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15 February 2013

Dear Sirs

Netting Analyser library

You have asked us to give an opinion in respect of the laws of the Netherlands ("this jurisdiction") as to the effect of certain netting and set-off provisions and collateral arrangements in relation to APX-ENDEX Clearing B.V. (the "Clearing House") as between the Clearing House and its clearing members (each a "Member").

We understand that your requirement is for the enforceability and validity of such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion letter. In the absence of any contractual netting and set-off provisions in the Rules, we have with your approval addressed the relevant statutory rights in respect of netting and set-off that a Member has on the insolvency of the Clearing House under Dutch law.

References herein to "this opinion" are to the opinion given in Section 3.

1. TERMS OF REFERENCE

- 1.1 Except where otherwise defined herein, terms defined in the Rules of the Clearing House have the same meaning in this opinion letter.
- 1.2 The opinions given in Section 3 are in respect of a Member's powers under the Clearing House Documentation or Dutch law, as the case may be, as at the date of this opinion. We express no opinion as to any provisions of the Rules of the Clearing House other than those on which we expressly opine.

1.3 Definitions

In this opinion, unless otherwise indicated:

- (a) "**Assessment Liability**" means a liability of a Member to pay an amount to the Clearing House (including a contribution to the assets or capital of the Clearing House, or to any default or similar fund maintained by the Clearing House); but excluding:
 - (i) any obligations to provide margin or collateral to the Clearing House, where calculated at any time by reference to Contracts open at that time;
 - (ii) membership fees, fines and charges;
 - (iii) reimbursement of costs incurred directly or indirectly on behalf of or for the Member or its own clients;
 - (iv) indemnification for any taxation liabilities;
 - (v) payment or delivery obligations under Contracts; or
 - (vi) any payment of damages awarded by a court or regulator for breach of contract, in respect of any tortious liability or for breach of statutory duty.
- (b) "**Bank Account**" has the meaning ascribed to it in the Rules, being a bank account held by and in the name of the Member with a Settlement Bank for the account of the Member, in which Collateral is held;
- (c) "**Cash Account**" has the meaning ascribed to it in the Rules, being a Member Escrow Account, a Bank Account or any other bank account designated by the Clearing House;
- (d) "**Clearing Agreement**" means the Model Form Clearing Agreement;
- (e) "**Collateral**" has the meaning ascribed to it in the Rules, being the amount of cash held by a Member in a Cash Account and/or the amount guaranteed under a Bank Guarantee, in each case as security for the obligations of the Member towards the Clearing House, including the Default Contribution;
- (f) "**Collateral Directive**" means EU Directive 2002/47/EC;

- (g) "**Commodity**" or "**Commodities**" means natural gas, power, coals, emissions or any other commodity;
- (h) "**Contract**" means a Trade Leg which is registered at the Clearing House;
- (i) "**FCA Rules**" mean the rules in Book 7 of the Dutch Civil Code and in the BA that implemented the Collateral Directive into Dutch law;
- (j) "**Forward Transaction**" means a forward transaction whereby one party agrees to buy from or sell to the other party a specified quantity of the Commodity in exchange for payment of a specified price, which becomes due on an agreed future date;
- (k) "**Insolvency Proceedings**" means the procedures referred to in paragraph 3.1;
- (l) "**Insolvency Representative**" means a liquidator (curator) during a bankruptcy (*faillissement*) or an administrator (*bewindvoerder*) during a moratorium of payments (*surseance van betaling*) in the sense of the BA;
- (m) "**Insolvent Party**" means a Party which is insolvent for the purposes of any insolvency law or otherwise subject to Insolvency Proceedings and the other Party is called the "**Solvent Party**";
- (n) "**Member Escrow Account**" has the meaning ascribed to it in the Rules, being a Cash Account held in the name of the Settlement Bank acting as escrow agent, in which account Collateral is held and which is subject to a Member Escrow Agreement;
- (o) "**Member Escrow Account Agreement**" has the meaning ascribed to it in the Rules, being the agreement between a Settlement Bank and a Member which governs the Member Escrow Account;
- (p) "**Model Form Clearing Agreement**" means the clearing membership agreement entered into between each Member and the Clearing House in the form of the Template Participation Agreement v4, draft date 27 September 2012;
- (q) "**Non-Proprietary Account**" has the meaning ascribed to it in the Rules, being a Position Account established by the Clearing House in

the name of a Member which refers to a Non-Clearing Member that is to be administered separately from any other Position Accounts established in the name of that Member;

