



- there may be limitations on the effectiveness of paragraph 13.3.1 in an insolvency proceeding.

## SECTION A - ENGLISH LAW

### 2. ENFORCEABILITY

We do not foresee any difficulties with the enforceability of the General Agreement when used in conjunction with the Gas Capacity Annex.

Certain contracts may be void or unenforceable by reason of Section 18 of the Gaming Act 1845 or Section 1 of the Gaming Act 1892. However, by virtue of Section 412 of the Financial Services and Markets Act 2000 ("FSMA"), no contract shall be void or unenforceable by reason of those sections where it is entered into by either or each party by way of business, the entering into or performance of the contract by either party constitutes an activity specified in the Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001 (the "**Order**") or one which falls within a class of activity specified in the Order, and the contract relates to an investment specified in the Order or one which falls within a class of investment specified in the Order. In our view, the Agreement will (assuming it and the Transactions entered into thereunder are entered into by way of business) fall within the provisions of Section 412 of the FSMA as a contract for difference.

Further, to the extent that certain provisions or Transactions may be unenforceable, this would not automatically affect the rest of the Agreement. If it is possible for the unenforceable part of the Agreement to be severed without substantially altering the commercial intention of the parties, then the remainder of the Agreement can still be enforced. However, the effectiveness of any provision of the Agreement (such as paragraph 23.4 of the General Agreement) which allows an invalid provision to be severed in order to save the remainder of the Agreement will be determined by the English courts in their discretion.

One additional point we would note is that additional steps are required under English law to effect a transfer of a chose in action such as the rights to the Gas Capacity. An assignment of a chose in action may be legal or equitable. To be a legal assignment, it must satisfy the requirements of section 136 Law of Property Act 1925 (section 136).

Section 136 provides as follows:

*"Legal assignments of things in action*

*Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice*

- (a) *the legal right to such debt or thing in action;*
- (b) *all legal and other remedies for the same; and*
- (c) *the power to give a good discharge for the same without the concurrence of the assignor...."*

Breaking the section down, the following basic conditions must be fulfilled:

- (a) the assignment must be of a debt or other legal thing in action (here the right to Gas Capacity);
- (b) the assignment must be absolute (not by way of charge) (paragraph 6.1 seeks to do this);
- (c) the whole chose in action must be assigned and not part only paragraph 6.1 seeks to do this;
- (d) the assignment must be in writing under the hand of (i.e. signed by) the Assignor (the Agreement would, if properly completed, satisfy this requirement); and
- (e) written notice of the assignment must be given to the TSO.

If these conditions are not satisfied, the assignment will take effect as an equitable assignment. The distinction between a legal and an equitable assignment is primarily of significance in that: (a) any action by an equitable assignee to enforce its rights may need to join in the assignor into the proceedings; and (b) failure to give written notice of the assignment to the third party obligor (the TSO) impacts on the buying party's priority as against subsequent assignees. The priority of successive assignments of choses in action is governed by the rule in *Dearle v Hall (1828) 3 Russ 1* which provides that an assignee who takes without notice of an earlier assignment, and is the first to give notice of the assignment to the third party obligor, gains priority. Therefore, to the extent that the steps required by section 136 are not taken, the Buyer risks losing priority to a subsequent assignee under the rule in *Dearle v Hall*.

Paragraph 6.4 does allow a party to request that the other party use its "reasonable and diligent efforts" to request from the TSO and share with the requesting party, any additional documentation necessary to enforce the transfer of the Contract Quantity. This paragraph could be used to ensure that the steps required by section 136 are taken.

### 3. **NETTING**

We do not foresee any difficulties with the effectiveness of netting under the General Agreement when used in conjunction with the Gas Capacity Annex.

