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International Swaps and Derivatives
Association, Inc.
360 Madison Avenue, 16th Floor
New York, N.Y. 10017
United States of America

21 December 2021

Dear Sirs,

Aruban, Curaçao and Sint Maarten law aspects of "close-out netting" under the 1992 and 2002 ISDA Master Agreements

In your email of 23 September 2021 and your memorandum of 10 April 2019 (together the "**Opinion Request**"), you requested us to render an opinion with respect to the validity and enforceability under the laws of Aruba, Curaçao and Sint Maarten of the termination, bilateral close-out netting and multibranch netting provisions of the 1992 and 2002 ISDA Master Agreements (collectively, the "**ISDA Master Agreements**") to the International Swaps and Derivatives Association, Inc in each case when entered into with certain legal entities incorporated or organized under the laws of Curaçao or Aruba.[1] You also requested to include an opinion on the 2001 ISDA Cross-Agreement Bridge (the "**2001 Bridge**") and the 2002 ISDA Energy Agreement Bridge (the "**2002 Bridge**"). In this Opinion Letter we will render a full legal opinion as to both issues.

1. SCOPE AND NATURE OF OPINION/DEFINITIONS

1.1 The structure of this opinion letter (the "**Opinion Letter**") follows that suggested in your Opinion Request.

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[1] The ISDA Master Agreements included for the purposes hereof are the 1992 ISDA Master Agreements (Multicurrency Cross-Border/Single Currency - Local Jurisdiction), the 2002 ISDA Master Agreement (English/New York law), the 2002 ISDA Master Agreement (French law) and the 2002 ISDA Master Agreement (Irish law) (collectively the "**2002 ISDA Master Agreements**"). For the purpose of this opinion, we have only considered the English language version of the 2002 ISDA Master Agreement (French law).

1.2 The ISDA Master Agreements contain certain close-out netting provisions that become operative after the early termination of the agreement. In addition, the ISDA Master Agreements (with the exception of the 1992 ISDA Master Agreement (Local Currency Single Jurisdiction)) contain multibranch netting provisions under which payments may be received and made through designated branches or offices of the relevant Party in different jurisdictions. Appendix A contains a brief description of the various types of Transactions that may be documented under an ISDA Master Agreement.

1.3 This Opinion Letter is given in respect of specific questions raised in your Opinion Request concerning the validity and effectiveness of the early termination and close-out netting provisions of Sections 5 and 6 of the ISDA Master Agreements where one of the Parties thereto is a Counterparty (as defined herein). Aruban, Curaçao and Sint Maarten law do not provide for any specific statutory rules relating to Transactions that may be entered into under the ISDA Master Agreements. There is no case law available on the question whether or not the early termination and close-out netting provisions of Sections 5 and 6 of the ISDA Master Agreements can be validly invoked against an Insolvency Representative under Aruban, Curaçao or Sint Maarten law. We understand, however, that your fundamental requirement is for the validity of such provisions to be substantiated by a written and reasoned opinion letter.

1.4 Furthermore, within the framework of the ISDA Master Agreements a wide variety of Transactions can be entered into, to which special considerations may apply. In this Opinion Letter the special nature of these Transactions can not be taken into account and consequently no opinion is expressed in relation to the enforceability of any specific Transaction. We would like to point out, however, that in respect of those Transactions that are physically settled, there is an increased risk that these Transactions would be within the scope of articles 34 and 227 of the Insolvency Code. These articles (which are dealt with *in extenso* in Part I(B)(1) hereof) may cause the mandatory *automatic* termination of all outstanding Transactions of that type as of the date of the insolvency judgment in respect of the Counterparty.

1.5 Interpretation and Terms of Reference

(i) Capitalised terms used in this Opinion Letter (and not otherwise defined herein) shall have the same meaning as attributed thereto in the relevant ISDA Master Agreement.

(ii) Save where the context otherwise requires, reference in this Opinion Letter to a paragraph number shall be a reference to such numbered paragraph in this Opinion Letter and reference to a Section number shall be a reference to such numbered section in the relevant Master Agreement.

(iii) Save where otherwise indicated, references to "**Curaçao**" in Part 2 through Part 4 of this Opinion Letter and Appendix D shall be understood to include Sint Maarten.

(iv) Headings used in this Opinion Letter are for ease of reference only and shall not affect its interpretation.

(v) "**Aruba Insurance Decree**" means the Decree on Supervision of Insurance Companies (*Landsverordening toezicht verzekeringsbedrijf*) of Aruba as modified up to the date hereof;

(vi) "**Aruba Securities Markets Decree**" means the Aruban Supervision of Securities Markets Decree 2016 (*Landsverordening toezicht effectenverkeer 2016*), which took effect in 2017 (as modified up to the date hereof);

(vii) references to "**Aruban Courts**" are to the Aruban court of first instance (*Gerecht in eerste aanleg van Aruba*), the common court of justice for Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba (*Gemeenschappelijk Hof van Justitie*) and the Dutch Supreme Court, unless otherwise provided;

(viii) "**Banking Decree**" means the Decree on Supervision of Banking and Credit Institutions 1994 (*Landsverordening toezicht bank- en kredietwezen 1994*) of Curaçao and the equivalent Sint Maarten, both as modified up to the date hereof;

(ix) "**Bankruptcy Decree**" means the Bankruptcy Decree of 1931 (*Faillissementsbesluit 1931*) of Curaçao and the equivalent of Sint Maarten, both as modified up to the date hereof;

(x) "**Bankruptcy Ordinance**" means the Bankruptcy Ordinance (*Faillissementsverordening*) of Aruba as modified up to the date hereof;

(xi) "**CBA**" means the Central Bank of Aruba (*Centrale Bank van Aruba*);

(xii) "**CBCM**" means the common Central Bank for Curaçao and Sint Maarten (*Gemeenschappelijke Centrale Bank voor Curaçao en Sint Maarten*);

(xiii) "**Commencement Time**" means 00.00 hours of the day of a judgment opening bankruptcy, moratorium or Emergency Measures as a result of which (i) such judgment has retroactive effect and (ii) any dispositions of property made or agreements entered into by the Party subject to such proceedings after the Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court) are void (the "**Retroactive Effect Rule**");

(xiv) "**Counterparty**" shall be understood to refer to:

(i) the type of entity falling within one of the categories specified in Appendix D; or

(ii) a Foreign Company.

(xiv) "**the Courts**" shall mean the Aruban Courts and the Curaçao courts unless the context suggests otherwise;

(xv) "**Credit Institution**" means a company that is duly incorporated under the laws of this jurisdiction and that has a license to engage in the business of a credit institution pursuant to the Credit Institution Decree or the Banking Decree;

(xvi) "**Credit Institution Decree**" means the Decree on Credit Institutions (*Landsverordening toezicht kredietwezen*) of Aruba as modified up to the date hereof;

(xvii) "**Curaçao courts**" shall mean the Curaçao and Sint Maarten court of first instance (*Gerecht in eerste aanleg van Curaçao en SMaarten*), the common court of justice for Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba (*Gemeenschappelijk Hof van Justitie*) and the Dutch Supreme Court, unless otherwise provided;

(xviii) "**Curaçao law**" shall be understood to include Sint Maarten law and references to "**Curaçao branches**" shall be understood to include Sint Maarten branches;

(xix) "**Curaçao public policy**" shall be understood to include Sint Maarten public policy;

(xx) "**Curaçao Insurance Decree**" means the Decree on Supervision of Insurance Companies (*Landsverordening toezicht verzekeringsbedrijf*) of Curaçao and the equivalent of Sint Maarten, both as modified up to the date hereof;

(xxi) "**DSIAA"** means the Decree on the Supervision of Investment Institutions and Administrators (*Landsverordening toezicht beleggingsinstellingen en administrateurs)* of Curaçao, and the equivalent of Sint Maarten, both as modified up to the date hereof;

(xxii) "**Emergency Measures**" mean the administration procedures (*noodregeling*) imposed by a Court pursuant to Chapter VIII of the Credit Institution Decree, Chapter VI of the Banking Decree, Chapter VII of the Aruban Insurance Decree or Chapter VIII of the Curaçao Insurance Decree which are a substitute procedure to the moratorium of payments (*surseance van betaling*) under the Insolvency Code which cannot be declared in respect of Credit Institutions and Insurance Companies;

(xxiii) "**EU Insolvency Regulation**" means EU Regulation No. 2015/848 on insolvency proceedings, an EU regulation which applies to all EU member states other than Denmark;

(xxiv) "**Foreign Company**" means a company incorporated with legal entity status under the laws of another jurisdiction and having a branch or

branches established or located in this jurisdiction (each, an "**Aruban Branch**" or a "**Curaçao Branch**");

(xxv) "**Insolvency**" and "**Insolvency Proceedings**" will be understood to refer to bankruptcy (*faillissement*) and moratorium of payments (*surseance van betaling*) which are governed by the Insolvency Code as well as to Emergency Measures;

(xxvi) a Counterparty which is subject to Insolvency Proceedings is referred to as the "**Insolvent Party**" and the other Party is referred to as the "**Solvent Party**";

(xxvii) "**Insolvency Code"** means the Bankruptcy Decree and the Bankruptcy Ordinance;

(xxviii) **"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 Insolvency Code or an administrator within the meaning of Emergency Measures;

(xxix) "**Insurance Company**" means a company that is validly incorporated under this jurisdiction and that has a license to engage in the business of an insurance company pursuant to the Aruban Insurance Decree or the Curaçao Insurance Decree;

(xxx) "**Investment Firm**" means a company that is duly incorporated under the laws of this jurisdiction and that has a license to engage in the business of a securities broker (*effectenbemiddelaar*) or an individual portfolio manager (*vermogensbeheerder*) pursuant to the Securities Broker Decree or the Aruba Securities Markets Decree[2];

(xxxi) "**Investment Institution**" means a company that is duly incorporated under the laws of this jurisdiction and that has a license to engage in the business of a collective investment company (*beleggingsmaatschappij*) pursuant to the DSIAA or the Aruba Securities Markets Decree[3];

(xxxii) "**this jurisdiction**" means Aruba, Curaçao, and Sint Maarten (and not, for the avoidance of doubt, Saba, Sint Eustatius or Bonaire);

(xxxiii) "**Netting Provisions**" means Sections 5 and 6 of the ISDA Master Agreements;

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[2] Note that certain investment firms may benefit from exempt status or a dispensation, in which case the relevant legislation does not or only partially apply. Sint Maarten has no equivalent legislation regarding securities brokers and portfolio managers.

[3] Note that certain investment institutions may benefit from exempt status or a dispensation, in which case the relevant legislation does not or only partially apply.

(xxxiv) the parties to an ISDA Master Agreement are hereinafter collectively referred to as the "**Parties**" and each a "**Party**", one of which shall at all times be a Counterparty;

(xxxv) the "**Procotol**" means the Close-out Amount Protocol published by ISDA on 27 February 2009;

(xxxvi) "**Securities Brokers Decree**" means the Decree on the Supervision of Securities Brokers and Individual Portfolio Managers 2016 (*Landsverordening toezicht effectenbemiddelaars en vermogensbeheerders 2016*) of Curaçao, which took effect in 2017 (as modified up to the date hereof);

(xxxvii) "**Winding-Up Directives**" means Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions ("**WUDCI**") and Directive 2009/138/EC on the taking up and pursuit of the business of insurance and reinsurance ("**Solvency II**").

1.6 Type of counterparties not covered by Opinion Letter

The term Counterparty shall not include any of the following:

(a) any partnerships (e.g. a (*personen*) *vennootschap, vennootschap onder firma, maatschap or commanditaire vennootschap*) [4];

(b) any unincorporated vehicles for collective investment (including unincorporated mutual, hedge, sovereign wealth or investment funds);

(c) any public law legal entities or local authorities (other than those referred to in Appendix D);

(d) any religious associations (*kerkgenootschappen*);

(e) any individuals; or

(f) any international or supranational organisations;

(g) any state-owned entities;

(h) any trusts (including segregated trust companies and family trusts such as the *Stichting Particulier Fonds*).

