~~24 March~~13 May 2016

Dear Sirs,

Enforceability of Close-out Netting under the ISDA Close-out Netting Master Agreements - Update Opinion for Belgium

1. We are writing with reference to the e-mail (hereinafter the "Instructions E-Mail") you - the International Swaps and Derivatives Association, Inc. ("ISDA") - sent us on 7 August 2015 whereby we were requested to review any and all relevant developments (such as legislation, court decisions, administrative rulings or official interpretations) since the date of our last opinion dated 9 October 2014 with respect to the validity and enforceability under the laws of Belgium of the termination, bilateral close-out netting and multibranch netting provisions of the 1987, 1992 and 2002 ISDA Master Agreements (collectively the "ISDA Master Agreements", each an "ISDA Master Agreement") and with respect to the 2001 ISDA Cross-Agreement Bridge (the "2001 Bridge") and the 2002 ISDA Energy Agreement Bridge (the "2002 Bridge"), that could materially and adversely affect the conclusions reached in our last opinion dated 9 October 2014.

This Update Opinion is limited to questions arising under Belgian law - including European legislation directly applicable in Belgium, as currently in force. It does not express any opinion as to other laws, nor have we conducted any examination under any other law than Belgian law for the purposes of rendering this Update Opinion. Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No ~~1093.2010~~1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (the "**Bank Recovery and Resolution Directive**" or "**BRRD**"), which had to be implemented in the Member States by 1 January 2015[(1)], was partly anticipated in Belgian law in the Act of 25 April 2014 on the status and control of credit institutions (hereinafter the "**Credit Institutions Act**"). The BRRD was further implemented in Belgian law by the Act of 18 December 2015 determining various financial provisions (hereinafter the "**Act of 18 December 2015**"), the Royal Decree of 18 December 2015 amending the Act of 25 April 2014 on the status and control of credit institutions and the Royal Decree of 26 December 2015 amending the Act of 25 April 2014 on the status and

([1]) Except for Section 5 of Chapter IV of Title IV, which had to be implemented by 1 January 2016 at the latest.

control of credit institutions with respect to the recovery and resolution of groups. The BBRD is however not yet implemented in Belgian law with respect to investment firms.

This Update Opinion constitutes an update and replaces our opinion provided to you on the same subject dated 9 October 2014.

Capitalized terms used herein that are not otherwise defined herein shall have the meaning ascribed to them in the ISDA Master Agreements.

2. In preparing this Update Opinion, we have considered the following:

- the 1987 ISDA Interest Rate and Currency Exchange Agreement;

- the 1987 ISDA Interest Rate Swap Agreement;[(2)]

- the 1992 ISDA Master Agreement (Multicurrency-Cross Border);

- the 1992 ISDA Master Agreement (Local Currency-Single Jurisdiction);[(3)]

- the 2002 ISDA Master Agreement;

  - Appendix A attached to your e-mail of 7 August 2015, dated August 2015, which sets forth an updated description of transaction types that can be documented under an ISDA Master Agreement (hereinafter "**Appendix A**"), and attached to this Update Opinion;

  - Appendix B attached to your e-mail of 7 August 2015, dated September 2009, which sets forth an updated description of counterparty types to an ISDA Master Agreement (hereinafter "**Appendix B**"), also attached to this Update Opinion;

  - the 2001 ISDA Cross-Agreement Bridge, attached as Appendix C to the instructions letter of 20 September 2003;

([2]) The 1987 ISDA Interest Rate and Currency Exchange Agreement and the 1987 ISDA Interest Rate Swap Agreement are collectively referred to as the "1987 ISDA Master Agreements", each a "1987 ISDA Master Agreement".

([3]) The 1992 ISDA Master Agreement (Multicurrency-Cross Border) and the 1992 ISDA Master Agreement (Local Currency-Single Jurisdiction) are collectively referred to as the "1992 ISDA Master Agreements", each a "1992 ISDA Master Agreement".

3 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4563203/1 and interwovenSite://BEDMS/BEMATTERS/4562940/1. Performed on 12/07/2016.

- the 2002 ISDA Energy Agreement Bridge, attached as Appendix D to the instructions letter of 20 September 2003;

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

- the amendments set out in the Annexes to the June 2014 Amendments to the ISDA Master Agreement in relation to Section 2 (a)(iii) (the "**June 2014 Amendments**").

The provisions of these documents which are not material for the issues set out below have not been reviewed in detail.

3. After examining preliminary issues of the application of Belgian law, Belgian insolvency law, the European Insolvency Regulation and the implementation of European Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions (the "**Credit Institutions Winding-Up Directive**"), Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (the "**Solvency II Directive**"), the BRRD and the specific netting legislation under Belgian law (I), we will examine the specific questions put to us dealing with close-out netting under the ISDA Master Agreements (II), close-out netting for multibranch parties (III), key differences between the 1992 ISDA Master Agreements and the 2002 ISDA Master Agreement (IV), the 2001 Cross-Agreement Bridge (V), and the 2002 ISDA Energy Agreement Bridge (VI).

I.- PRELIMINARY ISSUES

A.- Applicability of Belgian law

4. Principle of freedom of choice. According to the Convention of Rome of 19 June 1980 on the law applicable to contractual obligations (hereinafter "**Convention of Rome**")[(4)], and to Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (hereinafter "**Regulation Rome I**"), which is applicable to contracts that are

([4]) Please note that Article 98 of the International Private Law Code established by the Act of 16 July 2004 and which entered into force on 1 October 2004, confirms the application of the Convention of Rome. All references to the Convention of Rome are to be construed as references to the Regulation Rome I as Article 24.2 of the Regulation Rome I expressly provides that the Regulation replaces the Convention and hence any reference to that Convention is to be understood as a reference to the Regulation Rome I. The Regulation Rome I binds all Member States of the European Union except Denmark (see recitals 45 and 46 of the Regulation Rome I). The United Kingdom has joined the Regulation Rome I by way of a Commission decision of 22 December 2008 (2009/26/EC).

4 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4563203/1 and interwovenSite://BEDMS/BEMATTERS/4562940/1. Performed on 12/07/2016.

entered into after the date of 17 December 2009 (see Article 29 of the Regulation Rome I)[5], contracts are governed by the law elected by the parties.

Section 13 (a) of each ISDA Master Agreement provides that the ISDA Master Agreement is governed and construed in accordance with the law specified in the Schedule, which is specified to be English law or the law of the State of New York, as the parties choose.

However, the law elected by the parties may be set aside by virtue of the application of other conflicts of law rules contained in the Regulation Rome I.

In this respect, the scope of the law elected by the parties to govern their contract is limited under Article 12.1 of the Regulation Rome I to the interpretation of the contract, the payment obligations arising from the contract, the consequences of default by one of the parties, the various ways of terminating the contract obligations, and the consequences of nullity of the contract.[6]

As to the manner of performance and the steps to be taken by a creditor in the event of default on the part of the other party in performing its obligations, Article 12.2 of the Regulation Rome I designates the law of the country in which performance takes place.[7]

The application of *lex contractus* may also be set aside by the principles of Belgian international public policy.[8] This concept embraces the concepts that are regarded as utterly fundamental to Belgian society, which justifies the normally applicable foreign law nevertheless being replaced by Belgian law (see Cass., 28 March 1952, Pas., 1952, I, 483.- Cass., 25 October 1979, Pas., 1980, I, 262).

Further, the law elected by the parties cannot interfere with mandatory rules of *lex fori* which are applicable to the situation whatever law governs the contract.[9] This implies that the law elected by the parties is liable to be set aside if, *inter alia*, it interferes with insolvency laws (F. Meyrier, Les contrats d'échanges de devises et de taux d'intérêt (swaps), D.P.C.I., 1986, p. 16).

([5]) References will be made in this Update Opinion to the provisions of the Regulation Rome I, knowing that, in the case of a Master Agreement entered into on or before 17 December 2009, one should refer to the equivalent rules in the Convention of Rome.

([6]) Cf. the same rule in Article 10.1 of the Convention of Rome applicable to contracts entered into before the date of 17 December 2009.

([7]) Cf. Article 10.2. of the Convention of Rome.

([8]) Cf. Article 21 of the Regulation Rome I, on the refusal to apply a provision of the law elected by the parties where such application is manifestly incompatible with the public policy of the forum (cf. Article 16 of the Convention of Rome).

([9]) Cf. Article 9.2. of the Regulation Rome I; Article 7.2. of the Convention of Rome.

Lastly, the law elected by the parties may also be impacted by overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.(10) We do not see that any provision of Belgian law could render the performance of the ISDA Master Agreement unlawful, whatever the connections of a particular ISDA Master Agreement or the Transactions documented thereunder with Belgium.

5. Interference by Belgian law as insolvency law. As a general principle, insolvency proceedings may be raised in Belgium against any company that is governed by Belgian law (11) or an individual engaged in business (commerçant / koopman) that has its/his principal establishment in Belgium (see Article 631, § 1 of the Judicial Code concerning bankruptcy, and Article 631, § 2, concerning reorganization proceedings), or a company that has its registered office in Belgium (see Article 118, § 1, al. 2 of the International Private Law Code, which refers to the principal establishment or the registered office). Please note that the criteria used in article 3 of the Council Regulation n° 1346/2000 of 29 May 2000 on insolvency proceedings (O.J., L. 160, 1 of 30 June 2000) (hereinafter the "**European Insolvency Regulation**") are slightly different, as they refer to the territory within which the center of the debtor's main interests is situated(12), with a presumption that, in the case of a company or legal person, the place of the registered office is presumed to be the center of its main interests in the absence of proof to the contrary.(13)

Where a company or an individual has assets or carries out business in Belgium, although main insolvency proceedings may not be raised in Belgium in accordance with the above, secondary insolvency proceedings may be opened in Belgium in accordance with the European Insolvency Regulation concerning the establishment of a company or individual

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(10) Cf. Article 9.3. of the Regulation Rome I; Cf. previously Article 7.1 of the Convention of Rome, concerning the application of mandatory provisions of the law of another country with which the contract is closely connected.

(11) According to the rules of conflicts of laws applicable in Belgium, a corporation is governed by Belgian law when its principal establishment (principal établissement / hoofdvestiging) is in Belgium (see article 110 of the International Private Law Code; in accordance with Article 4, § 3 of the Code, the principal establishment of a legal entity is determined taking into account in particular the centre of its direction and activities and, in the alternative, its registered seat) and this rule is traditionally applicable to determine jurisdiction in bankruptcy matters, except if an international treaty to which Belgium is a party provides for another rule (Cloquet, "Les concordats et la faillite", Droit commercial, t. V, 3rd edition, no. 1059 et seq. and references to the case-law.- see also Cass., 26 February 1993, Pas., I, 219).

(12) Article 3.1, 1st branch of (EU) Regulation 2015/848 (EU) of 20 May 2015 on insolvency proceedings ("**Regulation 2015/848**") (which shall apply as from 26 June 2017 (with some exceptions) and which repeals the European Insolvency Regulation) clarifies that the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

(13) Pursuant to Article 3.1, 2nd branch of Regulation 2015/848, that presumption shall only apply if the registered office has not been moved to another member State within the 3-month period prior to the request for the opening of insolvency proceedings.

falling under the scope of the European Insolvency Regulation when main insolvency proceedings have been opened in another Member State. The European Insolvency Regulation binds all Member States of the European Union except Denmark (see recital 33 of the European Insolvency Regulation(14)). Please note that insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings are excluded from the scope of the European Insolvency Regulation. Secondary territorial insolvency proceedings may also be opened in Belgium in accordance with Article 118, § 1, al. 2, 2° of the International Private Law Code concerning the establishment of a foreign entity in Belgium, provided no other provision of international treaties, EU law or other national law apply, by application of the general principle of subsidiarity laid down in article 2 of the International Private Law Code.

Insurance undertakings and credit institutions are subject to two specific pieces of European legislation, i.e. the Credit Institutions Winding-Up Directive and the Solvency II Directive, implemented in Belgian law respectively by the Act of 6 December 2004 amending the Act of 22 March 1993 on the status and control of credit institutions (which was recently replaced by the Act of 25 April 2014 on the status and control of credit institutions (the "**Credit Institutions Act**")) and the Act of 13 March 2016 on the status and control of insurance and reinsurance undertakings (hereinafter the "**Insurance Supervision Act**").(15) Pursuant to the Credit Institutions Act and the Insurance Supervision Act, reorganization procedures and insolvency proceedings can only be opened in Belgium against credit institutions and insurance undertakings governed by Belgian law and may not be conducted against the Belgian branch of a foreign credit institution or insurance undertaking (Articles 353 and 359 of the Credit Institutions Act, implementing Articles 3.1 and 9.1. of the Credit Institutions Winding-Up Directive, and Articles 610 and 615 of the Insurance Supervision Act, implementing Articles 269.1 and 273.1 of the Solvency II Directive). However, in case of an insurance undertaking organized under the law of a country that is not a member of the European Economic Area(16) which is not subject to insolvency or winding-up proceedings based on its insolvability, the Belgian insurance undertakings' supervisory authority, the National Bank of Belgium (hereinafter the "**NBB**")(17) may, where the authorization for its

(14) Cf. recital 88 of Regulation 2015/848.

(15) The Insurance Supervision Act repealed the Act of 9 July 1975 on the control of insurance undertakings, which particularly implemented Directive 2001/17/EC of 19 March 2001 on the reorganization and winding up of insurance undertakings (as repealed by the Solvency II Directive).

(16) The countries members of the European Economic Area are, as of this date, the countries of the European Union and Iceland, Norway and Lichtenstein.

(17) Please note that, following the adoption of the Royal Decree of 3 March 2011, Belgium adopted a so-called "Twin Peaks model" for the supervision of the financial sector. In this model, on one hand, the National Bank of Belgium became the supervisory authority for the prudential aspects of major financial institutions, including credit institutions. The "Autorité des services et marchés financiers"/ "Autoriteit financiële diensten en markten" / "Financial Services and Markets Authority" (hereinafter defined by its only acronym "**FSMA**"), on the other hand, succeeded to the former CBFA, and is now the authority primarily responsible for the protection of the customers of the financial sector. Pursuant to the Credit Institutions Act and Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the

activities in Belgium is revoked, designate a liquidator in charge of realizing and liquidating all the assets and engagements of the undertaking in Belgium (Article 625 of the Insurance Supervision Act).

If a party to an agreement is subject to insolvency proceedings in Belgium, Belgian insolvency law may affect the rights of the parties to that agreement and set aside the law elected by the parties to the extent that it conflicts with the public policy principle of the *pari passu* ranking of creditors.

The rights of a solvent party that has entered into a contract with a party subject to the insolvency laws of Belgium are, to that extent, potentially affected by the application of Belgian insolvency law, notwithstanding the governing law clause, except (i) to the extent that specific insolvency provisions applicable to the insolvent Belgian party, in particular the provisions of the Credit Institutions Act, exclude the application of Belgian law for particular acts or transactions, in favor of a foreign law, and (ii) to the extent that Belgian Netting Legislation (*infra*, I, D) provides for the enforceability of a netting agreement notwithstanding any insolvency proceedings.

6. Interference by Belgian law in the case of transfer of shares or assets of a systemic insurance undertaking or in the case of resolution actions with respect to a Belgian credit institution. As indicated later in this Update Opinion, new recovery measures were introduced in Belgium for credit institutions (*infra*, ~~9~~10) and insurance undertakings (*infra*, ~~10~~11). The Act of 2 June 2010 introduced new recovery measures for Belgian insurance undertakings by providing that, where the difficulties faced by the insurance undertaking concerned are likely to impact the stability of the Belgian or international financial system (systemic situation), the government may issue a Royal Decree to transfer the shares or assets (all or part thereof) of that undertaking to the Belgian State or to any other party.

With respect to Belgian credit institutions, the Resolution Authority(18) could take resolution actions (i.e. the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool), if it considers that all of the following conditions are met:

1° the determination that the credit institution is failing or is likely to fail has been made by the credit institution's supervisory authority, the NBB or the

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prudential supervision of credit institutions, the European Central Bank ("**ECB**") assumes new banking supervision responsibilities in specific tasks since 14 November 2014.

(18) A new resolution authority was created within the National Bank of Belgium (further "**Resolution Authority**"). Its status is further elaborated in the Law of 22 February 1998 on the Organic Status of the National Bank of Belgium, the Royal Decree of 22 February 2015 on determining the rules for the organization and the operation of the Resolution Authority, the conditions for the exchange of information between the Resolution Authority and third parties and the measures to be taken to avoid conflicts of interest, the Royal Decree of 22 February 2015 on determining the date of entry into force of some provisions of the law of 25 April 2014 on the status and control on credit institutions and the law of 25 April 2014 on various provisions, the Royal Decree of 10 April 2015 on appointing a member of the Resolution Authority of the National Bank of Belgium and the Royal Decree of 10 April 2015 on appointing 4 members of the Resolution Authority of the National Bank of Belgium.

8 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4563203/1 and interwovenSite://BEDMS/BEMATTERS/4562940/1. Performed on 12/07/2016.

ECB, as the case may be (further referred to as the "**Supervisory Authority**"), after consulting the Resolution Authority, or by the Resolution Authority, after consulting the Supervisory Authority;

2° having regard to timing and other relevant circumstances, there is no reasonable prospect that any private sector or other prudential measure towards the credit institution would prevent the failure of the credit institution within a reasonable timeframe;

3° a resolution action is necessary in the public interest.(19)

The Insurance Supervision Act contains an overriding mandatory provision, providing that, notwithstanding any contractual provision to the contrary, such transfer may not result in modifying or terminating an agreement to which the insurance undertaking is a party, nor authorise the counterparty to terminate the same. It also provides that all litigation arising out of the transfer is to be decided exclusively by the Belgian courts, applying exclusively Belgian law.

Similarly, pursuant to the Credit Institutions Act, notwithstanding any contractual provision to the contrary and without prejudice to the safeguards in Book II, Title VIII, Chapter VII of the Credit Institutions Act (*infra*, ~~33~~35), the transfers ordered by the Resolution Authority cannot result in any changes to provisions of agreements in relation to transferred activities, or terminate said agreements, nor authorise any party to terminate them unilaterally, to suspend the execution thereof, to proceed to set-off of claims or debts resulting therefrom or to invoke resolution clauses or acceleration clauses.(20) All litigation with respect to decisions of the Resolution Authority are the exclusive competence of Belgian courts.

B.- Relevant Basic Principles of Belgian Insolvency Law

7. Insolvency and reorganization proceedings pursuant to the reform of 2009. Belgian law provides for two main regimes of insolvency or reorganization proceedings with respect to individuals engaged in business or commercial corporations, namely bankruptcy proceedings (faillite / faillissement), organised under the Bankruptcy Act of 8 August 1997 (Loi sur les faillites / Faillissementswet) (hereinafter "**B.A.**") and judicial reorganization proceedings (réorganisation judiciaire / gerechtelijke reorganisatie) that are organized by the Act of 31 January 2009 on the Continuity of Enterprises (loi relative à la continuité des entreprises / wet betreffende de continuïteit van de ondernemingen) (hereinafter the

(19) I.e. a liquidation would not lead to the intended objectives.

(20) This article guarantees the continuity of contracts, particularly in order to avoid that counterparties of the credit institution could invoke the transfers ordered by the Resolution Authority as a reason to terminate the contracts that were entered into with the credit institution. This provision however does not prevent parties to agree to include certain changes in the terms of the contracts they entered into (Doc. parl., Ch. session 2013-2014, Doc. 53, 3406/1, p. 201).

9 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4563203/1 and interwovenSite://BEDMS/BEMATTERS/4562940/1. Performed on 12/07/2016.

"**Continuity Act**" or "**C.A.**"), which has replaced the old composition proceedings (concordat judiciaire / gerechtelijk akkoord).

Please note, however, that the Continuity Act is not applicable to credit institutions, insurance undertakings, investment firms, management companies of collective investment undertakings, clearing or settlement undertakings and similar institutions, reinsurance undertakings, financial holdings and mixed financial holdings (see Article 4 of the Continuity Act). Credit institutions and insurance undertakings are subject to specific measures that may be triggered by their supervisory authority (*infra*, ~~9~~10 and ~~10~~11).

8. Winding-up proceedings under the Companies Code. A corporation may also enter into a voluntary winding-up (liquidation volontaire / vrijwillige vereffening) pursuant to Articles 181 *et seq.* of the Companies Code or be subject to a judicial winding-up (liquidation judiciaire / gerechtelijke liquidatie) in accordance with Articles 182 [(21)], 634 [(22)], 645 [(23)] or 667 [(24)] of the Companies Code. Since the last revision of Annex A to the European Insolvency Regulation, both voluntary and judicial winding-up are now listed for Belgium as proceedings falling under the definition of insolvency proceedings, and hence they fall under the scope of the European Insolvency Regulation.[(25)] Under internal Belgian law, winding-up is not, as such, necessarily considered as an insolvency proceeding. When, however, the liabilities of the company exceed its assets, the principle of *pari passu* ranking of creditors will be applicable. Winding-up proceedings under the Companies Code are on the other hand not covered by the reorganization measures or insolvency proceedings affecting a Belgian credit institution, defined in the Credit Institutions Act.[(26)]

([21]) Any company which failed to file its annual accounts for three consecutive years may be wound up by the Tribunal in accordance with Article 182 of the Companies Code.

