will meet the criteria of article 481 of the Bankruptcy Law provided that in addition it carries on activity in at least one EU Member State or EFTA Member State other than Poland.

(c) According to article 481 most of the provisions relating to insolvency of foreign banks and credit institutions shall apply to insurance undertakings meeting the criteria set in article 481. Therefore, Polish courts shall not have jurisdiction in bankruptcy cases of insurance undertakings having its seat in a EU or EFTA member State conducting business activities or having its assets in Poland. This is in line with the Insurance Undertakings Insolvency Directive. This means that <u>there will be no separate insolvency proceedings with respect to Party F assets in Poland or its Polish branch, provided that Party F has its seat in EU or EFTA;</u>

(d) Bankruptcy Law does not prohibit Polish courts from conducting insolvency proceedings with respect to foreign insurance undertakings having their seats outside EU or EFTA Member States. Certain amendments to the general regime with respect to foreign insurance undertakings meeting criteria of article 481 (i.e. foreign insurance undertakings carrying activity in Poland and at least in one EU Member State or European Free Trade Agreement (EFTA) Member State - a party to the European Economic Area Agreement). <u>In case of foreign insurance undertakings having its branch only in Poland and not in any other EU or EFTA Member State, a general insolvency regime for Polish insurance companies shall apply;</u>

(e) <u>By operation of </u>article 471 of the Bankruptcy Law in connection with article 20 of the Bankruptcy Law a bankruptcy petition concerning an insurance undertaking may be filed either by a creditor of the insurance undertaking or by the Financial Supervisory Commission.

<u>Investment undertakings which provide services involving the holding of funds or securities for third parties and to collective investment undertakings</u>

(a) <u>Foreign investment undertakings may be subject to insolvency proceedings conducted in Poland. A creditor of an investment undertaking may file a petition for its bankruptcy;</u>

(b) Contrary to credit institutions and insurance undertaking, Bankruptcy Law does not provide for special regime applicable to bankruptcy proceedings of foreign investment undertakings. Therefore they are subject to general regime of Part II of the Bankruptcy Law titled "Provisions in the field of international bankruptcy proceedings";

(c) In accordance with article 382 item 2 of the Bankruptcy Law Polish courts shall have jurisdiction if the debtor who conducts economic activity has its seat or assets in Poland. However, by virtue of article 380 item 4 of the Bankruptcy Law, if the main centre of interest of the debtor is located outside Poland, the bankruptcy proceedings conducted by the Polish court shall relate only to assets of the debtor located in Poland. General rules apply as to authority to initiate proceedings, thus, local creditors may initiate secondary proceedings even if the relevant authorities in Poland fail to do so;

(d) By operation of article 20 of the Bankruptcy Law a bankruptcy petition concerning an investment undertaking may be filed by a creditor of the investment undertaking.

Other entities

(a) Other entities may be subject to insolvency proceedings conducted in Poland. A creditor of such an entity may file a petition for its bankruptcy.

(b) In case of entities other than:

(viii) credit institutions;

(ix) insurance undertakings;

(x) investment undertakings which provide services involving the holding of funds or securities for third parties; and

(xi) collective investment undertakings

but having their seats in EU Member states, the Council Regulation (EU) No 1346/200 of 29 May 2000 on insolvency proceedings (**Regulation 1346/2000**) shall apply. If such entity has its seat outside EU, the conclusions as to investment undertakings above shall apply - i.e. an entity shall be subject to general Polish bankruptcy regime and provisions of Regulation 1346/2000 or provisions of Bankruptcy Law implementing Credit Institutions Insolvency Directive or Insurance Undertakings Insolvency Directive shall be disregarded.

(c) According to article 3 of the Regulation 1346/2000, Polish courts shall have jurisdiction to open insolvency proceedings (**secondary proceedings**) against debtor having its centre of main interest in other EU Member State only if the debtor possesses an establishment in Poland. The effects of secondary proceedings shall be restricted to the assets of the debtor situated in the territory of Poland. Opening of secondary proceedings may be requested by any person empowered to request the opening of insolvency proceedings under laws of Poland, thus given the regulation of Polish Bankruptcy Law, local creditors may initiate secondary proceedings even if the relevant authorities in Poland fail to do so;

(d) By operation of article 20 of the Bankruptcy Law a bankruptcy petition concerning such other entities may be filed by a creditor of the entity.

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

(a) In accordance with article 380 item 4 of the Bankruptcy Law, if the main centre of interest of the debtor is located outside Poland, the bankruptcy proceedings conducted by the Polish court shall relate only to the debtor's assets located in Poland. We assume, for the purpose of further analysis, that rights under transactions concluded by Polish Branch of Party F are located in Poland. Therefore, only receivables arising under transactions of the Party F Polish Branch will be included in the assets being subject to Polish insolvency proceedings, whereas receivables arising under transactions of Party F's main centre of interests will not be subject to Polish insolvency proceedings. However, taking into account that transactions concluded by the Polish Branch of Party F are entered into under the Master Netting Agreement or the Cross-Product Master Agreement, it is not possible to exclude that the whole Master Netting Agreement or the whole Cross-Product Master Agreement will be terminated on the basis of the occurrence of Close-Out Event. This is because evocation of Close-Out Event results in dissolution of the Master Netting Agreement or the Cross-Product Master Agreement and underlying transactions;

(b) Although there is no clear provision in Polish law in this respect, it seems probable that close-out netting following termination of the whole Master Netting Agreement or the whole Cross-Product Master Agreement will be effected separately:

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

(ii) in Country H, subject to bankruptcy law applicable to Party F's head office and only with respect to transactions concluded by Party F's head office and its other branches where there are no secondary insolvency proceedings pending.