1.7 Applicable law

1.7.1 The ISDA Master Agreements are expressed to be governed by English law, New York law, French law or Irish law. We are not qualified to assess the exact meaning and consequences of the terms of the ISDA Master

[4] This Opinion Letter does not cover partnerships because partnerships in most cases are sui generis contractual arrangements that often result in joint and several liability of certain or all partners for partnership debts. This feature complicates the netting analysis.

Agreements under such laws or of the application of such laws to such terms and, accordingly, our review thereof has been limited to the terms of such documents as they appear on the face thereof.

1.7.2 To the extent that the laws of England, New York, France or Ireland or any other jurisdiction may be relevant, we have made no independent investigation thereof and this Opinion Letter is subject to the effect (if any) of such laws (including the public policy).

1.8 Scope of the Opinion Letter / Matters Excluded

1.8.1 Only the obligations of the Counterparty in connection with the ISDA Master Agreements and those of no other person or persons, unless otherwise specified, are opined upon in this Opinion Letter.

1.8.2 This Opinion Letter is confined to the laws of the jurisdictions of Aruba, Curaçao and Sint Maarten as in force as at the date hereof and as applied and interpreted according to present published case-law of the Courts, administrative rulings notices of and communications with the CBCM and the CBA and authoritative literature. We express no opinion:

(a) as to any matters of fact or any person or entity other than Counterparties;

(b) on the effect of any laws other than those of this jurisdictions even in cases where, under the laws of this jurisdiction, any foreign law falls to be applied and we assume that no such foreign law would affect or qualify our Opinion Letter as set out in Part 2 below;

(c) as to any matters relating to tax law or as to any liability to tax which may arise or be suffered as a result of or in connection with the ISDA Master Agreements;

(d) on international law, including (without limitation) the rules of or promulgated under or by any bi- or multilateral treaty or treaty organisation (unless implemented into the laws of this jurisdiction) or on any anti-moneylaundering, data privacy, anti-trust, market abuse or competition laws;

(e) that the future or continued performance of any of the obligations of the Parties contemplated by the ISDA Master Agreements will not contravene Aruban or Curaçao law, its application or interpretation, if the same are altered in the future;

(f) on any commercial, accounting, capital adequacy or other non-legal matter or on the ability of any Counterparty to meet its financial or other obligations under the ISDA Master Agreements;

(g) any right or obligation which the ISDA Master Agreements may purport to impose, confer or establish in respect of any person who is not a party thereto;

(h) as to the validity or enforceability of any provisions of the ISDA Master Agreements other than those to which express reference is made in this Opinion Letter; or

(i) on any specific Transaction concluded under or pursuant to the ISDA Master Agreements or on the risk of recharacterisation of any specific Transactions such as (without limitation) credit protection transactions, longevity transactions, weather transactions or any other Transactions as a result of insurance laws or wagering and gambling laws.

1.8.3 We have not been concerned with investigating or verifying the accuracy of any facts, representations or warranties or the reasonableness of any statements of opinion set out in the ISDA Master Agreements. In particular, we have not verified whether any internal or external limitation on the powers of the signatories to bind each of the Parties has been, or will be exceeded. To the extent that the accuracy of such facts, representations and warranties not so investigated or verified and of any facts stated in any other document (or orally confirmed) is relevant to the contents of this Opinion Letter, we have, with your permission, assumed that such facts, representations and warranties were true and accurate when made and remain true and accurate.

1.8.4 Aruban law and Curaçao law do not provide for any specific statutory rules relating to the questions raised and dealt with in this Opinion Letter. There is case law available on the question whether early termination provisions (but not the specific Netting Provisions) can be validly invoked against an Insolvency Representative in Insolvency Proceedings.

1.8.5 Once an amount has been determined under the relevant Netting Provision, the Party to whom such amount is payable must seek to enforce that amount, whether by lodgement of a claim against the other Party or otherwise. The ability to actually enforce payment of that amount will be dependent on the facts of the case. Our Opinion Letter is confined to the enforceability of the relevant Netting Provisions and accordingly, we do not opine on the enforceability of any net amount payable under any ISDA Master Agreement *after giving effect to* the relevant Netting Provision or any right of set off save as set out in 2.3.4 and 2.3.5 below.

1.9 Opinions, Assumptions and Reservations

1.9.1 Our opinions in respect of the ISDA Master Agreements are set out in Part 2 of this Opinion.

1.9.2 The confirmations in Part 2 are given on the basis of the assumptions set out in Part 3 (*Assumptions*) and are subject to the reservations and qualifications set out in Part 4 (*Reservations*).

1.9.3 Where an assumption is stated to be made in this Opinion Letter, we have not made any investigation or enquiry with respect to the matters that are the subject of such assumption and we express no views as to such matters.

Part 2

2. OPINION

2.1 Insolvency Proceedings

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

(a) bankruptcy (*faillissement*), as regulated in Title I of the Insolvency Code;

(b) moratorium (*surséance van betaling*), as regulated in Title II of the Insolvency Code;

(c) for Credit Institutions and Insurance Companies: Emergency Measures.

These Insolvency Proceedings "commence" from the Commencement Time on the date of the judgment by a Court opening these Insolvency Proceedings.

2.1.2 **Bankruptcy** (*faillissement*) is a general attachment on (practically) all of the assets of the debtor, imposed by a judgment of the Court of First Instance (*Gerecht in Eerste Aanleg*) for the benefit of the bankrupt's collective creditors. The purpose of bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the bankrupt's assets among his creditors. Secured creditors can normally exercise their rights despite the bankruptcy. The court appointed liquidator in bankruptcy (*curator*) manages the bankrupt estate, which consists of all of the debtor's assets and liabilities existing on the date of the bankruptcy judgment and extends to all after-acquired assets as well. The estate is not liable for obligations incurred by the debtor after the bankruptcy adjudication, except to the extent that such obligations arise from transactions that are beneficial to the estate. A bankruptcy judgment under Aruban and Curaçao law takes effect retro-actively from the Commencement Time on the date the judgment of bankruptcy is rendered and not retro-actively from the date the petition was presented to the court (unless, of course, the bankruptcy order is rendered on the same day as a petition is presented, which is conceivable under certain circumstances). Bankruptcy judgments are published in a local newspaper.

2.1.3 **Moratorium of payments** (*surséance van betaling*) is a court-ordered general suspension of a debtor's obligations; its purpose is to avoid the debtor's bankruptcy in the interest of both the debtor and his creditors. It is available only at the request of the debtor, on the ground that he will be

unable to continue payments. The purpose of a moratorium is to give the debtor an opportunity for recovery; it may lead to a normal resumption of payments or to a settlement. In the majority of cases, however, moratorium is followed by bankruptcy. During the moratorium unsecured creditors cannot seek recovery of their claims on the debtor's assets (without prejudice to set-off and netting rights as explained below). However, secured creditors can exercise their security rights despite the moratorium. The administrator (*bewindvoerder*) in a moratorium has less powers than a liquidator in bankruptcy. The former can only act with the cooperation of the debtor, i.e. the management in the case of a company (and the debtor/the management can only act with the co-operation of the administrator(s)). It should be noted that moratorium of payments is deemed to take effect retro-actively from the Commencement Time on the day the judgment order for a provisional moratorium is rendered.

2.1.4 **Emergency Measures**. The Insolvency Code is applicable to all legal persons, including Credit Institutions and Insurance Companies, as well as to Aruban or Curaçao branches of foreign banks. However, the provisions in respect of moratorium are not applicable in respect of Credit Institutions and Insurance Companies or to local branches of credit institutions or insurance companies established outside Aruba or Curaçao. Instead, the Aruban Insurance Decree, the Curaçao Insurance Decree, the Banking Decree and the Credit Institution Decree provide that the CBA or CBCM may petition a Court for the application of Emergency Measures to respectively an Insurance Company or a Credit Institution (including the licensed local branches of a foreign insurance company or credit institution). If the court decides to apply the Emergency Measures, the CBA or CBCM itself assumes as administrator the role of the management of the Credit Institution or Insurance Company, to restore order to, or to liquidate (usually), the business of the Credit Institution or Insurance Company. Emergency Measures have an advantage compared with moratorium in that the CBA or CBCM as administrator does not require the cooperation of the Credit Institution's or Insurance Company's management (nor of their supervisory bodies) in taking decisions which it considers in the interest of creditors. In applying the Emergency Measures, the Court may authorise the CBA or CBCM to transfer in whole or in part the Credit Institution's or Insurance Company's business to another institution or to wind up such business[5]. Afterwards, a bankruptcy order can still be issued. Emergency Measures cannot be applied in respect of Investment Firms. They do not affect the analysis of this Opinion Letter, in that the results would be essentially the same as set out herein below.

[5] It is unclear how these authorisations might be applied in respect of the local licensed branch of a foreign insurance company or credit institution.

2.2 Conflict of Laws

Before discussing the issues relating to Sections 5 and 6 of the ISDA Master Agreements, the 2001 Bridge, the 2002 Bridge and the Protocol, a short exposé on certain Aruban or Curaçao conflict of laws rules will be given.

2.2.1 *Choice-of-law.* The ISDA Master Agreements are governed by either English, New York, French or Irish law pursuant to a specific choice-of-law clause in the Schedule to the ISDA Master Agreements. The Courts will observe and give effect to the choice of any such law (or of any other foreign law) as the law governing the ISDA Master Agreements, on the basis and within the scope of and subject to the limitations imposed by the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the "**Rome Convention**")[6]. On the assumption that there are no mandatory rules of a jurisdiction other than that of England, the State of New York, France or Ireland which could be applied by the Courts pursuant to article 7(1) of the Rome Convention - and subject to our comments below - the choice of English, New York, French or Irish law as the law governing the ISDA Master Agreements will in principle be observed and given effect by the Courts. However, the application of English, New York, French or Irish law (or of any other foreign law) may be refused by such courts:

(i) if both Parties to the ISDA Master Agreements would be companies incorporated under the laws of this jurisdiction or branches of foreign companies established in this jurisdiction, the validity of the choice of law clause is uncertain as the Rome Convention requires an "international connection". Article 3(3) of the Rome Convention provides that in situations where except for a choice-of-law and/or a jurisdiction or arbitration clause "*all the other elements relevant to the situation at the time of the choice are connected with one country only*", a choice-of-law cannot prejudice the mandatory rules of the law of that country. In our opinion, the question whether or not a contract has an international character cannot always be answered exclusively on the basis of the factual (geographical) connecting factors which the contract has with one or more countries. In particular, contracts that concern a certain sector of international economic activity (so-called "international market" contracts) may have to be qualified as truly international contracts, so as to enable the parties to designate themselves the law governing their contract. This opinion is in accordance with the authoritative conclusion by *Advocate-General Strikwerda* before HR 26 May 1989 NJ 1992, 105 NILR 1991, 408 (Zerstegen-Van der Horst B.V. v. Norfolk Line B.V.) and with the prevailing view in legal writing. We strongly believe that the ISDA Master

[6] 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**") does not apply in Aruba or Curaçao, but the Rome Convention was explicitly extended to the Netherlands (former) Antilles when it took effect.

Agreement does qualify as an 'international market contract'. One cannot rule out the possibility that the Courts will pursuant to article 3(3) of the Rome Convention only give effect to the relevant rules of English, New York, French or Irish law to the extent that these rules do not infringe mandatory rules of Aruban or Curaçao law. There are no such rules of Aruban or Curaçao law that in our view would be so infringed; and

(ii) where this would lead to manifest incompatibility with Aruban or Curaçao public policy (an exception to the chosen law permitted by article 16 of the Rome Convention).

