

NETTING ANALYSER LIBRARY

The Futures & Options Association
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17 January 2013

Dear Sirs

FOA Collateral Opinion

You have asked us to give an opinion in respect of the laws of Belgium ("**this jurisdiction**") in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an "**Agreement**") or under an Equivalent Agreement (as defined below).

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

References herein to "*this opinion*" are to the opinions given in paragraph 3. References to "**Core Provisions**" include Core Provisions that have been modified by Non-Material Amendments.

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of:

- 1.1.1 persons which are companies incorporated with limited liability;
- 1.1.2 credit institutions¹;
- 1.1.3 investment firms²;

¹ Governed by the Law of 22 March 1993 on the status and supervision of credit institutions.

- 1.1.4 partnerships;
- 1.1.5 insurance companies³;
- 1.1.6 undertakings for collective investment⁴;
- 1.1.7 sovereign and public sector entities;
- 1.1.8 pension funds⁵; and
- 1.1.9 in respect of paragraph 3.3, the entities referred to in such paragraph,

insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.3) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

- 1.2 However, this opinion is also given in respect of Counterparties providing Collateral to a Firm that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

- 1.2.1 individuals (Schedule 1),

insofar as each may act as a Counterparty to a Firm under an Agreement.

- 1.3 This opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions ("**Collateral**"). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

- 1.4 In this opinion letter:

- 1.4.1 "**Security Interest**" means the security interest created pursuant to the Security Interest Provisions;

- 1.4.2 "**Insolvency Proceedings**" means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this opinion, the occurrence of such proceedings in respect of the Counterparty falls within the definition of Event of Default under the Agreement);

- 1.4.3 "**Equivalent Agreement**" means an agreement:

² Governed by the Law of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers.

³ Governed by the Law of 9 July 1975 on the supervision of insurance undertakings.

⁴ Governed by the Law of 20 July 2004 on certain forms of collective management of investment portfolios.

⁵ Governed by the Law of 27 October 2006 on the supervision of institutions for occupational retirement provision.

- (a) which is governed by the law of England and Wales;
- (b) which has broadly similar function to any of the Agreements listed in Annex 1;
- (c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and
- (d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

References to the "**Agreement**" in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;

- 1.4.4 A "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 3;
- 1.4.5 "**enforcement**" means, in the relation to the Security Interest, the act of:
 - (i) sale and application of proceeds of the sale of Collateral against monies owed, or
 - (ii) appropriation of the Collateral,in either case in accordance with the Security Interest Provisions.
- 1.4.6 in other instances other than those referred to at 1.4.5 above, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.4.7 terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears;
- 1.4.8 any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter;
- 1.4.9 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2; and
- 1.4.10 headings in this opinion letter are for ease of reference only and shall not affect its interpretation.

2. ASSUMPTIONS

We assume the following:

- 2.1 That the Agreements are legally binding and enforceable against both Parties under their governing laws.
- 2.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.
- 2.4 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.
- 2.5 That the Agreement has been properly executed by both Parties.
- 2.6 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings (as to which please see paragraphs 1 and 2 of Schedule 2) in respect of either Party.
- 2.7 The Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.8 That the Agreement accurately reflects the true intentions of each Party.
- 2.9 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.
- 2.10 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.
- 2.11 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected. That all cash and securities comprising Collateral will have been provided to the relevant party in accordance

with the Agreement, so as to be in the possession or under the control of that party or a person acting on its behalf⁶.

- 2.12 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.
- 2.13 That, except with respect to our opinion at paragraph 3.3, any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions may be located either within or outside this jurisdiction.
- 2.14 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.15 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

3. OPINIONS

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in paragraph 4 below, we are of the following opinion.

3.1 Valid Security Interest

- 3.1.1 To the extent that under the laws referred to in paragraphs 2.2 and 2.11 above the Security Interest Provisions create a valid and perfected⁷ security interest over the Collateral, such security interest over the Collateral will be recognised and given effect to by the courts of Belgium
- 3.1.2 Following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.
- 3.1.3 There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.
- 3.1.4 Following exercise of the Firm's rights under the Security Interest Provisions, there are no rules of law of this jurisdiction which would affect the ranking of

⁶ This assumption is required because of the law of 15 December 2004 on financial collateral, Art. 4 §1.