- (r) "**Party**" means the Clearing House or the relevant Member;
- (s) "**Position Account**" has the meaning ascribed to it in the Rules, being an account opened in the administration of the Clearing House in the name of the Member, in which all Contracts are administered in the form of a Proprietary Account or a Non-Proprietary Account;
- (t) "**Proprietary Account**" has the meaning ascribed to it in the Rules, being a Position Account established by the Clearing House in the name of a Clearing Member for the registration of Trades Legs concluded for its own risk and account;
- (u) 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;
- (v) "**Rules**" means the rules of the Clearing House in force as at the date of this opinion; and
- (w) "**Spot Transaction**" means a spot contract within the meaning of Article 38(2) of Regulation 2006/1287 implementing the Markets in Financial Instruments Directive (2004/39/EC); and
- (x) references to a "**section**" or to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be).

1.4 This opinion letter:

- 1.4.1 relates solely to matters of Dutch law and does not consider the impact of any laws (including insolvency laws) other than Dutch law, even where, under Dutch law, any foreign law falls to be applied;
- 1.4.2 and the opinions given in it are governed by Dutch law and relate only to Dutch law as applied by the Dutch courts as at today's date. All non-contractual obligations and any other matters arising out of or in connection with this opinion letter are governed by Dutch law. We express no opinion in

this opinion letter on the laws of any other jurisdiction (including, for the avoidance of doubt, the laws of Curaçao, Aruba, Bonaire, St. Maarten, St. Eustatius or Saba);

- 1.4.3 expresses and describes Dutch legal concepts in English and not in their original Dutch terms; consequently, this opinion is issued and may only be relied upon on the express condition that it shall be governed by and that all words and expressions used herein shall be construed and interpreted in accordance with the laws of The Netherlands;
- 1.4.4 is strictly limited to the matters set forth herein and no opinion may be inferred or implied beyond that expressly stated herein; and
- 1.4.5 may not be used for any other purpose other than in connection with the Agreement.

1.5 We do not express any opinion as to any matters of fact or any accountancy, capital adequacy or other non-legal matter and no opinion expressed on any tax matters.

1.6 We do not opine on the enforceability of any net obligation resulting from any netting or set-off.

1.7 We have verified that:

- 1.7.1 the Clearing House is not a designated system within the meaning, and for the purposes of, the Settlement Finality Directive (98/26/EC); and
- 1.7.2 the Belgian power spot market operated by Belpex, the Dutch power spot market operated by APX-ENDEX Power B.V. and the Dutch and Belgian gas spot market (which are according to the Rules the only markets in respect of which the Clearing House executes clearing) do not have a licence as a regulated market or MTF, which suggests that the Contracts (i) relate to Spot Transactions only and not to Forward Transactions and (ii) are OTC derivative contracts.

2. ASSUMPTIONS

We assume the following:

2.1 That, except with regards to the provisions discussed and opined on in this opinion letter, the Clearing Agreement and any Contracts are legally binding and enforceable against both Parties under their governing laws.

- 2.2 That each Party has the capacity, power and authority (corporate, regulatory and otherwise) under all applicable law(s) to enter into the Clearing Agreement and any Contracts; to perform its obligations under the Clearing Agreement and any Contracts; and that each Party has taken all necessary steps to execute and deliver and perform the Clearing Agreement and any Contracts.
- 2.3 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it (also under the laws of this jurisdiction) lawfully to enter into and perform its obligations under the Clearing Agreement and any Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation in this jurisdiction.
- 2.4 That both Parties have properly executed the Model Form Clearing Agreement in substantially identical form to that attached at Annex 1.
- 2.5 That the Clearing Agreement and any Contract has been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 2.6 That each Party acts in accordance with the powers conferred by the Clearing Agreement and any Contracts; and that each Party performs its obligations under the Clearing Agreement and each Contract in accordance with their respective terms (save in relation to any non-performance leading to the taking of action by the Members under the Netting Provision).
- 2.7 That the Dutch Members entered into the Clearing Agreement and Contracts for *bona fide* commercial reasons and that the terms of the relevant Agreements are *bona fide* arm's length commercial terms;
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Rules, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing Agreement.
- 2.9 That the Member is at all relevant times solvent and not subject to any winding-up, administration, receivership, bankruptcy or analogous insolvency proceedings under the laws of any jurisdiction.
- 2.10 That (save as discussed at paragraph 3.4) the obligations assumed under the Clearing Agreement and any Contracts are mutual between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and is