The prevailing view is that the Courts will only in case of a manifest violation of fundamental principles of Aruban or Curaçao law rely on article 16 of the Rome Convention. In addition, the Rome Convention (article 7(2)) entails that despite the choice-of-law, Aruban or Curaçao courts shall be at liberty to apply those rules of Aruban or Curaçao law that are mandatory irrespective of the law otherwise applicable to the ISDA Master Agreements[7]. Where appropriate, this Opinion Letter will indicate whether the provisions of the ISDA Master Agreements could be contrary to Aruban or Curaçao public policy (article 16 of the Rome Convention) or whether the possibility exists that the Aruban or Curaçao courts would give overriding effect to mandatory rules of Aruban or Curaçao law (article 7(2) of the Rome Convention).

2.2.2 *Scope of chosen law.* Pursuant to article 10 of the Rome Convention, the law determined to be applicable to a contract on the basis of the Convention will govern the interpretation and performance of the contract as well as the consequences of nullity or a breach of contract (including the assessment of damages and termination) and the statutory limitations on bringing suit for a breach. With respect to the ISDA Master Agreements this entails that in principle English, New York, French or Irish law governs the remedies provided to the parties by the ISDA Master Agreements. Therefore, if these remedies are enforceable in accordance with the terms of the ISDA Master Agreements under English, New York, French or Irish law, this will in principle be recognised by the Courts.

2.2.3 *Scope of mandatory Aruban and Curaçao law.* The law governing the ISDA Master Agreements will, however, not govern every aspect of the ISDA Master Agreements and the relations of the parties thereunder. In

[7] We are not aware of any court decisions in which Aruban, Curaçao or Dutch courts have given overriding effect to *foreign* mandatory rules pertaining to any law other than the chosen law or Aruban, Curaçao or Dutch law in commercial or financial litigation brought before such courts (an exception to the chosen law permitted by article 7(1) of the Rome Convention). Aruban, Curaçao and Dutch courts (including the *Hoge Raad* acting in its capacity of Supreme Court of the former Netherlands Antilles) have refused to give such overriding effect to certain mandatory rules, even in cases where there seemed to be every opportunity to do so. The prevailing attitude in Supreme Court case law is that only *domestic* rules which are of a "public law nature" (e.g. exchange control regulations, banking regulations, competition rules) are mandatory rules which are capable of overriding the chosen law (article 7(2) of the Rome Convention).

particular, whenever a Party is subject to Insolvency Proceedings[8], Aruban or Curaçao insolvency rules are mandatorily applicable and may therefore affect the enforceability in insolvency situations of pre-insolvency contracts. Thus, questions such as whether upon or after insolvency a pre-insolvency contract is or can be terminated (assuming that this is possible under the contract's governing law) or whether the Insolvency Representative can claim performance will be governed by Aruban or Curaçao insolvency rules, even when the relevant contract is governed by foreign law. In the event of Insolvency Proceedings, the contractual set-off arrangements under the ISDA Master Agreements and any Confirmations (and English, New York, French or Irish law) will only be recognised within the limits of Aruban or Curaçao insolvency set-off[9].

2.3 Close-out Netting under the ISDA Master Agreements

2.3.1 ***Assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the insolvent Counterparty organized under the laws of Aruba or Curaçao, are the provisions of the ISDA Master Agreements permitting the Non-defaulting Party to terminate all the Transactions upon the insolvency of its Counterparty enforceable under such laws?***

In this case, termination of all Transactions is not automatic upon the occurrence of insolvency but rather optional, by reason of insolvency, upon notice given by the Non-defaulting Party. Aruban and Curaçao contract law recognise termination clauses triggered by the notice of one of the Parties and without court intervention as valid and effective. Aruban and Curaçao insolvency rules in principle do not affect these termination clauses. There is one potential exception to this rule.

There are two provisions in the Insolvency Code, articles 34 and 227,[10] which may cause the mandatory *automatic* termination of all outstanding Transactions of a certain type as of the date of the insolvency judgment in respect of the Counterparty. These articles deal with forward contracts for the future delivery of commodities (or securities), which commodities (or securities) are traded on a public exchange (i.e. the forward contract itself could be OTC) and which contracts have a settlement date falling after the Commencement Time. With effect from such Commencement Time *all* outstanding forward transactions falling within articles 34 or 227 of the Insolvency Code are terminated by operation of law. The parties' mutual and unperformed settlement and delivery obligations are extinguished automatically with effect from the Commencement Time. The rationale of

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8 On jurisdiction in insolvency-matters, see paragraph 2.4 below.

9 See further paragraph 2.3.3 below.

10 Equally applicable to Emergency Measures pursuant to article 41 of the Credit Institution Decree or article 32(2) of the Banking Decree and article 20(3) of the Aruban Insurance Decree or article 66(2) of the Curaçao Insurance Decree.

these articles is to create certainty with respect to executory contracts containing speculative elements but relating to goods or rights having a readily ascertainable market price. Therefore, it may not be required that the commodities/ securities having such a market price are actually traded on an exchange. In the event that a Court would apply articles 34 and 227 of the Insolvency Code to Transactions (with maturity dates after the insolvency judgment)[11], the only practical consequence would be that the Non-defaulting Party would have no freedom to close out (i.e. terminate) such Transactions *after* the Commencement Time, because the Transactions will have already been automatically terminated with effect from such Commencement Time by operation of Aruban or Curaçao insolvency law.

Otherwise, the legal consequences when applying either articles 34 and 227 of the Insolvency Code or Section 6 of the ISDA Master Agreements (insofar as early termination due to a bankruptcy event of default is concerned) are essentially the same: the relevant agreements will be terminated and the mutual obligations converted into an obligation for one of the parties to pay damages[12]. Articles 34 and 227 of the Insolvency Code do not provide for the manner in which such damages should be calculated, but, on the basis of the legislative history of these articles, it seems likely (although this is not entirely free of doubt) that the Parties can validly agree on an objective method of calculating damages based on market prices when entering into the ISDA Master Agreements and that such agreement will not be affected by the automatic termination of the Transactions.

Under the laws of this jurisdiction, it is not necessary for the Parties to agree to an automatic, rather than an optional close-out under the early termination and Netting Provisions. Whether it is advisable, as a matter of

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[11] It is possible that certain transactions involving cash settled derivatives and derivative transactions involving physical delivery would be characterised by Aruban or Curaçao court as falling within the scope of articles 34 and 227 of the Insolvency Code. The reason this is possible is that these articles cover all forward contracts (it is not required that such contracts are exchange traded) for the future delivery of commodities (or securities) which are traded on a public exchange (and therefore have a published and consequently easily ascertainable market price which is fixed from day to day) and which contracts require delivery and payment (or settlement of the difference between the contract rate and the market rate) after the date the insolvency proceedings commence. To the extent that the derivative Transactions documented under the ISDA Master Agreement therefore involve commodities or securities which are traded on a public exchange, articles 34/227 of the Insolvency Code could well apply to these transactions, although to our knowledge there has been no case law directly concerned with derivative transactions of the type covered by the ISDA Master Agreement and our analysis is therefore based solely on the face and the rationale of these articles.

[12] As mentioned in paragraph 2.3.3 below, the more likely interpretation of the netting arrangements under Section 6(e) is that of an agreed procedure for determining damages resulting from terminating the affected Transactions (provided this is consistent with how these arrangements are interpreted under English, New York, French or Irish law).

Aruban or Curaçao law, to elect "Automatic Early Termination" in the Schedule with a Counterparty is discussed in more detail in **Appendix C.**

2.3.2 ***Assuming the parties have selected Automatic Early Termination upon certain insolvency events to apply to the Insolvent Party, are the provisions of the ISDA Master Agreements automatically terminating all the Transactions upon the insolvency of its Counterparty enforceable under Aruban and Curaçao law?***

Under Aruban and Curaçao law the main principle is that, unless provided otherwise, the commencement of insolvency proceedings does not in itself affect existing contracts, in the sense that such proceedings do not change the terms of the parties' agreement.

There is case-law confirming the effectiveness of automatic termination clauses operating immediately prior to or upon the insolvency of one of the parties. These clauses qualify as dissolving conditions in respect of the parties' scheduled future obligations. Under Aruban and Curaçao contract law[13] any future contingency can be made a dissolving condition, unless it violates a statutory provision or public policy. We are not aware of any basis upon which Section 6(a) of the ISDA Master Agreements could violate such provision or public policy.

On this basis, and assuming the Courts would duly apply English, New York, French or Irish law (as the case may be), it is our opinion that:

(a) automatic termination clauses of the type used in the ISDA Master Agreements should be upheld by the Courts;

(b) the Insolvency Representative will not have the opportunity to disclaim or accept transactions depending on their profitability, since no transactions will be outstanding at the time he is appointed;[14] and

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[13] Article 1282 of the Aruban Civil Code (*Burgerlijk Wetboek van Aruba*) and article 6:22 of the Curaçao Civil Code (*Burgerlijk Wetboek*). The consequences of the dissolution/termination can be agreed upon in the contract

[14] ***"Cherry-picking".*** Absent any contractual (automatic or elective) termination and close-out of an ISDA Master Agreement and the outstanding Transactions documented thereunder, Aruban and Curaçao insolvency rules in principle allow the Insolvency Representative to demand performance of profitable contracts while choosing to default (he cannot repudiate) under transactions which are detrimental to the Insolvent Party's estate ("cherry-picking"). However, even in the absence of close-out provisions, the Insolvency Code contains certain safeguards against cherry-picking. *Firstly*, articles 33 / 226 of the Insolvency Code (equally applicable to Emergency Measures) would allow the Solvent Party in Insolvency Proceedings *to demand that the Insolvency Representative declares* within a reasonable period of time whether he will honour the transactions outstanding at such time. If the Insolvency Representative fails to do so, the transactions will no longer be enforceable against the Solvent Party by operation of law and the Solvent Party may be left with a claim for damages against the estate. Where the Insolvency Representative informs the Solvent Party that he will perform all (or certain) outstanding transactions, he is obliged to provide adequate security for the performance of the transactions 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 articles 33 / 226 of the Insolvency Code should, in our view, entail that this is the case. *Secondly*, where certain transactions would have

(c) although, where the Parties have selected Automatic Early Termination in accordance with the provisions of the ISDA Master Agreements and an Event of Default specified in Section 5(a)(vii)(4) occurs, early termination is expressed to be deemed to occur immediately prior to the institution of the relevant proceedings or the presentation of the relevant petition, we doubt that a Court would be willing so to deem, it being more likely to consider that early termination will occur upon the occurrence of such an Event of Default.

2.3.3 ***Are the provisions of the ISDA Master Agreements providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Counterparty enforceable under the laws of this jurisdiction?***

The determination of the amount due for all the Terminated Transactions upon early termination in accordance with Section 6(e) of the ISDA Master Agreements could be treated by the Courts either (i) as an agreed procedure for arriving at a single net amount representing a Party's damages on early termination of certain or all Transactions or (ii) as a contractual set-off of the mutual claims (representing losses and gains) resulting for both Parties from the Terminated Transactions. Although we regard the treatment under (i) to be the more likely, particularly if that is consistent with New York, English, French or Irish law, it cannot be excluded that the courts would adopt treatment (ii).

With respect to (i):

The calculation of damages pursuant to Section 6(e) of the ISDA Master Agreements:

(a) is governed by English, New York, French or Irish law and such choice of law will in principle be upheld by the Courts. However, Aruban or Curaçao insolvency law will govern the question whether these provisions for the calculation of damages (assuming their validity and effectiveness under English, New York, French or Irish law) will be enforceable against the insolvent estate in the event of Insolvency Proceedings being declared in this jurisdiction;

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to be performed whereas certain other transactions would not be honoured, the Solvent Party would be entitled to set off its claims for damages in connection with the dishonoured transactions against the Insolvency Representative's claims for performance of the other transactions, subject to the observations on set-off of foreign currency claims made in this Opinion Letter. *Thirdly*, as discussed in paragraph 2.3.1 above, articles 34 / 227 of the Insolvency Code, if applicable, would prevent the Insolvency Representative from "cherry-picking". By virtue of these articles *all* outstanding transactions falling within articles 34 / 227 of the Insolvency Code would be terminated by operation of law, irrespective of whether these contracts are favourable to the estate or not. Thus, the Insolvency Representative would *not* have the possibility of claiming performance of profitable transactions while choosing not to perform transactions which are detrimental to the insolvent estate.