⁷ "Perfected" for these purposes means that all applicable formalities to achieve enforceability against third parties of the security interest have been completed.

the Firm's rights to the proceeds of realisation of the Collateral in relation to the interests of the Counterparty and any other person.

3.2 Further acts

No further acts, conditions or things would be required by the law of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

3.3 Foreign Collateral Providers

Moreover, the opinions given at paragraphs 3.1 and 3.2 also apply in respect of any Counterparty that is not established or resident in this jurisdiction, where any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions are located within this jurisdiction.

3.4 Right of re-use

With respect to the Eligible Counterparty Agreement 2011, the Retail Client Agreement 2011, the Professional Client Agreement 2011 (or an Equivalent Agreement in the form of one of the foregoing), the Rehypothecation Clause would be effective in accordance with its terms, such that that Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

The opinion given at this paragraph 3.4 does not apply in respect of an Equivalent 2011 Agreement without Core Rehypothecation Clause.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

4.1 Voidness of collateral upon bankruptcy

Collateral provided under the Security Interest Provisions may be vulnerable to the application of the following "suspect period" rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Please see paragraph 3 (*Acts detrimental to all creditors*) of Schedule 2 for a discussion of these rules generally. "Suspect period" rules apply only in the case of a bankruptcy; there are no rules of that type in the case of other forms of Insolvency Proceedings.

Collateral provided under the Security Interest Provisions may be voidable, upon the bankruptcy of the provider of collateral, in the following circumstances:

4.1.1 If it is provided during the suspect period as security for pre-existing transactions⁸. It will not be voidable on this ground, however, if it is provided

⁸ Law of 8 August 1997 on bankruptcy, Art. 17, 3°; law of 15 December 2004 on financial collateral, Art. 15 §2, al. 2.

during the suspect period but pursuant to an undertaking to do so that was entered into prior to the suspect period with a view to ensuring, during the life of one or more transactions, a balance between the respective obligations of the parties⁹. Collateral delivered pursuant to the margining arrangements of the Agreement should in principle satisfy this condition and therefore be immune against avoidance on this ground, but the assessment of this question may be affected by the factual circumstances of a particular case; further, the question may be debatable where the obligation to provide collateral is not triggered by changes in the marked-to-market value of the underlying transactions, but rather by changes in the rating of a party or similar events¹⁰.

- 4.1.2 If it constitutes an abnormal transaction entered into in the knowledge that the transaction would prejudice the creditors of the provider of collateral¹¹. The delivery of collateral pursuant to the provisions of the Agreement does not in itself appear to us as "abnormal" for the purposes of this rule of bankruptcy law, but the assessment of the abnormal character of such an arrangement may be affected by the factual circumstances of a particular case.
- 4.1.3 If it is provided during the suspect period and entails a significant undervalue for the provider of collateral¹². The delivery of collateral pursuant to the provisions of the Agreement does not in itself appear to us as entailing a significant undervalue for the purposes of this rule of bankruptcy law, but the assessment of this question may be affected by the factual circumstances of a particular case.
- 4.1.4 If it is provided during the suspect period and the recipient of collateral at the time knew that the provider of collateral was already in a situation of cessation

⁹ Law of 15 December 2004 on financial collateral, Art. 3, 9° and 16 §1.