solely entitled to the benefit of obligations owed to it.

- 2.11 That any cash provided as Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.12 That no provision of the Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect.

3. OPINION

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

3.1 Insolvency Proceedings

- 3.1.1 The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency procedures to which the Clearing House would be subject in this jurisdiction are the following:
 - (a) bankruptcy (*faillissement*), as referred to in and governed by title I of the Dutch Bankruptcy Act (*Faillissementswet*, "BA");
 - (b) moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA;

3.1.2 Bankruptcy: general overview

Bankruptcy is a general attachment on (practically) all of the assets of a debtor, imposed by a judgment of the appropriate Dutch court (*rechbank*) for the benefit of the insolvent debtor's collective creditors. The objective of the bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the debtor's assets among its creditors. In practice, however, bankruptcy proceedings serve as an important instrument for the reorganisation and continuation of businesses in financial distress.

According to the BA, bankruptcy proceedings can be opened in respect of any debtor, natural or legal person, regardless of whether he carries on a business, practises an independent profession or not.

The BA does not provide for the consolidation of bankruptcy proceedings opened in respect of companies belonging to the same group. However, there are some examples of cases in which courts have allowed such consolidation.

If a bankruptcy proceeding is opened, the Insolvent Party loses the right to manage and dispose of his assets with retroactive effect to 00.00 hrs. of the day the bankruptcy order is issued. The court appoints a receiver who is charged with the management and realisation of the Insolvent Party's assets (including by means of a transfer of (part of) the business as a going concern). The receiver acts under the general supervision of a supervisory judge (*rechter-commissaris*). For certain acts of the receiver the law requires the (prior) authorisation of the supervisory judge, e.g. for conducting legal proceedings and for terminating employment and rental contracts. The estate is not liable for obligations incurred by the Insolvent Party after the bankruptcy adjudication, except to the extent that such obligations arise from transactions that are beneficial to the estate.

3.1.3 Moratorium of payments: general overview

Moratorium of payments is a court ordered general suspension of a debtor's payment obligations; its objective is to provide an instrument for the reorganisation and continuation of viable businesses in financial distress. It is available only at the request of the debtor and only has effect in respect of ordinary (non-secured and non-preferred) creditors. During the period for which the moratorium of payments has been granted, creditors with non-preferential claims cannot take recourse in respect of the debtor's assets.

Moratorium of payments proceedings can be opened in respect of natural persons carrying on a business or practising an independent profession and juristic persons. The moratorium of payments may be granted by the court for a maximum period of one and a half years and may be prolonged at the request of the debtor (if necessary more than once) with a maximum of one and a half years.

As a result of the granting of a moratorium of payments, the debtor can no longer manage and dispose of its assets without the co-operation or authorisation of a court appointed administrator. Likewise, the administrator cannot act without the co-operation or authorisation of the debtor. The moratorium of payments order has retroactive effect to 00.00hrs of the day it has been issued. In a moratorium of payments proceeding, the court may appoint a supervisory judge, whose role is limited to regulating certain procedural matters and advising the administrator upon his request.

3.2 Special provisions of law

There are no special provisions of law that apply to Contracts or the Clearing House.

3.3 Recognition of choice of law

The choice of law provisions of Clause 13.2 of the Rules (designating the laws of this jurisdiction as the governing law) would be recognised under the laws of this jurisdiction, even if the Member is not incorporated, domiciled or established in this jurisdiction.