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

C. *Please consider your answer to your question assuming instead that Party F has no branch located in Poland, but has assets in Poland.*

(a) Credit institutions: Credit institutions may conduct their banking activities in Poland only through branches or by way of cross-border activities. Both situations are covered by the special provisions of Bankruptcy Law applicable to credit institutions and referred to above. However, there is indeed a possibility that a credit institution has its assets in Poland although it does not conduct banking activities (and thus has neither branch nor conducts cross-border activities). In accordance with article 42 of the Banking Law, credit institutions and foreign banks may open agencies. The agency' scope of activities may comprise only advertising and promotion of the credit institution or the foreign bank. By virtue of article 453 of the Bankruptcy Law Polish courts shall not have jurisdiction in bankruptcy matters relating to credit institutions having assets in Poland, thus the above conclusion that credit institution shall not be subject to Polish bankruptcy proceedings remains unchanged;

(b) Insurance undertakings: Foreign insurance undertakings may conduct insurance activities in Poland only through branches. Therefore, it is unlikely for a foreign insurance undertaking to have assets in Poland and have no branch in Poland, although it is not impossible. By virtue of article 453 of the Bankruptcy Law, applied *mutatis mutandis* to foreign insurance undertakings with their seats in EU or EFTA members, they shall not be subject to Polish bankruptcy proceedings;

(c) Investment undertakings: In accordance with article 382 item 2 of the Bankruptcy Law Polish courts shall have jurisdiction if the debtor conducts economic activity, has its seat or assets in Poland. Therefore, conclusions with respect to a foreign investment undertaking having assets in Poland but having no branch in Poland remain unchanged, i.e. they may be subject to bankruptcy proceedings in Poland;

(d) Other entities: According to article 3 of the Regulation 1346/2000, Polish courts shall have jurisdiction to open secondary proceedings against debtor having its centre of main interest in other EU Member State only if the debtor possesses an establishment in Poland. Therefore, it is inadmissible to open secondary proceedings in Poland with respect to an entity not having a branch in Poland.

III. Collateral

3.1 Additional assumptions

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

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

3.2 Issues to be discussed

A. *Under the laws of Poland, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Cross Product Credit Support Annex?*

(a) General remarks: Regulation (EU) 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**) entered into force in the member states of the European Union, including Poland on 25 July 2008 and became directly effective from 17 December 2009. Rome I Regulation is applicable to contractual obligations in civil and commercial matters and superseded in that respect the Rome Convention dated 19 June 1980. Pursuant to the aforementioned Article 3 of the Rome I Regulation, the parties are free to choose a law to govern their contractual obligation without the necessity to establish a link between the agreement and the law chosen by the parties as required by the Polish Private International Law. In the absence of the choice of law, the agreement shall be governed by the law of the country where the party required to perform under the contract the characteristic performance has habitual residence;

(b) Cash: 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 terms and in accordance with the agreement on bank account maintenance and therefore is governed by the laws of Poland.

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

(a) In accordance with article 84 item 2 of the Bankruptcy Law, a contract for the transfer of ownership of a property, receivable or other rights shall be effective against the bankruptcy estate if executed in writing with a certified date. Since 20 July 2011, article 84 item 3 provides an exception to this rule. Collaterals established on the basis of the Act on Certain Financial Collaterals and meeting its requirements do not need to be executed in writing with a certified date in order to be effective against the bankruptcy estate.

(b) By virtue of article 70[1] of the Bankruptcy Law property, receivable or other rights transferred in order to secure claims shall not be excluded from the bankruptcy estate, but shall be subject to provisions relating to pledged assets, to be applied *mutatis mutandis*. At the same time there are no special form requirements to create a financial pledge over rights. Therefore, it is possible that a court would re-characterise an improperly executed transfer of rights into a transfer of rights governed by the Act on Certain Financial Collaterals or a financial pledge. An argument in favour of such re-characterisation into a financial pledge would be that a financial pledge with an option of a right of use of pledged assets has certain similarities to an outright transfer. A right of use means that a pledgee may exercise rights to the pledged asset and dispose of the asset. Following the disposal the pledgee shall be only obliged to replace the collateral with an appropriate equivalent by the time of fulfilment of the obligation secured by the pledge. However, if an enforcement event occurs, the obligation to return the equivalent collateral may be subject to set-off. Therefore, re-characterisation of the transfer of collateral into transfer of collateral governed by Act on Certain Financial Collaterals or or a financial pledge may be regarded as a remedy for a transfer executed without formal requirements which would otherwise be ineffective against the bankruptcy estate. The re-characterization into a financial pledge seems much less likely if the financial pledge does not provide for a right of use. Additionally, risk of re-characterisation is diminished due to § 7 item of the CSA, which provides that nothing in the CSA is intended to create or does create pledge or other security interest.

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

(a) As noted above security transfer requires certification of date in order to be effective against the bankruptcy estate and in order to be treated as a pledge (except for collaterals established on the basis of the Act on Certain Financial Collaterals). It means that certification of date will not result in exclusion of transferred assets from the bankruptcy estate in case of bankruptcy but the transferee will only enjoy the same rights in the bankruptcy proceedings as a pledgee enjoys with respect to pledged assets. It is not possible to conclusively determine how the provisions on pledge will be applied in case of the title transfer. The provision that may be regarded as the most significant with respect to the issue of treatment of pledged assets in bankruptcy provides that sums obtained from liquidation of assets encumbered with pledge shall be firstly used to satisfy claims of creditors secured by pledge. Only remaining sums (if any) shall be included in the bankruptcy estate (article 336 of the Bankruptcy Law). It may be anticipated that application of the above provision to transfer of title would probably lead to a solution, where the receiver shall liquidate the transferred assets and use obtained sum to satisfy claims of the transferee secured by the transfer. Only upon a full satisfaction of the claim secured by the title transfer may the receiver include the remaining amount in the bankruptcy estate;

(b) Under Polish law there are two most typical ways of certifying a date, i.e. certification executed by a notary, or by a Polish bank. The latter option is admissible only with respect to banking operations or acts securing bank's receivables;

(c) It shall be stressed that it is not only the CSA which requires a date certification, but each collateral transfer executed thereunder;

(d) With respect to financial pledge there are no formal requirements as to its creation, however financial pledge shall be recorded on the appropriate account or other register where the pledged asset is located. It shall be noted, that financial pledge cannot be established by a pledgor being an individual and at least one party to the agreement on establishment of financial pledge shall be a financial institution falling into one of categories listed in the Act on

Certain Financial Collaterals. Among entities specified in Appendix A the following ones shall be classified as authorised to provide or take financial collateral:

(i) Banks/credit institutions;

(ii) Investment services providers/investment firms;

(iii) Insurance companies;

(iv) Investment fund management companies;

(v) Municipalities, counties, association of local government, quasi-governmental entities - only provided that they are charged with or intervening in the management of public debt or authorised to hold accounts for customers.