(b) is permitted under Aruban or Curaçao law, which allows Parties to stipulate in advance how damages will be calculated in case of early termination due to breach or otherwise. In Insolvency Proceedings, the Insolvency Representative is bound by such agreements.

With respect to (ii):

However, even if the aggregating of (i) Close-out Amounts and Unpaid Amounts or (ii) Settlement Amounts and Unpaid Amounts or (iii) the determination of Loss pursuant to the ISDA Master Agreements would be considered as a procedure for calculating a Party's damages upon early termination, it is conceivable that the Courts would test whether article 49/224 of the Insolvency Code (the mandatory insolvency set-off provision which is equally applicable in Emergency Measures) achieves a result similar to that of Section 6. Consequently, we shall examine whether the netting envisaged by Section 6(e) would be consistent with Aruban or Curaçao insolvency set-off rules.

Netting as envisaged in Section 6(e) does not appear to lead to a result contrary to the mandatory insolvency set-off provisions of article 49 of the Insolvency Code. In the event that a creditor of an insolvent debtor is also the latter's debtor, article 49/224 allows this creditor/debtor to plead a set-off provided that his claim(s) and his debt(s) (if expressed in the same currency or "generic consideration"):

(a) have come into existence before the date of the judgment opening Insolvency Proceedings; *or*

(b) resulted directly from (one or more) transactions entered into with the Insolvent Party prior to the Commencement Time.[15]

Insolvency set-off is therefore allowed (and contractual set-off arrangements can be enforced) in Insolvency Proceedings, provided that (a) claim(s) and counterclaim(s) originate from pre-insolvency contracts and (b) there is "mutuality" and (c) the relevant claims(s) and counterclaim(s) are expressed in the same currency or "generic consideration".[16] We understand that the ISDA Master Agreements provide for conversion by either Party of all amounts due and payable into a single Base Currency in accordance with a pre-agreed conversion rate of exchange which will satisfy requirement (c). The requirement under (a) is

[15] A similar provision exists in respect of moratorium: article 224 of the Insolvency Code. Informally translated, article 49 of the Insolvency Code reads as follows: *"He who is both a creditor and a debtor of the bankrupt party can invoke set-off if both his claim and his indebtedness originated prior to the judgment of bankruptcy or resulted from transactions entered into with the bankrupt prior to such judgment."* This provision also applies to Emergency Measures in respect of Credit Institutions (article 32(1) of the Insolvency Code) and Insurance Companies.

[16] The mandatory mutuality requirement has been slightly relaxed in recent Supreme Court case law that upheld a multi-party contractual set-off arrangement in Insolvency Proceedings (Supreme Court 15 November 2019, JOR 2020/22, RI 2020/3)

mandatory and cannot be excluded by contract or otherwise. To the extent that either the claim(s) or the counterclaim(s) do not result from pre-insolvency transactions, a contractual set-off will not be effective in Insolvency Proceedings in respect of any such offending transactions (but will be effective as between all others). As stated in Part 3 below, we have assumed that there will be mutuality, and, in addition, we have assumed that none of the Transactions will have been entered into between the Parties after the Commencement Time in relation to the Insolvent Party.

Conclusion:

The general principles of insolvency set-off as outlined above, lead to the conclusion that (assuming this is the result of the provisions of Section 6 under English, New York, French or Irish law (as the case may be)), the Netting Provisions will be recognised and are enforceable in Insolvency Proceedings in relation to a Counterparty, provided that the obligations included in the netting process meet the above conditions (a) and (b).

Improved Position if EU Insolvency Regulation and the Winding Up Directives were to be applied

Although the EU Insolvency Regulation or the Winding Up Directives are not directly applicable or directly effective in this jurisdiction, the Courts might nevertheless apply insolvency set-off rules under English, New York, French or Irish law[17].

Based on article 7(2)(d) of the EU Insolvency Regulation, the insolvency rules of the law of the country where insolvency proceedings have commenced determine under which conditions a set-off can be invoked against the bankrupt estate. This would in the present case lead to the applicability of Aruban or Curaçao insolvency set-off rules. However, article 9(1), of the EU Insolvency Regulation specifies that the Counterparty's right of set-off remains intact, in so far as it exists under the (bankruptcy rules of the) law governing its claim against the Solvent Party. In the present case this would be English, New York, French or Irish law, as the law governing the ISDA Master Agreements. This would mean that a set-off not permitted by Aruban or Curaçao insolvency rules, but permitted under English, New York, French or Irish insolvency law, would be upheld by the Courts.

Another possibility would be that in respect of parties that are Credit Institutions or Insurance Companies the courts could adopt as rules of

[17] The reasoning which leads us to believe that English, New York, French or Irish insolvency set-off rules could be relevant is as follows. Although the EU Insolvency Regulation is not directly applicable in Aruba or Curaçao, one of its rules (on voidable preference (*actio pauliana*)) has been adopted by the Supreme Court (*Hoge Raad*) as a rule of Dutch and Aruban and Curaçao private international law, which leads us to believe that (irrespective of whether the parties would formally be within the scope of the EU Insolvency Regulation) Aruban, and Curaçao and Dutch courts may adopt other rules (e.g. on insolvency set-off) of the EU Insolvency Regulation and the Winding Up Directives as well.

Aruban or Curaçao private international law the rules on set-off contained in the Winding-Up Directives. Please refer to **Appendix B** for a fuller discussion of these rules as applicable in The Netherlands. This would mean that English, New York, French or Irish insolvency set-off rules could be applied by the courts, to determine the effectiveness of the contractual netting arrangements regardless of the outcome under Aruban or Curaçao insolvency law.

2.3.4 ***Assuming the Parties have entered into either a 1992 ISDA Master Agreement (Multicurrency-Cross Border) or one of the 2002 ISDA Master Agreements, the Counterparty is insolvent and the parties have selected a Termination Currency other than the currency of Aruba or Curaçao:***

(a) ***would a Court enforce a claim for the net termination amount in the Termination Currency?***

(b) ***can a claim for the net termination amount be proved in Insolvency Proceedings without conversion into the local currency?***

(c) ***if the claim must be converted to local currency for purposes of enforcement or proof in Insolvency Proceedings, what are the rules governing the timing and exchange rate for such conversion?***

Outside Insolvency Proceedings, a Court has powers to render judgments enforcing a claim for a net termination amount denominated in the Termination Currency. Enforcement of such a judgment against the Counterparty's assets located in this jurisdiction would be executed in terms of Aruban or Curaçao legal tender (the Netherlands Antilles Florin ("**NAF**") or Aruban Florin ("**AWG**")) and the applicable rate of exchange would be the market rate prevailing on the date of payment.

In the event that a Counterparty is subject to Insolvency Proceedings, a claim in a foreign currency will only be verified by the Insolvency Representative for its estimated value in NAF or AWG, applying the exchange rate prevailing on the date of the insolvency judgment (article 128/249 of the Insolvency Code). Hence, in the event that a Section 6(e) amount would be due in Insolvency Proceedings of a Counterparty in a foreign currency, the claim for payment must either be filed with the Insolvency Representative in NAF or AWG (applying the exchange rate between the applicable Termination Currency and NAF or AWG prevailing on the date of the insolvency judgment) and not in such Termination Currency or, alternatively, the Insolvency Representative will perform such conversion himself if the claim is filed with him expressed in the Termination Currency. The Insolvency Code is unclear as to whether an official exchange rate is to be used, or a rate determined for example by the Non-defaulting Party.

2.3.5 ***Is it possible to obtain or execute a judgment in a foreign currency under the laws of this jurisdiction?***

Under Aruban or Curaçao law judgments denominated in a currency other than NAF or AWG can be obtained and are enforceable in this jurisdiction. The creditor of such claims can either ask for a judgment in NAF or AWG or in the foreign currency. However, in Insolvency Proceedings, a claim in a foreign currency will only be admitted by the Insolvency Representative for its estimated value in NAF or AWG (see paragraph 2.3.4 above).

The main rule for judgments obtained outside this jurisdiction is that foreign judgments are not enforceable in this jurisdiction. Creditors whose claims have been recognised by a foreign court and who wish to seek recovery in Aruba or Curaçao will generally be forced to file their claims again (this time before a Court) for a review of the validity of the claim. In order to obtain a judgment that is enforceable (against a Counterparty) in Aruba or Curaçao, it will be necessary to relitigate the matter before the competent Court and to submit the judgment rendered by the foreign court in the course of such proceedings, in which case the Court may give such effect to the foreign judgment as it deems appropriate. According to current practice, however, based upon case law, the Courts will generally render a judgment in accordance with a foreign judgment, if and to the extent that:

(a) the foreign court rendering the judgment had jurisdiction over the subject matter of the litigation on internationally acceptable grounds (e.g. if the parties have agreed, for example in a written contract, to submit their disputes to the foreign court) and has conducted the proceedings in accordance with generally principals of fair trial (e.g. after proper service of process, giving the defendant sufficient time to prepare for the litigation);

(b) the foreign judgment is final and definite; and

(c) such recognition is not in conflict with an existing Court judgment or with local public policy (i.e. a fundamental principle of Aruban or Curaçao law); we are not aware of any reasons why in general enforcement of obligations under a foreign law agreement (such as the ISDA Master Agreements) would be in conflict with public policy of this jurisdiction.

Nonetheless, this main rule is not absolute. There are two groups of countries whose judgments are enforceable in Curaçao and Aruba: (i) the Netherlands, Bonaire, Sint Eustatius, Saba and Aruba/Curaçao and (ii) Germany and the United Kingdom, which are signatories to a bilateral enforcement treaty. The distinction between these two groups is important because judgments under (i) are enforceable without requiring leave of the Court (exequator), whereas leave must be obtained for the enforcement of

judgments from Germany and the United Kingdom.[18] Aruba is also a party to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (as amended; this is known as the "Brussels Convention"), as a result of which judgments from countries that signed the Brussels Convention can also be enforced on Aruba. This excludes insolvency judgments.

2.4 Close-out netting for Multibranch Parties

As there is no case law of the Courts offering any direct guidance on the issues discussed in 2.4.1 through 2.4.4 below, our conclusions are tentative.

2.4.1 ***Would there be any change in your conclusions concerning the enforceability of close-out netting under the ISDA Master Agreements remain the same, based upon the fact that a Credit Institution has entered into an ISDA Master Agreement on a multibranch basis and then conducted business in that fashion prior to its insolvency?***

Whether a Credit Institution has entered into an ISDA Master Agreement on a multibranch basis or not is irrelevant for the purposes of the enforceability analysis of close-out netting in this Opinion Letter.

For Insolvency Proceedings commenced in this jurisdiction, our reasoning is as follows:

(a) Aruba and Curaçao insolvency law follows, the principle of "universality of bankruptcy", i.e. such Insolvency Proceedings aim to comprise all assets, including those situated in foreign countries, and also claims to have legal effect, irrespective of factors such as the place of incorporation/business or the laws governing transactions with the Insolvent Party.[19] Insolvencies commenced in other jurisdictions must, on the other hand, in principle be assigned territorial effect.[20]

(b) the Insolvent Party is the Credit Institution in its entirety. Consequently, a Court is obliged by law to declare the Credit Institution, *including its branches*, insolvent and to apply the same legal provisions (i.e. of the Insolvency Code) to transactions booked through its head-office in this jurisdiction

[18] The Court that is to grant leave does not actually retry the case itself, but merely examines whether the leave has been requested for enforcement of a judgment that meets the requirements prescribed by law and the relevant treaty for enforcement.

[19] As far as the Netherlands is concerned, this extra-territorial effect is enshrined in the Statute for the Kingdom of The Netherlands ("*Statuut voor het Koninkrijk der Nederlanden"*). Based on article 40 of this Statute, insolvency judgments from Curacao, Aruba and the Netherlands have direct and automatic effect in all three jurisdictions.