([22]) A company incorporated in the form of a société anonyme / naamloze vennootschap may be wound up by the Court if its own funds (actif net / netto activa) are less than 61.500 EUR. A similar provision applies where the own funds of a société privée à responsabilité limitée / besloten vennootschap met beperkte aansprakelijkheid (Article 333 of the Companies Code) or société cooperative / coöperatieve vennootschap (Article 432 of the Companies Code) are less than 6.200 EUR.

([23]) A company incorporated in the form of a société anonyme / naamloze vennootschap may be wound up by the Court for fair motives. A similar provision applies to the société privée à responsabilité limitée / besloten vennootschap met beperkte aansprakelijkheid (Article 343 of the Companies Code) and to the société coopérative / coöperatieve vennootschap (Article 386 of the Companies Code).

([24]) A company which is incorporated as a société à finalité sociale / vennootschap met een sociaal oogmerk may be wound up by the Court in accordance with the conditions set out in Article 667 of the Companies Code.

([25]) Cf. Annex A of Regulation 2015/848.

([26]) Indeed, it results from the definition given at Article 3, 59° of the Credit Institutions Act, that winding-up proceedings are not listed as one of the proceedings covered under Book VI. By contrast, Article 15, 71° of the Insurance Supervision Act defines as winding-up proceedings both the bankruptcy proceeding and the winding-up proceeding organized under the Companies Code, and distinguishes among them depending on whether or not they are based on the insolvency of the insurance undertaking.

9. Attachment procedures under the Judicial Code. The mandatory *pari passu* ranking of unsecured creditors also applies to attachment procedures. A corporation in Belgium could be subject to an attachment procedure pursuant to Titles II and III of Part V of the Judicial Code, whether executory (saisie éxécutoire / uitvoerend beslag) or conservatory (saisie conservatoire / bewarend beslag), in particular in the event of attachment of receivables or funds owed by that corporation. Any creditor with an enforceable title and who wishes to recover the amount he is owed by the debtor, may initiate an attachment proceeding in execution of a judgment (executory attachment), with respect to assets of its debtor that can be attached to obtain payment of his claim. Any creditor in possession of a claim that is certain, of a fixed amount and due, may proceed with the conservatory attachment of his debtor's assets, if the latter's solvency is compromised.

10. ~~9.~~ Special measures concerning credit institutions. As indicated above, credit institutions are subject to the insolvency proceedings indicated above, save that they may not be subject to proceedings under the Continuity Act. In addition, the credit institutions' Supervisory Authority is entitled, under Article 234 of the Credit Institutions Act, to take imperative measures (mesures contraignantes / dwingende maatregelen), such as imposing more strict requirements in terms of own funds, liquidity (including limits on mismatches between assets and liabilities), risk concentration, exposure, reporting and publication, and, under Article 236 of the Credit Institutions Act, to take exceptional recovery measures (mesures de redressement exceptionnelles / uitzonderlijke herstelmaatregelen), such as appointing a special commissioner (commissaire spécial / speciale commissaris), or suspending or revoking the credit institution's licence. These measures are meant to ensure that the credit institution acts in compliance with Belgian laws and regulations. We believe that the appointment of a special commissioner should be treated as an Event of Default (under Article 5 (a) (vii) (5) or (6) of the ISDA Master Agreement) but this is also a question to be considered under the governing law of the ISDA Master Agreement.

Also, the Resolution Authority may take resolution actions (instruments de resolution / afwikkelingsinstrumenten) in relation to a Belgian credit institution (i.e. the sale of business tool, the bridge institution tool, the asset separation tool and the bail-in tool), if it considers that all of the following conditions are met:

1° the determination that the credit institution is failing or is likely to fail has been made by the Supervisory Authority, after consulting the Resolution Authority, or by the Resolution Authority, after consulting the Supervisory Authority;

2° having regard to timing and other relevant circumstances, there is no reasonable prospect that any private sector or other prudential measure towards the credit institution would prevent the failure of the credit institution within a reasonable timeframe;

3° a resolution action is necessary in the public interest (see Article 244 of the Credit Institutions Act).[27]

As mentioned above (*supra* 6), notwithstanding any contractual provision to the contrary and without prejudice to the safeguards in Book II, Title VIII, Chapter VII of the Credit Institutions Act, the transfers ordered by the Resolution Authority cannot result in any changes to provisions of agreements in relation to transferred activities, or terminate said agreements, nor authorise any party to terminate them unilaterally, to suspend the execution thereof, to proceed to set-off of claims or debts resulting therefrom or to invoke resolution clauses or acceleration clauses.

As the imperative measures, exceptional recovery measures and resolution actions should not, strictly speaking, be considered as insolvency proceedings, these measures are only given brief mention here, and will not be further examined. Except for what is mentioned with respect to the exclusion of certain contractual terms in early intervention and resolution (*infra*, ~~33~~35), we believe they do not impact on the general conclusions reached in this Update Opinion.

11. ~~10.~~ Special measures concerning insurance undertakings. Insurance undertakings are subject to the insolvency proceedings indicated above, save that, similarly to credit institutions, they are not subject to proceedings under the Continuity Act. In addition, their supervisory body, the NBB, is entitled, under Article 508 of the Insurance Supervision Act, to take imperative measures (mesures contraignantes / dwingende maatregelen), such as imposing more strict requirements in terms of liquidity (including limits on mismatches between assets and liabilities), risk concentration, exposure, reporting and publication, and, under Article 517 of the Insurance Supervision Act, to take exceptional recovery measures (mesures de redressement exceptionnelles / uitzonderlijke herstelmaatregelen), such as appointing a special commissioner (commissaire spécial / speciale commissaris), or suspending or revoking the insurance undertaking's licence. These measures are meant to ensure that the insurance undertaking acts in compliance with Belgian laws and regulations. We believe that the appointment of a special commissioner should be treated as an Event of Default (under Section 5 (a) (vii) (5) or (6) of the ISDA Master Agreements) but this is also a question to be considered under the governing law of the ISDA Master Agreement.

([27]) The provision has been drafted in very general terms. We believe however that it could not be construed as authorizing a transfer under which only certain Transactions under an ISDA Master Agreement would be transferred; as all Transactions form a single agreement between the parties, we believe a transfer could only concern the ISDA Master Agreement itself with all the Transactions documented under it. Moreover, pursuant to Article 286, §1, 2° and 3° of the Credit Institutions Act, the Resolution Authority cannot order the partial transfer, modification or termination of:

2° rights and liabilities resulting from a title transfer financial collateral arrangement, including repurchase agreements (repos);

3° rights and liabilities resulting from novation arrangements or from bilateral or multilateral set-off arrangements, including netting arrangements or close out netting arrangements.

Also, the government may, where the difficulties of the insurance undertaking concerned are likely to affect the stability of the Belgian or international financial system, promulgate a Royal Decree transferring to the Belgian State or to any other person shares issued by the insurance undertaking, or part or all of its assets or activities (see Article 519 of the Insurance Supervision Act). Such transfer, which may be considered to be close to a nationalisation, is aimed at avoiding any insolvency proceeding affecting a prominent insurance undertaking. As mentioned above (*supra* 6), a transfer pursuant to such Royal Decree may not, by law, result in modifying or terminating any agreement binding the insurance undertaking, nor give the counterparty the right to unilaterally terminate it.[28]

As they should not, strictly speaking, be considered as insolvency proceedings, these measures are only given brief mention here, and will not be further examined. We believe they do not impact on the general conclusions reached in this Update Opinion.

12. Special measures concerning the NBB. In addition to bankruptcy and judicial reorganisation proceedings, the NBB could also be subject to a dissolution procedure (dissolution / ontbinding) in accordance with Article 11 of the Statutes of the NBB. Pursuant to Article 11 of the Statutes of the NBB, such dissolution may not take place other than by means of a law.

The NBB could moreover be subject to attachment procedures under the Belgian Judicial Code (*supra* 9). Pursuant to Article 1412bis of the Belgian Judicial Code, the NBB benefits from immunity against any attachment in respect of goods belonging to the public domain. Such goods of the public domain are, in accordance with the jurisprudence of the Belgian supreme court (Cour de Cassation / Hof van Cassatie) "*all public goods either by an explicit or implicit decision of the competent body of law to be reserved for the use by all, indiscriminately*".[29] A decision of the public institution concerned on the nature of the goods is thus required for goods to qualify as goods of the public domain. Belgian public institutions may however indicate which goods are susceptible to attachment.[30] If no goods are identified, or if the goods indicated are insufficient, any creditor may however, in principle, seize "*the goods which are clearly not useful for these public institutions for the performance of their duties or for the continuity of public service*".[31] In practice, however, seizure may prove difficult as the NBB has not indicated any goods eligible for attachment and it remains unclear

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([28]) The *ratio legis* of a transfer pursuant to a Royal Decree however does not seem to cover certain Transactions under a single ISDA Master Agreement as part of the transfer. An ISDA Master Agreement would in principle be transferred in full, including all Transactions thereunder.

([29]) Cass, 3 May 1968, *R.W.*, 1968-1969, 409.

([30]) Although not specifically relating to attachment, Article 7 of the Statutes of the NBB provides that "*the shareholders, their heirs or creditors may neither cause the Bank's assets and valuables to be put under seal nor request apportionment or sale by auction or interfere in the Bank's administration. They must rely, for the exercise of their rights, on the inventory of the Bank's assets and on the resolutions of the General Meeting*".

([31]) Article 1412bis, §2, 2° Judicial Code. See also Cass., 24 April 1998, *R.W.*, 2000-2001, 1195, note Stan Brys; See also Court of First Instance, 15 May 2003, *BRF/DBF*, 2003/7, 381-383.

which of its assets may thus be considered as 'clearly not useful for performance of its duties or continuity of public services'. In addition, the NBB may oppose the attachment and may offer other goods, which the creditor is obliged to accept provided that such goods are adequate and located in Belgium.(32)

13. ~~11.~~ Developments concerning bankruptcy and reorganisation proceedings under the Continuity Act. The legal regime of the main insolvency proceedings, *i.e.* bankruptcy and reorganization proceedings under the Continuity Act, will be summarized hereinafter.(~~29~~33)

Please note, however, that reorganization proceedings under the C.A. only apply to a limited type of entities contemplated in this Update Opinion (*i.e.* mere corporations).

1°. - Bankruptcy

14. ~~12.~~ Criteria. Bankruptcy proceedings may be commenced against any individual that is engaged in business (commerçant / koopman) or commercial corporation which has legal personality, (i) has ceased paying its debts in an enduring manner (cessé ses payements de manière persistante / op duurzame wijze heeft opgehouden te betalen) and (ii) is unable to obtain further credit (ébranlement du crédit / wankelen van krediet). These conditions are cumulative: they must all be fulfilled prior to the institution of the bankruptcy proceedings.

A person is "*unable to obtain further credit*" where no further credit is granted and existing credit is refused by bankers and suppliers. The Bankruptcy Act replaced the previously existing condition of being unable to pay one's debts, which was fulfilled where the person failed to pay one single debt as it matured, by that of continually being unable to pay one's debts. This amendment was prompted by the structural change in insolvency proceedings, where composition proceedings - and later on reorganization proceedings - were thoroughly amended so as to constitute a true preventive procedure, with bankruptcy remaining a liquidation option for cases where prevention has not succeeded. Bankruptcy hence requires that the cessation of payments is continuing.

The directors of a corporation which fulfils these two conditions are required by law to institute bankruptcy proceedings by filing a petition with the bankruptcy court. A bankruptcy order may also be issued under bankruptcy proceedings instituted by any of the

(32) Article 1412bis, §3, first indent of the Judicial Code.

(~~29~~33) As the impact of the rules of the B.A. and C.A. is strongly reduced by the impact of the insolvency rules resulting from the European Insolvency Regulation, the implementation in Belgian law of the Solvency II Directive and the Credit Institutions Winding-Up Directive, the provisions of the International Private Law Code (*infra*, I. C), and by the Belgian Netting Legislation (*infra*, I. D), the developments have lost some of their importance in the context of an ISDA Master Agreement, this being the reason why they are presented in summary form only.

creditors, the public prosecutor (Ministère public / Openbaar Ministerie) or the provisional administrator (administrateur provisoire / voorlopige bewindvoerder).([30]34)

The bankruptcy order appoints a receiver in bankruptcy (curateur / curator) who "steps into the shoes" of the bankrupt, realizes his assets and distributes the proceeds among the creditors in proportion to their respective claims. Under certain conditions, he may be authorised to pursue the business of the bankrupt.

From the date of the bankruptcy order, no payment can be made or received by the bankrupt. Payments may be made only to the receiver, and the receiver can be asked to repay any amount paid to the bankrupt after the opening of the bankruptcy proceedings. The acceptance by the receiver of any payment for any act by the bankrupt prior to the bankruptcy does not lead to an endorsement of the contract, unless the receiver knowingly accepts payment for further performances occurring after the bankruptcy order.

15. ~~13.~~ No automatic suspect period. An important element of the reform of bankruptcy proceedings is that no "suspect period" will be automatically fixed by the Court. Article 12 B.A. provides that the date of cessation of payments of the bankrupt is deemed to be the date of the bankruptcy order. Only where a request was made, setting out the "serious and objective" elements leading clearly to the conclusion that the cessation of payments occurred at an earlier time([31]35), may the Court fix (i) an earlier date of cessation of payments not exceeding six months from the date of the order, or (ii) the date of winding-up of the debtor, even if earlier than six months, where it appears that such winding-up was decided to defraud creditors.

The current general tendency among the Courts is to keep the date of the bankruptcy order as the date of cessation of payments, and to fix an earlier date only under specific circumstances.

The period from the date of cessation of payments up to the bankruptcy order is called the "suspect period". Some transactions concluded, performed or executed during the suspect period are void. For certain types of transactions, the court must hold them to be void where the statutory conditions are satisfied (Article 17 B.A.). For other transactions, the court may void them (Article 18 B.A.).

([30]34) The provisional administrator referred to in Article 6 of the B.A. is the provisional administrator who may be appointed by the Court under Article 8 B.A. (*infra*, ~~17~~19). This provisional administrator may only initiate bankruptcy proceedings by issuing a writ of summons and not by filing a petition.

([31]35) The elements that may lead a Court to fix an earlier date of cessation of payments are elements which could have justified the bankruptcy during such period: e.g. number of debts remaining unpaid, judgments ordering the bankrupt to pay, attachment procedures on its assets and termination of all credit agreements by the banks.

16. ~~14.~~ Article 17 B.A. Article 17 B.A. lists transactions which are null and void when concluded, performed or executed during the suspect period. These transactions include, among others, transfers of property without proper consideration (Article 17, 1° B.A.), payments of debts not due (including payments by set-off) and payments of due debts made otherwise than in cash or by negotiable instruments (Article 17, 2° B.A.).

Notwithstanding the terms of Article 17, 2° B.A.:

(1) payments made by set-off are not liable to be set aside where the debts are set off against each other by operation of law (Van Ryn and Heenen, t. IV, no. 2726.- t' Kint and Coppens, Examen de jurisprudence (1979-1983).- Faillites et concordats, R.C.J.B., 1984, p. 528, no. 85.- R.P.D.B., V°, Faillite et banqueroute, no. 660, 661 and 692.- Lyon-Caen and Renault, Traité de droit commercial, p. 511, no. 358). However, when the conditions for legal set-off are artificially created by operation of an agreement entered into during the suspect period, such agreement is void under Article 17 B.A. (Cloquet, "Les concordats et la faillite", Novelles, Droit commercial, t. V, 3rd ed., no. 365 and 458 - R.P.D.B. V°, Faillite et banqueroute, no. 663 - Van Ryn and Heenen, t. IV, no. 2726 - t'Kint and Coppens, *op. cit.* p. 529 - Lyon-Caen and Renault, t. VII, no. 363). Set-off can also not be set aside where the debts are set off during the suspect period pursuant to an agreement which creates the conditions for legal set-off and which is entered into prior to the commencement of the suspect period (Van Ryn and Heenen, t. IV, no. 2726 - R.P.D.B., *op. cit.*, no. 692);

(2) payments in a currency other than Belgian legal currency (EUR) are not considered by law as being made "*otherwise than in cash*" if provided for in the contract, and they will therefore not be void under Article 17 B.A. (Cass., 15 February 1962, Pas. 1962, I, 682 - Van Ryn and Heenen, t. IV, no. 2721- Verougstraete, Manuel du curateur de faillite, no. 349).

Except for these restrictions, the good faith of the creditor, or the fact that he was not aware of the insolvency of his debtor, are immaterial to the application of Article 17 B.A.

17. ~~15.~~ Article 18 B.A. Article 18 B.A. provides that payments made, and onerous acts undertaken, during the suspect period may be declared null and void when the creditor has actual notice of the fact that the debtor has ceased his payments and fulfils the conditions for bankruptcy. Evidence of such notice may result from the fact that the beneficiary of the payment or the counterparty to the transaction had himself, prior to such act, raised bankruptcy proceedings against the future bankrupt, or, as the banker or the primary supplier of the bankrupt, he is particularly well aware of its financial condition (see P. Coppens and T'Kint, "Examen de jurisprudence" (1991 à 1996), "Les faillites, les concordats et les privilèges", R.C.J.B., 1997, pp. 396-401, nos. 93-98).

18. ~~16.~~ Article 20 B.A. Article 20 B.A. provides that all fraudulent acts or payments are void, whatever their date, even if concluded, performed or executed before the suspect period. Article 20 B.A. is the mere application of the right of a creditor to sue in order to have

transactions by his debtor with third parties declared void where they are fraudulent and prejudicial to his interests (the so-called "action paulienne") (Article 1167 of the Civil Code).

The action paulienne presupposes fraud on the part of the debtor and collusion on the part of the creditor.

The debtor acts fraudulently where the act or payment is abnormal and prejudicial to the other creditors (Cass., 15 March 1985, Pas., 1985, I, 875 - Cass., 11 January 1988, J.T., 1988, p. 190), and the creditor aids and abets in the knowledge thereof (Mahaux, "L'action paulienne et les nullités de la periode suspecte: conditions et effets respectifs", R.C.J.B., 1989, p. 321). It results therefrom that the creditor's complicity in fraud may be inferred from the abnormality of the act (Cass., 26 October 1989, Pas., 1990, I, 248).

19. ~~17.~~ Removal under Article 8 B.A. Independently from the proceedings for bankruptcy, the Bankruptcy Act provides that the Court may, in case of strong presumptions that the conditions for bankruptcy are fulfilled, remove an individual in business or a corporation from the administration of parts or all of its assets (Article 8 of the Bankruptcy Act).

Such an order is rendered in *ex parte* proceedings, on the petition of any person having an interest, or *ex proprio motu* by the Court itself. The Court appoints the 'provisional administrator' (administrateur provisoire / voorlopige bewindvoerder) responsible for administering the assets. The order is not specifically publicised. The Court may amend the competences of the provisional administrator at any time upon a request by the provisional administrator. The court order only remains valid if bankruptcy proceedings are instituted within fifteen days.

Payments made to a person in respect of whom such an order has been issued are deemed to be valid if the person making the payment was not aware of the court order. Acts undertaken by the person in respect of whom the court order is issued on or after the date of the court order in violation thereof, are unenforceable as against the body of creditors (in the event of a subsequent bankruptcy) where the party in whose favour the act was undertaken was aware of the court order, or where the acts fall within one of the categories that may be challenged where they occur during the "suspect period" (see Articles 17 and 18 B.A.; even if no such suspect period is fixed by the Court).

20. ~~18.~~ Principle of the *pari passu* treatment of creditors. The cardinal principle of insolvency law in Belgium is that unsecured creditors rank *pari passu* with one another and are entitled to a dividend in proportion to their respective claims (Van Ryn and Heenen, Principes de droit commercial, t. IV, no. 2632).

The principle of *pari passu* ranking prohibits contractual arrangements entered into prior to the opening of the insolvency proceedings which unfairly benefit one creditor at

the expense of the others by giving him a preferential right, not provided for by the law, over the debtor's assets.

However, the prevailing academic view is that the *pari passu* principle applies only to the distribution of the debtor's assets. It does not preclude the parties from establishing contractual arrangements in conformity with the law of contracts and the law of obligations - even if they result in a benefit to one particular creditor - in so far as they do not grant him a better ranking in the distribution of the debtor's assets.

Accordingly, fundamental concepts of the law of contracts and the law of obligations such as the *exceptio non adimpleti contractus* are, as a matter of principle, unaffected by insolvency law (P. Van Ommeslaghe, "Sûretés issues de la pratique et autonomie de la volonté", in Les sûretés, (sûretés traditionnelles, réelles et personnelles, en droit français et en droit belge ; sûretés issues de la pratique ; droit international privé), Paris, Feduci, 1984, p. 373 - De Page, t. VI, no. 778).

21. ~~19.~~ The event triggering the application of the *pari passu* principle. It is of the utmost importance to determine what event is to be considered as the opening the insolvency proceedings under bankruptcy, since it will also trigger the applicability of the *pari passu* principle and prohibit preferential payments to ordinary, unsecured creditors after that date. It is undisputed that the event triggering the applicability of the principle of *pari passu* ranking in the case of bankruptcy is the bankruptcy order itself, and not the date the bankruptcy proceedings may be instituted, without prejudice to the rules concerning the so-called "suspect period".