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

(a) If a collateral is replaced by a new one, it might be regarded as an event inherently involving creation of a new security. This would have an important impact on effectiveness of the collateral due to so called "suspect periods" applicable under Polish law by virtue of article 127 of the Bankruptcy Law. Pursuant to article 127 section 1 of the Bankruptcy Law, acts in law made by the bankrupt for one year prior to the date the petition for bankruptcy is filed, whereby the bankrupt disposed of assets, shall be ineffective against the bankruptcy estate if such acts were made without payment, or with payment if the value of bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the bankrupt or a third party. Further, pursuant to the first sentence of article 127 section 3 of the Bankruptcy Law, the bankrupt's payment of a non-matured debt or securing such debt within two months before a petition for bankruptcy is filed is ineffective against the bankruptcy estate. However, the above provisions shall not apply to creation of security occurring before the date of declaration of bankruptcy in connection with the financial terms operations or borrowing or sale of financial instruments involving undertaking for their repurchase, referred to in article 85 of the Bankruptcy Law. Thus, provided that transactions entered into under the Master Netting Agreement or the Cross-Product Master Agreement are classified as financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase, the rights of replacement of collateral as stipulated in § 6 of the CSA will not affect effectiveness of security created under the CSA. Presence or absence of consent of the Transferee for the replacement does not affect the above analysis. However, it shall be noted that § 6 of the CSA provides that the replacement of collateral shall be subject to approval of the Transferee (not unreasonably to be withheld). Given the abovementioned conclusions and taking into account absence of absolute certainty as to status of transactions as financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase within the meaning of article 85 of the Bankruptcy Law, it may be argued that it is always reasonable for the Transferee to withheld approval for replacement of collaterals.

E. *Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by Section 4 of the Cross-Product Master Agreement together with §11 of the EFET Cross Product Credit Support Annex. Assuming that Section 4 of the Cross-Product Master Agreement is valid and enforceable in Poland insofar as it relates to the determination of a Final Net Settlement Amount payable by either Party on the termination of transactions, is § 11 of the EFET Cross Product Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of the Final Net Settlement Amount under Section 4 of the Cross-Product Master Agreement?*

(a) We assume that the reference in the above question to a collateral "provided but not yet transferred" shall be read as a reference to Letters of Credit that have been provided by the Party A, but whereupon no payment has been effected by the bank issuing the Letter of Credit.

(b) A detailed discussion on admissibility of including the amount of collaterals in the close-out netting mechanism is covered in par. F(a) below. The arguments for and against such solution shall apply *mutatis mutandis* to collaterals provided but not yet transferred, however there is an additional issue which shall be raised.

(c) The receivables of the Transferor for waiver, amendment, revocation or return of collateral are non-pecuniary ones. They transform into pecuniary ones as of the date of the bankruptcy declaration thus - with reservations provided for in par. F(a) below - admissibility of them being covered by the close-out netting mechanism may be considered. However, if the termination of the Master Netting Agreement or the Cross-Product Master Agreement was caused by reason other than declaration of bankruptcy, the receivable of the Transferor does not transform into pecuniary one and thus cannot be covered by the close-out netting mechanism.

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

(a) Enforcement of rights relating to collaterals involves application of the close-out netting mechanism provided for in the Master Netting Agreement or the Cross-Product Master Agreement. As indicated above, admissibility of close-out netting does not raise any doubts if it occurs prior to declaration of bankruptcy. Following declaration of bankruptcy, in accordance with article 85 of the Bankruptcy Law, the termination of a master agreement and settlement as provided therein is recognised provided that the transactions performed under the master agreement are "financial term operations" or "contracts for the sale or borrowing or sale of financial instruments involving undertaking for their repurchase". Until 20 July 2011 It remained doubtful whether collateral transactions could be treated as financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase. It could be argued that article 85 was to cover only *per se* derivatives, and not any transactions entered into to secure claims arising under derivatives. Starting from 20 July 2011, when Act of 28 April 2011 on Amendment of the Bankruptcy Law came into force, it is justified to say the close-out netting of collaterals is recognised also in bankruptcy. The close-out amount would be now calculated not only in relation to derivatives/repos only (as explicitly allowed under Article 85) but also to the claims to return (or be returned) the collateral. This result is achieved by adding a new provision of article 85a of the Bankruptcy Law which provides that the declaration of bankruptcy of the debtor shall be without prejudice to rights arising from any close-out netting provision in the contract referred to in the Financial Collateral Act. The "single agreement" concept deployed in many master agreements or close-out netting provisions in such agreements enhances arguments supporting enforceability of close-out netting in respect of collateral arrangements, however in our view itself it is not sufficient in bankruptcy of Polish entities to overcome this potential risk of calculation of the close-out amount without taking into account collateral arrangements. The risk that close-out netting clauses (solely insofar as they pertain to collateral arrangements) could, at least in some cases, be void in relation to Polish entities upon the declaration of their bankruptcy is often referred to as the Collateral Netting Risk. Due to introduction of article 85a of the Bankruptcy the Collateral Netting Risk is no longer applicable. However, even prior to 20 July 2011 practitioners raised a number of arguments supporting the concept upon which collateral arrangements shall not be excluded from the close-out netting mechanism. These arguments shall not be now disregarded, as they enhance and support the conclusion arising under new article 85a of the Bankruptcy and thus are discussed below;

(b) Firstly, article 127 item 4 of the Bankruptcy Law expressly provides that provisions of article 127 item 1-3 (providing for ineffectiveness towards bankruptcy estate of security created prior to bankruptcy declaration within so called suspect period) shall not apply to creation of security prior to bankruptcy declaration date, effected in connection with the financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase, referred to in article 85 of the Bankruptcy Law. Thus, security transfer of collaterals shall be recognised, however an important reservation shall be made. Starting from 2 May 2009 recognition of security transfer of title no longer implies that the transferred assets shall be excluded from the bankruptcy estate, but shall only be treated as pledged assets within the bankruptcy assets. Therefore, it may be argued that the sole application of article 127 item 4 of the Bankruptcy Law is not persuasive as to admissibility of close-out netting with respect to collaterals. Moreover, article 127 item 4 of the Bankruptcy could be relied on only if collateral provider is provided by the further bankrupt party, i.e. Party A;

(c) Another argument for admissibility of close-out netting with respect to collateral amount relies on article 93 item 1 of the Bankruptcy Law which provides that the bankrupt's receivable may be set-off with the receivable of the bankrupt's creditor, if both receivables existed on the day of the declaration of bankruptcy, even if the enforceability date of one of them has not yet occurred. It seems justified to claim that the receivable for return of collateral exists from the actual transfer of collateral and it only becomes enforceable when the secured claim amount under the Master Netting Agreement or the Cross-Product Master Agreement is set. Thus claim for a return of collateral meets criteria of application of article 93 item 1 of the Bankruptcy Law. The receivable to pay the close-out amount (calculated with respect to the Master Netting Agreement or the Cross-Product Master Agreement only, not including claims under the CSA) does not meet criteria of article 93 item 1 of the Bankruptcy Law if it arises only upon termination the Master Netting Agreement or the Cross-Product Master Agreement effected after bankruptcy declaration. However, this receivable shall not be subject to article 93 item 1 of the Bankruptcy Law, but shall benefit from less strict regime of article 85 item 4 of the Bankruptcy Law, which provides that the settlement amount arising under the terminated contracts performed under the master agreement, may be subject to set-off without any further requirements;