¹⁰ We believe it can be reasonably argued that a rating based test does not jeopardise the effectiveness of collateral delivered during the suspect period, but legal doctrine is divided on this point and the outcome of litigation would be uncertain. The wording of the Belgian law of 15 December 2004 on financial collateral is different from that of the European directive 2002/47 of 6 June 2002 on financial collateral arrangements (the "**Financial Collateral Directive**") in this respect, and this gives rise to ambiguity. Article 8.3(a) of the Financial Collateral Directive validates the delivery during the suspect period of top-up collateral "in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations"; Article 3, 9° of the Belgian law by contrast refers to top-up collateral "provided with a view to ensuring during the life of an agreement the agreed balance between the obligations of the parties". The wording of the Belgian law is thus broader than that of the directive, and we believe it can be reasonably argued that the rating of the parties may be a component of the "agreed balance" that top-up collateral is meant to maintain. Part of the legal doctrine supports that argument; see I. Peeters et K. Christiaens, "De Wet Financiële Zekerheden – een stap te ver of de aanloop naar een totaal vernieuwd zekerheidsrecht?", *RDCB*, 2006, p. 170, n° 59; other commentators take the opposite view: V. Sagaert en H. Seeldrayers, "De wet financiële zekerheden", *RW*, 2004-2005, p. 1521, n° 78, D. Demarez, "De wet financiële zekerheden", *TPR*, 2006, p. 1101, n° 61, and there is some suggestion in the legislative history that the Belgian law in this respect should be given the same meaning as the directive: *doc. parl., Ch., Statement of reasons*, 51/1407/01, p. 28.

¹¹ See paragraph 4.7.2 of our accompanying netting opinion dated 17 January 2013

¹² See paragraph 4.7.3 of our accompanying netting opinion dated 17 January 2013.

of payments¹³, unless it is provided pursuant to an undertaking to do so that was entered into prior to the suspect period with a view to ensuring, during the life of one or more transactions, a balance between the respective obligations of the parties¹⁴. Collateral delivered pursuant to the margining arrangements of the Agreement should in principle satisfy this condition and therefore be immune against avoidance on this ground, but the assessment of this question may be affected by the factual circumstances of a particular case; further, the question may be debatable where the obligation to provide collateral is not triggered by changes in the marked-to-market value of the underlying transactions, but rather by changes in the rating of a party or similar events¹⁵.

The substitution of collateral during the suspect period will not invalidate an otherwise valid transfer, assuming that the exchanged assets are of no greater value than the assets that they are replacing and that there is no time gap between the restitution of the "old" assets and the delivery of the "new" assets¹⁶. If these conditions are not satisfied and if the substitution takes place during the suspect period preceding the bankruptcy of the provider of collateral, the new collateral may be voidable on the grounds that it constitutes new security for pre-existing transactions (see paragraph 4.1.1 above).

4.2 Voidness of redelivery of collateral upon bankruptcy

The return of collateral made by the initial recipient of that collateral during the suspect period prior to its bankruptcy may be caught by the same grounds of avoidance as discussed in paragraphs 4.1.2 and 4.1.3 above. In practice, the risks that those grounds would apply appear even more remote in the case of a return of collateral than they did in respect of the initial provision of collateral.

In addition, the return of collateral may arguably be avoided if the initial provider of collateral knew at the time of that return that the initial recipient of collateral was already in a situation of cessation of payments¹⁷. The law of 15 December 2004 on financial collateral made this ground of voidness inapplicable to the provision of top-up collateral, but seems not to have made it inapplicable to the return of collateral.

4.3 Ranking

Under Belgian law, financial intermediaries and clearing and settlement systems have a statutory lien over any securities and cash they hold from clients as security for the payment of any transaction and handling costs due by the client¹⁸. To the extent that

¹³ Law of 8 August 1997 on bankruptcy, Art. 18.

¹⁴ See footnote 9.

¹⁵ See footnote 10.

¹⁶ Cass., 12 November 1914, *Pas.*, 1915-1916, I, 124; law of 15 December 2004 on financial collateral, Art. 16 §2.

¹⁷ Law of 8 August 1997 on bankruptcy, Art. 18; law of 15 December 2004 on financial collateral, Art. 16 §1.

¹⁸ Law of 2 August 2002 on the supervision of the financial sector and the financial services, Art. 31

any financial intermediaries and clearing and settlement systems involved in the Collateral arrangements have agreed to book the securities on a special collateral account, or have acknowledged the pledge on cash, the security interest created over the Collateral pursuant to the Security Interest Provisions will rank ahead of their statutory lien¹⁹.

4.4 Application of enforcement proceeds

The laws of this jurisdiction provide an obligation:

- 4.4.1 to apply the proceeds of the Collateral first against interest and secondly against principal²⁰; and
- 4.4.2 to return any excess proceeds of enforcement to the collateral provider.