The Bankruptcy Act confirms previous case law according to which the effects of the judgment declaring the bankruptcy are backdated to the zero hour on the very day of the declaration (Article 16 B.A.- Exposé des motifs, Doc. parl. Ch., session 1991-92, no. 631/1-91-92 p. 12, when such article was numbered 15).

2°. - **Reorganisation proceedings under the Continuity Act**

22. ~~20.~~ Aim and scope of the Continuity Act. The Continuity Act results from the aim of the legislator to deeply re-think the composition proceedings that existed under the Composition Act of 17 July 1997, in view of the relative failure of the latter. The ambition was to provide for adequate tools to allow an enterprise to overcome its financial difficulties, thereby avoiding bankruptcy. To achieve this end, the C.A. provides for a number of pre-procedural tools: the appointment of an enterprise mediator (médiateur d'entreprise / ondernemingsbemiddelaar), the appointment of an "ad hoc" manager (mandataire de justice / gerechtsmandataris), or the entering into an amicable agreement by the debtor with two or more creditors with a view to its reorganization and restoration of its financial situation. It also organizes the judicial reorganization proceedings, with three possibilities: (i) the

reorganization through mutual agreement, (ii) through agreement of the creditors on a reorganization plan, or (iii) through the judicial transfer of all or part of the activities.

The C.A. applies, in addition to individuals or corporations engaged in business, to farmers, to agricultural partnerships (cf. Article 2, § 3 of the Companies Code) and to civil partnerships with a commercial form (cf. Article 3, § 4 of the Companies Code).

23. ~~21.~~ Commencement of the judicial reorganization proceedings. The proceedings are commenced by a petition filed by the debtor himself with the Commercial Court. The effects of the petition for reorganization vis-à-vis creditors are that (1°) until an order is pronounced by the Court, bankruptcy proceedings or voluntary winding-up proceedings may not affect the debtor and (2°) there may not be any realization of the assets of the debtor as a result of any enforcement procedures (Article 22 C.A.). Also, the Commercial Court will immediately designate a special judge (juge délégué / gedelegeerd rechter) who will follow the proceedings.

24. ~~22.~~ Opening of the judicial reorganisation proceedings. The Court needs to examine the request for judicial reorganization proceedings within fourteen days of the filing of the petition. After hearing the debtor and the report of the delegated judge, the Court will declare the opening of the judicial reorganization proceedings, provided it is satisfied the relevant criteria are met.[~~32~~36] The Court also determines the duration of the initial period of suspension of payment (sursis de paiement / opschorting van betaling), which may not exceed six months[~~33~~37], determines the period within which the creditors have to lodge their claims, lays down any limits on the powers of the debtor, may in certain situations designate a judicial manager (mandataire de justice / gerechtsmandataris) to assist the debtor (Article 27 C.A.) and fixes the date on which the Court will decide on the reorganization itself. The order is published in the Official Gazette (Moniteur Belge / Belgisch Staatsblad). If the Court refuses the petition for judicial reorganization, it may issue a bankruptcy order over the debtor.

During the period of suspension of payment, the debtor retains control over his assets and liabilities. The court order opening the reorganization proceedings, or any later order of the same Court may, however, in case of bad faith or severe faults of the debtor or its manager, designate a provisional manager (administrateur provisoire / voorlopige bestuurder)

([~~32~~36]) The criteria that need to be met are that the continuity of the business is jeopardized and the petition has been filed. Also, the proceedings may not be opened in the case of a debtor who benefited from a judicial reorganization less than three years before, except if the new petition seeks the transfer of all or parts of the business or its activities. Where the debtor is a legal entity, the continuity of the business is deemed to be jeopardized where the losses have resulted in the net assets to be less than 50 % of the amount of the capital. Moreover, if the petition is filed by a debtor who benefited from a judicial reorganization more than three but less than five years before, the new procedure of judicial reorganisation cannot reverse any achievements of the creditors obtained during past procedures.

([~~33~~37]) The duration of the initial period of suspension of payments may later be extended, upon request by the debtor, to reach a total of 12 months or even 18 months in case of exceptional circumstances (Article 38 C.A.).

to replace the debtor or his manager (Article 28, § 2 C.A.). Such judgment of the Court is published.

Vis-à-vis the creditors, the consequence of the period of suspension of payments is to prevent them from pursuing their claims (existing at the date of the order opening the reorganisation proceedings or stemming from the decisions taken within the reorganisation) against the assets of the debtor (Article 30 C.A.), with the exception of the claims that have been specifically pledged (Article 32 C.A.).([34]38)

In an important deviation from what was provided for in the past composition proceedings, the debtor is authorised to voluntarily pay the claims that are otherwise affected by the suspension if required for the continuity of the business (Article 33 C.A.). Also, the general principle is that existing contracts binding on the debtor continue to exist, and are not affected by the opening of reorganization proceedings.

The debtor could however, even without any contractual provision in this respect, decide no longer to execute an existing contract for the duration of the suspension, with a communication to its counterparties, under the condition that the non-execution is necessary to be able to propose a reorganization plan to the creditors or to allow the judicial transfer.([35]39) The execution of this right does not affect the creditor's right to suspend its own performances. When the debtor decides no longer to execute an existing contract, the compensation the counterparty would be subject to, as the case may be, is a claim in the suspension.

Article 34 of the C.A. lastly provides that, without prejudice to the application of the Act of 15 December 2004 on financial collateral implementing Directive 2002/47/CE of 6 June 2002 (hereinafter the "**Financial Collateral Act**", or "**F.C.A.**"), set off between claims affected by the suspension and claims dating from after the commencement of the reorganization proceedings is only authorised during the reorganization proceedings provided there is a close connection (*nexus*) among them.

25. [23.] Prohibition of termination clauses linked to the petition for reorganization or to the order opening the reorganization proceedings. Article 35 of the C.A. provides that a petition for reorganization or the order opening the reorganization proceedings does not cause

([34]38) I.e. any claims that were specifically pledged when establishing the pledge are not affected by the reorganization proceedings (e.g. pledge of bank accounts).

([35]39) Article 35 C.A. cannot be used for 'cherry picking': the option for the debtor should always refer to contracts in their entirety and can hence not refer to parts of such contracts (E. Dirix and R. Jansen, "De positie van de schuldeisers en het lot van lopende overeenkomsten", in K. Byttebier, E. Dirix, M. Tison and M. Vanmeenen (eds.), Gerechtelijke reorganisatie. Getest, gewikt en gewogen, Antwerpen, Intersentia, 2010, p. 191).The 'necessity condition' was introduced to protect contractual counterparties. It would in our opinion be difficult to prove that the non-execution of an ISDA Master Agreement is necessary to be able to propose a reorganization plan to the creditors or to allow the judicial transfer. The *ratio legis* of the 'necessity condition' was to allow the debtor to dispose of any non-profitable or loss making contracts (e.g. contracts that were entered into at conditions that were not in conformity with the market) (cf. E. Dirix and R. Jansen, *op.cit.*, p. 190).

the contracts entered into by the debtor to be terminated nor does it change the modalities of their execution. Termination clauses linked to such events are in principle prohibited.

It is not clear at this stage whether or not this general prohibition extends to *intuitu personae* or *intuitu firmae* contracts (see A. Zenner, "Dépistage, faillites et concordats", Larcier, 1998, p. 100, n° 59, considering that the prohibition does not apply to such contracts).

Contrary to past Article 28 of the Composition Act, Article 35 of the C.A. states the prohibition without expressly reserving the application of specific legislation authorising such termination clauses.

We are however of the opinion that, notwithstanding Article 35 of the C.A., termination clauses linked to reorganization proceedings may be valid where they are validated by Article 14 F.C.A. (see *infra*, ~~34~~36 *et seq.*).

This is because:

i. Article 7 of the C.A. generally states that the C.A. does not purport to amend or derogate from previous legislation, save where such amendment or derogation is made expressly;([~~36~~40])

ii. the legislator had no intent of amending or reducing the enforceability of the Financial Collateral Act; in any event, in case of doubt, Belgian law must be interpreted in conformity with EC law, including article 7 of the Collateral Directive 2002/47/EC validating termination clauses provided to achieve netting;

iii. also, in case of doubt, the interpretation that avoids any conflict between two separate legislations must be favoured, to ensure a coherent legal system;([~~37~~41])

iv. there was a mention, in the legislative history, that the principle of Article 35 C.A. would apply subject to Article 14 F.C.A.;([~~38~~42])

v. Article 14 F.C.A. validates as a whole the two aspects of close-out netting, *i.e.* the termination clause and the netting or set-off provision;

([~~36~~40]) Cf. sharing this opinion, A. Zenner, La nouvelle loi sur la continuité des entreprises, Anthémis, 2009, p. 101 - M. Grégoire, "Le sort des créanciers et leurs garanties", in La loi sur la continuité des entreprises, Van Ham et Van Ham, 29 January 2009, n° 38 ; S. Loosveld, "Lopende overeenkomsten en insolventie (faillissement en gerechtelijke reorganisatie): een stand van zaken", *RABG* 2009/ 8, p. 525, nr. 7 .2

([~~37~~41]) I do not share the opinion of J. Windey who sees in these two provisions a blatant contradiction (J. Windey, "La loi du 31 janvier 2009 relative à la continuité des entreprises", *J.T.*, 2009, p. 237 et s., no. 32 *et seq.*).

([~~38~~42]) Doc. parl. Ch, session 2007-2008, Doc. 52, 016/002, p. 62.

the links between those two aspects justify that the reservation made in Article 34 of the C.A., regarding the netting aspect of Article 14 F.C.A., also applies to Article 35 of the C.A., dealing generally with termination clauses;

vi. in the case of an ISDA Master Agreement and Transactions documented thereunder, the Act of 26 September 2011 (*infra*, ~~35~~37) confirms *a contrario* that Article 14 F.C.A. trumps Article 28 of the C.A. and validates termination clauses even where the debtor is subject to judicial reorganisation proceedings. Indeed, the Act of 26 September 2011 introduced new clear derogations from the scope of Articles 14 and 15 F.C.A. in the hypothesis where the debtor is subject to judicial reorganisation proceedings, but provides at the same time that these derogations do not apply to netting agreements and termination or acceleration clauses stipulated to allow novation or set off where such are entered into concerning derivative transactions (and such concept is broadly defined in Royal Decree of 7 November 2011, as to include all Transactions in Appendix A) documented under a standardized master agreement such as the ISDA Master Agreement.

Article 35 of the C.A. only sanctions clauses authorising termination of the contract on the basis of the reorganization proceedings. Termination is hence enforceable where it is motivated by a fact or circumstance distinct from the reorganization proceedings; it results however from Article 35, § 1, paragraph 2 C.A. that the creditor wishing to terminate a contract for a breach committed by the debtor before the reorganization proceedings must send a notice of default and may not terminate the contract where the debtor has resolved the breach by executing said contract within fifteen days after the notice of default was sent.

26. ~~24.~~ The three forms of judicial reorganization. During the initial period of suspension of payment, the debtor may opt for any of the three forms of reorganization provided under the C.A., *i.e.* reorganization through amicable agreement, through collective agreement, or through a transfer of activities. The debtor may, at any time, request the Court to pursue the proceedings through a different judicial reorganization than the one he had chosen initially (Article 39 C.A.).

27. ~~25.~~ Judicial reorganization through amicable agreement. The debtor may enter into an amicable agreement with two or several (or all) of his creditors, which agreement will be noted in a judgment by the Court, be binding on the parties to it, and will close the reorganization proceedings (Article 43 of the C.A.). Article 43 of the C.A. expressly excludes the application of Articles 17, 2° and 18 of the B.A. (dealing with voidable preferences) concerning such amicable agreement. The judgment that establishes the amicable agreement of the creditors closes the proceedings and is subject to publication in the Moniteur Belge.

28. ~~26.~~ Judicial reorganization through collective agreement of the creditors on a reorganization plan. The debtor wishing to proceed to reorganization through collective agreement of the creditors must prepare a reorganization plan. Such plan needs to be approved by more than half of the creditors that have lodged their claims, and whose claims amount to more than half of the total claims (Article 54 C.A.). The Court must homologate the reorganization plan that is approved by the creditors provided it is not contrary to public policy and the forms laid down in the C.A. have been complied with (Article 55 C.A.). The judgment of homologation closes the proceedings and is published in the Moniteur Belge.

Once the reorganization plan has been homologated, it is enforceable vis-à-vis all the creditors, including those who have not voted in favour of it.

29. ~~27.~~ Judicial reorganization through transfer. The debtor may seek the judicial transfer of all or parts of its business or activities.[~~39~~43] Judicial transfer may also be ordered by the Court against the debtor where (1°) the debtor meets the conditions for bankruptcy without having petitioned for reorganization proceedings, (2°) the Court rejects the petition for opening of the judicial reorganization proceeding, closes it anticipatively or revokes the reorganization plan, (3°) the creditors do not approve the reorganization plan, or (4°) the Court refuses to homologate the reorganization plan.

The judgment ordering the transfer designates the person (mandataire de justice / gerechtsmandataris) responsible for organizing the transfer in the name of and for the account of the debtor. By same judgment, the Court may order a further period of suspension of payments, not to exceed six months. The judgment is published in the Moniteur Belge.

30. ~~28.~~ The application of the *pari passu* principle. It was generally agreed, before the previous reform of 1997, that the *pari passu* principle applied both to bankruptcy and to composition proceedings (Van Ryn and Heenen, t. IV, no. 2934).

The solution was less clear under the Composition Act of 1997, as there was an unsettled debate on the question whether or not the *pari passu* principle still applied to composition proceedings.

The new reorganization proceedings provided under the C.A. contain some remarkable derogations from the principle of equality among creditors and the new

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([~~39~~43]) The judicial transfer concerns all or parts of the debtor's business or activities. The business and activities are not defined explicitly in the C.A. The parliamentary works define a 'business' as a complex sum of assets, staff, production means, clients, etc. (Amendment nr. 1 of the Government, Doc. parl., Ch. session 2007-08, Doc. 52, 160/2, p. 72). With the notion of 'activities', the object of the transfer can be targeted and detailed, as a business and even part of a business can have more activities (E. Dirix and R. Jansen, *op. cit.*, p. 233). The *ratio legis* of the judicial reorganization through transfer however does not seem to cover certain Transactions under a single ISDA Master Agreement as part of the transfer as it is unlikely that these Transactions would qualify as an activity of a debtor in the sense of the C.A.

proceedings therefore do not seem to create a situation where the *pari passu* principle applies (cf. the views expressed by the early commentators, A. Zenner, *op.cit.*, p. 94 *et seq.*, no. 56 *et seq.*). The only applicable limitations to the rights of the creditors are those that are expressly set forth in the C.A.

C.- Specific rules affecting set-off in the case of an insolvency proceeding resulting from the European Insolvency Regulation, the implementation under Belgian law of the Credit Institutions Winding-Up Directive, the Solvency II Directive, and from the International Private Law Code and in the case of resolution acts resulting from the implementation under Belgian law of the BRRD

31. ~~29.~~ Application of the European Insolvency Regulation. The European Insolvency Regulation applies to insolvency proceedings(~~40~~44) affecting a Belgian debtor where such debtor does not qualify as an insurance undertaking, credit institution, investment undertaking which provides services involving the holding of funds or securities for third parties, or a collective investment undertaking.(~~41~~45)

Article 4.1 of the European Insolvency Regulation provides that the law applicable to insolvency proceedings and their effects is in principle that of the Member State within the territory of which such proceedings are opened (hereinafter the "*lex concursus*"). This law determines the conditions for the opening of those proceedings, their conduct and their closure and in particular the various issues listed in Article 4.2 of the European Insolvency Regulation, among which, under Article 4.2. (d), the conditions under which set-offs may be invoked.(~~42~~46)

Article 6.1 of the European Insolvency Regulation states further that the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.(~~43~~47) Article 6.2 of the European Insolvency Regulation

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(~~40~~44) Annex A and Annex B of the European Insolvency Regulation have been recently amended to take into account changes in Belgian insolvency law. Annex A now refers, for Belgium, to all proceedings under the B.A. or under the C.A., to winding-up and also to the "règlement collectif de dettes / collectieve schuldenregeling", a proceeding which is restricted to individuals (Annex A of Regulation 2015/848 refers to the same insolvency proceedings).

(~~41~~45) See *supra*, I., A.

(~~42~~46) Cf. Article 7 of Regulation 2015/848.

(~~43~~47) Scholars consider that this implies that the law applicable to the insolvent debtor's claim must authorise the set-off even in the context of an insolvency proceeding (N. Watté, "L'opposabilité des sûretés dans le nouveau règlement européen des procédures d'insolvabilité", Rev. ULB, 2001, p. 39, n° 2 - D. Devos, "Collateral transactions in payment and securities settlement systems: the EU framework", Dr. bancaire et financier, 2002, p. 16, n° 11 - V. Marquette, "L'incidence du Règlement 1346/2000 relatif aux procédures d'insolvabilité sur les sûretés bancaires contractuelles", in Sûretés bancaires et financières, Cahiers AEDBF, Bruylant, 2004, p. 175, n° 74 - E. Dirix and V. Sagaert, "Verhaalsrechten en zekerheidsposities van schuldeisers onder de Europese

however stipulates that this does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors (*supra*, ~~13~~15 *et seq.* on the suspect period), except if the beneficiary of an act detrimental to all the other creditors provides proof that: 1°) this act is subject to the law of a Member State other than that of the State of the opening of insolvency proceeding and 2°) that law does not allow any means of challenging that act in the relevant case (Article 13 of the European Insolvency Regulation). Article 6.1 of the European Insolvency Regulation provides for a negative rule of conflict of law, which effect is to prevent the application of the *lex concursus*, where such law would not recognize the set-off.(~~44~~48) Where the *lex concursus* on the other hand authorizes the set-off, the rule of Article 6.1 is not applicable.(~~45~~49)

32. ~~30.~~ Implementation of the Solvency II Directive. The Act of 6 December 2004 implemented Directive 2001/17/EC of 19 March 2001 on the reorganization and winding up of insurance undertakings by amending the Insurance Supervision Act. The Solvency II Directive repealed Directive 2001/17/EC and now sets out the EU framework for the reorganization and winding up of insurance undertakings. The Act of 9 July 1975 on the control of insurance undertakings (as repealed by the Insurance Supervision Act) already reflected the relevant provisions of the Solvency II Directive discussed below, due to the prior implementation of Directive 2001/17/EC.

The provisions concern reorganization measures(~~46~~50) and winding-up proceedings, which include bankruptcy proceedings and winding-up proceedings in accordance with the Companies Code.

Article 621 of the Insurance Supervision Act provides for the general principle that the bankruptcy of a Belgian insurance undertaking is governed by Belgian law, subject to various exceptions.

Article 633 further provides that the opening of reorganization measures or of bankruptcy proceedings shall not affect the right of a creditor to demand the set-off of its claim against the claim of the insurance undertaking, where such a set-off is permitted by the law applicable to the insurance undertaking's claim.(~~47~~51) Article 634 of the Insurance Supervision Act stipulates that this does not preclude actions for voidness, voidability or

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Insolventieverordening", R.D.C.B., 2001, p. 598, n° 52). The law applicable to the insolvent debtor's claim may be the law of a Member State of the Community or of any other country.

(~~44~~48) V. Marquette, *op.cit.*, p. 173, n° 72.

(~~45~~49) E. Dirix and V. Sagaert, *op.cit.*, p. 597, n° 51. Cf. Articles 9 and 16 of Regulation 2015/848.

(~~46~~50) Article 15, 70° of the Insurance Supervision Act which defines reorganization measures covered under the Act now only refers to reorganization measures under the Insurance Supervision Act itself, as composition proceedings no longer exist and as insurance undertakings are excluded from the scope of the C.A. (see Article 12 of the Act of 2 June 2010).

(~~47~~51) This provision implements article 288 of the Solvency II Directive with similar wording to that of Article 6.1 of the European Insolvency Regulation.

unenforceability of legal acts detrimental to the creditors (Articles 17 to 20 of the Bankruptcy Act, *supra*, ~~11~~13 *et seq.*, and Article 1167 of the Civil Code), except if the beneficiary of an act subject to these rules establishes that this act is subject to the law of a country that is a member of the European Economic Area (other than Belgian law), and that this law does not allow any means of challenging that act.[~~48~~52] Like Article 6.1 of the European Insolvency Regulation, Article 633 of the Insurance Supervision Act creates a negative rule of conflict of law, which effect is to prevent the application of Belgian law as the *lex concursus*, where such law would not recognize the set-off. Where the Belgian law, on the other hand, authorizes the set-off, the rule is not applicable.

33. ~~31.~~ Implementation of the Credit Institutions Winding-Up Directive. The Act of 6 December 2004 implemented the Credit Institutions Winding-Up Directive by amending the Act of 22 March 1993, which was recently replaced by the Credit Institutions Act of 25 April 2014.

The provisions concern reorganization measures[~~49~~53] and bankruptcy as sole winding-up proceedings.