(d) Although provision of article 93 section 1 of the Bankruptcy Law provides some argument supporting admissibility of covering the receivables under the CSA by the close-out netting, the criteria of application of this provision raise certain doubts whether collaterals provided under the CSA could be netted. This doubt is justified by the fact that set-off, referred to in article 93 section 1 of the Bankruptcy Law, is admissible only with respect to receivables existing on the date of declaration of bankruptcy. Therefore, it shall be noted that following declaration of the bankruptcy, security transfer of title shall be regarded as pledge, i.e. transferred assets are treated not as a part of Transferee's assets, but as part of bankruptcy estate, however encumbered by the pledge in favour of the Transferee. This might lead to conclusion, that following bankruptcy declaration, the receivable of the Transferor for re-transfer and return of transferred assets, in accordance with the security transfer agreement, ceases to exist. On the date of declaration of bankruptcy transferred assets become, by virtue of law, a part of bankruptcy estate - even though they are still deposited at the Transferee account and technically shall be re-transferred into the account of the bankruptcy estate. Because of that a financial pledge with the right of use seems safer here. Following the execution of the right of use, the pledgee may become the owner of pledged assets and be only obliged to return an equivalent of pledged assets. Financial pledge is not subject to any transformation due to declaration of bankruptcy, thus it may be argued that the receivable of the pledgor for return of equivalent of pledged assets which have been transferred into the account of the pledgee in execution of the right of use, shall continue its existence following the bankruptcy and thus the criteria of article 93 section 1 of the Bankruptcy Law shall be met.

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

(a) Polish Bankruptcy Law provides that a creation of security (which shall cover also security transfer of title to assets) is ineffective towards bankruptcy estate if performed within certain periods, traditionally referred to as "suspect periods". Pursuant to article 127 section 1 of the Bankruptcy Law, acts in law made by the bankrupt for one year prior to the date the petition for bankruptcy is filed, whereby the bankrupt disposed of assets, shall be ineffective against the bankruptcy estate if such acts were made without payment, or with payment if the value of bankrupt's performance grossly exceeds the value of the performance received by the bankrupt or reserved for the bankrupt or a third party. Further, pursuant to the first sentence of article 127 section 3 of the Bankruptcy Law, the bankrupt's payment of a non-matured debt or securing such debt within two months before a petition for bankruptcy is filed is ineffective against the bankruptcy estate. The above suspect periods are not applicable to creation of security prior to bankruptcy declaration date in connection with the financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase, referred to in article 85 of the Bankruptcy Law. Thus suspect periods will not affect effectiveness of collaterals provided that transactions performed under the Master Netting Agreement or the Cross-Product Master Agreement are classified as financial term operations or borrowing or sale of financial instruments involving undertaking for their repurchase;

(b) There is a risk that in case of replacement of collateral by a new asset, the suspect period will start to run from the beginning with respect to such newly transferred assets. This is due to fact that replacement of collateral, in most cases, shall be regarded under Polish law as involving a new act in law which creates new security. It refers to a transfer of title or issue of a new letter of credit. It may be argued that a creditor would not face such risk in case of a financial pledge over bank account which is created only once and shall cover amounts deposited on the account at given time. However the above argument could be challenged;

(c) According to the prevailing opinion of Polish scholars a suspect period, referred to in article 127 item 3 of the Bankruptcy, applies only to the creation of security which secures debt which was unenforceable but was already existing at the date of security creation. It shall not apply to the creation of security which secures a newly acquired debt;

(d) 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 against the bankruptcy estate, if it had not been aware of the existence of grounds for bankruptcy. This leads to conclusion, that Party B could be protected in certain situations against negative consequences of suspect periods. It will be however difficult in case of those entities which have access to information concerning overall business and financial situation of their counterparties, i.e. especially in case of banks maintaining bank accounts or granting loans to their counterparties.

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

(a) CSA is an appropriate form to create the outright transfer of ownership in the collateral. In addition to requirements to be observed in Poland in order to ensure validity of such transfer as specified above, under certain circumstances, parties to the CSA shall obtain a foreign exchange permit to ensure validity of settlement of transactions entered under the CSA. If transactions specified in the CSA are concluded between a Polish entity and another entity based outside the EU, EEA or OECD country, they might be classified in accordance with the act of 27 July 2002 - Foreign Exchange Law (**Foreign Exchange Law**) as transactions of transfer of receivables exercised by financial settlement and thus admissible upon receipt of a foreign exchange permit. On the other hand, it shall be noted that the recent developments in law have relieved the regime of the Foreign Exchange Law. Specifically, due to amendment of the Foreign Exchange Law, effective as of 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.

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

(a) Due to reasons detailed above, parties entering into the CSA may consider amending provisions of the CSA, whereunder a financial pledge with rights of use may be established as a security which would secure exposure of parties under the Netted Agreements or Principal Agreements.

IV. General Enforceability

General remarks

(a) Based on the assumptions and subject to qualifications set out in this opinion, we are of the opinion that each the Master Netting Agreement, the Cross-Product Master Agreement and the Cross-Product Credit Support Annex constitute a legally valid and binding agreement. Unless otherwise stated in this opinion, our review of each of the Master Netting Agreement, the Cross-Product Master Agreement and the Cross-Product Credit Support Annex has not revealed any provisions that apparently violate Polish law.

Enforceability of provisions on non-performance due to Force Majeure

(a) Provisions on non-performance due to Force Majeure (applicable to the Master Netting Agreement and the Cross-Product Master Agreement if not excluded from the Close-Out Events) are enforceable under Polish law.

4.2 Impossibility of performance

(a) Polish law differentiates impossibility of performance existing *ab initio*, from the moment of the execution of a contract, and impossibility that occurred after a contract has been entered into. Impossibility of performance exists only if it is objectively impossible to perform obligations arising from the contract and it is impossible for anyone, not just for a given party to the contract in question. Insolvency and an inability to pay debts do not constitute impossibility of performance.

(b) If the impossibility of performance existed *ab initio*, the contract is null and void. If a party to such a contract was aware of the impossibility of performance at the time of its execution and did not inform the other party about it, such party is liable to redress the damage incurred by the other party by having entered into the contract while unaware of the impossibility of performance.