[20] Exceptions are insolvency proceedings commenced in (a) Belgium: these have to be recognised in accordance with the Dutch-Belgian Execution Treaty (which also extends to Aruba and Curaçao) and (b) the Netherlands: based on the Statute for the Kingdom of The Netherlands ("*Statuut voor het Koninkrijk der Nederlanden"*), insolvency judgments from Curacao, Aruba and the Netherlands have direct and automatic effect in all three jurisdictions.

and to transactions booked through branches located in other jurisdictions. A branch is not considered under Aruban or Curaçao law to be a legal entity separate from the legal entity (incorporated under Aruban or Curaçao law) to which it pertains.

2.4.2 ***Would there be a separate proceeding in this jurisdiction with respect to the assets and liabilities of the Local Branch at the start of the insolvency proceedings for Bank F in country H? Or would the relevant authorities in Aruba or Curaçao defer to the proceedings in country H so that the assets and liabilities of the Local Brach would be handled as part of the proceeding for Bank F in Country H? Could local creditors of the Local Branch initiate a separate proceeding in Aruba or Curaçao even if the relevant authorities in Aruba or Curaçao did not do so?***

Whether or not a concurrent insolvency proceeding against Bank F has been started in Country H (assuming Country H is not Aruba, Curaçao or The Netherlands[21]) outside this jurisdiction is irrelevant in relation to the commencement of Insolvency Proceedings against the Aruban or Curaçao Branch. Consequently, as a matter of Aruban or Curaçao law, the commencement of such foreign proceedings does not imply either the mandatory start of insolvency proceedings in Aruba or Curaçao or the legal impossibility of starting such proceedings.

Under Aruban or Curaçao insolvency law, the Courts have jurisdiction in respect of insolvency proceedings against corporations that have their corporate seat (*statutaire zetel*) in Aruba or Curaçao and, *inter alia*, against any corporation that carries on business or professional activities through an office in Aruba or Curaçao. Bank F can therefore be declared insolvent in Aruba or Curaçao because it has a branch office in this jurisdiction. Local creditors of the Local Branch could initiate separate Insolvency Proceedings in Aruba or Curaçao, even if the relevant authorities in Aruba or Curaçao did not do so.

2.4.3 ***If there would be separate Insolvency Proceedings in Aruba or Curaçao with respect to the assets and liabilities of the Local Branch, would the relevant Insolvency Representative and the Courts, on the facts above, include Bank F's position under an ISDA Master Agreement, in whole or in part, among the assets of the Local Branch and, if so, would the Insolvency Representative and the Courts recognize the close-out netting provisions of the ISDA Master Agreement in accordance with their terms? The most significant concern would arise if the Insolvency Representative or the Court considering a single ISDA Master Agreement would require a Counterparty of the Local Branch to pay the mark-to-market value of Transactions entered into by the Local Branch***

[21] Based on the Statute for the Kingdom of The Netherlands ("*Statuut voor het Koninkrijk der Nederlanden"*),insolvency judgments from Curacao, Aruba and the Netherlands have effect in all three jurisdictions.

to the Insolvency Representative of the Local 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 Bank F under the same ISDA Master Agreement. In considering this issue, please assume that close-out netting under the ISDA Master Agreement would be enforced in accordance with its terms in the proceedings for Bank F in Country H.

In the event that a Court were to declare the Aruban or Curaçao Branch of Bank F insolvent, Insolvency Proceedings would not be confined to the Aruban or Curaçao Branch, but would comprise the assets and liabilities of Bank F generally (wherever they were located).[22] Therefore, even creditors whose claims were payable through a different branch may participate in the Insolvency Proceedings. Likewise, an Insolvency Representative of the Aruban or Curaçao Branch may try to recover Bank F's assets located abroad.

Under Aruban or Curaçao law, a branch is not considered to have legal personality. Hence, Bank F and not its Aruban or Curaçao Branch will at all times remain the counterparty under the ISDA Master Agreement. Because the mutuality requirement as set out in paragraph 2.3.3.is fulfilled in this scenario, set off can take place. This remains true regardless of the fact that the Aruban or Curaçao Branch could be subject to separate Insolvency Proceedings.

2.4.4 ***Where the Courts have jurisdiction over the assets of a Credit Institution or a Local Branch, would a multibranch master agreement such as the ISDA Master Agreement be treated as a single, unified agreement by an Insolvency Representative under the laws of Aruba or Curaçao regardless of the treatment of the ISDA Master Agreement or Transactions thereunder by an insolvency official in a jurisdiction where close-out netting may not be enforceable?***

As a result of the principle of universality of bankruptcy (see paragraph 2.4.1(a) above), in Insolvency Proceedings in Aruba or Curaçao, a multibranch master agreement, such as the ISDA Master Agreement would be treated as a single unified agreement (provided it would be treated as such under English, New York, French or Irish law) regardless of the treatment of the ISDA Master Agreement or Transactions thereunder in a jurisdiction where close-out netting may not be enforceable.

We believe that - in proceedings before the Courts - the insolvency law applicable in another jurisdiction (even where close-out netting is not

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[22] Such possibility derives from the idea that all of the debtor's assets should be used to pay all of the debtor's creditors. In this respect, Aruban or Curaçao insolvency law is based upon the principle of universality of bankruptcy. See paragraph 2.4.1(a) above.

enforceable) is irrelevant in this respect and that the conclusions reached in this Opinion Letter concerning the enforceability of close-out netting under the ISDA Master Agreement should remain the same.

2.5 Key Differences between the 1992 ISDA Master Agreement and the 2002 ISDA Master Agreements:

2.5.1 ***Does the inclusion of the Force Majeure Termination Event in a 2002 ISDA Master Agreement affect the opinion on the enforceability of the termination, close-out netting and multi-branch netting provisions of the 2002 ISDA Master Agreement?***

We confirm that the inclusion of the Force Majeure Termination Event would not affect our conclusions on termination, close-out netting and multi-branch netting reached in this Opinion Letter.

2.5.2 ***Does the inclusion of Close-out Amount, in a 2002 ISDA Master Agreement, in lieu of the prior choice between Market Quotation and Loss affect your opinion on the enforceability of the termination, close-out netting and multi-branch netting provisions of the 2002 ISDA Master Agreement?***

We confirm that the inclusion of Close-out Amount would not affect our conclusions reached in this Opinion Letter.

2.5.3 ***Does the inclusion of a set-off provision in Section 6(f) of a 2002 ISDA Master Agreement affect your opinion on the enforceability of the close-out netting provisions of the 2002 ISDA Master Agreement***?

We confirm that the inclusion of a set-off provision in Section 6(f) would not affect our conclusions reached in this Opinion Letter.

2.6 2001 Bridge and 2002 Bridge

2.6.1 ***Would the inclusion of the 2001 Bridge and/or the 2002 Bridge in an ISDA Master Agreement affect the conclusions reached in your legal opinion?***

We confirm that the inclusion of the 2001 Bridge and/or the 2002 Bridge in an ISDA Master Agreement would not affect our conclusions reached in this Opinion Letter.

2.7 Close-out Amount Protocol

2.7.1 On the assumptions that:

(a) the Adhering Parties (as defined in the Protocol) have validly entered into the Protocol;

(b) under the governing law of the Protocol, the Protocol had the effect that the 1992 ISDA Master Agreement is amended as set out in the applicable Attachments to the Protocol; and

(c) those amendments are effective as a matter of the governing law of the 1992 ISDA Master Agreement;

we confirm that the changes made by the Protocol are not material to, and do not affect, the conclusions reached in this Part 2 of this Opinion Letter in relation to the 1992 ISDA Master Agreement. The conclusions in Part 2 on the determination of the Close-out Amount in respect of the 2002 ISDA Master Agreement apply *mutatis mutandis* to the determination of the Close-out Amount in respect of the 1992 ISDA Master Agreement as modified pursuant to the Protocol.

2.8 June 2014 Amendment to the ISDA Master Agreements

2.8.1 ***Would the amendments set out in the Annexes to the June 2014 Amendment to the ISDA Master Agreements (the "Amendment Agreement") in relation to Section 2(a)(iii) affect the conclusions reached in your legal opinion?***

On the assumptions that:

(i) the Parties have validly entered into the Amendment Agreement;

(ii) under the governing law of the Amendment Agreement, the Amendment Agreement had the effect that the ISDA Master Agreement is amended as set out in the applicable Annexes to the Amendment Agreement; and

(iii) those amendments are effective as a matter of the governing law of the ISDA Master Agreement;

we confirm that the changes made by the Amendment Agreement are not material to, and do not affect, the conclusions reached in Part 2 of this Opinion Letter.

Part 3

3. ASSUMPTIONS

3.1 For the purposes of paragraph 2.3 of this Opinion Letter, we have assumed the following facts:

3.1.1 Two institutions - one of which is a Counterparty - enter into an ISDA Master Agreement. The ISDA Master Agreement executed by the Parties states that the Parties will enter into certain transactions with each other from time to time (each such transaction further referred to as a "**Transaction**") and will execute and exchange a document (each such document, a "**Confirmation**") confirming and evidencing the particular terms of each Transaction. Each Confirmation also provides that that Confirmation will constitute a supplement to, form a part of, and be subject to, the ISDA Master Agreement.

The ISDA Master Agreement provides that on each payment date all amounts otherwise owing in the same currency under the same Transaction are netted so that only a single amount is owed. The ISDA Master Agreement also provides, if the Parties so elect, for such netting of amounts in the same currency among two or more Transactions as specified that have common payment dates and booking offices and, for purposes of paragraph 2.3 of this Opinion Letter, we have assumed that each Party uses a single booking office for all Transactions. The obligation of each Party to make scheduled payments with respect to the Transactions is subject to the condition that (i) no Event of Default or Potential Event of Default in respect of the other Party (including, without limitation, a payment default) shall have occurred and be continuing, (ii) that no Early Termination Date has occurred or is effectively designated in relation of the relevant Transaction, or (iii) any other condition, specified in the ISDA Master Agreement to be a condition precedent, has occurred. The failure by a Party to make a payment or a delivery with respect to any Transaction constitutes an Event of Default under the ISDA Master Agreement as it relates to all Transactions. The default-based termination of any Specified Transaction between the Parties and subsequent close-out of all other transactions under the relevant documentation applicable to the Specified Transaction constitutes an Event of Default under the ISDA Master Agreement.

In addition, Section 6 of the ISDA Master Agreements permits the designation of an Early Termination Date following the occurrence of an Event of Default or a Termination Event as specified in Section 5 of the ISDA Master Agreements. For certain bankruptcy related Events of Default the parties can elect "**Automatic Early Termination**" in the Schedule. Section 6 also provides that, where an Early Termination Date occurs, no further scheduled payments or deliveries under Section 2 in respect of the Transactions will be required to be made. In addition, it is assumed that neither of the Parties has specified that the provisions of Section 10(a) apply to it.

It is assumed for the purposes of paragraph 2.3 that the Parties have amended the 1992 ISDA Master Agreement so that they have adopted either Market Quotation or Loss, but in either case always the Second Method ("**Full Two Way Payments**") for all Events of Default as well as Termination Events.[23]

Under the 1992 ISDA Master Agreement, if Market Quotation is chosen to apply, the lump sum amount would include: (i) all Unpaid Amounts (amounts which were or would have been due prior to termination) relating to the Transactions and (ii) an amount that reflects the netting of positive (i.e. each amount that would be payable by the Non-defaulting Party to replace Transactions under the current market conditions) and negative (i.e. each amount that would be received by the Non-defaulting Party to replace Transactions under the current market conditions) Market Quotations. If Loss is chosen to apply, the lump sum amount would include the total losses or costs (or gains) in respect of the Terminated Transactions, which may include losses or costs incurred in relation to related hedges or trading positions, and any amounts due, but unpaid before the relevant Early Termination Date. Under the Second Method, if the lump sum termination amount is a positive number, the Defaulting Party will pay that amount to the Non-defaulting Party; if that amount is a negative number, the Non-defaulting Party will pay the absolute value of that number to the Defaulting Party.