Article 365 of the Credit Institutions Act determines the general principle that the bankruptcy of a Belgian credit institution is governed by Belgian law, subject to various exceptions.

Derogating from Article 365 of the Credit Institutions Act, Article 369, 5° provides that the consequences of reorganization measures and bankruptcy proceedings on novation and bilateral or multi-lateral set-off agreements, and the termination provisions they contain in order to allow set-off, are exclusively governed by the law applicable to these agreements.[~~50~~54]

Article 372 of the Credit Institutions Act also provides that reorganization measures or the opening of bankruptcy proceedings will not affect the right of a creditor to demand the set-off of his claim against the claim of the credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim.[~~51~~55] Article 373 of the Credit Institutions Act stipulates that this does not preclude, in the case of Article 372, the actions for voidness, voidability or unenforceability of legal acts detrimental to the creditors (Articles 17 to 20 of the Bankruptcy Act, *supra*, ~~11~~13 *et seq.*, and Article 1167 of the Civil

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([~~48~~52]) This provision implements article 290 of the Solvency II Directive, with similar wording to that of Article 13 of European Insolvency Regulation.

([~~49~~53]) Article 3, § 1, 8° of the Credit Institutions Act which defines reorganization measures covered under the Act now only refers to reorganization under the Credit Institutions Act itself (see our comment in footnote 26).

([~~50~~54]) This provision implements Article 25 of the Credit Institutions Winding-Up Directive, which refers however only to netting agreements. The Belgian legislator added a reference to termination provisions.

([~~51~~55]) This provision implements Article 23 of the Credit Institutions Winding-Up Directive, which wording is similar to Article 6.1 of the European Insolvency Regulation.

Code), except if the beneficiary of an act subject to these rules establishes that this act is subject to the law of a country that is a member of the European Economic Area (other than Belgian law), and that this law does not allow any means of challenging that act.([52]56) As Article 6.1 of the European Insolvency Regulation, Article 372 of the Credit Institutions Act creates a negative rule of conflict of law, which effect is to prevent the application of Belgian law as the *lex concursus*, where such law would not recognise the set-off. Where the Belgian law, on the other hand, authorizes the set-off, the rule is not applicable.

As netting agreements are subject to a specific rule in Article 369, 5° of the Credit Institutions Act, which excludes the application of Belgian law for ISDA Master Agreements, the rule of Article 372 of the Credit Institutions Act will in principle not be applicable.([53]57)

34. [32.] International Private Law Code. The provisions of the International Private Law Code apply failing the application of international treaties, the law of the European Union, or specific law (Article 2 of the International Private Law Code). In the case of insolvency proceedings, the provisions of the International Private Law Code will in particular apply failing the application of the European Insolvency Regulation and the provisions of the Insurance Supervision Act and the Credit Institutions Act resulting from the implementation of the Credit Institutions Winding-Up Directive and the Solvency II Directive, *i.e.* they will apply mainly in the case of an insolvency proceeding affecting an entity not falling under the scope of such legislations, such as an investment firm or a collective investment undertaking, or in the case of winding-up proceedings under the Companies Code of a credit institution, which do not fall under the scope of the European Insolvency Regulation, nor under the scope of the specific provisions of the Credit Institutions Act.

Article 119, § 1 of the International Private Law Code determines the general principle that insolvency proceedings opened in Belgium will be governed by Belgian law.

Derogating from such rule, Article 119, § 2, 2° of the International Private Law Code provides that the effect of insolvency proceedings upon the right of a creditor to demand the set-off of its claim against the claim of the debtor is governed by the law applicable to the insolvent debtor's claim. The application of the actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors is however not precluded, except

([52]56) This provision implements Article 30 of the Credit Institutions Winding-Up Directive, which wording is similar to Article 13 of European Insolvency Regulation.

([53]57) See the discussion of the overlap of both provisions in the legislative history, "Exposé des motifs", Doc. Parl., 2003-2004, 1157/1, p. 40 to 42, which states that both provisions will be applied cumulatively, before recognizing that, as conventional set-off (including netting) is governed by Article 109/19 of the Act of 22 March 1993 (now Article 369, 5° of the Credit Institutions Act), the rule of Article 109/22 of the Act of 22 March 1993 (now Article 372 of the Credit Institutions Act) will only apply in case of legal set-off.

if the beneficiary of the act establishes that this act is subject to a foreign law which does not allow any means of challenging that act in the relevant case.([54]58)

Contrary to the rule of Article 6 of the European Insolvency Regulation, the rule of Article 119, § 2 of the International Private Law Code has not been drafted as a negative rule of conflict of law, but as a positive rule of conflict of law, commanding the application of the law applicable to the insolvent debtor's claim.

35. [33.] Implementation of the BRRD. The Act of 18 December 2015 inserted Article 68 of the BRRD on the exclusion of certain contractual terms in early intervention and resolution in Belgian law, by amending Article 286, § 3 of the Credit Institutions Act and by inserting a new Article 287 in the Credit Institutions Act.

Provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed, the application of resolution actions, the execution of resolution competences or taking the imperative measures under Article 234 of the Credit Institutions Act, the exceptional recovery measures under Article 236 of the Credit Institutions Act, or any other measures the credit institution's Supervisory Authority is entitled to take under Articles 116, § 2, 232, 2nd branch, 235 and 250 of the Credit Institutions Act([55]59), in relation to a credit institution, even by virtue of an agreement entered into by the credit institution;

1° cannot be deemed to be an enforcement event within the meaning of the Financial Collateral Act or an insolvency proceeding within the meaning of the Act of 28 April 1999 transposing Directive 98/26/EC of 19 May 1998 on the finality of settlement of payments and securities transactions in payment and settlement systems (hereinafter the "**Settlement Finality Act**"); and

2° do not authorize to invoke acceleration clauses, nor any right to terminate, suspend or compensate, nor to realize any collateral security on the assets of the credit institution.

The above restrictions are also applicable to agreements entered into by subsidiaries of a credit institution, which include obligations which are guaranteed or otherwise supported by the credit institution or by any entity of the same group as the credit institution, and to agreements entered into by a group entity which include cross-default provisions. The restrictions are moreover applicable to (mixed) financial holdings.

The above provisions are considered to be overriding mandatory provisions within the meaning of Article 9 of the Regulation Rome I.

([54]58) Article 119, § 4, 1° of the International Private Law Code. This provision is inspired by Article 13 of the European Insolvency Regulation. It will however apply irrespective of whether the foreign law is the law of a Member State or not.

([55]59) Please note that these measures do not include any bankruptcy or winding-up proceedings.

In the context of its resolution powers, and without prejudice to the restrictions in Book II, Title VIII, Chapter VII of the Credit Institutions Act, the Resolution Authority has the power:([5660])

1° to suspend any payment or delivery obligations pursuant to any contract to which a credit institution under resolution is a party from the publication of a notice of the suspension in accordance with Article 295, 1°([5761]) until midnight at the end of the business day following that publication, taking into account the fact that the payment or delivery obligations of the credit institution's counterparties under that contract shall be suspended for the same period of time;

2° to restrict secured creditors of a credit institution from enforcing security interests for the period of time set out in 1°;

3° to suspend the termination rights of any party to a contract with a credit institution or, under the conditions set out by Royal Decree, with a subsidiary of the credit institution, for the period of time set out in 1°, provided that the payment and delivery obligations and the provision of collateral continue to be performed.

Any suspension under the paragraph above shall not apply to:

(i) eligible deposits;

(ii) payment and delivery obligations owed to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, and central banks;

(iii) eligible claims for the purpose of Directive 97/9/EC.

Any suspension, referred to in paragraph 3° above, shall not apply towards entities referred to in (ii) above.

When the Resolution Authority applies the bail-in tool, it should apply its write down and conversion powers in relation to a liability arising from derivatives only upon closing out the derivative positions.([5862]) Upon entry into resolution, the Resolution Authority is empowered to terminate the derivative contracts or close out the derivative positions.

([5660]) The preparatory works to the Credit Institutions Act specifically provide that this power to suspend payment or delivery obligations, to restrict the enforcement of security interests and to temporarily suspend termination rights of counterparties during a short period of time is required to grant the Resolution Authority sufficient time to apply the resolution tools (Doc. parl., Ch. session 2013-14, Doc. 53, 3406/1, p. 203).

([5761]) Article 295, 1° of the Credit Institutions Act refers to the publication of the resolution proceedings on the website of the Resolution Authority.

([5862]) A 'derivative' means a derivative as defined in point (5) of Article 2 of Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, and hence means a financial instrument as set out in points (4) to (10) of Section C of Annex I to Directive 2004/39/EC as implemented by Article 38 and 39 of Regulation (EC) No 1287/2006. The definition of 'derivative' for this purpose will therefore not cover all Transactions described in Appendix A (for example, Repurchase Transactions and Securities Lending Transactions may not be a 'derivative'). However, there is a separate safeguard for security arrangements (including under title transfer collateral arrangements) under Article 285 of the Credit Institutions Act and it is not possible to bail-in secured liabilities pursuant to Article 267/1 of the Credit Institutions Act.

Where a derivative liability has been excluded from the application of the bail-in tool([59]63), the Resolution Authority shall not be obliged to terminate the aforementioned derivative contracts or close out the derivative positions.

In case of a valuation in the context of resolution by virtue of article 246 to 248 of the Credit Institutions Act, the Resolution Authority or the independent valuer shall take the existing netting agreements into account and determine the respective liabilities of the parties on a net basis in accordance with the terms of such agreement.

The Resolution Authority shall determine the value of liabilities arising from derivatives in accordance with the following:

1° appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;
2° principles for establishing the point in time at which the value of a derivative position should be established; and
3° appropriate methodologies for comparing the destruction in value that would arise from the close out of derivatives positions and the bail-in of derivatives, with the amount of the losses that would be borne by these derivatives in a bail in.

D.- Specific netting legislation under Belgian law

36. ~~34.~~ Belgian specific Netting Legislation. Specific netting legislation has been introduced into Belgian law by Articles 14 to 16 of the Financial Collateral Act, which entered into force on 1 February 2005, and which abrogated Article 157, § 1 of the Act of 22 March 1993, which had been a first attempt to constitute netting legislation (Articles 14 to 16, taking also into account Article 4 F.C.A. containing restrictions to their scope of application, will be referred to in this Update Opinion as the "**Belgian Netting Legislation**"). The full text of the Belgian Netting Legislation, as amended by the Act of 26 September 2011 (implementing Directive 2009/44/CE of 6 May 2009) and as supplemented by the Royal Decree of 7 November 2011 determining the derivative products and other financial transactions referred to in Article 4, § 3 and § 4 of the F.C.A., is incorporated in an English translation as Appendix C to this Update Opinion ("**Appendix C**").

Belgian Netting Legislation provides for the enforceability of netting agreements as well as termination clauses (clauses résolutoires / ontbindende bedingen), conditions subsequent (conditions résolutoires / ontbindende voorwaarden) or acceleration clauses (clauses et conditions de déchéance du terme / bedingen en voorwaarden met betrekking tot de vroegtijdige beëindiging) stipulated in order to allow novation or netting, in case of insolvency

([59]63) I.e. on the basis of Article 267/2, §2 of the Credit Institutions Act, e.g. if it is not possible to bail-in that liability within a reasonable time or if the exclusion is strictly necessary and is proportionate to achieve the continuity of critical functions and core business lines of the credit institution in resolution.

proceedings, attachment proceedings, or any other situation where the *pari passu* principle applies, provided that the claims to be novated or set off existed at the time of the opening of the insolvency proceedings, or the occurrence of the attachment or other situation where the *pari passu* applies, irrespective of their maturity dates, their subject, or the currency in which they are denominated (Article 14 F.C.A.). Such netting agreements and termination clauses are enforceable without any prior notice of default or judicial decision being required, and irrespective of any transfer of their rights.

Netting agreements are defined under the Belgian Netting Legislation as novation or bilateral or multilateral set-off agreements. Hence, Belgian Netting Legislation applies to any ISDA Master Agreement, irrespective of the type of counterparties([60~~60~~64]), the nature of the claim or any *nexus* among such claims, the sole condition being that the claims to be netted existed at the date of opening of the insolvency proceeding, even if not in the same estate. Also, implicit to Belgian Netting Legislation is that the netting agreement itself be entered into before the date of opening of the insolvency proceedings, or, by application of Article 15, § 1 F.C.A., on or after such date provided the counterparty was acting in the legitimate ignorance thereof (*infra*, ~~36~~38).([61~~61~~65])

The F.C.A. does not define what event is to be considered as the "opening" of each insolvency proceeding. We consider that, for the purpose of Belgian Netting Legislation, the opening of the bankruptcy is the order for bankruptcy, as, prior to the date of this order the principle of *pari passu* does not apply. In case of judicial reorganization proceedings, it should in our opinion be considered that the proceedings are opened with the judgment of the Court which follows the petition of the debtor, and pronounces specifically the opening of the proceedings.

37. ~~35.~~ Three sets of restrictions have been implemented to the scope of the Belgian Netting Legislation, following the Act of 26 September 2011 and Royal Decree of 7 November 2011 (*supra*, ~~34~~36).

([60~~60~~64]) In this respect, the Belgian legislator went well beyond the implementation of Article 7 of the Collateral Directive 2002/47/CE of 6 June 2002. See A. Zenner and I. Peeters, "Faillite et compensation : une révolution copernicienne", *J.T.*, 2005, p. 334.- I. Peeters, "De wet Financiële Zekerheden : netting, schuldvergelijking en overdracht tot zekerheid", *Rev. Dr. Bancaire et Financier*, 2005/III, p. 166.- V. Sagaert and H. Seeldragen, "De wet financiële zekerheden", *R.W.*, 2004-2005, p. 1524 *et seq*..-R. Houben, "Compensatieclausules, rekening-courant- bedingen en nettingclausules: een analyse vanuit het gemene recht, met de financiële sector als toetssteen", Jura Falconis, 2005, p. 752. See however the restriction implemented by the Act of 26 September 2011: agreements between natural persons who do not qualify as merchants are now excluded. See also *infra* ~~38~~40 on the recent changes in the Credit Institutions Act (according to which the provisions of Book II, Title VIII, prevail over the Belgian Netting Legislation).

([61~~61~~65]) A. Zenner and I. Peeters, *op.cit.*, p. 335.- I. Peeters, *op.cit.*, n° 9.- V. Sagaert and H. Seeldragen (*op.cit.*, p. 1543, n° 76) seem to consider that, to benefit from the protection offered by the Belgian Netting Legislation, a netting agreement should also be entered into before the date of commencement of the suspect period, if any, but this is not required by the F.C.A.

1°- It does not apply to netting agreements with natural persons who do not qualify as merchants (cf. Article 14, § 2, paragraph 1 and Article 15, § 3, paragraph 1 F.C.A.);

2°- The benefit of the Belgian Netting Legislation may not be invoked, except where the creditor can invoke a default of payment by the debtor:

a. as from the date the debtor has requested or benefits from reorganisation proceedings under the Continuity Act, where the debtor does not qualify as a "*public or financial legal entity*", as defined for the purpose of the F.C.A. (see the full text in Appendix C to this Update Opinion);

b. as from the start of reorganisation proceedings affecting an entity which does qualify as a "*public or financial legal entity*" by creditors who do not qualify as a "*public or financial legal entity*".

There is however a safe harbor rule that provides that such restriction is not applicable "*to (..) netting agreements and termination or acceleration clauses or conditions stipulated to allow novation or set-off,* ***where they are entered into with respect to derivative products or other financial transactions as described by the King in a Decree to be enacted in consultation with the BNB***".([6266]) The Financial Collateral Act further expressly stipulates that, in drafting the list of these transactions, the King will take into account the interest of these mechanisms (including netting agreements) for the normal functioning of these transactions and for the markets in which they are used, and, more generally, Belgian and international market practices.

Such Royal Decree was enacted on 7 November 2011. Its Article 2 contains a list of exempted transactions, among which derivative products, provided they are either documented under a standard master agreement (master agreements published by ISDA are expressly referred to in the Royal Decree) or they are eligible for trading on a regulated market, a MTF, a clearing house or through a central counterparty.

The definition of derivative products in Article 1 of the Royal Decree is broad, referring to "*any option contract, forward, future, swap, financial transaction for the set-off of differences in relation to a reference value, any combination of such or any other type of derivative transaction in the largest sense, irrespective of whether such contracts a) are entered into OTC or traded on a regulated market or MTF, b) are cash or physically settled, c) are settled through a clearing house, a central counterparty, among the parties or*

([6266]) Bold added; translation from the French text: "*(…) lorsqu'elles sont conclues au sujet de produits dérivés ou d'autres opérations financières telles que décrites par le Roi dans un arrêté concerté avec la Banque Nationale de Belgique*".

otherwise".([6367]) This definition is in our opinion broad enough to encompass all the Transactions listed in Appendix A.

3°- The ability to invoke the benefit of the Belgian Netting Legislation is similarly restricted in case the debtor is subject to a transfer decided by the Government as a recovery measure, under Article 26 bis, § 1 of the Insurance Supervision Act([6468]), Article 57 bis, § 1 of the Act of 22 March 1993([6569]) or of Article 23 bis, § 1 of the Act of 2 August 2002 relating to the supervision of the financial sector and financial services.

However, the same safe harbor rule has been created for derivative transactions documented under a standardized master agreement. Article 2 of the Royal Decree to which reference is made above applies equally; there is hence the same express reference to the master agreements published by ISDA.

In view of the safe harbor rule, the close-out and netting provisions of the ISDA Master Agreement documenting Transactions will in our opinion always qualify as being entered in relation to derivative products, thereby resulting in the fact that Articles 14 and 15 of the Financial Collateral Act will remain applicable even where the debtor is subject to judicial reorganisation proceedings or to a transfer ordered by the King in accordance with specific financial regulations, without the need to distinguish whether the parties qualify as a "*public or financial legal entity*" under the F.C.A. (see however *infra* [3840]).

With respect to Belgian credit institutions, the Credit Institutions Act explicitly mentions that the Resolution Authority cannot order the partial transfer, the modification or termination of novation, or bilateral or multi-lateral set-off agreements, including netting agreements or close-out netting agreements.([6670])

([6367]) Our translation from the French text: "*tous contrats d'option, contrats à terme, futures, contrats d'échange, contrats financiers pour la compensation de différences en rapport avec une valeur de référence déterminée, et toute combinaison de ceux-ci et tout autre type de contrats dérivés dans le sens le plus large, peu importe que ces contrats a) soient conclus de gré à gré entre les parties (OTC) ou soient traités sur un marché réglementé et/ou un MTF, b) soient réglés en espèces ou au moyen d'une livraison physique de marchandises, valeurs mobilières ou toute autre valeur; et c) soient réglés via une chambre de compensation, une contrepartie ou un système central ou directement entre les parties ou leurs représentants*".

([6468]) The reference in the F.C.A. to an act pursuant to Article 26 bis, § 1 of the Act of 9 July 1975 should still be amended to the exceptional recovery measures of Article 519 of the Insurance Supervision Act as Article 757 repealed the Act of 9 July 1975.

([6569]) The reference in the F.C.A. to an act pursuant to Article 57 bis, § 1 of the Act of 22 March 1993 should still be amended to the new resolution tools in the Credit Institutions Act as Article 421 of the Credit Institutions Act repealed the Act of 22 March 1993.

([6670]) Article 286, § 1, 3° Credit Institutions Act.

38. ~~36.~~ Article 15 F.C.A. also contains a derogation from the "zero hour rule", as it provides that netting agreements, and payments, transactions and acts in execution thereof, are valid and enforceable in the case of insolvency proceedings, attachment proceedings, or any other situation where the *pari passu* principle applies, if made prior to the time of the opening of the insolvency proceedings, the occurrence of an attachment of another situation where the *pari passu* principle applies or, if after such time, the counterparty was acting in the legitimate ignorance thereof.

Lastly, Article 16, § 3 F.C.A. confirms the inapplicability of Articles 17, 2° and 18 B.A. to netting agreements and to payments, transactions and acts in execution of such agreements, and to provisions with respect to termination clauses and acceleration clauses which were concluded in order to allow novation or set-off.(~~67~~71) Only Article 20 B.A. concerning fraudulent or abnormal acts (*supra*, ~~16~~18) remains applicable.

39. ~~37.~~ Belgian Netting Legislation entered into force on 1 February 2005. It is however also applicable to netting agreements entered into prior to that date, except with respect to insolvency proceedings, situations where the *pari passu* principle applies or attachment procedures which occurred prior to 1 February 2005 (Article 73 F.C.A.).

40. ~~38.~~ With respect to Belgian credit institutions and (mixed) financial holdings, the Credit Institutions Act explicitly provides that the provisions of Book II, Title VIII of the Credit Institutions Act prevail over the Financial Collateral Act.(~~68~~72)

As mentioned under ~~33,~~35, the efficiency of close-out netting clauses is limited by the new provisions in the Credit Institutions Act implementing Article 68 of the BRRD in Belgian law.