(c) If the performance of a party to a contract becomes impossible after the contract is entered into ("subsequent impossibility of performance"), as a result of circumstances for which such party is not responsible, as a general rule the respective obligations of the parties are terminated. In the case of a partial impossibility, the relevant parts of the parties' corresponding obligations are terminated. However, if partial performance by the party affected by the impossibility would have no significance for the other party in view of the nature of the obligation or in view of the intended purpose of the contract, known to the party the performance by which has become partly impossible, the other party can rescind the agreement.

4.3 Impracticability of performance

(a) Pursuant to article 357^1 of the Civil Code, if, following an extraordinary change of circumstances, the performance of an obligation would involve excessive difficulties or would threaten one of the parties with a flagrant loss, which the parties did not foresee when entering into the contract, the court may, after considering the interests of the parties and taking into account the principles of equity, define how the obligations are to be performed and the degree of performance, and even decide upon the termination of the contract (*the rebus sic stantibus* *principle*). However, many legal commentators in Poland currently support the view that article 357^1 of the Civil Code is not a mandatory one (i.e. does not have a *ius cogens nature*) and the parties to a contract may elect not to apply article 357^1 of the Civil Code to their agreement. Unfortunately, to our knowledge this opinion has not been to date confirmed by any court decision.

(b) Therefore:

(i) the parties to the Master Netting Agreement may contemplate adding a new §3.3 of the Master Netting Agreement and with the following wording:

"3. **Exclusion of Article 357^1 of the Civil Code.** Article 357^1 of the Civil Code will not apply to any obligation of a Party under or in connection with this Master Netting Agreement, and each Party undertakes not to make any claims for a modification to the method or the scope of performance of its obligation, or to demand termination of its obligation under or in connection with this Master Netting Agreement due to an extraordinary change of circumstances."; and

(ii) the parties to the Cross-Product Master Agreement may contemplate adding a new Section 2.3 of the Cross-Product Master Agreement and with the following wording:

"2.3 **Exclusion of Article 357^1 of the Civil Code.**

Article 357^1 of the Civil Code will not apply to any obligation of a Party under or in connection with this Cross-Product Master Agreement, and each Party undertakes not to make any claims for a modification to the method or the scope of performance of its obligation, or to demand termination of its obligation under or in connection with this Cross-Product Master Agreement due to an extraordinary change of circumstances."

V. Confirmation Practices

5.1 Additional assumptions

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

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

5.2 Binding transaction

General remarks

(a) Below, we outline selected principles for the conclusion and settlement of commercial transactions that would apply if Polish Law were chosen to govern the Cross-Product Master Agreement and the Cross-Product Master Agreement. Should the transactions be submitted to another jurisdiction, however, then the respective requirements for conclusion and settlement of transactions would need to be analysed in the light of the Polish conflict of laws provisions.

(b) If Polish law governs an electricity or allowances trading transaction, then the rules of the Civil Code would apply to such a transaction. In particular, the Civil Code's provisions regarding the ability of individuals and legal entities to contract, the manner of entering into agreements and the form of agreements, general provisions regarding the performance of agreements, as well as contractual and tort liability would apply to such transactions. The Civil Code also regulates a number of typical agreements, including sale agreements, exchange (swap) agreements, agency agreements, guarantee agreements etc.

(c) It is a general rule applicable to contracts entered into under, and governed by, Polish law that, in the absence of the parties' agreement, the provisions of the Civil Code (or other applicable regulations) apply to, and govern, all issues left unregulated by the parties. In this sense, there are a number of implied terms and conditions that apply to a contractual relationship, depending on the nature of this relationship. A thorough analysis of all of these implied terms and conditions would exceed the scope of this opinion. As an example, under the Civil Code, in the absence of specific arrangements between parties, interest on a delay in payment is due by operation of law, in the statutory amount. Other provisions of the Civil Code allow for the "silent acceptance" of an offer - if a business entity receives an offer within the scope of its business from an offeror with whom it remains in a continuous business relationship, then its silence is deemed to constitute an acceptance of the offer.

(d) Pursuant to article 68^2 of the Civil Code a contract may be concluded if an offer is deemed to be accepted. In accordance with this concept, an offer is deemed to be accepted, and a new contractual relationship is created, if:

(i) the offer is received by a business entity;

(ii) the offeror maintains a regular business relationship with the offeree;

(iii) the offer relates to the line of business of the offeree; and

(iv) the offeree does not immediately respond to the offer.

(e) Please also note that, as described above, article 68^2 of the Civil Code provides for the possibility of a contract being concluded if an offer is deemed to be accepted.

(f) Although it is not expressly stated in the above article of the Civil Code, we believe that in certain circumstances it could also apply to offers relating to the modification of existing contracts.

Issues to be discussed

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

(a) Generally, under Polish law parties are free to execute agreements in any form (statutory exceptions relate to the transfer of real property or transfer of an enterprise for example, but not to the sale of electricity or emission allowances). Consequently, as a rule, an oral agreement between the parties leads to the conclusion of a valid and binding contract just as written agreements do. For the purpose of reaching a valid and binding contract, there is no need to have the oral agreement taped, although for evidentiary purposes it is advisable to have an agreement recorded on tape or in writing. A signature is required only if the need to employ the written form is a statutory requirement or was introduced by the parties.

(b) With respect to agreements on the sale of electricity or emission allowances no requirements as to the form are present.

B. *At what point in time does an transaction agreed upon orally become legally binding or enforceable?*

(a) Assuming that the confirmation does not modify the contents of the orally pre-agreed transaction, then the moment of reaching an oral agreement is decisive.

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

(a) As a rule, it is not possible to unilaterally modify a pre-agreed valid and binding contract by way of a confirmation. However, there is an exception for transactions entered into between two business entities (a business entity is an individual, legal entity or other organisation conducting business activity in its own name) in a form other than written (for example: orally, or through an exchange of electronic documents not signed with an electronic signature).

(b) Pursuant to the Civil Code, if a contract concluded between business entities without observing the written form is immediately confirmed by one of the parties in a written document addressed to the other party, and such a document contains no amendments or supplements to the contract which significantly amend its contents, the parties are bound by the contract rendered in the wording determined in the confirmation, unless the other party immediately objects to it in writing.

D. *Is the reference to a Netted Agreement or Principal Agreement sufficient for the inclusion of the transaction in the Agreement?*

(a) Such reference is sufficient for the inclusion of the transaction in the Master Netting Agreement and the Cross-Product Master Agreement.