As regards the contractual obligations arising under or pursuant to the Clearing Agreement and any Contracts, the courts of The Netherlands will observe and give effect to the choice of the laws of The Netherlands as the law governing the Clearing Agreement and any Contracts and Netherlands law would accordingly be applied by the Dutch courts if the Clearing Agreement and any Contracts or any claim thereunder comes under their jurisdiction.

3.4 Termination of Contracts

Absent any contractual (automatic or elective) termination and close-out by the Member of the Clearing Agreement and the outstanding Contracts documented thereunder, Netherlands insolvency rules in principle allow the Insolvency Representative to demand performance of profitable Contracts while choosing to default (he cannot repudiate) under Contracts which are detrimental to the estate of the bankrupt party (i.e. the Clearing House) ("**cherry-picking**"). However, even in the absence of termination and close-out provisions dealing with a default or insolvency of the Clearing House, the BA contains certain safeguards against cherry-picking.

Firstly, Article 37 BA would allow the Solvent Party (i.e. the Member) to demand that the Insolvency Representative declares within a reasonable period of time whether he will honour the Contracts outstanding at such time. If the Insolvency Representative fails to do so, the Contracts will no longer be enforceable against the Solvent Party by operation of law. The Solvent Party will be entitled to terminate the Contracts under Article 6:265 Dutch Civil Code and possibly to a claim for compensatory damages against the estate. Where the Insolvency Representative informs the Solvent Party that he will perform all (or certain) outstanding Contracts, he is obliged to provide adequate security for the due performance of the Contracts concerned. It is not entirely clear whether the Insolvency Representative is also obligated to provide security where he himself demands performance from the Solvent Party. A reasonable interpretation of Article 37 BA should in our view entail that this is the case.

Secondly, where certain Contracts would have to be performed whereas certain other Contracts would not be honoured, under article 53 BA the Solvent Party would be entitled to set off its claims for damages in connection with the dishonoured Contracts against the Insolvency Representative's claims for performance of the other Contracts, subject to the observations on set-off of foreign currency claims made hereunder.

We also note that Clause 8.2.3 of the Rules states that all contracts registered in the Member's Position Accounts are held to constitute one single agreement between the Clearing House and the Member, except as otherwise set out in the Rules. This may be effective to bar cherry-picking.

3.5 Netting and Set-off: General

There are no netting or set-off provisions in the Clearing Agreement or the Rules that apply upon the occurrence of Insolvency Proceedings in relation to the Clearing House. However, under Dutch law in such circumstances:

- (a) the Member would be entitled immediately to terminate (partly or wholly) those outstanding Contracts for which the Insolvency Representative does not confirm that they will be performed and claim damages (see 3.4 above); and
- (b) the Member would be entitled to set-off its restitutory and/or damages claims against any claims against it from the Insolvency Representative in respect of the Contracts that it wishes to honour and Contracts that have been disavowed or terminated and receive or be obliged to pay only the net sum.

We are of this opinion because in the event that a creditor of an insolvent debtor is also the latter's debtor, the BA (Article 53 for bankruptcy and Article 234 for moratorium) allows this creditor/debtor to plead a set-off provided that his claim(s) and his obligations (expressed in the same currency or "generic consideration"):

- (a) have come into existence before the date of the Insolvency; or
- (b) resulted directly from (one or more) transactions with the bankrupt entered into prior to the Insolvency date.

Insolvency set-off is therefore allowed and contractual set-off arrangements can be enforced in Insolvency provided that (a) claim and counterclaim have "pre-insolvency roots" and (b) there is "mutuality" (as explained in paragraph 2.10 above) and (c) the claim and counterclaim are expressed in the same currency or "generic consideration". The requirements under (a) and (b) are mandatory and cannot be excluded by contract

or otherwise. Because Article 53/234 BA presupposes that each creditor of an insolvent party may regard his obligations to the insolvent party as security for the payment of his claims, it is the prevailing view that all contractual set-off arrangements can be enforced in Insolvency Proceedings, provided the above conditions (a) and (b) are met. To the extent that either the claim or the counterclaim do not result from pre-insolvency transactions or there is no such mutuality or single currency, a contractual set-off will not be effective in Insolvency. For the purpose of this opinion, we have assumed that there will be mutuality between the Parties.