II.- CLOSE-OUT NETTING UNDER THE ISDA MASTER AGREEMENT

A.- Assumptions

41. ~~39.~~ The facts and assumptions which have been provided by ISDA and which have been supplemented by ourselves with your permission are as follows:

a.- Two institutions, each validly incorporated and existing under the laws of its incorporation, have entered into an ISDA Master Agreement. At least one of the institutions entering into the ISDA Master Agreement is organized in Belgium, and qualifies either as:

(~~67~~71) The derogation already results from Article 14 F.C.A.

(~~68~~72) Article 286, § 3 Credit Institutions Act (as amended by the Act of 18 December 2015).

(i) a credit institution, covered by the definition of Article 1, § 3 of the Credit Institutions Act and under the definition of Article 4.1 (1) of EU Regulation 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, generally including in its denomination the word établissement de credit / kredietinstelling or banque / bank (such credit institution falling also under the definition "Bank/Credit Institution" given in Appendix B); ~~or~~

(ii) a corporation organized pursuant to one of the forms of corporations listed in Article 2, § 2 of the Companies Code (such a corporation falling also under the definition "Corporation" given in Appendix B), *i.e.* a société anonyme (SA) / naamloze vennootschap (NV), a société privée à responsabilité limitée (SPRL) / besloten venootschap met beperkte aansprakelijkheid (BVBA), a société cooperative (SCRL or SCRI) / coöperatieve venootschap (CVBA or CVOA), a société en commandite par actions (SCA) / commanditaire vennootschap op aandelen (Comm. VA), a société en commandite simple (SCS) / gewone commanditaire vennootschap, (Comm. Ven.), a société en nom collectif (SNC) / vennootschap onder firma (V.O.F.), a groupement d'intérêt économique (GIE) / economisch samenwerkingsverband (ESV);

(iii) an insurance undertaking subject to the Insurance Supervision Act of 13 March 2016 and constituted under the form of a SA/NV, SCA/Comm.Venn., SCRL/CVBA or SCRI/CVOA (such insurance undertaking covered by the definition of "Insurance Company" given in Appendix B, provided it is organized as a corporation);

(iv) an investment firm covered by the definition set out by Article 44 of the Investment Services Act of 6 April 1995 and the definition in EC Directive 2004/39 on markets in financial instruments (and also covered by the definition of "Investment Firm/Broker Dealer" given in Appendix B, provided it is organized as a corporation);

(v) a collective investment undertaking corresponding to the definition of "Investment Fund" in Appendix B, provided it is organized as a corporation with legal personality; or

(vi) the NBB which is a company duly organised under the law of 22 February 1998 on the Organic Status of the National Bank of Belgium.

b.- The parties have selected either New York law or English law to govern their ISDA Master Agreement, and neither institution has specified that the provisions of Section 10 (a) apply to it.

c.- The entering into the ISDA Master Agreement and Transactions documented thereunder is within each party's capacity, and each party is acting in strict compliance with the regulations applicable to it;

d.- Those provisions of the ISDA Master Agreement which are pivotal to this Update Opinion (e.g. the introduction, Sections 2 (c), 5 and 6 and the related definitions) have not been altered in any material respect. Any selection contemplated by Sections 5 and 6 of the

ISDA Master Agreement and made pursuant to a Schedule or in a Confirmation of a Transaction would not be considered material alterations (save that the parties to a 1992 ISDA Master Agreement shall not have selected the First Method under Section 6 (e) of the 1992 ISDA Master Agreement).

We refer to the Protocol and to the June 2014 Amendments. On the assumption that the changes intended by the Protocol are effective as a matter of the governing law of the Covered Master Agreement (as defined in the Protocol) and that the June 2014 Amendments are effective as a matter of the governing law of the ISDA Master Agreement, we confirm that the changes made by the Protocol and the June 2014 Amendments are not material to and do not affect the conclusions reached in this Update Opinion.

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

f.- 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.

g.- After entering into these Transactions and prior to the maturity thereof, one of the parties, being organized in Belgium, becomes the subject of a voluntary or involuntary case under the insolvency laws of Belgium and, subsequent to the commencement of the insolvency, either that party or an insolvency official seeks to assume the Confirmations representing profitable Transactions for the insolvent party and reject the Confirmations representing unprofitable Transactions for the insolvent party.

h.- The parties have amended the 1987 ISDA Master Agreement to adopt the approach of Full Two Way Payment for all Events of Default as well as Termination Events and elected for the Second Method to apply in respect of the 1992 ISDA Master Agreement.

i.- The relevant ISDA Master Agreement is not entered into fraudulently and is entered into before the opening of the insolvency proceedings affecting the Belgian counterparty (and therefore the implicit condition of the Belgian Netting Legislation in this respect is fulfilled).

B.- Summary of Conclusions

Question 1: Assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in Belgium or assuming, in the case of a 1987 ISDA Master Agreement, the

parties have amended such ISDA Master Agreement so that Automatic Early Termination does not apply, are the provisions of the ISDA Master Agreement permitting the Non-defaulting Party to terminate all the Transactions upon the insolvency of its counter party enforceable under the law of Belgium?

42. ~~40.~~ The provisions permitting the Non-defaulting Party to terminate all the Transactions upon the insolvency of the Belgian party will be enforceable under Belgian law, as provided for by Belgian Netting Legislation.

Where the defaulting counterparty organized in Belgium is a credit institution, the provisions of the ISDA Master Agreement permitting the Non-Defaulting Party to terminate all the Transactions upon the insolvency of its counterparty should in principle be exclusively subject to the law governing the ISDA Master Agreement, without any interference of Belgian law.

However, as the new Article 287, § 1 of the Credit Institutions Act is an overriding mandatory provision within the meaning of Article 9 of the Regulation Rome I, it cannot be set aside by choosing the application of a foreign law.

Hence, in case the Belgian counterparty, which is a credit institution or a (mixed) financial holding, is subject to resolution actions, or to any measures imposed by the Supervisory Authority(~~69~~73), and provided the substantive obligations under the ISDA Master Agreement, including payment and delivery obligations and the provision of collateral, continue to be performed, this does not qualify as an Event of Default under the ISDA Master Agreement and the ISDA Master Agreement cannot be terminated by the other party to the Agreement.

Pursuant to Article 286, §1, 2° and 3° of the Credit Institutions Act, the Resolution Authority cannot order the partial transfer, modification or termination of: (…), 2° rights and liabilities resulting from a title transfer financial collateral arrangement, including repurchase agreements (repos); and 3° rights and liabilities resulting from novation arrangements or from bilateral or multilateral set-off arrangements, including netting arrangements or close out netting arrangements. The ISDA Master Agreement is hence likely to survive any resolution actions as a single agreement under which netting can take place.

In the context of its resolution powers, the Resolution Authority might transfer the shares or all or part of the assets, rights and liabilities of a Belgian credit institution to a private sector purchaser, a bridge institution or asset management vehicle, which could include any ISDA Master Agreement entered into by the defaulting counterparty with another market participant, including any Transactions thereunder. In such case, from the point of view of the other market participant, the identity of its contracting party would change. This would

(~~69~~73) I.e. any measures referred to in Articles 116, § 2, 232, 2nd branch, 234, 235, 236 and 250 of the Credit Institutions Act with respect to credit institutions. These measures do not cover bankruptcy or winding-up proceedings under the Companies Code. Termination on a subsequent winding up would hence be acceptable.

however not affect the validity and enforceability of the ISDA Master Agreement and any Transactions thereunder, as a matter of Belgian law.

Question 2: Assuming the parties have selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in Belgium, are the provisions of the ISDA Master Agreement automatically terminating all the Transactions upon the insolvency of its counter party enforceable under the law of Belgium?

43. ~~41.~~ The provisions providing for automatic termination of all the Transactions upon the insolvency of the Belgian party will be enforceable under Belgian law, as provided for by Belgian Netting Legislation.

Where the defaulting counterparty organized in Belgium is a credit institution, the provisions providing for automatic termination of all the Transactions upon the insolvency of its counterparty will in principle be exclusively subject to the law governing the ISDA Master Agreement, without any interference of Belgian law.

However, as the new Article 287, § 1 of the Credit Institutions Act is an overriding mandatory provision within the meaning of Article 9 of the Regulation Rome I, it cannot be set aside by choosing the application of a foreign law.

Hence, in case the Belgian counterparty, which is a credit institution or a (mixed) financial holding, is subject to resolution actions, or to any measures imposed by the Supervisory Authority(~~70~~74), and provided the substantive obligations under the ISDA Master Agreement, including payment and delivery obligations and the provision of collateral, continue to be performed, this does not qualify as an Event of Default under the ISDA Master Agreement and the ISDA Master Agreement cannot be automatically terminated by the other party to the Agreement.

Pursuant to Article 286, §1, 2° and 3° of the Credit Institutions Act, the Resolution Authority cannot order the partial transfer, modification or termination of: (…), 2° rights and liabilities resulting from a title transfer financial collateral arrangement, including repurchase agreements (repos); and 3° rights and liabilities resulting from novation arrangements or from bilateral or multilateral set-off arrangements, including netting arrangements or close out netting arrangements. The ISDA Master Agreement is hence likely to survive any resolution actions as a single agreement under which netting can take place.

In the context of its resolution powers, the Resolution Authority might transfer the shares or all or part of the assets, rights and liabilities of a Belgian credit institution to a

(~~70~~74) I.e. any measures referred to in Articles 116, § 2, 232, 2nd branch, 234, 235, 236 and 250 of the Credit Institutions Act with respect to credit institutions. These measures do not cover bankruptcy or winding-up proceedings under the Companies Code. Termination on a subsequent winding up would hence be acceptable.

private sector purchaser, a bridge institution or asset management vehicle, which could include any ISDA Master Agreement entered into by the defaulting counterparty with another market participant, including any Transactions thereunder. In such case, from the point of view of the other market participant, the identity of its contracting party would change. This would however not affect the validity and enforceability of the ISDA Master Agreement and any Transactions thereunder, as a matter of Belgian law.

Question 3: Are the provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a counterparty enforceable under Belgian law?

44. ~~42.~~ The provisions providing for the netting of termination values in determining a single lump-sum termination amount are enforceable upon the insolvency of a Belgian counterparty, on the basis of Belgian Netting Legislation, subject to the sole condition that the debts to be netted existed at the time of the opening of the insolvency proceeding.

In case of insolvency proceedings governed by the International Private Law Code (such as e.g. insolvency proceedings affecting an investment firm or a collective investment undertaking), Belgian law will not interfere with the enforceability of netting, which will also be governed by the law governing the ISDA Master Agreement, except for possible interference of Belgian law concerning actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Where the insolvent counterparty organized in Belgium is a credit institution, the provisions of the ISDA Master Agreement organizing the close-out netting will in principle exclusively be subject to the law governing the ISDA Master Agreement, without any interference of Belgian law.

However, as the new Article 287, § 1 of the Credit Institutions Act is an overriding mandatory provision within the meaning of Article 9 of the Regulation Rome I, it cannot be set aside by choosing the application of a foreign law.

Hence, in case the Belgian counterparty, which is a credit institution or a (mixed) financial holding, is subject to resolution actions, or to any measures imposed by the Supervisory Authority(~~71~~75), and provided the substantive obligations under the ISDA Master Agreement, including payment and delivery obligations and the provision of collateral, continue to be performed, this does not qualify as an Event of Default under the ISDA Master Agreement and the ISDA Master Agreement cannot be terminated by the other party to the

(~~71~~75) I.e. any measures referred to in Articles 116, § 2, 232, 2nd branch, 234, 235, 236 and 250 of the Credit Institutions Act with respect to credit institutions. These measures do not cover bankruptcy or winding-up proceedings under the Companies Code. Termination and netting of termination values in determining a single lump-sum termination amount on a subsequent winding up would hence be acceptable.

Agreement (with netting of termination values in determining a single lump-sum termination amount).

Question 4: Assuming the parties have entered into either a 1992 ISDA Master Agreement (Multicurrency-Cross Border) or a 2002 ISDA Master Agreement, one of the parties is insolvent and the parties have selected a Termination Currency other than the currency of the jurisdiction in which the insolvent party is organized, is it possible to "prove" (*i.e.* to file) a claim in a local insolvency proceeding in a foreign currency?

45. ~~43.~~ It is generally considered that declarations of claims within a bankruptcy proceeding do not necessarily need to be expressed in the local currency; if a conversion into Euro is made, the claims are to be converted on the day of the bankruptcy order.

A creditor could file a foreign currency claim. Generally, a Belgian Court would determine the payment amount of an equivalent of the foreign currency claim in euro on the moment that payment should be made. A Belgian Court could however decide for a payment in Euro or in the currency of any member country of the OECD.([~~72~~76])

Question 5: Is it possible to obtain or execute a judgment in a foreign currency in Belgium?

46. ~~44.~~ As mentioned under the previous question, we believe that currency claims expressed in Euro or in another OECD currency may successfully be asserted. However, currency claims expressed in currencies other than Euro must still be converted into Euro at the market rate of exchange prevailing on the date of the commencement order.

C.- Analysis of Questions

Question 1: Assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in Belgium, are the provisions of the ISDA Master Agreement permitting the Non-defaulting Party to terminate all the Transactions upon the insolvency of its counterparty enforceable under the law of Belgium?

([~~72~~76]) Article 3 of Law of 30 December 1885; Cass., 2 October 1980, Pas., 1981, I, 128; *J.T.*, 1980, 114; Brussels, 24 December 1924, *J.T.*, 1925, 8. In case the applicant requests the conversion in euro, he would generally ask for this on the day on which the obligation had to be executed or on the day of serving the summons.

47. ~~45.~~ Introduction. Assuming the parties have not specified Automatic Early Termination as applicable to the Belgian counterparty or assuming, in the case of a 1987 ISDA Master Agreement, the parties have amended such 1987 ISDA Master Agreement so that Automatic Early Termination does not apply, Section 6 (a) will provide that the other party, upon the occurrence of an Event of Default affecting the Defaulting Party may, by no more than 20 days' notice to the Defaulting Party specifying the relevant Event of Default, designate a day no earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions.

48. ~~46.~~ Principles of Belgian law. Based upon the *intuitu personae* nature of the ISDA Master Agreement, the other party might argue, even if automatic termination is not specified in the Schedule, that the Transactions have been terminated because of the insolvency of the Defaulting Party. This position may, however, be challenged as the fact that the parties have not specified Automatic Early Termination might be viewed as evidence of the parties' intention to deviate from the rules applying to *intuitu personae* contracts.

Wherever termination is not automatic, as may be the case in *intuitu personae* contracts, it is in principle subject to an order of the Court (Article 1184 of the Civil Code - P. Van Ommeslaghe, "Examen de jurisprudence: les obligations", R.C.J.B., 1986, pp. 239 *et seq*.). As a result, the Defaulting Party, to whom the other party has notified an Event of Default of a Termination Event, is entitled to contest such notification before the court and plead that the default was not serious enough to warrant the termination of the agreement. This provision is not a matter of "public policy" and, under domestic Belgian law parties may, by appropriate clauses, set aside the requirement for the Court's involvement.

Therefore, we believe that such intervention is not necessary in the case of termination under Section 6 (a) of the ISDA Master Agreement.

Moreover, we believe that Article 1184 of the Civil Code is not a "*loi de police*" within the meaning of Article 7 of the Convention of Rome (or Article 9 of the Regulation Rome I) and that, accordingly, it can be set aside by choosing the application of a foreign law, such as English or New York law in this case.

49. ~~47.~~ Belgian Netting Legislation. The ISDA Master Agreement will be considered a netting agreement under the Belgian Netting Legislation, as such agreements are defined for the purpose of this legislation as novation or bilateral or multilateral set-off agreements.

Also, Section 6 (a) of the ISDA Master Agreement must be considered as a termination clause, condition subsequent or acceleration clause stipulated in order to allow the novation or set-off, which clauses are covered by Article 14 F.C.A. Hence, such provision of the ISDA Master Agreement is enforceable under Belgian law, even where the Belgian counterparty is subject to insolvency proceedings in Belgium, subject to the sole condition that the debts to be netted existed at the time of opening of the insolvency proceedings.

41 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4563203/1 and interwovenSite://BEDMS/BEMATTERS/4562940/1. Performed on 12/07/2016.

The above rule applies including where the Belgian counterparty is subject to judicial reorganization proceedings. Indeed, as discussed above (*supra*, ~~23~~25), we believe that Article 35 C.A. that generally prohibits termination clauses linked to reorganization proceedings is pre-empted by Belgian Netting Legislation (Article 14 F.C.A.), that validates termination clauses, conditions subsequent or acceleration clauses stipulated in order to allow novation or netting in the case of an insolvency proceeding. Further, the recent amendments made to the Belgian Netting Legislation now incorporate specific restrictions to Articles 14 and 15 F.C.A. where the debtor is subject to reorganization proceedings but provide at the same time for a safe harbor rule that preempts the restriction in case of derivative transactions documented under an ISDA Master Agreement (*supra*, ~~35~~37).

50. ~~48.~~ Credit institutions and (mixed) financial holdings. Where the insolvent Belgian counterparty is a credit institution, Belgian law will in principle not apply as, in accordance with Article 369, 5° of the Credit Institutions Act, the consequences of reorganization measures and bankruptcy proceedings on termination clauses contained in novation or bilateral or multilateral set-off agreements to allow set-off, are exclusively governed by the law applicable to such agreements.

However, as Article 369, 5° refers to "*conditions résolutoires expresses / uitdrukkelijke ontbindende bedingen*", a wording that is less extensive than that of the Belgian Netting Legislation, which refers to "*clauses et conditions résolutoires ou de déchéance du terme / ontbindende bedingen en voorwaarden of bedingen en voorwaarden met betrekking tot de vroegtijdige beëindiging*", we cannot exclude that a Court would find that it can be translated as "conditions subsequent" and decide that such provision only applies to automatic termination clauses, even if we are of the opinion that the legislative intent was not to restrict the scope of the provision only to automatic termination clauses.[(~~73~~77)] Where, contrary to our opinion, the scope of Article 369, 5° of the Credit Institutions Act would be restricted to automatic termination clauses, Section 6 (a) of the ISDA Master Agreement providing for non-automatic termination would however be valid under Belgian law, as indicated hereabove, by application of the Belgian Netting Legislation, without prejudice to the paragraphs below.

Moreover, Article 287, § 1 of the Credit Institutions Act provides that, provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed, the application of resolution actions, the execution of resolution competences or taking the imperative measures under Article 234 of the Credit Institutions Act, the exceptional recovery measures under Article 236 of the Credit Institutions Act, or any other measures the credit institution's Supervisory Authority is entitled to take under Articles 116, § 2, 232, 2nd branch, 235 and 250 of the Credit Institutions Act, in relation to a credit institution, even by virtue of an agreement entered into by the credit institution:

(~~73~~77) The question would also arise under which law the issue should be determined.

1° cannot be deemed to be an enforcement event within the meaning of Financial Collateral Act or an insolvency proceeding within the meaning of the Settlement Finality Act ; and

2° do not authorize to invoke acceleration clauses, nor any right to terminate, suspend or compensate, nor to realize any collateral security on the assets of the credit institution.

The above restriction is also applicable to (mixed) financial holdings governed by Belgian law.

The above provisions are moreover considered to be overriding mandatory provisions within the meaning of Article 9 of Regulation Rome I. Consequently, they cannot be set aside by choosing the application of a foreign law, such as English or New York law.

Hence, in case the Belgian counterparty, which is a credit institution or a (mixed) financial holding, is subject to resolution actions, or to any measures imposed by the Supervisory Authority([7478]), and provided the substantive obligations under the ISDA Master Agreement, including payment and delivery obligations and the provision of collateral, continue to be performed, this does not qualify as an Event of Default under the ISDA Master Agreement and the ISDA Master Agreement cannot be terminated by the other party to the Agreement.

Pursuant to Article 286, §1, 2° and 3° of the Credit Institutions Act, the Resolution Authority cannot order the partial transfer, modification or termination of: (…), 2° rights and liabilities resulting from a title transfer financial collateral arrangement, including repurchase agreements (repos); and 3° rights and liabilities resulting from novation arrangements or from bilateral or multilateral set-off arrangements, including netting arrangements or close out netting arrangements. The ISDA Master Agreement is hence likely to survive any resolution actions as a single agreement under which netting can take place.

In the context of its resolution powers, the Resolution Authority might transfer the shares or all or part of the assets, rights and liabilities of a Belgian credit institution to a private sector purchaser, a bridge institution or asset management vehicle, which could include any ISDA Master Agreement entered into by the defaulting counterparty with another market participant, including any Transactions thereunder. In such case, from the point of view of the other market participant, the identity of its contracting party would change. This would however not affect the validity and enforceability of the ISDA Master Agreement and any Transactions thereunder, as a matter of Belgian law.

([7478]) I.e. any measures referred to in Articles 116, § 2, 232, 2nd branch, 234, 235, 236 and 250 of the Credit Institutions Act with respect to credit institutions. These measures do not cover bankruptcy or winding-up proceedings under the Companies Code. Termination on a subsequent winding up would hence be acceptable.

Article 286, § 3 of the Credit Institutions Act moreover explicitly provides that the provisions of Book II, Title VIII (including Article 287) of the Credit Institutions Act prevail over the Financial Collateral Act.