5.3 Means of Evidence

General remarks

(a) The Polish Civil Procedure Code provides for the principle of unrestricted evaluation of evidence. Therefore the court evaluates the credibility and the power of the evidence in accordance with its own conviction after thorough contemplation of the collected evidence material. In the doctrine it is accented that the frames of the principle of unrestricted evaluation of evidence are drawn by the provisions of procedure law, life experience, rules of logical reasoning and a certain level of legal awareness by which the court in an unbiased, rational and thorough manner contemplates the whole evidence material.

(b) The Polish Civil Procedure Code does not provide for a closed catalogue of means of evidence, therefore anything that may prove the fact in question may be presented in court and will be subject to the courts evaluation. Some means of evidence like witness' statement are regulated more thoroughly.

Taped recording

(a) A taped recording is *expressis verbis* eligible for rendering evidence in court and is subject to unrestricted evaluation of evidence of the court.

Witness' statement

(a) A taped recording is eligible for rendering evidence in court, however, with certain limitations. If a statute or another agreement prescribe written form for the legal action (as concluding an transaction) a witness' or parties' hearing on the fact of its conclusion is possible only if the document was lost, destroyed or taken by a third party. A witness' or parties' hearing against the merit of the document is possible only if it does not lead to the circumvention of the provisions on mandatory written form (does not apply to transactions nor the Master Netting Agreement / the Cross-Product Master Agreement) and if for specific reasons the court will hold it necessary.

E-mail or other electronic message or transaction entry system and facsimile

(a) An e-mail or other electronic message or transaction entry system and facsimile are under the general provisions on other means evidence than those mentioned explicitly in the Civil Procedure code eligible for rendering evidence in court and are subject to unrestricted evaluation of evidence of the court.

6 Core Provisions

6.1 Additional assumptions:

As provided in Part C.I.1 and C.II.2.

6.2 Issued to be discussed

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

(a) Given the fact that each the Master Netting Agreement and the Cross-Product Master Agreement may widely be modified by selecting from the optional provisions or inserting specifically negotiated changes in the Election Sheet (in the case of the Master Netting Agreement) or in the Schedule (in the case of the Cross-Product Master Agreement), it is impossible to render an exhaustive and final legal opinion that would cover all possible alterations to the the Master Netting Agreement and the Cross-Product Master Agreement.

(b) This legal opinion must, therefore, be strictly limited to the issues addressed herein, which we have reviewed in accordance with your instructions and which we have deemed important and necessary to fit the purpose of this opinion regarding the standard form of the Master Netting Agreement and the Cross-Product Master Agreement.

(c) Even a material alteration of the Master Netting Agreement or the Cross-Product Master Agreement does not necessarily imply that the conclusions reached in our legal opinion are inapplicable to such altered contracts. Whether or not alterations to the Master Netting Agreement or the Cross-Product Master Agreement would affect the conclusions in this legal opinion can only be assessed taking into account the individual modifications proposed.

(d) It shall be noted that with respect to § 3.1 (*Other Master Netting Agreement Default Events*) and § 3.1(C)(VII) of the Election Sheet of the Master Netting Agreement we can not anticipate all possible additional Close-Out Events the parties could agree on. Nevertheless, conclusions reached in this opinion remain relevant since each additional Close-Out Event will be subject to Polish law regulations discussed therein.

Possible alterations of conclusions reached in relation to Close-Out Netting

(e) Having reviewed the content of Election Sheet of the Master Netting Agreement we identified certain alterations which relate to Master Netting Agreement's provisions discussed in Section (*Enforceability of Close-Out Netting*) above. These are alterations of § 3.1 of the Election Sheet of the Master Netting Agreement. We have not identified alternations to the Cross-Product Master Agreement which could have impact on this opinion.

(f) The conclusions reached in this opinion in Section C.I (*Enforceability of Close-Out Netting*) will not be affected by a modification of the Master Netting Agreement to the effects stipulated § 3.1 of the Election Sheet of the Master Netting Agreement. This is a consequence of the fact that in Section C.I we discussed the broadest possible content of the Master Netting Agreement with respect to § 3.1 of the Election Sheet of the Master Netting Agreement.

Possible alterations of conclusions reached in relation to Mulitbranching

(g) The conclusions reached in this opinion in Section C.II (*Multibranch Parties*) will not be affected by a modification of the Master Netting Agreement to the effects stipulated in § 3.1 of the Election Sheet of the Master Netting Agreement. We have not identified alternations to the Cross-Product Master Agreement which could have impact on this opinion.

Possible alterations of conclusions reached in relation to Collaterals

(h) The conclusions reached in this opinion in Section C.III (*Collateral*) will not be affected by a modification of the Master Netting Agreement to the effects stipulated in § 3.1 of the Election Sheet of the Master Netting Agreement. We have not identified alternations to the Cross-Product Master Agreement which could have impact on this opinion.

(i) Issue of adopting or deleting the right of substitution is discussed in par. 3.2 (D)(a).

B. *Considering your conclusions reached under Part C.I or C.II. (Enforceability of Close-out Netting), what are the provisions of the EFET Master Netting Agreement or the Cross-Product Master Agreement that you regard as so essential that a material alteration thereof could affect the conclusions reached in that Part C.I or C.II (each such provision a "Core Provision")? We believe that the following provisions are Core Provisions: § 3 - § 8, § 11 and the related definitions contained Annex 1 to the Master Netting Agreement and Section 2 – 4 of the Cross-Product Master Agreement.*

(j) We have been asked to identify any provisions of the Master Netting Agreement and the Cross-Product Master Agreement that we regard as so essential to the Master Netting Agreement and the Cross-Product Master Agreement that a material alteration thereof (or any other arrangement that could have the effect of modifying such provision) could affect the conclusions reached in this opinion (each such a provision and such provisions together a **Core Provision**).

(k) We have been asked to confirm that any modification to any provision of the Master Netting Agreement and the Cross-Product Master Agreement that is not a Core Provision would not affect our conclusions reached in this opinion (each such provision and such provisions together a **Modifiable Provision**).

(l) We assume that any modification to any Modifiable Provision would not have the effect of modifying any Core Provision.

(m) We believe that the following provisions contained in the Master Netting Agreement are Core Provisions: § 3 - § 8, § 11 of the Master Netting Agreement.

(n) We believe that the following provisions contained in the Cross-Product Master Agreement are Core Provisions: Sections 2 – 4 of the Cross-Product Master Agreement.

(o) We believe that modifications to any Modifiable Provision would not affect our conclusions reached in this opinion, so long as the modifications would not have the effect of modifying any Core Provision.

7 Governing Law, Arbitration and Jurisdiction

7.1 Additional assumptions

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

7.2 Issued to be discussed

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

(a) The agreement on the governing law, submission to arbitration or jurisdiction would be upheld in Poland.