It is uncertain whether these two rules are matters of substantive law and do not apply to the Agreement which is governed by English law or the laws of the State of New York, or are matters of procedural enforcement and can be applied more broadly by the courts of this jurisdiction.

There are no other material issues relevant to the issues addressed in this opinion letter which we draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully,



¹⁹ Law on Financial Collateral, Art. 10.

²⁰ Law on Financial Collateral, Art.8, 9 and 12 and Civil Code, Art. 1254.

SCHEDULE 1 Individuals

Subject to the modifications and additions set out in this Schedule 1 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are individuals. For the purposes of this Schedule 1 (*Individuals*), an "**individual**" means a natural person acting on his own account and in his own name.

1. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualifications.

1.1 Protective legislation

Individuals have the benefit of various laws and regulations generally aiming at "consumer protection", or at the protection of their spouse or family. These laws can have wide ranging consequences, for instance because contractual provisions may be unenforceable if they fail to satisfy certain fairness tests. This opinion does not discuss these laws and regulations and must therefore be read subject to this qualification.

1.2 Set-off and enforcement of financial collateral after insolvency

The Constitutional Court declared in its judgment 167/2008 of 27 November 2008²¹ that the law on financial collateral is unconstitutional to the extent that its Articles 14 and 15 §1 applied to "natural persons who do not qualify as tradesmen" (*commerçants / kooplieden*). As a result, the law on financial collateral cannot be applied to set-off or to enforce financial collateral against natural persons who fall within the scope of the judgment, and the law on financial collateral has been amended accordingly²². Post-insolvency set-off will not be allowed unless the mutual debts are closely connected with each other. The concept of "close connection" is highly factual; case law does not provide consistent guidelines for the application of this concept and it is often difficult to assess whether a particular set of facts will be recognised as showing a close connection or not²³. There will certainly be arguments to support the idea that all Transactions covered by the Agreement and entered into with a particular individual Counterparty are closely connected with each other, so that the netting provisions of the Agreement should remain effective in an insolvency

²¹ *Monit.*, 4 February 2009, p. 7947.

²² Law of 26 September 2011 implementing European directive 2009/44 of 6 May 2009 amending European Directive 98/26 on settlement finality and securities settlement systems and European directive 2002/47 on financial collateral arrangements as regards linked systems and credit claims, Art. 20 and 21.

²³ Civil Code, Art. 1298; law of 31 January 2009 on the continuity of enterprises, Art. 34; cass., 4 February 2011, C.10.0443.N, *juridat*; 24 June 2010, with concl. Adv. Gen. D. Thijs, C.09.0365.N, *juridat*; 1 June 2006, *Pas.*, 2006, p. 1255; 7 April 2006, *Pas.*, 2006, p. 812, with concl. Adv. Gen. Werquin; 12 January 1996, *Pas.*, 1996, I, 27; 25 May 1989, *Pas.*, 1989, I, 1015; 11 April 1986, *Pas.*, 1986, I, 987; 28 February 1985, *Pas.*, 1985, I, 795; 2 September 1982, *Pas.*, 1983, I, 3.

of the Counterparty, but the outcome of any litigation on this subject will never be entirely predictable.

The judgment of the Constitutional Court (and the financial collateral law) refer to individuals "who do not qualify as tradesmen". This makes it clear that the judgment applies to consumers, *ie* individuals who do not carry out any commercial or self-employed professional activity. The Court, however, did not provide a conclusive statement about the exact scope of its judgment. It used the words "who do not qualify as tradesmen" because the case brought before it arose in the context of a particular type of insolvency proceedings, the so-called collective debt settlement (*règlement collectif de dette / collectieve schuldenregeling*), and these are the words that are used by the law to define the scope of collective debt settlement proceedings²⁴. The court did not say anything about the application of the law on financial collateral to individuals in other circumstances. This leaves a doubt as to whether the law may be applied to the following situations:

- 1.2.1 *tradesmen acting for private purposes, ie* the situation where the Counterparty is an individual tradesman who enters into a transaction for private purposes rather than in connection with his trade; and
- 1.2.2 *liberal professions and other self-employed activities:* certain individual Counterparties will not technically qualify as tradesmen because their activities are traditionally seen as being of a "civil" rather than "commercial" nature (for instance, farmers or liberal professions), even though their transactions may have been entered into in connection with their business or profession.