Under Section 6(e) of the 2002 ISDA Master Agreement, the Parties should calculate a single lump-sum amount reflecting the costs, losses and/or gains as a result of replacing or providing the economic equivalent of the Terminated Transactions and including any Unpaid Amounts (the "**Early Termination Amount**"), on the Early Termination Date. The Early Termination Amount would include the Termination Currency Equivalent of (i) all Unpaid Amounts (amounts which were or would have been due prior to termination) relating to the Transactions and (ii) an amount that reflects the netting of losses or costs (i.e. an amount that would be incurred by the Determining Party under then prevailing circumstances (expressed as a negative number)) and gains (i.e. an amount that would be realised by

[23] The insolvency analysis set out above would differ if the so-called "Limited Two Way Payments" method (or "First Method") (Section 6(e)(i)(1) of the 1992 ISDA Master Agreement) of settling terminated transactions under a Master Agreement were to be used. Articles 34 and 227 of the Insolvency Code could (if applicable to the Transactions) be relevant to the enforceability of contractual damages provisions, because these provisions specify that where the insolvent estate incurs losses as a consequence of the automatic termination, the insolvent's Counterparty shall compensate the estate for these losses *and vice-versa*. Therefore, should any one of the parties suffer losses, the other Party is required by law to pay damages accordingly. The principal exposure provided by these articles 34 and 227 is that because they expressly provide that if the insolvent Party suffers losses the other Party is obliged to pay damages, a method of calculating contractual damages that limited or excluded the losses ("one way payments" or "limited two way payments") suffered by the insolvent Counterparty (cf. Section 6(e)(i)(1) and (2) of the 1992 ISDA Master Agreement) may not be (fully) recognised. Furthermore, Aruban or Curaçao courts could refuse to uphold "one way payment" or "limited two way payment" clauses, because they would be in violation of Aruban or Curaçao public policy.

the Determining Party under then prevailing circumstances (expressed as a negative number)) in replacing or providing the economic equivalent of the relevant Transaction(s). If the Early Termination Amount is a positive number, the Defaulting Party will pay that amount to the Non-defaulting Party; if the amount is a negative number, the Non-defaulting Party will pay the absolute value of that number to the Defaulting Party. In relation to Termination Events the same mechanism for calculating the Early Termination Amount applies, unless there are two Affected Parties, in which case the Early Termination Amount will be one half of the difference between the aggregate of the Close-out Amounts determined by each Party for the relevant Termination Transactions, taking into account any Unpaid Amounts.

Furthermore, Section 1(c) of the ISDA Master Agreements also states the Parties' respective intention that the ISDA Master Agreements together with all Confirmations will constitute a single agreement between the Parties.

The Parties may select one of New York law, English law, French law or Irish law to govern the relevant ISDA Master Agreement.[24]

3.1.2 The provisions of the ISDA Master Agreements have not been altered, varied, waived, discharged or superseded in any respect material for this Opinion Letter and in particular the provisions in relation to the single agreement concept have not been altered. We confirm that in our opinion, any selections contemplated by Sections 5 and 6 of the ISDA Master Agreements and made in a Schedule to an ISDA Master Agreement or in a Confirmation (as well as any amendments made by the Close-out Amount Protocol) would not constitute material alterations (other than a selection for "First Method" in respect of the 1992 ISDA Master Agreement).

3.1.3 On the basis of the terms and conditions of the ISDA Master Agreements and other relevant factors, and acting in a manner consistent with the intentions stated in the ISDA Master Agreements, the Parties over time enter into a number of Transactions that are intended to be governed by the ISDA Master Agreements. The transactions entered into include any or all of the Transactions described in Appendix A hereto.

3.1.4 Some of the Transactions provide for an exchange of cash by both Parties and others provide for the physical delivery of shares, bonds or commodities in exchange for cash.

3.1.5 After entering into the Transactions and prior to the maturity thereof, the Counterparty becomes the subject of Insolvency Proceedings under the

[24] For the purposes of this Opinion Letter, only the English language version of the 2002 ISDA Master Agreement (French law) has been reviewed and it is assumed there is no difference in interpretation between the English and French language versions of the 2002 ISDA Master Agreements (French law).

laws of this jurisdiction and subsequent to the commencement of such proceedings either the Insolvent Party or its Insolvency Representative seeks to assume those Confirmations representing profitable Transactions for the Insolvent Party and reject those Confirmations representing unprofitable Transactions for the Insolvent Party.

3.2 We also make the following assumptions in respect of Part 2 of this Opinion Letter:

3.2.1 that, as a matter of New York, English, French or Irish law, as the case may be (i) the ISDA Master Agreements (including, without limitation, the termination provisions and the Netting Provisions thereof) are legal, valid, binding and enforceable, (ii) such ISDA Master Agreements constitute legal, valid and binding obligations of both Parties thereto, enforceable in accordance with their respective terms, and (iii) the choice of law provisions pursuant to Section 13(a) of the ISDA Master Agreements are valid and effective;

3.2.2 that each Party has the power, capacity (corporate, regulatory and otherwise) and authority under the applicable laws of all relevant jurisdictions to enter into, exercise its rights and perform its obligations under the ISDA Master Agreements, any Confirmations and any other documents relating thereto;

3.2.3 that the ISDA Master Agreements, any Confirmations and any other documents relating thereto will (a) be duly authorised, executed and delivered by each Party thereto and (b) create valid, legally binding and enforceable obligations for all such Parties as a matter of applicable law (if other than Aruban or Curaçao law);

3.2.4 that each of the Parties to the ISDA Master Agreements, any Confirmations and any other documents relating thereto has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required and has taken all necessary steps and performed such notarisations, registrations, stampings, filings, recordings, lodgments, submissions or other formalities required under the laws of any applicable jurisdiction (including Aruba and Curaçao) to enable it validly and lawfully to enter into, execute, deliver and perform its obligations thereunder and to ensure the legality, validity, enforceability or admissibility in evidence thereof in each relevant jurisdiction (including Aruba and Curaçao);[25]

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[25] Although it is not necessary under the laws of Aruba or Curaçao to notarise, file, register or otherwise record in any public office or elsewhere the ISDA Master Agreements or any Confirmations or to comply with any other formality in relation thereto in order to ensure the validity, effectiveness, enforceability or admissibility in evidence of any of such documents, it should be noted that the Courts of Aruba or Curaçao may not render judgment on the basis of documents which have not been duly registered pursuant to the 1908 Registration Regulation (*Registratieverordening*), as amended, or duly stamped pursuant to the 1908 Stamp Regulation (*Zegelverordening*), as amended; such registration

3.2.5 that each Party to any document is duly incorporated and organised, validly existing and in good standing (where such concept is legally relevant to its capacity) under the laws of its jurisdiction of incorporation and of the jurisdiction of its place of business;

3.2.6 that the execution of the ISDA Master Agreements and the performance of any Transactions entered into thereunder are in the Counterparty's best corporate interest (*vennootschappelijk belang*);

3.2.7 that any obligations under the ISDA Master Agreements or any Confirmations entered into pursuant thereto which are to be performed in any jurisdiction outside Aruba and Curaçao will not be illegal or contrary to public policy under the laws of that jurisdiction, that none of the ISDA Master Agreements, the Confirmations or the Transactions contemplated thereby or connected therewith (whether individually or seen as a whole) are or will result in a breach of the laws (including the tax laws) of England, New York, France or Ireland or of any other relevant laws, or are intended to avoid the applicability or the consequences of such laws in a manner that is not permitted under such laws and that none of the opinions expressed herein will be qualified or otherwise affected by the laws (including the public policy) of any jurisdiction outside this jurisdiction;

3.2.8 that, apart from any breach giving rise to the right to invoke the termination and Netting Provisions, the ISDA Master Agreements will be performed and implemented by the Parties thereto in accordance with their terms and that any and all Transactions are entered into in accordance with the terms of the ISDA Master Agreements;

3.2.9 that the ISDA Master Agreements have been and all Transactions entered into thereunder have been or will be, as the case may be, entered into for *bona fide* commercial reasons and on arm's length terms by each of the Parties;

3.2.10 that, as a matter of the laws governing the ISDA Master Agreements and all other relevant laws (other than the laws of Aruba or Curaçao):

(a) all Transactions under the ISDA Master Agreements are capable of being terminated in the manner envisaged by the ISDA Master Agreements and capable of having a net sum determined in accordance with the relevant Netting Provision; and

(b) all obligations under the ISDA Master Agreements to be included in the close-out netting procedures envisaged thereby are capable of being set-off or netted under the relevant ISDA Master Agreement and are mutual between the Parties in the sense that they (i) arise between the same Parties, (ii) those Parties are the only two Parties involved and each is acting for

and stamping of documents, however, may be postponed until the date enforcement thereof is sought in Aruba or Curaçao.

its own account as principal and not as agent and (iii) each Party is personally liable as regards obligations owing by it and is personally entitled to the rights corresponding with the other Party's obligations, (iv) such obligations or rights are not assigned to one of the Parties by a third party and (v) are not assigned, pledged or otherwise encumbered by one of the Parties to a third party or otherwise transferred to a third party;

3.2.11 that no Transactions will be entered into with the Counterparty on or after (i) the Commencement Time of any Insolvency Proceedings in respect of such Counterparty or (ii) the date the other Party was aware that an insolvency petition in respect of such Counterparty had been filed.

3.3 For the purposes of paragraph 2.4 of this Opinion Letter, we have assumed the same facts as in 3.1 above, but with the following modifications:

3.3.1 For the purposes of the opinions in 2.4.1 and 2.4.4 above, it is assumed that a Credit Institution has entered into an ISDA Master Agreement on a multibranch basis. In the ISDA Master Agreement, the Credit Institution is specified as a "Multibranch Party" and it has also specified that Section 10(a) applies to it. The Credit Institution then has entered into Transactions under the ISDA Master Agreement through its head office in Aruba or Curaçao and also through one or more branches located in other countries that have been specified in the Schedule to the ISDA Master Agreement. After entering into these Transactions and prior to the maturity thereof, the Credit Institution becomes the subject of Insolvency Proceedings.

3.3.2 For the purposes of the opinions in 2.4.2, 2.4.3 and 2.4.4 above, it is assumed that a bank ("**Bank F**"), incorporated and with its headquarters in a country ("**Country H**"), other than Aruba, Curaçao or the Netherlands, has entered into an ISDA Master Agreement on a multibranch basis. Bank F then has entered into Transactions under the ISDA Master Agreement through its head office in Country H and also through one or more branches located in other countries that Bank F had specified in the Schedule to Bank F's ISDA Master Agreement, including a branch of Bank F located in and subject to the laws of Aruba or Curaçao (the "**Local Branch**"). After entering into these Transactions and prior to the maturity thereof, Bank F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H and/or Aruba or Curaçao.

3.4 For the purposes of paragraph 2.6 of this Opinion Letter, we make the same assumptions as set out in 3.1 and 3.2 above and in addition we have assumed:

3.4.1 that as a matter of the laws governing the ISDA Master Agreements and all other relevant laws (other than the law of Aruba or Curaçao) the Bridged Agreements are valid, binding and enforceable in respect of the Parties and the provisions of each of the 2001 Bridge and 2002 Bridge are valid, binding and enforceable in respect of the Parties;

3.4.2 that under the governing laws all the obligations to be included in the close-out netting envisaged by Section 6 of the ISDA Master Agreement (as amended by the 2001 Bridge and 2002 Bridge) must be deemed to originate from legal relationships which have come into existence prior to the insolvency of one of the Parties;

3.4.3 that as a matter of the laws governing the ISDA Master Agreements and all other relevant laws (other than Aruban or Curaçao law) none of the changes and amendments to the ISDA Master Agreements effected by the 2001 Bridge and 2002 Bridge and referred to above will adversely affect the close-out netting envisaged by the ISDA Master Agreements;

3.4.4 that the netting procedures envisaged by the ISDA Master Agreement (as amended by the 2001 Bridge and 2002 Bridge) will not result in 'one-way payments' or 'limited two-way payments', i.e. would have the effect that one of the Parties would not, or only partly receive, the positive net balance of the close-out netting procedures; and

3.4.5 that under all relevant laws (including Aruban or Curaçao law) the close-out netting procedures of the agreements incorporated by the Bridged Agreements are valid and enforceable in insolvency proceedings and that the obligation to pay net close-out amounts calculated under each Bridged Agreement is legally binding and enforceable against the Parties under its governing law(s) and must be deemed to have originated prior to the insolvency of the Parties under its governing law(s).