Further, 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 exercise of such rights by the Member.

3.6 **Netting and Set-Off: Proprietary Accounts and Non-Proprietary Accounts**

A termination amount payable on any Non-Proprietary Account of a Member would be aggregated with or netted against a termination amount payable on any Proprietary Account of the Member.

This is because (i) Clause 8.2.3 of the Rules states that all contracts registered in the Member's Position Accounts are held to constitute one single Agreement between the Clearing House and the Member, except as otherwise set out in the Rules and (ii) Insolvency set-off by the Member would apply to all Contracts, regardless of whether they are administered in any Non-Proprietary Account of a Member or any Proprietary Account of a Member. Please refer to paragraph 3.5.

3.7 **Netting and Set-Off: Cross-Product Netting**

In Insolvency of the Clearing House a Member can exercise the rights under art. 37 BA in respect of any outstanding Contract without a contractual provision to that end.

3.8 **Cash Collateral**

Payments made by a Member to the Clearing House as cash margin under Clause 6.1.2 of the Rules constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash would be treated as the property of the Clearing House available to its creditors generally.

However, the amount of cash so provided would constitute a debt owed by the Clearing House to the Member as principal. As such, Insolvency set-off rights could be exercised by the Member.

3.9 Members' Assessment Liabilities

A Member's Assessment Liability is as follows under Clause 7.1 and 7.2 of the Rules, respectively.

- (i) Each Member is obliged to contribute to the Clearing Fund. The Default Contribution will be determined by the Clearing House for each individual Member in accordance with the calculation method as announced by the Clearing House. The Rules do not address whether any contribution would be subject to a cap or other restriction that would limit overall liability but the aforementioned calculation method could possibly contain a cap.
- (ii) Following utilization of the Clearing Fund by the Clearing House, each Member must restore its contribution to its original amount within a period of one Business Day after the utilization. This means that more than one contribution could be demanded from a Member.

4. QUALIFICATIONS

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

4.1 when applying Netherlands law as the law governing the Clearing Agreement and any Contracts, the competent courts of The Netherlands, if any, by virtue of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**"):

- (a) may give effect to the overriding mandatory provisions (i.e. provisions the respect for which is regarded as crucial for a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the Clearing Agreement and any Contracts (article 9(1) Rome I)) of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful (article 9(3) Rome I);
- (b) shall have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (Article 12(2) of Rome I).

It should also be noted that we are not aware of any published order, ruling or decision of a Netherlands court, in which such a court has used article 9(3) or its predecessor, article 7(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations to give overriding effect to foreign mandatory rules pertaining to a law other than the chosen (or applicable) law in commercial or financial litigation brought before such courts.

- 4.2 a determination, calculation or certificate of any party might in certain circumstances be held by a Dutch court not to be final, conclusive and binding (for example, if it could be shown to have been incorrect or to have any other unreasonable or arbitrary basis or not to have been made in good faith) notwithstanding the provisions of the relevant document;
- 4.3 in issuing this opinion we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time.
- 4.4 if the Clearing House does not have its centre of its main interests in this jurisdiction for the purposes of the EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings, the Dutch courts would not have jurisdiction to open Insolvency Proceedings with regard to the Clearing House.
- 4.5 interest accruing after the date on which Insolvency is declared cannot be admitted on an insolvency claim, unless the claim is secured by a right of pledge or mortgage (article 128 BA). Although article 53 BA does not provide for the applicability of this provision *per analogiam* on set-off, there is a remote risk that the claim for interest accruing after the date of the Insolvency judgment may not be capable of being taken into account for set-off purposes. The better view, however, is that (a) insolvency set-off governed by articles 53/234 BA operates, in effect, outside the Insolvent estate and therefore would not cause the monetary claims which are the subject of such set-off to be "admitted" in the Insolvency Proceedings, thereby causing article 128/260 BA to be applicable and (b) the only consequence of articles 128/260 BA is that the net amount resulting from the set-off, if any such amount is owed by the Insolvent Party (i.e. the Clearing House), will not be capable of accruing interest after the date of the Insolvency judgment, in order to be admitted in the Insolvency Proceedings;
- 4.6 in the Insolvency of the Clearing House in this jurisdiction, any amount payable by it must be filed with the Insolvency Representative in its equivalent in Euro (converted at the exchange rate prevailing on the date of the Insolvency judgment). This is a result of the application of Article 133 and/or 260 BA. It is not possible to obtain a payment from the Insolvency Representative in a currency other than Euro. The BA is

unclear as to whether an official exchange rate is to be used, or a rate determined for example by the Non-Defaulting Party.