Some legal doctrine takes the view that the scope of the Constitutional Court's judgment must be extended to all categories of individuals²⁵.

1.3 Title transfer collateral arrangements

Under the laws of this jurisdiction, title transfer collateral arrangements cannot validly be made between or with individuals²⁶. To the extent that the courts of Belgium would characterise the Security Interest Provisions as a title transfer collateral arrangement, the Security Interest Provisions would not be enforceable against individuals.

²⁴ Judicial Code, Art. 1675/2.

²⁵ C. Boddaert, *loc. cit.*

²⁶ Financial Collateral Law, Art. 12 §3.

SCHEDULE 2 Insolvency Proceedings

1. Insolvency Proceedings

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction are the following:

- (a) bankruptcy (*faillite / faillissement*) under the law of 8 August 1997; this law also permits the temporary appointment of a provisional administrator (*administrateur provisoire / voorlopige bewindvoerder*) in the anticipation of a possible declaration of bankruptcy;
- (b) judicial reorganisation (*réorganisation judiciaire / gerechtelijke reorganisatie*) under the law of 31 January 2009²⁷; this law also permits the temporary appointment of a judicial representative (*mandataire de justice / gerechts-mandataris*) if the continuity of the business is jeopardised; reorganisation proceedings, however, are not available to credit institutions, insurance companies and certain other categories of regulated financial institutions²⁸;
- (c) voluntary or judicial liquidation (*liquidation / vereffening*) under the Company Code; it should be noted that a liquidation does not necessarily imply that the entity is insolvent properly speaking, but the proceeding triggers the applicability of many rules of insolvency law; and
- (d) rescue measures (*mesures de redressement / herstelmaatregelen*) taken by the government in respect of a financial institution of systemic importance under the law of 2 June 2010²⁹.

2. Territorial scope of Insolvency Proceedings

The territorial scope of the above Insolvency Proceedings is as follows:

- (a) Bankruptcy proceedings may apply in the form of main proceedings to:
 - (i) parties that are credit institutions³⁰ or insurance undertakings³¹ organised under Belgian law;

²⁷ Law of 31 January 2009 on the continuity of enterprises.

²⁸ *Ibid.*, Art. 4, par. 2.

²⁹ The government's powers to impose rescue measures relate only to insurance companies, credit institutions, and operators of clearing and settlement systems; law of 2 June 2010 on the completion of rescue measures applicable to enterprises in the banking and financial sector, Art. 3, 5 and 6.

³⁰ Law of 22 March 1993, Art. 109/1 and 109/8.

³¹ Law of 9 July 1975, Art. 45 and 48/2.

- (ii) parties that are collective investment undertakings or investment undertakings which provide services involving the holding of funds or securities for third parties, and of which the principal establishment or the statutory seat is in Belgium³²; and
- (iii) parties that do not fall under any of the above categories of which the centre of main interests is in Belgium^{33 34};

and may apply in the form of secondary or territorial proceedings to parties, other than credit institutions and insurance undertakings³⁵, that do not meet the above eligibility conditions for main proceedings in Belgium and have an establishment in Belgium³⁶.

- (b) Judicial reorganisation proceedings are subject to the same territorial tests as set out in paragraph (a) in respect of bankruptcy proceedings, save that:
 - (i) they cannot apply to credit institutions, insurance companies and certain other categories of regulated financial institutions³⁷; and
 - (ii) they generally cannot apply in the form of secondary or territorial proceedings³⁸.
- (c) Liquidation proceedings under the Company Code may apply to parties the principal establishment of which is located in Belgium³⁹.
- (d) Rescue measures may apply to parties that are organised under Belgian law. They do not apply to Belgian branches of foreign credit institutions⁴⁰, and it is unclear whether they may also apply to Belgian branches of foreign insurance undertakings and clearing and settlement systems⁴¹.

³² European Regulation 1346/2000 of 29 May 2000 on insolvency proceedings ("EUIR"), Art. 1.2; Code IPL, Art. 118 §1 al. 2, 1°.

³³ EUIR, Art. 3.1.