Part 4

4. RESERVATIONS

4.1 Meaning of 'duly authorised'

The terms *"duly authorised, executed and delivered*" mean that there must be nothing specific to the ISDA Master Agreements, to any particular Confirmation or to any payments made by or to either of the Parties (such as, without limitation, lack of capacity, lack of authorisation, failure to comply with any applicable regulatory requirements, fraud, error, coercion, undue influence, illegality under any law applicable to either of the Parties or voidable preference or transaction at an undervalue[26]) which could render the ISDA Master Agreements or any Confirmation invalid or unenforceable or which could result in the ISDA Master Agreements, Confirmation or any payment[27] being set aside or otherwise declared null, void or voidable whether or not on the insolvency of either of the Parties.

4.2 Meaning of 'enforceable'

The terms "*enforceable*", "*enforceability*", "*uphold*", "*valid*", "*binding*" and "*effective*" (or any combination thereof), where used in this Opinion, mean that the obligations assumed by the Parties under, and the relevant provisions of, the ISDA Master Agreements are of a type which Aruban or Curaçao law generally enforces or recognises; they do not mean that an obligation or provision will necessarily be enforced in all circumstances, it being understood that enforcement before the Courts will in any event be subject to:

(a) the degree to which the relevant obligations and provisions are enforceable under their governing law (if other than Aruban or Curaçao law);

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[26] Under Aruban or Curaçao law *every creditor*, and in bankruptcy, the liquidator, has the right (the so-called *Actio Pauliana*) to nullify (by simple declaration) a transaction entered into by the debtor (in this case the Counterparty) with a third party provided that (i) the transaction was entered into by the debtor *voluntarily* (i.e. in the absence of a legal or contractual obligation) and (ii) the transaction was *prejudicial to the recourse possibilities* of (some or all of) the debtor's creditors (e.g. if the debtor's transaction leads to a reduction in the assets available for recourse by its creditors), and (iii) *at the time of the transaction* both the debtor and the entity with whom it acted were aware or should reasonably have been aware of the fact that the transaction would have such prejudicial effect (the knowledge of the *mere possibility* that such detrimental effects might arise being insufficient), or (iv) in the event that the transaction is for nil consideration (i.e. gifts and other gratuitous dispositions), *at the time of the transaction*, the debtor knew (or must have known) of the detrimental effect, regardless of whether the beneficiary of the transaction shared such knowledge. See our assumptions under 3.2.6, 3.2.9 and 3.2.11.

[27] The Insolvency Representative under Aruban or Curaçao law can only invoke the nullity and demand refunding of any pre-insolvency payments made by the insolvent Party to the other Party (assuming such payments were made on their due date) 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.

(b) the nature of the remedies available in such Courts (the power to order specific performance possibly being subject to limitations imposed by statute);

(c) the acceptance by such Courts of jurisdiction;

(d) the availability of defences such as fraud, duress, misrepresentation, undue influence, error, set-off (unless validly waived), abatement (i.e. the discretion to decrease the amount of agreed damages, indemnities or penalties) and counter-claim;

(e) the effect of provisions imposing prescription or limitation periods (within which suits, actions or proceedings can be brought);

(f) the possibility that the Courts may require a Non-defaulting Party to act with reasonableness and good faith; and

(g) the effect of financial or economic sanctions applicable in this jurisdiction; and

(h) the possibility that if the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the Courts may recognise the extinction of those claims or liabilities.

4.3 Court Freeze Orders

The Insolvency Code has provisions (articles 59a/231a) that allow the supervisory judge in case of bankruptcy and the Court in case of moratorium to render a judgment/order to the effect that the rights of recourse of all or specifically designated third parties in respect of assets belonging to the Insolvent Party (or in its possession) are suspended for a period of no more than one month (with a possibility of extension by - at most - one more month), with the exception of recourse with the prior permission of the Court or the supervisory judge, as the case may be. Although there is no case law on this matter, the prevailing view in authoritative legal writing is that termination rights, close-out netting and set-off are not within the scope of article 59a/231a of the Insolvency Code and that therefore a "freezing-order" has no impact whatsoever on the Solvent Party's termination, set-off or close-out netting rights.

4.4 Court judgment could supersede agreements

There is some possibility that a Court would hold that a judgment on a particular agreement or instrument, whether given in a New York, London or other foreign court, would supersede such agreement or instrument to all intents and purposes, so that any obligation thereunder which by its terms would survive such judgment might not be held to do so.

4.5 Default Interest/Currency

Interest on claims against the Insolvent Party continues to accrue during the Insolvency Proceedings, but cannot be submitted in the claims validation procedure or otherwise enforced during the Insolvency Proceedings, unless the claim is secured by a right of pledge or mortgage. Although the Insolvency Code does not provide for the applicability of this provision *per analogiam* to set-off, there is a remote risk that the claim for interest accruing after the Commencement Time may not be capable of being taken into account for set-off purposes. The better view, however, is that (a) insolvency set-off 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 the "no interest rule" to be applicable and (b) the only consequence of the "no interest rule" is that the net amount resulting from the set-off, if any such amount is owed by the Insolvent Party, will not be capable of accruing interest after the Commencement Time, in order to be admitted in the Insolvency Proceedings.

4.6 Enforcement through the Courts

4.6.1 As articles 128 / 249 of the Insolvency Code apparently aim to protect the insolvent estate against currency fluctuations, it is doubtful whether the currency indemnity in Section 8 of the Master Agreement would actually protect the Non-defaulting Party in the event that the amount payable as a result of the relevant Early Termination in the chosen Termination Currency has appreciated against the NAF or AWG between the date of the insolvency judgment and the date the solvent Party receives any amount from the receiver. We doubt very much whether the Non-defaulting Party would be able to recover the shortfall.

4.6.2 On the basis of articles 49/224 of the Insolvency Code in combination with articles 128/249 of the Insolvency Code, it *could* be argued that in case of Insolvency Proceedings in this jurisdiction, the calculation to be effected pursuant to the relevant Netting Provision should be made in NAF or AWG instead of any other base currency. On the basis of this argument, any claims of the Non-defaulting Party on the Counterparty would by operation of law be converted in NAF or AWG whereas any claims of the latter on the former would remain in the relevant base currency[28]. If the base currency is not NAF or AWG, this could theoretically have the result that such claims cannot be set off, since the requirement that such claims should be expressed in the same "generic consideration" is not met. However, in our view:

(i) the insolvency set-off of articles 49/224 of the Insolvency Code would operate, in effect, outside the insolvent estate and therefore would not cause the monetary claims which are the subject of such

[28] It should be noted that articles 128 and/or 249 only refer to claims to be "verified" by the Insolvency Representative, i.e. claims of the creditors of the Insolvent Party.

set-off to be "admitted" in the Insolvency Proceedings, thereby causing section 128/249 of the Insolvency Code to be applicable;

(ii) the contractual arrangements providing for conversion of other currencies into a base currency would be effective vis-à-vis the Insolvency Representative, that representative in this respect being in the same contractual position as the Insolvent Party; and

(iii) the only consequence of articles 128/249 of the Insolvency Code is that the amount resulting from the relevant Netting Provision, if any such amount is owed by the Insolvent Counterparty, must be converted in NAF or AWG at the market rate of exchange prevailing on the date of the judgment opening Insolvency Proceedings, in order to be admitted in the Insolvency Proceedings.

Consequently, it is, as a matter of the insolvency law of this jurisdiction, unlikely that the application of a base currency other than NAF or AWG (*e.g.*, USD) would frustrate the operation of the relevant Netting Provision.

4.7 Restrictions on Section 6(e) Calculations

The enforceability of Section 6(e) in Insolvency Proceedings may be subject to the limitation that all calculations may have to be made by reference to a date not later than the Commencement Time of the Insolvency Proceedings.[29] Although there is no express provision in the Insolvency Code stating this, it is held that as a general rule the insolvency judgment fixes the rights of the creditors unalterably as of the Commencement Time. This means, *inter alia*, that (a) the amount by which the lump sum amount owing to the Non-defaulting Party pursuant to the Netting Provision increased - as between making the relevant calculations on the Commencement Time and the later date by reference to which the calculation was made - would be irrecoverable; and (b) the computation of the Termination Currency Equivalents will have to be made on the basis of the rates prevailing on the Commencement Time of the Insolvency Proceedings.

4.8 Insolvency / Regulatory Interventions

If automatic early termination is elected to apply in respect of the Counterparty, the appointment by the CBA or CBCM of a silent administrator[30] may trigger

[29] This is a result of the so-called fixation principle. Although there is no express provision in the Insolvency Code stating this (see however e.g. Supreme Court 18 December 1987 NJ 1988, 340), it is held that as a general rule the insolvency judgment fixes the rights of the creditors unalterably as of the insolvency date. Please note that in our opinion this fixation principle does *not* prevent a Party from giving a notice of termination after the Commencement Time.

[30] If the CBA or CBCM finds that an Credit Institution does not comply with the solvency, liquidity and administrative directives issued by the CBA or CBCM pursuant to the Credit Institution Decree or the Banking Decree, or if there are other indications of a development which in the judgment of the CBA or CBCM endangers or could endanger the solvency or liquidity of such a Credit Institution, then the CBA or CBCM can determine, pursuant to the Credit Institution Decree or the Banking Decree, that as of a certain moment in time, all or certain bodies of the Credit Institution can only exercise their powers with the approval of one or more persons (known as silent administrators,

automatic early termination as such appointment could very well qualify as an insolvency related Event of Default under the ISDA Master Agreements. As such appointments by their nature may not be publicly known, the Non-defaulting Party may be faced with automatically terminated Transactions without being aware of that. Therefore, it is suggested to exclude the appointment of such silent administrator from the automatic early termination provisions in the ISDA Master Agreements.

4.9 Netting vs Set-Off

We express no view as to whether or not the Courts would make any distinction between the concepts of set-off and (close-out) netting.

"*stille curatoren*") designated by the CBA or CBCM. The official determination and accordingly the necessity of the administrator's approval are not necessarily published. Similar undisclosed powers exist in respect of Insurance Companies, Investment Firms and Investment Institutions and in addition, the applicable regulatory regimes permit the Credit Institution, the Insurance Company, the Investment Firm and the Investment Institution (or the CBA or CBCM on their behalf) to challenge the validity of any transaction performed without such approval, if the counterparty to that transaction knew that no such approval was given, or could not have been ignorant thereof. There is no guidance as to when knowledge will be imputed or in what circumstances it will be considered that a counterparty could not have been ignorant.

Part 5

5. EFFECTIVE DATE, PENDING DEVELOPMENTS AND BENEFIT OF OPINION

5.1 This Opinion Letter:

(a) expresses and describes Aruban and Curaçao legal concepts in English and not in their original Dutch terms; these legal concepts may not be identical to the concepts described by the English translation; consequently, this Opinion Letter 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 Aruban and Curaçao law;

(b) speaks as of the date that appears at the head of this letter;

(c) is addressed to you and is solely for the benefit of the International Swaps and Derivatives Association, Inc. and its members;

(d) is strictly limited to the matters set forth herein and no opinion may be inferred or implied beyond that expressly stated herein; and

(e) may not be relied upon by or disclosed to any other person, enterprise or institution, except for disclosure to your members' legal advisers, supervisors and regulators, or used for any other purpose than in connection with the ISDA Master Agreements.

5.2 In issuing this Opinion Letter we do not assume any obligation to notify or to inform you of any developments subsequent to its date that might render its contents untrue or inaccurate in whole or in part at such time.

