

CLIFFORD CHANCE
LIMITED LIABILITY PARTNERSHIP

SCXP/C1458/04790/HNM

16 February 2000

The Bond Market Association
40 Broad Street
New York
NY 10004-2373
USA

Dear Sirs

Cross-Product Master Agreement

1. **INTRODUCTION**

We have been asked, as legal advisors to The Bond Market Association ("**TBMA**"), to deliver this opinion in respect of the laws of England and Wales (this "**Jurisdiction**") as to the enforceability of agreements on the terms of the Cross-Product Master Agreement published by TBMA and other Publishing Associations in circumstances where such agreement is governed by the laws of this Jurisdiction.

For the purposes of giving this opinion, we have examined the form published on 16 February 2000 of an agreement entitled the Cross-Product Master Agreement, including Parts I to VI of the Schedule thereto but, subject as mentioned in paragraph 3.1, excluding Parts VII to IX, (the "**Master Agreement**") between the parties thereto (a copy of which is attached to this opinion).

- 1.1 In this opinion references to a "paragraph" are to a paragraph of this opinion and references to a "Section" are to a section of the Master Agreement.

When used in this opinion, unless otherwise defined herein, terms defined in the Master Agreement shall have the same meaning as defined therein.

References to the Principal Agreements shall include references to any transactions thereunder, unless the contrary is stated.

2. ASSUMPTIONS

In rendering this opinion, we have assumed that:

- (a) the Master Agreement and all Principal Agreements entered into between the Parties are within each Party's capacity and authority and all steps necessary for each Party to authorise, execute and perform the Master Agreement and the Principal Agreements have been duly taken;
- (b) each Party has duly executed and properly completed the Master Agreement and all documentation relating to any Principal Agreement and has obtained, complied with the terms of and maintained, all authorisations, approvals, licences and consents required to enable it lawfully (i) to enter into and perform its obligations under the Master Agreement and all Principal Agreements, (ii) to ensure the legality, validity and enforceability of the Master Agreement and all Principal Agreements and (iii) to ensure the admissibility in evidence in this Jurisdiction of the Master Agreement and the Principal Agreements;
- (c) each Party duly performs its obligations under the Master Agreement and each Principal Agreement in accordance with their terms;
- (d) the termination provisions contained in Section 2 of the Master Agreement, the provisions relating to the calculation and determination of the Settlement Amounts and Final Net Settlement Amount set out in Sections 3.1 and 4.4 respectively of the Master Agreement and the provisions of Section 3.2 of the Master Agreement are valid and legally binding in accordance with their terms (this being a matter on which we opine in our opinion of even date addressed to TBMA in relation to the Master Agreement);(in this opinion the provisions of the Master Agreement other than the provisions of Sections 2, 3.1, 3.2 and 4.4 referred to above are referred to as the "**Specified Provisions**");
- (e) the Principal Agreements and any contractual or proprietary arrangements or rights thereunder are valid and legally binding and each is capable of being terminated and closed-out in the manner envisaged by the Master Agreement;
- (f) the Master Agreement is entered into prior to the formal commencement of any Insolvency Proceedings (as defined below) against either Party and, at the time at which the Master Agreement or any Principal Agreement (including any transactions thereunder) is entered into, neither Party has actual notice of the insolvency of the other Party;
- (g) all obligations under the Master Agreement (including under all Principal Agreements covered by the Master Agreement) are mutual between the Parties in the sense that there are only two parties, each is personally and solely liable as regards obligations owed by it and sole and beneficial owner of obligations owed to it and no third party has any right or interest in any such obligations;

- (h) all Settlement Amounts falling to be determined under the Principal Agreements are duly determined in accordance with the provisions of the relevant Principal Agreement;
- (i) the Parties to the Master Agreement are companies (including banks but excluding insurance companies) which are: (i) incorporated and registered under the laws of this Jurisdiction; or (ii) incorporated or organised under the laws of another jurisdiction (excluding Scotland);

For these purposes, a reference to a "**bank**" is a reference to an authorised institution within the meaning of the Banking Act 1987; a reference to a "**company**" is a reference to a company within the meaning of section 735 of the Companies Act 1985; and a reference to an "**insurance company**" is a reference to an insurance company within the meaning of the Insurance Companies Act 1982; and

- (j) the governing law selected in Part IV to the Schedule is the law of this jurisdiction.