Choice of law issues

(b) Regulation (EU) 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**) entered into force in the member states of the European Union, including Poland on 25 July 2008 and became directly effective from 17 December 2009. Rome I Regulation is applicable to contractual obligations in civil and commercial matters and superseded in that respect the Rome Convention dated 19 June 1980.

(c) From the date of their effective entry into force, the provisions of the Rome I Regulation, including its Article 3 introducing the freedom of choice of governing law principle, apply and as regards Poland prevail over the relevant provisions of the Polish Private International Law. Pursuant to the aforementioned Article 3 of the Rome I Regulation, the parties are free to choose a law to govern their contractual obligation without the necessity to establish a link between the agreement and the law chosen by the parties as required by the Polish Private International Law. The parties to a contract can select the law applicable to the whole or to part of the contract. At any time, the parties are entitled to choose the law governing the contract other that which previously selected.

(d) In the absence of the choice of law, the agreement shall be governed by the law of the country where the party required to perform under the contract the characteristic performance has habitual residence. However, in the case that it is clear from the circumstances of the case that the contract is manifestly closely connected with a country other than indicated in the preceding sentence, the law of that country shall be applied. If the applicable law cannot be determined on the basis of the aforementioned rules, the contract shall be governed by the law of the country with which it is most closely connected (Article 4 section 1 of the Rome I Regulation).

(e) Pursuant to the Rome I Regulation contracts can be governed also by the law of countries other than member states of the European Union (Article 2 of the Rome I Regulation).It should be noted that, as regards the choice of foreign law, the Polish courts will refuse to apply it, if the application would bring the effects contrary to the principal rules of public order in Poland. We are not aware of any principal rule of public order in Poland that would be contradicted by the Master Netting Agreement or the Cross-Product Master Agreement, although it needs to be mentioned that such terms as "principal rules of public order" or "public policy" do not have a precise legal definition or crystallized jurisprudence.

(f) If a law of jurisdiction other than Poland (including English or German law) remains the governing law of the Master Netting Agreement or the Cross-Product Master Agreement, and assuming that the Master Netting Agreement or the Cross-Product Master Agreement would be legal, valid and enforceable under that law, respectively, we are of the opinion that the agreement on the governing law would be legally enforceable by the courts in Poland, subject to the qualifications described.

(g) In addition, we are of the opinion that the following requirements of Polish law described in this opinion could be applicable to the Master Netting Agreement or the Cross-Product Master Agreement irrespective of the choice of a foreign law:

(i) insolvency related issues with respect to an insolvent Polish counterparty (see Section I above);

(ii) currency and exchange control laws;

(iii) various licensing, permitting and other regulatory issues;

(iv) public procurement requirements;

(v) possibly requirements of the Act on Payment Periods in Commercial;

(vi) provisions relating to maximum contractual interest; and

(vii) with respect to CO_2 allowances trading only - in the event of an entity selling allowances through the Polish allowances registry, and in particular in the event of a sale by a Polish installation of its own allowances allocated to it by the Polish State – the requirement to notify the agreement to the Polish registry within three business days from its execution.

This list is not exhaustive.

Jurisdiction issues

(a) As regards the submission to the jurisdiction of Polish courts, please note that Poland, as an EU Member State, is bound by the provisions of the Council Regulation (EU) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), and also the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters concluded in Lugano on 16 September 1988.

(b) Therefore, if the parties, one or more of whom is domiciled in a EU Member State, have agreed that a court or the courts of a EU Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with an agreement, then that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(i) in writing or evidenced in writing; or

(ii) in a form which accords with practices which the parties have established between themselves; or

(iii) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

(c) Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing". Where such an agreement is concluded by parties, none of whom is domiciled in a EU Member State, the courts of other EU Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

(d) With respect to the submission of potential disputes under the Master Netting Agreement to international arbitration (which we understand is also contemplated under § 12.4(B) and (C) of the Master Netting Agreement), under the Polish Code of Civil Procedure, it is generally possible to submit disputes to arbitration, either local or international, provided that they concern proprietary rights or non-proprietary rights that may be subject to a settlement, meaning that the parties are able to dispose of such rights.

(e) Even if an agreement pertaining to arbitration is duly concluded, this does not prohibit the party from referring the case to the Polish state court. Generally, the court will refuse to hear the case only if the arbitration agreement is properly brought to its attention before proceedings start.

(f) As Poland is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, a foreign arbitral award granted in a foreign country being a party to this Convention is enforceable in Poland, after completing respective proceedings for enforcement of the award. A separate regulation for non-signatories to the New York Convention is provided for in the Polish Code of Civil Procedure, but is generally compliant with the rules contained in the Convention.

FINAL NOTES

This opinion is addressed exclusively to EFET, the members of the EFET Legal Committee and any other entity who has subscribed to EFET for one or more of the country opinions, for their sole benefit and may not be relied upon by any other person, entity or corporation whatsoever, and may not be disclosed to any other person without EFET's prior written approval. Any rights of the above entities arising out of this opinion may not be assigned, encumbered or otherwise dealt with without our prior written consent.

This opinion shall be governed by and construed in accordance with Polish law. The competent court in Warsaw, Poland, shall have exclusive jurisdiction over all disputes arising out of, or in connection with this opinion.

Yours faithfully,

Rafał Hajduk
Partner

Tomasz Rogalski
Senior Associate

Norton Rose Fulbright Piotr Strawa and Partners, Limited Partnership

Appendix A
Types of Counterparties

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

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

Banks/Credit Institutions

Investment Services Provider/Investment Firms

Insurance Companies

Investment Fund Management Companies

Other Financial Institution (please specify)

Municipalities or Counties

Associations of Local Government

Publicly-owned Corporations

Quasi Governmental Entities (please specify)

Appendix B

Master Agreements covered by the

EFET Master Netting Agreement or the TBMA Cross Product Master Agreement

Energy Trading Master Agreements

- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Electricity (version 2000), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2007), sponsored by the European Federation of Energy Traders (EFET)
- European General Agreement Concerning the Delivery and Acceptance of Natural Gas (version 2003), sponsored by the European Federation of Energy Traders (EFET)
- UK Grid Trade Master Agreement (version June 2004), sponsored by the Futures and Options Association (FOA)
- NBP Amendment Agreement for natural gas settled through the National Balancing Point (NBP) based on the Short Term Flat NBP Trading Terms and Conditions 1997
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2004
- ZBT Amendment Agreement for natural gas settled through the Belgian Zeebruegge hub based on the Zeebruegge Terms and Conditions 2001
- International Emissions Trading Master Agreement (version 2010/2011), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2008), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2005), sponsored by the International Emissions Trading Association (IETA)
- Emissions Trading Master Agreement for the EU Scheme (version 2002), sponsored by the International Emissions Trading Association (IETA)
- US Master Power Purchase & Sale Agreement (version 2000), sponsored by the Edison Electric Institute
- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2002), sponsored by the North American Energy Standards Board, Inc (NAESB)
- US General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas (version 2006), sponsored by the North American Energy Standards Board, Inc (NAESB)
- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2005), sponsored by GasEDI
- Canadian Base Contract for Short-term Sale and Purchase of Natural Gas (version 2000), sponsored by GasEDI