5.3 At this point in time, we are not aware of any official legislative plans to change Curaçao or Aruban law as a result of which the conclusions set forth in this Opinion Letter may be expected to change in any material and adverse respect in the foreseeable future.

Yours sincerely,

F.G.B. Graaf
Advocaat
Clifford Chance LLP

APPENDIX A
AUGUST 2015

CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

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

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond 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).

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 specified amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

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

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

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

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce (or in the case of

reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

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

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

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

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price, and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. A Commodity Forward may be settled by the physical delivery of the commodity in exchange for the specified price or may be cash settled based on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity 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 based on the price of one or more commodities.

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

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

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

floor) over a specified floating rate (in 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).

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

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

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

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a "Fund Interest"), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction 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 based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a

payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

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

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

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

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

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

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

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

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

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

Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

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

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

APPENDIX B

EFFECTS OF THE WINDING UP DIRECTIVES

The following analysis of the position under Dutch law is provided to illustrate how the Aruban and Curaçao courts might act in the situations referred to in paragraph 2.3.3. where the Counterparty is an Credit Institution or an Insurance Company.

(i) Effects of the WUDCI

In accordance with the WUDCI, Dutch law provides that the insolvency laws:

- of The Netherlands will be applied by the Dutch courts to Transactions under the ISDA Master Agreements with Counterparties that are Dutch credit institutions; and

- of the home Member State of an EEA Credit Institution will be applied by the Dutch courts to Transactions under the ISDA Master Agreements with Counterparties that are EEA Credit Institutions. These laws will in principle govern the effects on such Transactions of any reorganisation or liquidation measures (which measures will by law encompass that EEA Credit Institution's branches in the Netherlands.

The following analysis will only deal with the first situation, *i.e.* that Insolvency Proceedings are commenced in the Netherlands in respect of a Dutch credit institution and that therefore Dutch insolvency rules determine the effects of such Insolvency Proceedings on the ISDA Master Agreements. In the second situation the Dutch courts would be held to apply the laws of the home Member State of the EEA Credit Institution and this Opinion Letter cannot cover that situation.

(ii) Treatment as Set-Off

If the Netting Provision qualifies as a set-off arrangement within the meaning of article 23 of the WUDCI, then in the event Dutch Insolvency Proceedings are commenced in respect of a Dutch credit institution, a set-off is permitted in each of the two following situations:

(1) if it is permitted under Dutch insolvency law (article 10.2(c) of the WUDCI); or

(2) if it is permitted by the law that is applicable to the Regulated Entity's claim (article 23 of the WUDCI, article 3:243 of the FMSA and article 212w BA).

This means that a set-off will be allowed if and to the extent that it is permitted under English, New York, French or Irish law, being the law which governs such Regulated Entity's claim under the ISDA Master Agreement, even if Dutch Insolvency law did not allow a set-off as contemplated by the Netting Provision.

(iii) Treatment as Netting

However, if the Netting Provision, together with the early termination provision, is regarded as a "netting agreement" within the meaning of article 25 of the WUDCI, then in the event Insolvency Proceedings are commenced in respect of a Dutch credit

institution, the effectiveness of the Netting Provision will be determined solely by English, New York, French or Irish law.

Article 25 WUDCI refers to the *lex contractus* as "solely" governing a netting agreement, which implies that the insolvency rules of English, New York, French or Irish law exclusively determine the validity and effectiveness of a netting agreement in the insolvency of a credit institution. Therefore, the restrictions outlined in 2.3.3, 4.5, and 4.7 above would then not apply.

We express no view as to whether or not the courts of this jurisdiction would make any distinction between the concepts of set-off and close out netting for the purposes of the WUDCI.

(iv) Effect of Solvency II

The same rules with regard to set-off as are discussed in paragraph (ii) above also apply under the implementation of Solvency II to Dutch insurance companies. There is no separate rule of law in Solvency II and in the Netherlands with regard to "netting arrangements" entered into by Dutch insurance companies that is equivalent to article 25 WUDCI (discussed in (iii) above).

APPENDIX C

Disadvantages to selecting Automatic Early Termination

There are two main disadvantages to using Automatic Early Termination:

(a) Firstly, the Non-defaulting Party would not necessarily be apprised immediately of any insolvency judgment regarding the Counterparty, which entails the risk that Transactions will have terminated without the Non-defaulting Party's knowledge.

(b) Secondly, the defaults triggering Automatic Early Termination are so widely drafted that they would include "silent administration" (*stille curatele*), which is a form of emergency administratorship applicable to Credit Institutions and Insurance Companies in this jurisdiction, and of which counterparties would not normally be apprised (see paragraph 4.8 of our Opinion Letter). This would entail the risk that the Non-defaulting Party might be approached by the administrator with the claim that all Transactions had terminated long ago, without having had an opportunity to mitigate its damages or to unwind related transactions such as hedges. Obviously, in Transactions with Credit Institutions and Insurance Companies one could amend Section 5 to exclude silent administration from the effects of Automatic Early Termination.

Disadvantages to disapplying Automatic Early Termination

There are two main risks involved in not using Automatic Early Termination:

(c) Firstly, Transactions which are outstanding as of the day of the Insolvency judgment and which are within the scope of articles 34/227 of the Insolvency Code would be terminated by operation of law even if Automatic Early Termination did not apply (*i.e.* regardless of whether Automatic Early Termination applied or not). Potentially parties who do not apply Automatic Early Termination are more likely to overlook the fact that they need to take prompt action to cope with the potentially harmful effects of these articles from the Insolvency Code. For more detail see paragraph 2.3.1 above.

(d) Secondly, for all outstanding Transactions at the time of the Insolvency judgment – irrespective of whether they are within the scope of articles 34/227 of the Insolvency Code – the 'fixation principle' enshrined in case law could entail that the enforceability of the Netting Provision may be subject to the limitation that all calculations must be made by reference to a date not later than the date of the insolvency judgment (see paragraph 4.7.2 in our Opinion Letter which discusses the potential adverse consequences). When Automatic Early Termination is applied, all calculations in respect of a transaction will by virtue of the ISDA

Master Agreement have to be made by reference to the day of the default, while not electing Automatic Early Termination: (a) would give a Non-defaulting Party the freedom to terminate outstanding Transactions by notice on or after the date of the insolvency judgment, but (b) could also give rise to the mistaken belief that by having the option of giving notice against a later date, the Non-defaulting Party would be entitled to calculate the net amount by reference to rates and values applicable at such later date (*e.g.* at the time it concludes a replacement transaction).

APPENDIX D

CERTAIN COUNTERPARTY TYPES[31]

SEPTEMBER 2009

Type of Counterparty:	**Covered by Opinion**	**Legal form(s)?**
(i) Bank/Credit Institution. A legal entity, which may be organized as a corporation, partnership or in some other form, that conducts commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individual and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" category below.) This type of entity is referred to as a "credit institution" in European Community (**EC**) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity (as in the case of a building society in the United Kingdom (**UK**)).	Yes (see the defined term "**Credit Institution**")	In Aruba: a public limited liability company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (*Aruba Vrijgestelde Vennootschap* ("**AVV**")), in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*), and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (naamloze vennootschap ("N.V.")), a private limited liability company (besloten vennootschap ("B.V.")), a foundation (*stichting* (no affix or suffix)) in accordance with Book 2 of the Curaçao Civil Code (Burgerlijk Wetboek).

[31] In these definitions, the term "legal entity" means an entity (i.e. not a person) with legal personality.

		But not a partnership or otherwise lacking entity status.
(ii) Central Bank. A legal entity that performs the function of a central bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).	Yes	CBA or CBCM
(iii) Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix D.	Yes	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*) and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), in accor-dance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*). **But not a partnership or any other entity lacking legal entity status.**

(iv) Hedge Fund/Proprietary Trader. A legal entity, which may be organized as a corporation, partnership or in some other legal form, the principal business of which is to deal in and/or manage securities and/or other financial instruments and/or otherwise to carry on an investment business predominantly or exclusively as principal for its own account.	Yes	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*), a foundation (*Stichting* (no affix or suffix)) in accordance with the National Ordinance on foundations (*Landsverordening op de stichtingen*) and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), a foundation (*stichting* (no affix or suffix)), in accordance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*). **But not a partnership or any other entity lacking legal entity status.**
(v) Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for	Yes (see the defined term "**Insurance Company**")	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an

example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.		Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")), a mutual insurance association (which typically contain the words "*onderlinge*" or "*wederkerig*" in their full name) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*) and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), a mutual insurance association (*onderlinge waarborgmaatschappij* (which must contain the words "*onderlinge*" or "*wederkerig*" in their full name) in accordance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*). **But not a partnership or any other entity lacking legal entity status.**
(vi) International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and	No	Does not exist in this jurisdiction.

Development (the World Bank), regional development banks and similar organizations established by treaty.		
(vii) Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.	Yes (see the defined term "**Investment Firm**")	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*) and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), a foundation (*stichting* (no affix or suffix)), in accordance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*). **But not a partnership or any other entity lacking legal entity status.**
(viii) Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or	Yes (see the defined term "**Investment Institution**").	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde*

disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.		*Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*) and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), in accor-dance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*). **But not a partnership or any other entity lacking legal entity status.**
(ix) Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.	Yes	Gemeente ("Municipality")
(x) Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this Appendix B. If it does not have legal personality, it may nonetheless be treated as though it were a legal person for certain purposes (for example, for insolvency purposes) and not for other purposes (for example, tax or personal liability).	No	

(xi) Pension Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide pension benefits to a specific class of beneficiaries, normally sponsored by an employer or group of employers. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by pensions legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Pension Fund (for example, a trustee of a pension scheme in the form of a common law trust) contract on behalf of the Pension Fund and are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	Yes	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*) a foundation (*Stichting* (no affix or suffix)) in accordance with the National Ordinance on foundations (*Landsverordening op stichtingen*) and a limited liability company (*vennootschap met beperkte aansprakelijkheid*) ("**VBA**") in accordance with the National Ordinance on limited liability companies (*Landsverordening vennootschap met beperkte aansprakelijkheid*). In Curaçao and Sint Maarten: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), a foundation (*stichting* (no affix or suffix)), in accordance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*). **But not a partnership or any other entity lacking legal entity status. Also excluded are public law pension funds.**

(xii) Sovereign. A sovereign nation state recognized internationally as such, typically acting through a direct agency or instrumentality of the central government without separate legal personality, for example, the ministry of finance, treasury or national debt office. This category does not include a State of a Federal Sovereign or other political sub-division of a sovereign nation state if the sub-division has separate legal personality (for example, a Local Authority) and it does not include any legal entity owned by a sovereign nation state (see "Sovereign-owned Entity").	No	
(xiii) Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "Sovereign Wealth Fund" excludes a Central Bank.	Yes	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code (*Wetboek van Koophandel Aruba*). In Curaçao: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), a foundation (*stichting* (no affix or suffix)) in accordance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*), but not a partnership or any other entity lacking legal entity status.
(xiv) Sovereign-Owned Entity. A legal entity wholly or majority-owned by a Sovereign, other than a Central Bank, or by a State of a Federal Sovereign, which may or may not benefit from any immunity enjoyed by the Sovereign or State of a Federal Sovereign from legal proceedings or execution against its assets. This category may include entities active entirely in the private sector	Yes	In Aruba: a public limited company (*naamloze vennootschap* ("**NV**")), an Aruban exempt company (A*ruba Vrijgestelde Vennootschap* ("**AVV**")) in accordance with the Aruban Commercial Code

without any specific public duties or public sector mission as well as statutory bodies with public duties (for example, a statutory body charged with regulatory responsibility over a sector of the domestic economy). This category does not include local governmental authorities (see "Local Authority").		(*Wetboek van Koophandel Aruba*). In Curaçao: a public limited liability company (*naamloze vennootschap* ("**N.V.**")), a private limited liability company (*besloten vennootschap* ("**B.V.**")), a foundation (*stichting* (no affix or suffix)), in accordance with Book 2 of the Curaçao Civil Code (*Burgerlijk Wetboek*), but not a partnership or any other entity lacking legal entity status.
(xv) State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.	No	