Question 2: Assuming the parties have selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in Belgium, are the provisions of the ISDA Master Agreement automatically terminating all the Transactions upon the insolvency of its counterparty enforceable under the law of Belgium?

51. ~~49.~~ Introduction. If Automatic Early Termination is specified in the Schedule as applying to a party, Section 6 (a) of the ISDA Master Agreement provides for Early Termination of all outstanding Transactions immediately upon the occurrence of any Event of Default specified in Section 5 (a) (vii) (1), (3), (5), (6), or to the extent analogous thereto, (8) and as of the time immediately preceding the institution of the proceedings specified in Section 5 (a) (vii) (4) or to the extent analogous thereto, (8). Section 6 (c) (ii) specifies that the obligations of the parties to make any further payments with respect to the terminated Transactions terminates.

52. ~~50.~~ Impact of bankruptcy upon the contracts. Under Belgian law, bankruptcy does not by itself terminate contracts concluded by the debtor, nor does it constitute repudiation by the debtor relieving the creditor from his obligation to perform the contract (Van Ryn and Heenen, t. IV, first ed., n° 2780).

The receiver may elect to either perform or decline to perform a contract entered into by the bankrupt debtor, as will best serve the interests of the debtor's estate and of the general body of creditors (Van Ryn and Heenen, t. IV, n° 2781 and 2782). He may however not cherry pick within a single agreement.

53. ~~51.~~ *Intuitu firmae* contracts. However, bankruptcy terminates contracts concluded *intuitu personae* or *intuitu firmae* by the bankrupt and those that contain a clause providing for their termination upon the occurrence of bankruptcy (Van Ryn and Heenen, t. IV, n° 2783).

Failing any special contractual provisions, it could be argued the *intuitu personae* or *intuitu firmae* character of the Transactions should cause them to be terminated on the date of the bankruptcy order.

As a matter of principle, the issue of "cherry picking", *i.e.*, the question of whether the receiver would be entitled to perform the Transactions that were beneficial to the general body of creditors and decline to perform those which were not, would not arise under Belgian law.

Whether or not the *intuitu personae* or *intuitu firmae* character of the Transaction would cause them to be validly terminated on the date of the opening of the reorganization proceedings under the C.A. is more debatable (*supra*, ~~23~~25).

54. ~~52.~~ Belgian Netting Legislation. The ISDA Master Agreement will be considered a netting agreement under the F.C.A., as such agreements are defined for the purpose of this legislation as novation or bilateral or multilateral set-off agreements.

Also, Section 6 (a) of the ISDA Master Agreement will be considered as a termination clause, condition subsequent or acceleration clause stipulated to allow the novation or set-off, which clauses are covered by Article 14 F.C.A. Hence, such provision of the ISDA Master Agreement is enforceable under Belgian law, even where the Belgian counterparty is subject to insolvency proceedings in Belgium, subject to the sole condition that the debts to be netted existed at the time of opening of the insolvency proceedings.

The above rule applies including where the Belgian counterparty is subject to reorganization proceedings seeking a collective agreement. Indeed, as discussed above (*supra*, ~~23~~25), we are of the opinion that Article 35 of the C.A., that generally prohibits termination clauses linked to reorganization proceedings, is pre-empted by Belgian Netting Legislation (Article 14 F.C.A.). Further, the recent amendments made to the Belgian Netting Legislation now incorporate specific restrictions to Articles 14 and 15 where the debtor is subject to reorganization proceedings but provide at the same time for a safe harbor rule that preempts the restriction in case of derivative transactions documented under an ISDA Master Agreement (*supra*, ~~35~~37).

55. ~~53.~~ Time of termination. Section 6 (a) provides that Early Termination of the Transactions will occur immediately at the time of the occurrence of any Event of Default specified in Section 5 (a) (vii) (1), (3), (5), (6) or to the extent analogous thereto, (8). It provides that it will occur as of the time immediately preceding the institution of the relevant proceedings or the presentation of the relevant petition upon the occurrence of any Event of Default specified in Section 5 (a) (vii) (4) or to the extent analogous thereto, (8).

The prevailing view under Belgian law is that retroactive effect may be assigned by the parties to specific events (see De Page, t. V, n° 446 - Cass., 6 February 1953, R.P.S., 1954, p. 224). However, this retroactive effect has to be set aside with respect to third parties where it would prejudice their rights.

Taking into account Belgian Netting Legislation according to which set-off made under a netting agreement is enforceable even in the case of insolvency proceedings, provided, only, that the claims to be set off existed at the time of the opening of the insolvency proceedings, it is our opinion that the retroactive effect of Section 6 (a) should no longer be considered by Belgian courts as an artificial provision which violates public policy principles. Hence the retroactive effect provided for by Section 6 (a) should in principle be effective.

56. ~~54.~~ Credit institutions and (mixed) financial holdings. Where the insolvent Belgian counterparty is a credit institution, Belgian law will in principle not apply as, in accordance with Article 369, 5° of the Credit Institutions Act, termination clauses contained in novation or bilateral or multilateral set-off agreements to allow set-off are exclusively governed by the law applicable to such agreements.

Moreover, Article 287, § 1 of the Credit Institutions Act, provides that provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed, the application of resolution actions, the execution of resolution competences or taking the imperative measures under Article 234 of the Credit Institutions Act, the exceptional recovery measures under Article 236 of the Credit Institutions Act, or any other measures the credit institution's Supervisory Authority is entitled to take under Articles 116, § 2, 232, 2nd branch, 235 and 250 of the Credit Institutions Act, in relation to a credit institution, even by virtue of an agreement entered into by the credit institution;

1° cannot be deemed to be an enforcement event within the meaning of the Financial Collateral Act or an insolvency proceeding within the meaning of the Settlement Finality Act; and

2° do not authorize to invoke acceleration clauses, nor any right to terminate, suspend or compensate, nor to realize any collateral security on the assets of the credit institution.

The above restriction is also applicable to (mixed) financial holdings governed by Belgian law.

The above provisions are moreover considered to be overriding mandatory provisions within the meaning of Article 9 of Regulation Rome I. Consequently, they cannot be set aside by choosing the application of a foreign law, such as English law or the law of the State of New York.

Hence, in case the Belgian counterparty, which is a credit institution or a (mixed) financial holding, is subject to resolution actions, or to any measures imposed by the Supervisory Authority(~~75~~79), and provided the substantive obligations under the ISDA Master Agreement, including payment and delivery obligations and the provision of collateral, continue to be performed, this does not qualify as an Event of Default under the ISDA Master Agreement and the ISDA Master Agreement cannot be automatically terminated by the other party to the Agreement.

(~~75~~79) I.e. any measures referred to in Articles 116, § 2, 232, 2nd branch, 234, 235, 236 and 250 of the Credit Institutions Act with respect to credit institutions. These measures do not cover bankruptcy or winding-up proceedings under the Companies Code. Termination on a subsequent winding up would hence be acceptable.

Article 286, § 3 of the Credit Institutions Act moreover explicitly provides that the provisions of Book II, Title VIII (including Article 287) of the Credit Institutions Act prevail over the Financial Collateral Act.

Question 3: Are the provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a counterparty enforceable under Belgian law?

57. ~~55.~~ Introduction. There are two sets of provisions in the ISDA Master Agreement which provide for the netting of termination values: Section 2 (c) and Section 6 (e).

Section 2 (c) addresses the issue of "*payment date netting*", which occurs before any Event of Default.

It provides for the netting of amounts payable on any date in the same currency and in respect of the same Transaction. The parties may provide that there will be netting of amounts payable on any date in the same currency, irrespective of the Transaction they originate by specifying "Multiple Transaction Payment Netting"([~~76~~80]) in the Schedule or Confirmation(s) (Section 2 (c)).

Section 6 (e) provides for the netting of the Parties' position, to determine a single amount to be paid with respect to an Early Termination Date, *i.e.* the close-out netting.

58. ~~56.~~ Plan of this section. Distinctions will be made for set-off and netting occurring prior to the opening of an insolvency proceeding, at the time of such insolvency proceeding, or afterwards. Belgian law resulting from Belgian Netting Legislation will be discussed in each case, before the specific rules applying to entities covered by the European Insolvency Regulation, insurance undertakings and credit institutions.

i. Set-off and netting prior to the opening of an Insolvency Proceeding

59. ~~57.~~ Suspect period. Under the B.A., the date of cessation of payments is presumed to be the date of bankruptcy. However, where significant and objective elements clearly establish that such date was earlier, the court may on the basis of a specific request fix it at an earlier time, not exceeding six months prior to the bankruptcy order (Article 12 B.A., *supra*, ~~13~~15). There is no suspect period in other circumstances.

([~~76~~80]) In the case of a 1992 Master Agreement, the Parties will elect that sub-paragraph (ii) of Section 2 (c) will not apply. In the case of a 1987 Master Agreement, they will specify "Net Payments-Corresponding Payment Dates".

60. ~~58.~~ Belgian Netting Legislation. In accordance with Article 14 F.C.A., netting agreements are enforceable in case of insolvency proceedings, subject to the sole condition that the claims to be netted existed at the time of opening of the insolvency proceedings. Article 16, § 3 F.C.A. additionally contains an express derogation from Articles 17, 2° and 18 B.A. for netting agreements and payments, transactions and acts in execution of these agreements.

As a result, payment netting provided for by Section 2 (c) and close-out netting provided for by Section 6 (e) will not be challenged under Articles 17, 2° or 18 B.A., even assuming a suspect period were to be fixed.

Payment netting or close-out netting would not be preferential under Article 20 B.A., irrespective of the existence of a suspect period, unless it was abnormal and prejudicial to the other creditors, while the Non-defaulting Party acted in the knowledge thereof.

61. ~~59.~~ Insolvent party falling under the scope of the European Insolvency Regulation. As indicated above (*supra*, ~~29~~31), by virtue of Article 4.2. d) of the European Insolvency Regulation, the enforceability of set-off in case of insolvency proceedings is in principle subject to the *lex concursus*, in this case Belgian law. At the same time, Article 6.1 of the European Insolvency Regulation states that the opening of insolvency proceedings will not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

As, on the basis of Belgian Netting Legislation, payment netting under Section 2 (c) and close-out netting under Section 6 (e) are enforceable prior to the opening of insolvency proceedings, subject to the sole condition that the debts to be netted existed at the time of the insolvency proceedings, which will be the case for netting occurring at the commencement of insolvency proceedings, netting is enforceable in accordance with the *lex concursus*, without it being necessary to invoke the rule of Article 6.1 of the European Insolvency Regulation which would validate netting under the law governing the ISDA Master Agreement.

Payment netting or close-out netting will only be unenforceable under Belgian law where it was abnormal or fraudulent, by application of Article 20 B.A. In this case, the rules of Articles 6.1, 6.2 and 13 of the European Insolvency Regulation may be invoked, and netting will be validated where the ISDA Master Agreement is governed by English law(~~77~~81) and English law does not allow any means to challenge it.

(~~77~~81) The rule of Article 13 of the European Insolvency Regulation requires that the act be governed by the law of another Member State, hence it will not apply where the ISDA Master Agreement is governed by New York law.

62. ~~60.~~ Insurance undertakings. As indicated hereabove (*supra*, ~~30~~32), insolvency proceedings affecting a Belgian insurance undertaking are in principle governed by Belgian law. At the same time, Article 633 of the Insurance Supervision Act states that the opening of a reorganization measure or of a bankruptcy proceeding will not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insurance undertaking's claim.

As, on the basis of Belgian Netting Legislation, payment netting and close-out netting occurring prior to the opening of insolvency proceedings are now enforceable, subject to the sole condition that the debts to be netted existed at the time of the insolvency proceedings, netting is enforceable in accordance with the *lex concursus*, without it being necessary to invoke the rule of Article 633 of the Insurance Supervision Act, which would validate netting under the law governing the ISDA Master Agreement.

Payment netting or close-out netting will only be unenforceable under Belgian law where it was abnormal or fraudulent, by application of Article 20 B.A. In this case, the rules of Article 633 and 634 of the Insurance Supervision Act may be invoked, and netting will be validated where the ISDA Master Agreement is governed by English law(~~78~~82) and English law does not allow any means to challenge it.

63. ~~61.~~ Credit institutions. Article 369, 5° of the Credit Institutions Act provides that netting agreements are exclusively governed by the law applicable to such agreements. Hence, payment netting and close-out netting under the ISDA Master Agreement will be exclusively governed by the law applicable to such Agreement, without any interference of Belgian law.

64. ~~62.~~ Insolvency proceedings under the International Private Law Code (applicable in particular in case of insolvency of an investment firm or collective investment undertaking) Article 119, § 2 of the International Private Law Code provides that the effect of the opening of insolvency proceedings upon the right of a creditor to demand the set-off of his claim against the claim of the debtor is governed by the law applicable to the insolvent debtor's claim, save that the *lex concursus* applies in principle to the actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

As, on the basis of Belgian Netting Legislation, payment netting and close-out netting occurring prior to the opening of insolvency proceedings are now excluded from the scope of application of the rules of the suspect period, save for Article 20 B.A., netting is enforceable in accordance with the *lex concursus*.

Payment netting or close-out netting will only be unenforceable under Belgian law where it was abnormal or fraudulent, by application of Article 20 B.A. In this case, the rule of Article 119, § 4 of the International Private Law Code may be invoked, and netting will

(~~78~~82) See our comment in preceding footnote.

be validated where the law governing the ISDA Master Agreement, *i.e.* English or New York law, does not allow any means to challenge it.

65. ~~63.~~ No suspect period in case of reorganization proceedings. No rule similar to the rules of the suspect period exists in case of reorganization proceedings. Hence, netting under Section 2 (c) or under Section 6 (e) of the ISDA Master Agreement arising before the institution of reorganisation proceedings could not be set aside under Belgian law, except where the strict criteria of the *action paulienne* have been met (cf. Article 20 B.A.). As indicated before, reorganization proceedings are moreover not applicable to credit institutions, insurance undertakings and investment firms.

ii. Set-off at the commencement of the Insolvency Proceeding

66. ~~64.~~ Belgian Netting Legislation. In accordance with Article 14 F.C.A., netting agreements are enforceable in case of insolvency proceedings, subject to the sole condition that the claims to be netted existed at the time of opening of the insolvency proceedings, irrespective of their maturity date, object or currency, and irrespective of the type of counterparty. The three sets of exceptions to the scope of the Belgian Netting Legislation that exist, concerning natural individuals on the one hand, and reorganization proceedings and transfer decided by the Government on the other hand, are, as examined previously (*supra*, ~~35~~37), not applicable, the last two because of the safe harbor rule designed specifically for derivative transactions provided they are documented under an international standard master agreement such as an ISDA Master Agreement.

Belgian Netting Legislation has introduced a clear and important derogation to the general rule of the prohibition of set-off in case of insolvency proceedings, and the exceptions to this general rule, that were prevailing before its enactment.

As a result, Section 6 (e) of the ISDA Master Agreement is enforceable in case of insolvency proceedings provided the debts to be netted existed at the time of opening of the insolvency proceedings.

67. ~~65.~~ Insolvent party falling under the scope of the European Insolvency Regulation As indicated above (*supra*, ~~29~~31), by virtue of Article 4.2. d) of the European Insolvency Regulation, the enforceability of set-off in case of insolvency proceedings is in principle subject to the *lex concursus*, in this case Belgian law. At the same time, Article 6.1. of the European Insolvency Regulation states that the opening of insolvency proceedings will not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

As, on the basis of Belgian Netting Legislation, Section 6 (e) of the ISDA Master Agreement is now enforceable, subject to the sole condition that the debts to be netted existed at the time of the opening of the insolvency proceedings, which will be the case for netting occurring at the commencement of insolvency proceedings, close-out netting is enforceable in accordance with the *lex concursus*, without it being necessary to invoke the rule of Article 6.1 of the European Insolvency Regulation which would validate close-out netting under the law governing the ISDA Master Agreement.

68. ~~66.~~ Insurance undertakings. As indicated above (*supra*, ~~30~~32), insolvency proceedings affecting a Belgian insurance undertaking are in principle governed by Belgian law. At the same time, Article 633 of the Insurance Supervision Act states that the opening of a reorganization measure or of a bankruptcy proceeding will not affect the rights of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insurance undertaking's claim.

As, on the basis of Belgian Netting Legislation, Section 6 (e) of the ISDA Master Agreement is now enforceable, subject to the sole condition that the debts to be netted existed at the time of the opening of the insolvency proceedings, which will be the case for netting occurring at the commencement of insolvency proceedings, close-out netting is enforceable in accordance with the *lex concursus*, without it being necessary to invoke the rule of Article 633 of the Insurance Supervision Act, which would validate close-out netting under the law governing the ISDA Master Agreement.

69. ~~67.~~ Credit institutions. As indicated hereabove (*supra*, ~~31~~33), Article 369, 5° of the Credit Institutions Act provides that netting agreements are exclusively governed by the law applicable to these agreements. As a result, Belgian law will not interfere with the enforceability of Section 6 (e) in case of insolvency proceedings affecting a Belgian credit institution.

However, Article 287, § 1 of the Credit Institutions Act cannot be set aside and, provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed, the execution of resolution competences or taking the imperative measures under Article 234 of the Credit Institutions Act, the exceptional recovery measures under Article 236 of the Credit Institutions Act, or any other measures the credit institution's Supervisory Authority is entitled to take under Articles 116, § 2, 232, 2nd branch, 235 and 250 of the Credit Institutions Act(~~79~~83), in relation to a credit institution, even by virtue of an agreement entered into by the credit institution;

(~~79~~83) Please note that these measures do not cover any bankruptcy or winding-up proceedings.

51 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4563203/1 and interwovenSite://BEDMS/BEMATTERS/4562940/1. Performed on 12/07/2016.

1° cannot be deemed to be an enforcement event within the meaning of the Financial Collateral Act or an insolvency proceeding within the meaning of the Settlement Finality Act; and

2° do not authorize to invoke acceleration clauses, nor any right to terminate, suspend or compensate, nor to realize any collateral security on the assets of the credit institution.

The above restrictions are also applicable to (mixed) financial holdings.

70. ~~68.~~ Insolvency proceedings under the International Private Law Code (applicable in particular in case of insolvency of an investment firm or collective investment undertaking). Insolvency proceedings under the International Private Law Code are in principle governed by Belgian law. At the same time, Article 119, § 2 of the International Private Law Code states that the effect of the opening of insolvency proceedings upon the right of a creditor to demand the set-off of his claim against the claim of the debtor is governed by the law applicable to the insolvent debtor's claim. As a result, Belgian law will not interfere with the enforceability of Section 6 (e) in case of insolvency proceedings under the International Private Law Code.

We do not share the opinion expressed by an author according to which close-out netting would not be considered as set-off under Article 119, § 2 of the International Private Law Code (expressing this opinion, V. Marquette, Code de DIP: Droits réels et compensation, R.D.C., 2005, p. 672, n° 36). However, even in case a Court would follow this view and consider that Article 119, § 2 is not applicable to netting under Section 6 (e) of the ISDA Master Agreement, such netting would still be enforceable, on the basis of Belgian Netting Legislation (Article 14 F.C.A.).

iii. Set-off after the start of the Insolvency Proceeding

71. ~~69.~~ Bankruptcy. The bankrupt is deprived of any right over its estate (Article 16 B.A.) as of zero hours on the day of the bankruptcy order.

As a result, no transaction can take place after the commencement of bankruptcy proceedings. The performance of any transaction entered into before the day of the bankruptcy should occur in the hands of the receiver in bankruptcy (curateur / curator), who represents the bankrupt.

In any event, Section 2 (a) (iii) of the ISDA Master Agreement provides that each obligation of each party to make the payments and deliveries specified in the Confirmations is subject to the condition precedent that no Event of Default has occurred with respect to the other party.

Apart from payments by or to the receiver (or to the bank account of the bankrupt), any payment by or to a bankrupt party personally and, all the more so, any set-off

made after the commencement of the bankruptcy proceedings, is in principle null and void, unless such payment operates by set-off under the conditions defined above (*supra*, ~~64~~66).

72. ~~70.~~ Belgian Netting Legislation. Article 15, § 1 and § 2 F.C.A. contains a limited exception to this rule, to the extent that it authorizes entering into a netting agreement and payments, transactions and acts in execution of such an agreement where these agreements, payments, transactions or acts are made on the day of the opening of the insolvency proceedings, provided the counterparty establishes that it legitimately was not aware of such insolvency proceedings.

Question 4: Assuming the parties have entered into either a 1992 ISDA Master Agreement (Multicurrency-Cross Border) or a 2002 ISDA Master Agreement, one of the parties is insolvent and the parties have selected a Termination Currency other than the currency of the jurisdiction in which the insolvent party is organized, is it possible to prove (that is, file) a claim in a local insolvency proceeding in a foreign currency?

73. ~~71.~~ Filing of a claim in bankruptcy proceedings. Creditors of the bankrupt party have to file a declaration of their claim with the Court within the deadline determined by the bankruptcy order.

It is generally considered that the declarations of claim do not necessarily need to be expressed in the local currency (A. Zenner, *op.cit.*, p. 600, n° 827 - Van Ryn and Heenen, Principes de droit commercial, Bruylant, t. IV, 1965, p. 349, n° 2814). If a conversion into local currency (Euro) is made, the claims are to be converted taking into account the conversion rate valid on the day of the bankruptcy order, as this is the day on which the rights of the creditors are fixed.