³⁴ As well as parties that do not fall under any of the above categories of which the centre of main interests is outside the European Union or in Denmark but the principal establishment or the statutory seat is in Belgium; this is an implausible factual situation. EUIR, Art. 1.2; Code IPL, Art. 118 §1 al. 2, 1°.

³⁵ See footnotes 30 and 31.

³⁶ EUIR, Art. 3.2; Code IPL, Art. 118 §1 al. 2, 2°.

³⁷ See footnote 28.

³⁸ EUIR, Art. 3.3 and 37.

³⁹ Code IPL, Art. 110, 111 §1, 3° and 112.

⁴⁰ Law of 22 March 1993, Art. 57*bis* and (*a contrario*) 84.

⁴¹ Law of 9 July 1975, Art. 26*bis*; law of 2 August 2002 on the supervision of the financial sector and financial services, Art. 23*bis*.

3. **Acts detrimental to all creditors**

Collateral provided under the security Interest Provisions may be vulnerable to the application of the following rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors:

- (a) *Post insolvency transactions.* The calculation of a single Liquidation Amount may not include transactions entered into after the commencement of the Insolvency Proceedings⁴².
- (b) *Abnormal transactions.* Abnormal transactions entered into in the knowledge that the transaction would prejudice the creditors of a party are voidable in the subsequent bankruptcy of that party⁴³. None of the provisions of the Agreement in itself appears to us as "abnormal" for the purposes of this rule of bankruptcy law, but the assessment of the abnormal character of a contractual arrangement may be affected by the factual circumstances of a particular case.
- (c) *Transactions at an undervalue.* Transactions entered into by a party during the suspect period prior to the declaration of bankruptcy of that party are voidable if they entail a significant undervalue (the law reads "if the value of what was given by the bankrupt party notably exceeds the value of the consideration received by it")⁴⁴. The so-called "suspect period" may have a duration of up to six months before the declaration of bankruptcy, or more if the bankrupt entity was already in liquidation or subject to judicial reorganisation before its bankruptcy. None of the provisions of the Netting Arrangements in itself appears to us as entailing a significant undervalue for the purposes of this rule of bankruptcy law, but the assessment of this question may be affected by the factual circumstances of a particular case and in particular by the arm's length character of the Transactions.

⁴² Law on Financial Collateral, Art. 14.

⁴³ Law of 8 August 1997 on bankruptcy, Art. 20; Law on Financial Collateral, Art. 16 §3; cass., 15 March 1985, *Pas.*, 1985, I, 875; 27 February 1998, *Pas.*, 1998, p. 109.

⁴⁴ Law of 8 August 1997 on bankruptcy, Art. 17, 1^o.

ANNEX 1
FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2007**")
2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")
3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")
4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")
5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")
6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")
7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")
8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")
9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the "**FOA Published Form Agreement**") expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).
2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).
3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).
4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.
5. "**Core Provisions**" means:
 - (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and
 - (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.
6. "**Rehypothecation Clause**" means:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
 - (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);
 - (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); and
 - (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
7. "**Security Interest Provisions**" means:
 - (a) the "**Security Interest Clause**", being:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (b) the "**Power to Charge Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (*Power to charge*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (*Power to charge*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (*Power to charge*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (*Power to charge*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (*Power to charge*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (*Power to charge*);

- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (*Power to charge*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (*Power to charge*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (*Power to charge*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (c) the "**Power of Sale Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (*Power of sale*); and
 - (x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

- (d) the "**Power of Appropriation Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (*Power of appropriation*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (*Power of appropriation*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (*Power of appropriation*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (*Power of appropriation*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (*Power of appropriation*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (*Power of appropriation*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (*Power of appropriation*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (*Power of appropriation*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (*Power of appropriation*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (e) the "**Lien Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (*General lien*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (*General lien*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (*General lien*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (*General lien*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (*General lien*);

- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (*General lien*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (*General lien*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (*General lien*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (*General lien*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and
- (f) the "**Client Money Additional Security Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);

- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).
8. **"Two Way Clauses"** means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

ANNEX 3
NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as “you”, “Counterparty”, “Party A/Party B”) provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.
4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.
5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.
6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.
7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).
8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.