Derivatives Master Agreements

- Financial Energy Master Agreement (version 2000), sponsored by the Nordic Association of Energy Traders (NAET)
- ISDA 2002 Master Agreement, sponsored by the International Swaps and Derivatives Association, Inc.
- 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the International Swaps and Derivatives Association, Inc.
- 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction), sponsored by the International Swaps and Derivatives Association, Inc.
- 1987 Interest Rate and Currency Exchange Agreement, sponsored by the International Swaps and Derivatives Association, Inc.
- Australian version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of the 1992 ISDA Master Agreement (Multicurrency – Cross Border)
- German Rahmenvertrag für Finanztermingeschäfte (version 2001), sponsored by the German Banker's Association
- German Rahmenvertrag für Finanztermingeschäfte (version 1994), sponsored by the German Banker's Association
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 2003), sponsored by the Schweizerische Bankiervereinigung
- Swiss Master Agreement for Over-The-Counter Derivative Instruments (version 1994), sponsored by the Schweizerische Bankiervereinigung
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version July 2007), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre FBF Relative Aux Operations Sur Instruments Financiers à Terme (version August 2001), sponsored by the Fédération Bancaire Française (FBF)
- French Convention-Cadre AFB Relative Aux Operations Sur Instruments Financiers à Terme (version), sponsored by the Association Française des Banques (AFB)
- Spanish Contrato Marco De Operaciones Financieras (versión 1997), sponsored by the Asociación Española de Banca Privada (AEB)
- Dutch Raamovereenkomst voor Financiële Derivaten (RFD), sponsored by the Nederlandse Vereniging van Banken (NVB)
- Japanese Bond Option Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Mexican Contrato Marco para Operaciones Financieras Derividas
- Mexican Contrato Normativo para la realización de las operaciones de Intercambio
- Mexican Master Agreement for Entering into Dollar against Mexican Peso Forward Transactions
- US Master Securities Forward Agreement (version 1996), sponsored by The Bond Market Association (TBMA)
- US Master OTC Options Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US OTC Option Transactions – U.S. Treasury Securities Master Dealer Agreement (version August 1989), sponsored by the Public Securities Association (PSA)
- UK International Currency Options Market Agreement (ICOM) sponsored by the British Bankers' Association (BBA)

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

Securities Lending Master Agreements

- Global Master Securities Lending Agreement (GMSLA) (version 2010), sponsored by the International Securities Lending Association (ISLA)
- Global Master Securities Lending Agreement (GMSLA) (version 2000), sponsored by the International Securities Lending Association (ISLA)
- Master Equity & Fixed Interest Stock Lending Agreement (MEFISLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Master Gilt Edged Stock Lending Agreement (GESLA) (version 1996), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version 1995), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version October 1994), sponsored by the International Securities Lending Association (ISLA)
- Overseas Securities Lender's Agreement (OSLA) (version February 1994), sponsored by the International Securities Lending Association (ISLA)
- US Master Securities Loan Agreement (version 2000), sponsored by The Bond Market Association (TBMA)
- US Master Securities Loan Agreement (version May 1993), sponsored by the Public Securities Association (PSA)
- Canadian Securities Loan Agreement, sponsored by the Investment Dealers Association of Canada (IDAC)
- German Rahmenvertrag für Wertpapierleihgeschäfte
- German Rahmenvertrag für Wertpapierdarlehen (version 1999)
- French Contract Cadre de Prêts des Titres (version 2007), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- French Contract Cadre de Prêts des Titres (version), sponsored by the Association Francaise des Professionnels des Titres (AFTI)
- Australian Master Securities Lending Agreement (version November 2003), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version December 2002), sponsored by Australian Securities Lending Association Ltd. (ASLA)
- Australian Master Securities Lending Agreement (version April 1997), sponsored by Australian Securities Lending Association Ltd. (ASLA)

- New Zealand Master Repurchase Securities Lending Agreement
- Japanese Basis Agreement Concerning Stock Lending Transactions, sponsored by the Japan Securities Dealers Association (JSDA)

<u>Repurchase Master Agreements</u>

- Global Master Repurchase Agreement (GMRA) (version October 2000), sponsored by The Bond Market Association (TBMA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA)
- Global Master Repurchase Agreement (GMRA), sponsored by the Public Securities Association (PSA) and the International Securities Market Association (ISMA) (version November 1992)
- US Master Repurchase Agreement (MRA) (version September 1996), sponsored by The Bond Market Association (TBMA)
- US Master Repurchase Agreement (MRA) (version 1987)
- Canadian Repurchase/Reverse Repurchase Transaction Agreement
- Australian version of the Global Master Repurchase Agreement (GMRA) (version 1995), sponsored by the Australian Financial Markets Association (AFMA)
- New Zealand version of Global Master Repurchase Agreement (GMRA) (version 1995)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2005)
- German Rahmenvertrag für Wertpapierpensionsgeschäfte (version 2002)
- German Rahmenvertrag für echte Pensionsgeschäfte (version 1997)
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2007), sponsored by the Fédération bancaire française (FBF) [FBF07 REPO]
- French Convention-cadre FBF Relative Aux Opérations de Pensions Livriée (version 2003), sponsored by the Fédération bancaire française (FBF)
- French Convention-cadre Relative Aux Opérations de Pensions Livriée, sponsored by the Association du Forex et des Trésoriers de Banque (AFTB
- Japanese Bond Lending Agreement, sponsored by the Japan Securities Dealers Association (JSDA)
- Japanese Basic Agreement Concerning Gensaki Transactions of Bonds, Japan Securities Dealers Association (JSDA)

Appendix C
Transactions under Netted Agreements or Principal Agreements

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

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

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

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

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

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

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

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

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

10. Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity

of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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

12. Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

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

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

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

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

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

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

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

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

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

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

23. Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity of shares of an issuer to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

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

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

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

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

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

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

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

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

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

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

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

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

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

37. Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

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

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

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

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