74. ~~72.~~ Filing of a claim in reorganisation proceedings. We believe the rules determined for the bankruptcy proceeding should also apply in the case of reorganisation proceedings, taking into account the day of the judgment opening the proceeding for the conversion rate.

Question 5: Is it possible to obtain or execute a judgment in a foreign currency in Belgium?

75. ~~73.~~ Act of 12 July 1991. According to the Act of 12 July 1991, amending Article 3 of the Act of 30 December 1885, amounts in public and administrative acts may be expressed

in Euro([8084]), or another currency of one of the Member States of the Organisation for Economic Cooperation and Development ("OECD").

It results therefrom that, where an action for the payment of an amount expressed in a foreign currency is raised and proven before a Belgian court, it must award such amount as expressed, without converting it into Euro (J.V. Louis, "Le franc belge n'est plus requis dans les actes publics et administratifs", J.T., 1991, p. 669).

However, if the Termination Currency is not the Euro or the currency of another of the Member States of the OECD, the court has to award the equivalent of such amount in Euro, fixed as at the date of payment.

76. ~~74.~~ Foreign currency claims expressed in an OECD currency other than the Euro. As a result of the Act of 12 July 1991, we believe that currency claims expressed in an OECD currency other than the Euro may successfully be asserted against the bankrupt.

However, the Act of 12 July 1991 has not settled this issue conclusively. This view may be disputed on the basis that it would entail unfair gains where the exchange rate increased after the judgment (see Van Ryn and Heenen, t. IV, n° 2752-1) but the solution provided by the 1991 Act particularly eliminates any problem of conversion rates.

77. ~~75.~~ Foreign currency claims not expressed in an OECD currency. Currency claims expressed in other currencies must still be converted into Euro at the market rate of exchange prevailing on the date of the opening judgment (Cloquet, *op. cit.*, n° 1725 - Van Ryn and Heenen, t. IV, n° 2752-2). Section 14 of the ISDA Master Agreement contains such a provision. Indeed, the definition of Termination Currency Equivalent provides that amounts couched in a currency other than the Termination Currency are converted at a rate equal to the spot exchange rate of the foreign exchange agent for the purchase of such Other Currency with the Termination Currency at or about 11:00 a.m. on such date as would be customary for the determination of such rate for the purchase of such Other Currency for value on the relevant Early Termination Date.

On the other hand, Section 8 (b) of the ISDA Master Agreement, providing for the payment of the amount of any shortfall of the Contractual Currency as a consequence of sums paid in any such other currency, might not be enforceable under Belgian law - which means that it might not be possible to obtain a court order to pay the debt in such currency.

([8084]) The Act refers to the ECU. As provided under article 2 of the EC Regulation 1103/97 of 17 June 1997, the reference to the ECU is replaced by a reference to the Euro, at the rate of one Euro for one ECU, as of 1 January 1999.

III.- CLOSE-OUT NETTING FOR MULTIBRANCH PARTIES

A.- Assumptions

78. ~~76.~~ The facts and assumptions are those stated above in Parts II, A, with the following qualifications :

1°.- A credit institution organized in Belgium has entered into an ISDA Master Agreement on a multibranch basis. In the ISDA Master Agreement, the credit institution has 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 Belgium and also through one or more branches located in other jurisdictions 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 is subject to voluntary or involuntary proceedings under the insolvency laws of Belgium.

2°.- A credit institution ("Bank F"), organized and having its headquarters in a country ("Country H") other than Belgium, has entered into an ISDA Master Agreement on a multibranch basis. Bank F has entered into Transactions under the ISDA Master Agreement through Bank F and also through one or more branches located in other jurisdictions that Bank F had specified in the Schedule to Bank F's ISDA Master Agreement, including in a branch of Bank F located in and subject to the laws of Belgium (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.

B.- Questions

Question 6: In relation to a multibranch party organized in Belgium, would there be any change in our conclusions concerning the enforceability of close-out netting under the ISDA Master Agreement based upon the fact that the bank has entered into an ISDA Master Agreement on a multibranch basis and then conducted business in that fashion prior to its insolvency?

79. ~~77.~~ Assets and liabilities of the branch of a Belgian company. It is a general principle under Belgian law that the rights and liabilities of a company are the same whatever

the branches or offices through which they are contracted, provided that these branches or offices do not constitute a distinct company or other legal entity.

As banks qualify as companies under Belgian law, this principle also applies to banks.

80. ~~78.~~ Impact on jurisdiction (compétence / bevoegdheid). The conclusion of an engagement through a branch or office located abroad is, however, relevant for the application of the rules that are based on the place of conclusion or performance of an agreement. Under the Belgian rules of conflict of jurisdictions in contractual matters, defendants may be sued, as a general rule, before the jurisdictions of the State in which the engagement in dispute has been created or was to be performed (Article 96, 1° of the International Private Law Code; see also article 7 (1) of Regulation (EU) n° 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; hereinafter the "**Recast Brussels Regulation**"). A company may also be sued before the jurisdiction of the State where its branch is located, for disputes arising out of the operations of such branch (Article 5, § 2 of the International Private Law Code; see also Article 7 (5) of the Recast Brussels Regulation).

81. ~~79.~~ Insolvency proceedings. However, these rules do not apply in the event of insolvency proceedings. As a matter of principle, a bankruptcy order affects all the assets and liabilities of the debtor, including those situated abroad (principe de l'universalité de la faillite / beginsel van de universaliteit van het faillissement); hence, only one bankruptcy proceeding may exist concerning a company (principe de l'unité de la faillite / beginsel van de eenheid van het faillissement) (Fredericq, Traité de droit commercial, t. VII, n° 51 .- Van Ryn and Heenen, Principes de droit commercial, t. IV, 1st ed., 1965, no. 2633 .- Van Hecke and Lenaerts, Internationaal privaatrecht, A.P.R., 1986, n° 802 .- Rigaux, Droit international privé, t. II, n° 1103.- Lefebvre, La faillite, in Traité pratique de droit commercial, t. II, 1992, n° 341.- N. Watté, *op. cit.*, p. 11.- M. Delierneux, "Les succursales face à la faillite", in Les succursales bancaires, Cahiers AEDBF, Bruylant, 1996, pp. 213 *et seq*.). Important derogations to these two principles have been introduced into Belgian law, as it is now possible to open a secondary, *i.e.* territorial, insolvency proceedings in Belgium in the cases provided for by the European Insolvency Regulation and Article 118, § 1, 2° of the International Private Law Code (*supra*, 5). These derogations do however not apply to insolvency proceedings affecting credit institutions.

The Credit Institutions Act confirms, by implementation of the Credit Institutions Winding-Up Directive, the principles of the universality and of the unity of insolvency proceedings. In particular, it is confirmed that Belgian authorities only have jurisdiction to decide on the bankruptcy of a Belgian credit institution, and may not decide on such measures concerning a credit institution of another country, including the Belgian branch of such foreign credit institution (Article 359 of the Credit Institutions Act).

However, the application of these principles supposes the recognition by the foreign jurisdiction of the judgment rendered in Belgium. Problems may arise where a Belgian bank has branches or assets in a country which does not apply the same principles of universalité and unité of the insolvency proceeding.

These problems may be partially solved by international bilateral treaties.

There should be no problem with the Member States of the European Union, as their law will have incorporated the principles of universalité and unité of insolvency proceedings, by implementation of the Credit Institutions Winding-Up Directive.

82. ~~80.~~ The ISDA multibranch provisions. The multibranch provisions contained in the ISDA Master Agreement are consistent with the above-mentioned principles of Belgian law. Accordingly, Belgian courts would recognise these multibranch provisions and consider that the Transactions entered into by a branch or office of a bank organized in Belgium are those of that bank itself, and apply the close-out netting provisions accordingly.

83. ~~81.~~ Conclusions. In conclusion, the circumstance that a Belgian bank has entered into an ISDA Master Agreement on a multibranch basis and has made or received payments through any of its branches or offices located in a country other than Belgium, would not affect the conclusions reached above on the enforceability of close-out netting under the ISDA Master Agreement.

Question 7 (a): Would there be a separate proceeding in Belgium with respect to the assets and liabilities of the Local Branch at the start of the insolvency proceeding for Bank F in Country H ? Or would the relevant authorities in Belgium defer to the proceeding in Country H so that the assets and liabilities of the Local Branch 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 Belgium even if the relevant authorities in Belgium did not do so?

84. ~~82.~~ Jurisdiction *ratione materiae* in cases of insolvency proceedings. Under Belgian law, the courts having jurisdiction for initiating insolvency proceedings are those of the principal establishment or registered office of the debtor (*supra*, 5), save to the extent the European Insolvency Regulation or the International Private Law Code organise secondary insolvency proceedings for legal entities other than credit institutions or insurance undertakings.

Accordingly and by virtue of the principe de l'unité de la faillite / beginsel van de eenheid van het faillissement (*supra*, ~~79~~81), insolvency proceedings may not be commenced in Belgium in relation to the branch or office of Bank F located in Belgium (Commercial Court Liège, 25 October 1993, R.D.C., 1994, p. 904 - Commercial Court Brussels, 21

February, 1953, J.C.B., 1954, p. 38.- Van Ryn and Heenen, t. IV, no. 2633 - Ganshof, "Le droit de la faillite dans les Etats de la Communauté Economique Européenne", Bruylant, 1969, n° 10 and 200.- Cloquet, *op.cit.*, n° 1028.- Van Hecke and Lenaerts, Internationaal privaatrecht, n° 802.- N. Watté, "Les faillites et les sûretés internationales", DAOR, 1997, n° 44, p. 11) and no secondary bankruptcies can be opened in Belgium (Ganshof, *op.cit.*, n° 10 and 200). This is now expressly confirmed by article 353 and article 359 of the Credit Institutions Act for reorganization procedures and winding-up proceedings.

However, a reservation must be expressed if it appears that Bank F's true place of management was located in Belgium, in which case the Belgian courts would have jurisdiction to declare the bankruptcy (see, for a case concerning the bankruptcy of Air Zaïre, Cass., 2 December 1996, R.D.C., 1997, p. 526, with note by Claeys, "De bevoegdheidsregels voor de internationale faillietverklaring naar huidig en toekomstig recht", pp. 501 *et seq*.- Brussels Court of Appeal, 21 September 1995 and Commercial Court Brussels, 12 June 1995, R.P.S., 1996, p. 125).

85. ~~83.~~ Enforceability in Belgium of insolvency proceedings initiated in a country member of the European Economic Area. If Country H is a member of the European Economic Area, the winding-up proceeding(~~81~~85) initiated against Bank F in Country H will be recognized and effective in Belgium as from the moment it is effective in Country H, by virtue of article 360 of the Credit Institutions Act. Reorganization measures decided in Country H will also be effective in Belgium, provided the laws of Country H provide so (Article 354 of the Credit Institutions Act).

86. ~~84.~~ Enforceability in Belgium of insolvency proceedings initiated in a country applying the principle of territoriality other than a country of the European Economic Area. If Country H applies the principle of universality of bankruptcy (*supra*, ~~79~~81), the insolvency proceedings initiated against Bank F in Country H are effective in Belgium and affect all assets and liabilities of Bank F located in Belgium (Van Ryn and Heenen, t. IV, n° 2633, p. 209 - Lefebvre, *op. cit.*, n° 241 - Commercial Court Brussels, 8 November 1989, R.D.C., 1990, p. 854 - Van Hecke and Lenaerts, Internationaal Privaatrecht, n° 804).

If Country H applies the principle of territoriality, the insolvency proceedings initiated against Bank F in Country H are effective in the territory of Country H only, and do not affect the assets and liabilities of Bank F located in Belgium because Belgian courts may not give more effect to a foreign judgment than the effect such judgment has under foreign law (Cass., 26 September, 1991, R.D.C., 1992, p. 360.- Lefebvre, *op. cit.*, n° 841, p. 247.- Van Hecke and Lenaerts, Internationaal privaatrecht, 1986, n° 801 and 804).

(~~81~~85) For the purpose of the Credit Institutions Act, a winding-up proceeding is a collective proceeding opened and controlled by administrative or judicial authorities with a view to the realization of the assets of the credit institution under the supervision of these authorities.

As a result, these assets and liabilities are not subject to the principle of the *pari passu* ranking of creditors, either under Belgian law (the Belgian courts having no jurisdiction for initiating insolvency proceedings against a branch, see ~~79~~81 above) or under foreign law (which does not stretch to assets and liabilities located outside its territory (see Ganshof, *op. cit.*, n° 200).

Creditors of Bank F may, however, initiate ordinary proceedings (as opposed to insolvency proceedings) against Bank F with respect to its assets and liabilities located in Belgium provided that, under the Belgian rules of conflicts of jurisdiction, they may bring an action against Bank F in Belgium (*supra*, ~~78~~80).

As mentioned above (~~79~~81), the problems arising out of the application of the principle of the universal nature of bankruptcy in Belgium and of the principle of territoriality in other countries are partially solved by bilateral treaties.

87. ~~85.~~ Enforceability in Belgium of resolution proceedings initiated in a country member of the European Economic Area. If Country H is a member of the European Economic Area, the resolution proceedings initiated against Bank F in Country H will be recognized and effective in Belgium, in accordance with the legislation of Country H, once they become effective in Country H, and such regardless of their possible publication in Belgium. These resolutions proceedings are applicable in Belgium without any further formalities (Article 354 of the Credit Institutions Act).

88. ~~86.~~ Enforceability in Belgium of resolution proceedings initiated in a country other than a country of the European Economic Area. As long as no international agreement with the third country has been concluded in this respect, the Resolution Authority will, together with the other members of the European resolution college, decide on the recognition of third country resolution proceedings relating to a third country institution or a parent undertaking that: (a) has EEA subsidiaries established in, or EEA branches regarded as significant located in, Belgium and one or more other Member States; or (b) has assets, rights or liabilities, located in Belgium and one or more other Member States, or governed by the law of Belgium or those Member States.

Where a joint decision on the recognition of the third-country resolution proceedings is reached, the Resolution Authority shall seek the enforcement of the recognised third country resolution proceedings in accordance with the Credit Institutions Act.

In the absence of a joint decision between the resolution authorities participating in the European resolution college, or in the absence of a European resolution college, the Resolution Authority shall make its own decision on whether to recognise and enforce, except

as provided for in Article 483 of the Credit Institutions Act([82]86), third country resolution proceedings relating to a third country institution or a parent undertaking. The decision shall give due consideration to the interests of each individual Member State where a third country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third country resolution proceedings on the other parts of the group and the financial stability in those Member States.

89. ~~87.~~ Power to resolve Belgian branches of non EEA credit institutions. The Resolution Authority has the power to act in relation to a Belgian branch of a non EEA credit institution that is not subject to any third country resolution proceedings or that is subject to third country resolution proceedings and one of the circumstances referred to in Article 483 of the Credit Institutions Act applies([83]87), if it considers that action is necessary in the public interest and one or more of the following conditions are met:

1° the Belgian branch no longer meets, or is likely not to meet, the conditions imposed by Article 333 of the Credit Institutions Act for its authorisation and operation within Belgium and there is no prospect that any private sector, supervisory or relevant third-country action would restore the branch to compliance or prevent failure in a reasonable timeframe;

2° the third-country credit institution is, in the opinion of the Resolution Authority, unable or unwilling, or is likely to be unable, to pay its obligations to Union creditors, or obligations that have been created or booked through the branch, as they fall due and the Resolution Authority is satisfied that no third-country resolution proceedings or insolvency proceedings have been or will be initiated in relation to that third-country institution in a reasonable timeframe;

3° the relevant third-country authority has initiated third-country resolution proceedings in relation to the third-country credit institution, or has notified the Resolution Authority its intention to initiate such a proceeding.

Please note that Article 287 of the Credit Institutions Act would be applicable in case of the paragraph above (cf. supra ~~33~~35).

Question 7 (b): If there were a separate proceeding in Belgium with respect to the assets and liabilities of the Local Branch, would the relevant insolvency official and the courts in Belgium, 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 official and the courts recognize the close-out netting provisions of

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([82]86) The Resolution Authority has the right to refuse recognition or enforcement of third country resolution proceedings in certain circumstances, e.g. it is considers that that the third country resolution proceedings would have adverse effects on financial stability in Belgium, or that the proceedings would have adverse effects on financial stability in another Member State or that the effects of such recognition or enforcement would be contrary to national law.

([83]87) Cf. previous footnote.

the ISDA Master Agreement in accordance with their terms? The most significant concern would arise if the insolvency official or court considering a single ISDA Master Agreement would require a counterparty of the Local Branch of Bank F to pay the mark-to-market value of Transactions entered into with the Local Branch to the insolvency official of the local Branch while at the same time forcing the counterparty to claim in the proceeding in Country H for its net value from other Transactions with Bank F under the same ISDA Master Agreement. In considering this issue, we assume that close-out netting under the ISDA Master Agreement would be enforced in accordance with its terms in the proceeding for Bank F in Country H.

90. ~~88.~~ Separate insolvency proceedings in Belgium. It results from the answer to Question 7 (a) above, that only separate ordinary proceedings (*i.e.* not insolvency proceedings)([~~84~~88]) can be initiated against Bank F in Belgium provided that the following conditions are met :

- Country H applies the principle of territoriality;

- creditors may bring an action against Bank F in Belgium under Belgian procedural law; and

- Bank F has assets and liabilities located in Belgium. Accordingly, the test is not, as suggested by the wording of this issue, whether assets and liabilities of Bank F refer to the Belgian Branch, but whether assets and liabilities of Bank F are located in Belgium. Admittedly, assets and liabilities of a Belgian Branch are usually located in Belgium, but variations may occur.

91. ~~89.~~ ISDA multibranch provisions. The multibranch provisions contained in the ISDA Master Agreement do not violate any rule of public policy under Belgian law since the assets and liabilities of the Local Branch of Bank F are not submitted to the principle of *pari passu* ranking, as far as this principle derives from an insolvency procedure.([~~85~~89])

Provided that the multibranch provisions contained in the ISDA Master Agreement are valid under the law governing the same (*i.e.* New York or English law), the Belgian courts would in our opinion recognize these provisions, would consider that the obligations of the Local Branch are those of Bank F and are located in Country H as if entered into through its head office, and would decline jurisdiction over any claim against Bank F arising out of the debts contracted by its Belgian Branch.

([~~84~~88]) Assuming that it cannot be concluded that Bank F's true place of management is in Belgium

([~~85~~89]) However, even if the three conditions listed in paragraph ~~88~~90 above are met, if more than one creditor brings a claim in ordinary proceedings in Belgium against the Belgian Branch, a court might apply the principle of *pari passu* ranking to those claims with respect to the assets of the Belgian Branch. We understand that this question lies outside the issues you have submitted.

92. ~~90.~~ Risk that the close-out netting may be limited to the Transactions of the Belgian Branch. Notwithstanding the foregoing, it may not entirely be ruled out that the Belgian courts would regard the validity of the multibranch provisions as being governed by the *lex concursus* and postpone their decision until Country H decided whether to include the debts of the Local Branch in the insolvency proceedings of Bank F.

If Country H does not recognise the multibranch provisions and, on the basis of a strict conception of the principle of territoriality, does not include the debts of the Local Branch in the insolvency proceedings of Bank F, the Belgian courts might include Transactions entered into by the Local Branch among the assets and liabilities of the Belgian Branch and recognise the close-out netting only to the extent that the Local Branch's Transactions are concerned. We note that this result is unlikely as we have been advised by ISDA that the multibranch provisions are recognised in some 50 jurisdictions.

Question 8: This issue addresses the likely impact of the involvement of a country which does not recognise multibranch close-out netting (a "Non-Netting Jurisdiction"). Will the conclusions set forth above be affected by the two following scenarios:

(A) in the case of an insolvency proceeding for a Belgian bank, the Belgian bank, acting as a multibranch party, has booked Transactions through its home office and one or more branches located in Non-Netting Jurisdictions (the "Non-Netting Branches");

(B) in the case of an insolvency proceeding for a Belgian Branch of Bank F, Bank F acting as a multibranch party, has booked Transactions through (i) its home office, (ii) its Belgian Branch and (iii) one or more Non-Netting Branches in other jurisdictions.

93. ~~91.~~ Transactions booked by the Belgian bank in Non-Netting Branches. If a Belgian bank entered into some Transactions through its branch located in a Non-Netting Jurisdiction and later becomes insolvent, the fact that a Transaction was booked in a branch located in a Non-Netting Jurisdiction should not impact upon the conclusion reached under Question 6 above. Indeed, Belgian law applies the principles of universalité and unicité of the insolvency proceedings.

The situation would become more complex if the Non-Netting Jurisdiction did not recognise the principle of universalité and unicité of insolvency proceedings, and where, assuming a receiver is appointed for the Non-Netting Branch, such receiver would isolate the Transactions entered through the branch. Still in such a case, the Belgian court should recognize the enforceability of the multibranch clause of close-out netting under the ISDA Master Agreement.