Furthermore, as a matter of English law, the provision of the Gas Capacity Appendix which seeks to amend the General Agreement to allow a party to elect between a "mini close out" or a "full close out" on a termination pursuant to paragraph 10.5(a) (*Non Performance*) or 10.5(e) (*Representation or Warranty*) would not affect the

enforceability of the netting provision under the General Agreement. To the extent that a party does elect to effect a mini close out, then clearly the Gas Capacity Transactions terminated in that manner will not be included in any general close out netting under the General Agreement and in all cases will be subject to the overriding application of any Statutory Insolvency Set-Off (discussed below).

With respect to the provisions of paragraph 13.3.1 of the Gas Capacity Appendix, whilst it is open for the parties to agree as a matter of contract that payments in respect of only certain types of Transactions should be netted against each other, such limited payment netting will not be effective if the party is subject to UK Statutory Insolvency Set-off. In a winding-up or an administration under the laws of England and Wales, the aggregation or set-off of amounts representing terminated obligations may be implemented under Rule 4.90 of the Insolvency Rules 1986 ("**Rule 4.90**"), or Rule 2.85 of the Insolvency Rules 1986 ("**Rule 2.85**"), rather than under the specific provisions of the Agreement. Set-off pursuant to Rule 4.90 or Rule 2.85 ("**Statutory Insolvency Set-Off**") would, in our view, result in a net amount payable between the parties in respect of all amounts owing between the parties under the Agreement, subject to the other qualifications set out in the Clifford Chance opinion and subject also to the inclusion in any Statutory Insolvency Set-Off of other mutual obligations between the Parties.

#### 4. **SPECIFIC QUESTIONS RAISED BY EFET'S EXTERNAL COUNSEL**

- 4.1 We have been specifically asked whether our conclusions expressed in the Opinions depend on the transactions subject to netting under the General Agreement being transactions for the delivery of a physical or material commodity, and whether the inclusion of the Gas Capacity Annex could taint or impair a party's rights to net other, physical, transactions.

In considering the effectiveness of netting, it is not necessary under the laws of England and Wales that the subject-matter of the Transaction be a physical commodity or physically deliverable, and it is not objectionable that a Transaction may be regarded as a contract for services or for a difference in values.

- 4.2 We have also been specifically asked whether our conclusions expressed in the Opinions would be affected by reason of the Gas Capacity Annex applying a different, modified sub-set of the contractual provisions of the General Agreement to some transactions while seeking to preserve the (unmodified) approach of the General Agreement for other transactions.

As a matter of English law, there is no objection to the "contract within a contract" approach in itself. Provided that there is sufficient certainty in the drafting to enable the relevant applicable provisions to be identified and applied, the courts of England and Wales would not refuse to enforce the Agreement simply on the basis that certain provisions apply to a defined set of Transactions and other (even if contradictory) provisions apply to a separate defined set of Transactions.

## **SECTION B - GERMAN LAW**

Terms defined or given a particular construction in the German law opinion on the General Agreement dated 21 April 2008 (the " German Opinion") have the same meaning in this memorandum (except where the context otherwise requires).

### **5. ENFORCEABILITY**

The provisions of the General Agreement when used in conjunction with the Gas Capacity Annex are enforceable.

However, additional steps may be required under German law to effect a transfer of the rights to the Gas Capacity as contemplated by paragraph 6.1 (*Transfer of Rights*) provided that such additional steps are required with respect to the Gas Capacity (including any agreements between the Seller and the TSO).

### **6. NETTING**

The Netting Provisions under the General Agreement when used in conjunction with the Gas Capacity Annex will be effective.

The provision of the Gas Capacity Appendix which seeks to amend the General Agreement to allow a party to elect between a "mini close out" or a "full close out" on a termination pursuant to paragraph 10.5(a) (*Non Performance*) or 10.5(e) (*Representation or Warranty*) would not affect the enforceability of the Netting Provisions. To the extent that a party does elect to effect a "mini close out", then, as already mentioned, the Gas Capacity Transactions terminated in that manner will not be included in any general close out netting under the General Agreement and in all cases will be subject to the overriding application of any statutory netting provisions.