- 4.7 all calculations for set-off in Insolvency Proceedings may have to be made by reference to a date not later than the date on which the Insolvency Proceedings were declared. Although there is no express provision in the BA stating this, it is held that as a general rule an Insolvency judgment fixes the rights of the creditors unalterably as of its date. Any amount by which the net amount due from the Clearing House increased between the Insolvency judgment date and the (later) termination date by reference to which calculation was made, may not be recoverable and therefore not capable of set-off.
- 4.8 we express no opinion as to whether any party needs to comply with or as to the consequences of compliance or non-compliance with any applicable provisions of Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories ("EMIR") and any technical standards made thereunder in respect of anything done by it in relation to or in connection with the Clearing Agreement. However, Article 12(3) of EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the Agreement invalid or unenforceable;
- 4.9 in Insolvency Proceedings under the laws of this jurisdiction, any dispositions of the Insolvent Party's property made after the commencement of Insolvency Proceedings of such Party are void under article 23 of the BA unless the court otherwise orders or the FCA Rules prevent its application. In Insolvency Proceedings a judgment of bankruptcy or moratorium has retroactive effect as from 00.00 hours of the day of the judgement and any dispositions by the counterparty (i.e. the Clearing House) of property made after the commencement of such Insolvency Proceedings are void, but this does not apply to financial collateral arrangements nor to acts performed pursuant to such arrangements (e.g. a pledge or transfer of additional or substitute Collateral). The actual time of the judgment applies to such financial collateral arrangements or acts. In addition, financial collateral arrangements or acts pursuant thereto are enforceable against third parties even if such arrangements or acts were entered into or took place after the judgment opening the Insolvency Proceedings was made, but on the same day, provided the counterparty is able to show that it was not aware nor should have been aware of such judgment.
- 4.10 obligations incurred by an Insolvent Party after the commencement of its Insolvency

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Proceedings might not be capable of being included in a set-off pursuant to the Set-Off Provisions, except where the obligation concerned comes into existence on the day of, but after, the commencement of the Insolvency Proceedings and the other Party can show that it was not aware, nor should it have been aware, of the making of the order.

- 4.11 Contracts entered into after Insolvency Proceedings have commenced in relation to the Clearing House might not be capable of inclusion in the netting or a set-off.
- 4.12 the BA contains provisions (Article 63a regarding bankruptcy and Article 241a regarding moratorium) allowing the supervisory judge (*rechter-commissaris*) in case of bankruptcy and the court in case of moratorium to render an order/judgment to the effect that the rights of recourse of all or specifically designated third parties in respect of assets belonging to the insolvent estate (or in the possession of the insolvent debtor) are suspended for a period of no more than two months (with a possibility of extension by - at most - two more months), save with prior permission of the supervisory judge /court. Although there is no case law on this matter, we endorse the view that has been expressed in authoritative legal writing that termination rights and set-off are not within the scope of Article 63a and Article 241a BA and that therefore a "freeze-order" should have no impact on the exercise of such rights.
- 4.13 the Insolvency Representative can only invoke the nullity and demand refunding of any pre-insolvency payments or transfers made by the insolvent party to the other party (assuming such payments or transfers were made on the due date therefore) in the event that the other party knew, at the time of such payment on the due date, that a petition for the insolvent party's bankruptcy or moratorium had been filed with the court or, alternatively, that such payment resulted from concerted action of the insolvent party and the other party aimed at paying the latter to the detriment of the insolvent party's other creditors.

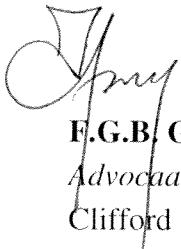
There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

5. RELIANCE

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 person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Option 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


F.G.B. Graaf
Advocaat
Clifford Chance LLP