This is because:

- the ISDA Master Agreement provides, where the Multibranch option is chosen, that the Transactions entered into through branch offices give rise to obligations on the part of the party itself;

- the Belgian court will apply the law elected by the parties (English or New York law) and Belgian law, to the extent determined above, and such court will have no reason to apply the law of the Non-Netting Jurisdiction; and,

- the Belgian court will not give effect to foreign insolvency proceedings, where insolvency proceedings have been exercised in Belgium, because of the principle of the *universal nature* of insolvency proceedings.

Such a situation may however result in conflicting judgments.

94. ~~92.~~ Transactions booked by Bank F in its Belgian Branch and in Non-Netting Branch. It results from the answer to Question 7 (a) above that only separate ordinary proceedings can be initiated in Belgium concerning the Belgian branch of Bank F and provided that the following conditions are met :

- Country H applies the principle of territoriality;

- Creditors may bring an action against Bank F in Belgium under Belgian procedural law; and

- Bank F has assets and liabilities located in Belgium.

As mentioned above there is a possibility, where Country H applies the principle of territoriality and does not give effect to the multibranch provisions of the ISDA Master Agreement, that a Belgian court would include the Transactions booked with the Belgian Branch in the assets and liabilities of the Branch. The fact that other Transactions would have been booked by Bank F in a Non-Netting Branch should not have any impact upon such situation.

IV.- KEY DIFFERENCES BETWEEN THE 1992 AND 2002 ISDA MASTER AGREEMENTS

Question 9: We ask you to confirm that the inclusion of the Force Majeure Event would not affect your opinion. If the inclusion of this provision would affect your

opinion, please set forth the legal implications. Please note that this is not a request for advice on force majeure and impossibility issues generally under the laws of Belgium, but merely whether the inclusion of the Force Majeure Event would affect your opinion on the enforceability of the termination, close-out netting and multibranch netting provision of the 2002 ISDA Master Agreement.

95. ~~93.~~ Force Majeure. We confirm that the inclusion of the Force Majeure Termination Event (Section 5 (b) (ii) of the 2002 Master Agreement) does not affect the conclusions reached in this Update Opinion.

Question 10: Please confirm that the inclusion of the Close-out Amount instead of the prior choice between Market Quotation and Loss would not affect your opinion on the enforceability of the termination, close-out netting and multibranch netting provisions of the 2002 ISDA Master Agreement.

96. ~~94.~~ Close-out Amount. We confirm also that the inclusion of the Close-out Amount in the calculation of the Early Termination Amount in Section 6 (e) does not affect the conclusions reached in this Update Opinion. We note that the single standard Close-out Amount has replaced Market Quotation and Loss among which the parties had to choose under the 1992 ISDA Master Agreements.

Question 11 : We are not asking you to opine on the enforceability of Section 6(f), but to confirm that the inclusion of Section 6(f) would not affect your opinion on the enforceability of the close-out netting provisions of the 2002 ISDA Master Agreement.

97. ~~95.~~ Set-off under Section 6 (f). We note further that the 2002 ISDA Master Agreement has introduced a new set-off provision. Set-off under Section 6 (f) is to be applicable after determination of the Early Termination Amount, hence after close-out netting has been applied. It concerns set-off of the Early Termination Amount payable to one party by the other party against any other amounts payable by the first party to the latter.

You are not asking us to render an opinion on the enforceability of this set-off provision under Belgian law. We confirm that the inclusion of Section 6 (f) would not affect the conclusions reached in our opinion on the enforceability of the close-out netting provisions of the 2002 ISDA Master Agreement. It might be the case that set-off under Section 6 (f) would be protected under the Belgian Netting Legislation. We consider that, even in the hypothesis where such set-off would not be enforceable under Belgian law in case of insolvency proceedings affecting the Belgian party, this should not impact the conclusions reached under III hereabove. A clause providing for the severability of any invalid or unenforceable provision in the ISDA Master Agreement or part thereof may however be inserted to confirm this.

V.- 2001 ISDA CROSS AGREEMENT BRIDGE

Question 12: You are asking us to state whether the inclusion of the 2001 Bridge would materially affect the conclusions reached in this opinion. We note that you are not asking us to confirm that validity or enforceability of the 2001 Bridge under Belgian Law.

98. ~~96.~~ Belgian Netting Legislation. Changes to the ISDA Master Agreement so as to include Cross-Agreement Bridging will not impact on the conclusions reached otherwise in this Update Opinion. This is because Belgian Netting Legislation is drafted in general terms and will therefore cover the netting resulting from the inclusion of the provisions of the Cross Agreement Bridge.

99. ~~97.~~ Credit Institutions. Where the insolvent party is a credit institution, changes to the ISDA Master Agreement so as to include Cross-Agreement Bridging will not impact on the conclusions reached otherwise in this Update Opinion. The rule remains that the ISDA Master Agreement will be a netting agreement governed exclusively by the law applicable to it, without any interference of Belgian law, except for overriding mandatory provisions (such as Article 287, § 1 of the Credit Institutions Act).

VI.- 2002 ISDA ENERGY AGREEMENT BRIDGE

Question 13: You are asking us to state whether the inclusion of the 2002 Bridge would materially affect the conclusions reached in our opinion. We note that you are not asking us to confirm the validity or enforceability of the 2002 Bridge under Belgian law.

100. ~~98.~~ Belgian Netting Legislation. Changes to the ISDA Master Agreement so as to include Energy-Agreement Bridging will not impact on the conclusions reached otherwise in this Update Opinion. This is because Belgian Netting Legislation is drafted in general terms and will therefore cover the netting resulting from the inclusion of the provisions of the Energy Agreement Bridge.

101. ~~99.~~ Credit Institutions. Where the insolvent party is a credit institution, changes to the ISDA Master Agreement so as to include Energy-Agreement Bridging will not impact on the conclusions reached otherwise in this Update Opinion. The rule remains that the ISDA Master Agreement will be a netting agreement governed exclusively by the law applicable to it, without any interference of Belgian law, except for overriding mandatory provisions (such as Article 287, § 1 of the Credit Institutions Act).

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This Update Opinion has been rendered on the basis of Belgian law as in force on the date hereof, but we are unaware of any pending legislative development which would adversely impact on our conclusions.

It is addressed to ISDA for use by ISDA and its members. It may not be relied upon by any other person without our prior written consent. We however agree that it may be shown by ISDA and its members to their professional advisers and supervisory and regulatory authorities.

Brussels, ~~24 March~~13 May 2016

Koen Vanderheyden

- Appendix A: certain transactions under the ISDA Master Agreement (dated August 2015, as enclosed to your Instructions E-Mail)
- Appendix B : ISDA's list of certain counterparty types dated September 2009 – Comments for Belgium (version dated September 2009, as enclosed to your Instructions E-Mail)
- Appendix C: Belgian Netting Legislation (English translation; dated ~~24 March~~13 May 2016)

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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 TO THE ISDA OPINION DATED 13 MAY 2016(BELGIUM)

PLEASE NOTE THAT THIS LIST OF COUNTERPARTIES HAS BEEN DRAWN-UP TO DEFINE THE SCOPE OF THE OPINION. IT SHOULD NOT BEEN CONSTRUED AS CONSTITUTING AN OPINION AS TO THE CAPACITY OF THE COUNTERPARTY TO ENTER INTO AN ISDA MASTER AGREEMENT OR TRANSACTIONS DOCUMENTED THEREUNDER. WE ARE ASSUMING SUCH CAPACITY, AS WE ARE ASSUMING THAT EACH COUNTERPARTY IS ACTING IN STRICT COMPLIANCE WITH THE REGULATION THAT IS APPLICABLE TO IT

Type	Covered	Legal form(s) / Comments
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	"Etablissement de credit" / "Kredietinstelling" authorised pursuant to the Act of 25 April 2014.
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).	~~No~~Yes	~~This would require a further analysis of the specific laws and regulations governing the~~ "Banque Nationale de Belgique" / "Nationale Bank van België"
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 B.	Yes	See the form of corporations listed in Article 2, § 2 of the Companies Code in Assumption (a) to the Opinion, i.e.: - société anonyme (SA) / naamloze vennootschap (NV) -société privée à responsabilité limitée (SPRL) / besloten venootschap met beperkte aansprakelijkheid

1 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4562941/1 and interwovenSite://BEDMS/BEMATTERS/4562938/1. Performed on 12/07/2016.

		(BVBA), - société cooperative (SCRL or SCRI) / coöperatieve venootschap (CVBA or CVOA), - société en commandite par actions (SCA) / commanditaire vennootschap op aandelen (Comm. VA), - société en commandite simple (SCS) / gewone commanditaire vennootschap, (Comm. Ven.), - société en nom collectif (SNC) / vennootschap onder firma (V.O.F.), -groupement d'intérêt économique (GIE) / economisch samenwerkingsverband (ESV);
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	But only to the extent the Hedge Fund is organized as a Corporation, having legal personality.
Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for 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.	Yes	But only provided it is constituted under the form of a SA/NV, SCA/Comm.Venn. or SCRL/CVOA.
International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and similar organizations established by treaty.	No	This would require further analysis on a case-by-case basis.

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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	But only provided it is organized as a Corporation.
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 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.	Yes	But provided it is organized as a Corporation, with a legal personality.
Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a	No	This would require further analysis and developments, in particular as such entity is normally not subject to the

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Federal Sovereign, for example, a city, county, borough or similar area.		insolvency proceedings examined in this Opinion.
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	This would require further analysis and developments, failing a legal personality.
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.	No	This would require further analysis and developments, in particular as such entity is normally not subject to the insolvency proceedings examined in this Opinion
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	This would require further analysis and developments, in particular as such entity is normally not subject to the insolvency proceedings examined in this Opinion

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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.	No	This would require a further analysis on a case-by-case basis.
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 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").	No	This would require further analysis and developments, on a case-by-case basis, as such entity may or may not be subject to the insolvency proceedings examined in this Opinion
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	This would require further analysis and developments as such entity is normally not subject to the insolvency proceedings examined in this Opinion

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Belgian Netting Legislation: Sections 14 to 16 F.C.A. (and ancillary provisions to assess scope of application)

(English translation for information purposes)

Chapter II: Definitions

Section 3, 4°. "netting agreements": novation or bilateral or multilateral set-off agreements.

Section 3, 5°. "insolvency proceeding": bankruptcy, judicial reorganization, "*règlement collectif de dettes*"/ "*collectieve schuldenregeling*" or any other judicial, administrative or voluntary collective proceeding, Belgian or foreign, implying the realization of assets and the distribution of the proceeds of such realization among the creditors, shareholders, partners or members, as the case may be, as well as reorganization measures involving administrative or judicial authorities, Belgian or foreign, aimed at preserving or restoring the financial situation and which affects third parties' pre-existing rights, especially including measures involving suspension of payments, suspension of enforcement measures or reduction of claims.

Section 3, 11°. "public or financial legal entity":

(a) a credit institution within the meaning of the Act of 22 March 1993 relating to the status and control of credit institutions;

(b) an investment firm within the meaning of the Act of 6 April 1995 relating to the status and control of investment firms;

(c) an insurance undertaking within the meaning of the Act of 9 July 1975 relating to the control of insurance undertakings ;

(d) a management company of a collective investment undertaking within the meaning of Part III of the Act of 20 July 2004 relating to certain form of collective investment undertakings;

(e) a collective investment undertaking within the meaning of Part II of the Act of 20 July 2004 relating to certain form of collective investment undertakings;

(f) a central counterparty, settlement agent or clearing house, as defined in the Act of 28 April 1999 implementing Directive 98/26/CE concerning settlement finality;

(g) a financial undertaking within the meaning of the present Act,

(h) a foreign or Belgian legal entity under Section 5 acting in its name but for the benefit of beneficiaries of security interests;

(i) a public authority (with the exception of entities benefitting from the guarantee of the State), including the undertakings of the public sector responsible for the management of the public debt or intervening in that field, and the undertakings of the public sector authorized to maintain accounts for their clients;

(j) the NBB, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in Annex VI, part 1, section 4 of Directive 2006/48/EC, the International Monetary Fund and the European Investment Bank;

(k) any other foreign legal entity qualifying in its country of origin as an entity falling under categories listed in Article 1.2. a) to d) of Directive 2002/47/CE.

1 Workshare Compare comparison of interwovenSite://BEDMS/BEMATTERS/4562942/1 and interwovenSite://BEDMS/BEMATTERS/4562939/1. Performed on 12/07/2016.

Section 3, 12°. "Financial undertaking": an undertaking other than a credit institution, the principal activity of which is to acquire holdings or to carry on one or more of the activities listed in points 2 to 12 of Article 3, § 3 of the Act of 22 March 1993 relating to the status and control of credit institutions, including, inter alia:

a) a mortgage company within the meaning of the Act of 4 August 1992 relating to mortgage loan;

b) a consumer credit company within the Act of 12 June 1991 relating to consumer credit;

c) a leasing company within the meaning of Royal-Decree no. 55 of 10 November 1967 organizing the status of undertakings practicing leasing;

d) a payment institution or an electronic money institution within the meaning of the Act of 21 December 2009 on the legal status of payment institutions and electronic money institutions, the access to the business of payment service provider and the activity of issuing electronic money and the access to payment systems.

Chapter III. Scope of application and general dispositions

Section 4.

§ 1. The present Act applies to agreements that create rights of security interest (…).

§ 2. The present Act also applies to netting agreements.

§ 3. The sections 9, 9/1, 14 and 15 of the present Act may not be invoked in the situations mentioned hereinafter, unless provided the creditor may avail itself of a default by the debtor in a payment obligation:

a) whatever the nature of the creditors, as from the date the debtor has requested or benefits from a judicial reorganization and for the duration of such proceedings, where the debtor is not an entity covered by section 3, 11° of the present Act;

b) by a creditor who is not an entity covered by section 3, 11° of the present Act, as from the request or order for judicial reorganization and for the duration of such proceedings, where the debtor is a public or financial entity.

The rule above in paragraph 3 does not apply:

a) where the creditor who is availing himself of a set-off or novation on the basis of a netting agreement is not at the same time availing himself of a termination clause, of a condition subsequent or of acceleration clauses and conditions stipulated to allow novation or set-off.

b) (…)

c) to the security interests, netting agreements and termination or acceleration clauses or conditions stipulated to allow novation or set-off where they are entered into concerning derivative products or other financial transactions as described by the King in a Decree to be enacted in consultation with the BNB. In the drafting of such list of operations, the King will take into account the interest of the mechanisms defined in the beginning of the paragraph for the normal functioning of the transactions concerned and for the markets in which they are used and, more generally, the Belgian and international market practices.

§4. Where the King decides on a transfer within the meaning of article 26 bis, § 1 of the Act of 9 July 1975 relating to the control of insurance undertakings, of article 57 bis § 1 of the Act of 22

March 1993 relating to the status and control of credit institutions or of article 23 bis, § 1 of the Act of 2 August 2002 relating to the supervision of the financial sector and financial services, the sections 9, 9/1, 14 and 15 of the Act may not be invoked by the contracting party other than those listed in section 3, 11° of the present Act, save where they can avail themselves of a failure to pay. The rule in the beginning of the paragraph does not apply:

a) where the creditor who is availing himself of a set-off or novation on the basis of a netting agreement is not at the same time availing himself of a termination clause, of a condition subsequent or of acceleration clauses and conditions stipulated to allow novation or set-off.

b) (…)

c) to the security interests, netting agreements and termination or acceleration clauses or conditions stipulated to allow novation or set-off where they are entered into concerning derivative products or other financial transactions as described by the King in a Decree to be enacted in consultation with the BNB. In the drafting of such list of operations, the King will take into account the interest of the mechanisms defined in the beginning of the paragraph for the normal functioning of the transactions concerned and for the markets in which they are used and, more generally, the Belgian and international market practices.

Chapter VIII: Netting Agreements

Section 14.

§ 1. Netting agreements, as well as termination clauses, conditions subsequent or acceleration clauses stipulated in order to allow novation or set-off, may, without any prior notice of default or judicial decision, notwithstanding any transfer of rights thereunder, in the case of an insolvency proceeding, attachment or any situation where the *pari passu* principle applies, be enforced upon creditors provided the claim and debt to be novated or set off existed at the time of opening of the insolvency proceeding, the attachment or situation where the *pari passu* principle applies, irrespective of their maturity date, subject-matter or the currency in which they are denominated.

§ 2. Paragraph 1 of the present article does not apply to netting agreements and to termination or acceleration clauses or conditions stipulated to allow novation or set-off, entered into between or with physical individuals who are not merchants. Paragraph 1 remains however applicable concerning netting agreements and termination or acceleration clauses or conditions stipulated to allow novation or set-off where they have been entered into at a time the physical individual qualified as a merchant and provided the novation or set-off concern at least one claim that existed at a time the physical individual was a merchant.
(…).

Chapter IX: Insolvency

Section 15.

§ 1 (…) netting agreements are valid and enforceable towards third parties and are also enforceable in the case of an insolvency proceeding, attachment or situation where the *pari passu* principle applies, if they were entered into before the time of the opening of the insolvency proceeding or the occurrence of the attachment or situation where the *pari passu* principle applies,

or if they were entered into after that time, in so far as the counterparty can avail itself, at the time of entering into the agreement, of legitimate ignorance of the opening or prior occurrence of such a proceeding or situation.

§ 2. The first paragraph is also applicable to payments, transactions and acts performed under the above-mentioned agreements (…).

§ 3. The § 1 and 2 of the present article are not applicable to netting agreements and termination or acceleration clauses or conditions stipulated to allow novation or set-off, entered into between or with physical individuals who are not merchants. Paragraph 1 remains however applicable concerning netting agreements and termination or acceleration clauses or conditions stipulated to allow novation or set-off where they have been entered into at a time the physical individual qualified as a merchant and provided the novation or set-off concern at least one claim that existed at a time the physical individual was a merchant.
(…).

Section 16.

§ 3. Subject to Section 20 of the Bankruptcy Act of 8 August 1997, Sections 17, 2° and 18 of this Act are not applicable to netting agreements and payments, transactions and acts performed thereunder, nor to their modalities, consisting in termination clauses, condition subsequent and acceleration terms stipulated in order to allow novation or set-off.

Royal Decree of 7 November 2011 determining the derivative products and other financial transactions referred to in Section 4, § 3 and § 4 of the Act of 15 December 2004 relating to financial collateral

Section 1. For the application of this Decree, the following terms are defined as follows:
(…)
4°- "derivative products": "*any option contract, forward, future, swap, financial transaction for the set-off of differences in relation to a reference value, any combination of such or any other type of derivative transaction in the largest sense, irrespective of whether such contracts a) are entered into OTC or traded on a regulated market or MTF, b) are cash or physically settled, c) are settled through a clearing house, a central counterparty, among the parties or otherwise*."[1]

Section 2. By application of Section 4, § 3, al. 2, c) and Section 4, § 4, al. 2, c) of the Act of 15 December 2004 relating to financial collateral, here is the list of exempted transactions:

[1] My translation from the French text: "*tous contrats d'option, contrats à terme, futures, contrats d'échange, contrats financiers pour la compensation de différences en rapport avec une valeur de référence déterminée, et toute combinaison de ceux-ci et tout autre type de contrats dérivés dans le sens le plus large, peu importe que ces contrats a) soient conclus de gré à gré entre les parties (OTC) ou soient traités sur un marché réglementé et/ou un MTF, b) soient réglés en espèces ou au moyen d'une livraison physique de marchandises, valeurs mobilières ou toute autre valeur; et c) soient réglés via une chambre de compensation, une contrepartie ou un système central ou directement entre les parties ou leurs représentants.*"

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1°- operations and products that follow, provided they belong to one the two categories described in § 2:

a) derivative products;

b) purchase, sale, loan or delivery of securities, instruments of the money market, shares in collective investment undertakings, derivatives, emission trading, electricity certificates and similar instruments;

c) the spot sale or purchase of foreign currencies;

2°- loans and advances furnished within the framework of or with a vue to settlement of derivative transactions, securities or instruments of the money market;

3°- guarantees, letters of credit to guarantee derivative or other financial transactions covered under 1° a), b) or c) and 2° of the present paragraph.

§2. For the application of paragraph 1 of this article, the two following categories of transactions are taken into account:

1°) transactions concerning which the parties agree to apply, in a standard or other form of:

a) internationally standardized master agreements elaborated by ISDA (ISDA Master Agreement);

b) internationally standardized master agreements elaborated by the German bank association (Rahmenvertrag für Finanztermingeschäfte); or

c) internationally standardized master agreements elaborated by the banking federation of the European Union (European Master Agreement for Financial Transactions);

d) internationally standardized master agreements elaborated by the international association for securities lending (Global Master Securities Lending Agreement);

e) internationally standardized master agreement elaborated by the International capital market association (Global Master Repurchase Agreement);

f) application of standard master agreements that are comparable or similar to those referred to under a) to e) above, governed by Belgian law or not, used by credit institutions on the Belgian market;

g) rules of contract elaborated by a regulated market, a MTF, a clearing house, a central counterparty or system.

2°) transactions that may be taken into consideration for the negotiation upon a Belgian or foreign regulated market or a MTF or for settlement through a clearing house, central counterparty or system.

§ 3. For the application of the present Decree, transactions referred to in § 1 also include any claims or rights that exist because of the rules, the orders for transfer or the set-off of these transactions.