On the assumption that a Material Reason has occurred in relation to a Party and that the date for Early Termination falls before the opening of Insolvency Proceedings, the Netting Provisions which provide for the Early Termination of the underlying Individual Contracts and the calculation of a single Termination Amount are enforceable as set out in the German Opinion. On the assumption that a Material Reason has occurred in relation to a Party and that the date for early (automatic) termination falls after the opening of Insolvency Proceedings, the provisions of sections 103, 104 of the Insolvency Code would override the Netting Provisions. This applies for both, a "mini close out" or a "full close out", however, we note that Gas Capacity Appendix entitles a Party to a "mini close out" only in non-insolvency related circumstances.

Physically settled gas capacity transactions which have not been effectively terminated prior to the opening of Insolvency Proceedings are, pursuant to section 103 of the Insolvency Code, subject to the Insolvency Administrator's right to decide whether to assume or reject such transactions. Consequently, the Insolvency Administrator has the power to disclaim unprofitable transactions and to enforce profitable ones ("cherry-picking").

However, section 104 of the Insolvency Code provides for exceptions to the Insolvency Administrator's "cherry-picking" right if the respective Transaction qualifies as an obligation which must be fulfilled by a particular date as otherwise its fulfilment becomes worthless (*Fixgeschäft*), or if it falls within the exemption for financial transactions within the meaning of section 104 para. 2 of the Insolvency Code. In such case, the physically settled Transaction may become subject to the statutory netting as set forth in section 104 of the Insolvency Code.

Where a Material Reason has occurred in relation to a Party and the date of Early Termination falls before the opening of Insolvency Proceedings, the Single Agreement concept as set forth in Section 1.1 of the General Agreement is not required to preserve the enforceability of Early Termination rights and the ability to close out. However, where a Material Reason has occurred in relation to a Party and the date of Early Termination falls after the opening of Insolvency Proceedings, to ensure that all Individual Contracts, which constitute financial transactions are included in the statutory netting under section 104 para. 2 of the Insolvency Code the relevant master agreement must provide for the termination of all transactions entered into under the master agreement upon insolvency (section 104 para. 2 sent. 3 of the Insolvency Code).

With respect to the provisions of paragraph 13.3.1 of the Gas Capacity Appendix, whilst it is open for the parties to agree as a matter of contract that payments in respect of only certain types of Transactions should be netted against each other, such limited payment netting might not be effective in case the statutory netting provisions apply.

## **7. SPECIFIC QUESTIONS RAISED BY EFET'S EXTERNAL COUNSEL**

- 7.1 We have been specifically asked whether our conclusions expressed in the Opinions depend on the transactions subject to netting under the General Agreement being transactions for the delivery of a physical or material commodity, and whether the inclusion of the Gas Capacity Annex could taint or impair a party's rights to net other, physical, transactions.

Whether or not the Transaction would fall within the scope statutory netting provisions apply depends largely on the subject-matter of the Transaction. Therefore, it may make a difference whether the subject-matter of a Transaction is a physical commodity, physically deliverable, contract for services or for a difference in values (however, only to the extent the Transaction (and the General Agreement)) was not terminated before the formal commencement of Insolvency Proceedings (please refer for further details to Paragraph 3.1.3 (b) (ii) of the German Law Opinion).

We have also been specifically asked whether our conclusions expressed in the Opinions would be affected by reason of the Gas Capacity Annex applying a different, modified sub-set of the contractual provisions of the General Agreement to some transactions while seeking to preserve the (unmodified) approach of the General Agreement for other transactions.

Under German law, there is no objection to the "contract within a contract" approach in itself. Provided that there is sufficient certainty in the drafting to enable the relevant applicable provisions to be identified and applied, German courts would not refuse to enforce the Agreement simply on the basis that certain provisions apply to a defined set of Transactions and other (even if contradictory) provisions apply to a separate defined set of Transactions.

In giving this memorandum we have not set out the full assessment of risks, assumptions and reservations which would be appropriate for a formal legal opinion, but have merely identified the principal legal points which have come to our attention.

*Clifford Chance LLP*

**Clifford Chance LLP**

30 May 2008