3. **OPINION**

This opinion relates solely to matters of the laws of this Jurisdiction as in force and as interpreted as at the date hereof. This opinion does not consider the impact of any laws (including insolvency laws) other than of the laws of this Jurisdiction, even in the case where, under the laws of this Jurisdiction, the law of any other jurisdiction falls to be applied. This opinion is based upon the express words of the Master Agreement, as they would be interpreted under the laws of this Jurisdiction and takes no account of how such words would be interpreted under, or the effect of, any other laws which may govern the Master Agreement or any Principal Agreement. We do not express any opinion as to any matters of fact or as to any competition law aspects raised by virtue of the publication of the Master Agreement by the TBMA. We have not considered and do not express any opinion on:

- (i) any provision of the Master Agreement which is not in Sections 1 to 9 of the Master Agreement or, subject as mentioned in paragraph 3.1, in Parts I, II, IV, V or VI of the Schedule thereto (we do not opine on the provisions of Part III of the Schedule as they relate to matters of US laws); or
- (ii) the Principal Agreements, including any transactions thereunder; or
- (iii) the provisions for submission to jurisdiction of courts, waiver of immunities and the appointment of Process Agents adopted in relation to the Master Agreement incorporated by reference to one of the Principal Agreements (see Section 6 and Part IV to the Schedule) - we do not opine with regard to these matters as the relevant provisions are not set out in the Master Agreement and are, thus, not available to us. Nevertheless, we do opine on certain matters regarding jurisdictions as indicated in paragraph 3.2.2.

On the basis of the foregoing, and subject to the reservations set out below, we are of the following opinion:

3.1 **Validity of the Specified Provisions of the Master Agreement**

The Specified Provisions of the Master Agreement would be valid and enforceable under the laws of this Jurisdiction. Our opinion in the preceding sentence would not be affected in the event that the Parties had agreed to apply paragraph 3 of Part VII to the Schedule to the Master Agreement.

3.2 **Choice of Governing Law and Jurisdiction**

3.2.1 If the matter were raised before the courts of this Jurisdiction, the choice of the laws of this Jurisdiction to govern the Master Agreement would be recognised under the laws of this Jurisdiction, even if neither Party is incorporated, domiciled or established in this Jurisdiction, subject to the provisions of the Contracts (Applicable Law) Act 1990. In summary, the Contracts (Applicable Law) Act 1990 allows parties to choose the law to govern a contract subject to the following provisions:

- (a) the fact that the Parties have chosen a foreign law shall not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of law of that country which cannot be derogated from by contract; and
- (b) the Parties cannot restrict the application of the rules of law which are mandatory in the forum irrespective of the law otherwise applicable to the contract.

3.2.2 In our opinion, if the Parties specify the courts of this Jurisdiction as the courts which are to have jurisdiction in respect of any proceedings relating to the Master Agreement the courts of this Jurisdiction will accept jurisdiction over proceedings relating to the Master Agreement subject to the following:

- (a) where one or both of the Parties to the Master Agreement is domiciled in a state which is a member of the EU or EFTA (except Liechtenstein) there is some uncertainty over the effectiveness of non-exclusive jurisdiction clauses but the current practice of the courts of this Jurisdiction is, subject to the following, to enforce such clauses in accordance with their terms;
- (b) the courts of this Jurisdiction retain an inherent jurisdiction to control any proceedings before them, including by staying those proceedings; and
- (c) in making a decision on whether to stay proceedings, the courts of this Jurisdiction will take into account all material circumstances including, in particular, the existence of proceedings in another jurisdiction; but
- (d) the courts of this Jurisdiction will stay proceedings before them if the courts of an EU or EFTA state (except Liechtenstein) were seised before the courts of this Jurisdiction in proceedings involving the same

cause of action and between the same parties, and the courts of this Jurisdiction may also stay proceedings if the courts of an EU or EFTA state (except Liechtenstein) were seised of related proceedings before the courts of this Jurisdiction.

4. QUALIFICATIONS

This opinion is subject to the following qualifications:

- 4.1 The terms "**enforceable**" and "**enforceability**" as used in this opinion mean that the relevant obligations are of a type which the courts of this Jurisdiction may enforce; but it does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms. In particular, we draw your attention to the following.
- 4.1.1 Our opinion is subject to any limitations arising from administration, bankruptcy, insolvency, liquidation, reorganisation and similar laws generally affecting the rights of creditors and the application of general principles of equity (regardless of whether such enforceability is considered a proceeding in equity or law).
- 4.1.2 Where any obligations under the Master Agreement are to be performed in a jurisdiction other than this Jurisdiction or a Party's obligations are subject to the laws of a jurisdiction other than this Jurisdiction, those obligations may not be enforceable under the laws of this Jurisdiction to the extent that performance would be illegal or contrary to public policy under the laws of the other jurisdiction.
- 4.1.3 Any provision in the Master Agreement to the effect that any calculation, determination or certification will be conclusive and binding will not be effective if such calculation, determination or certification is fraudulent, incorrect, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto. The laws of this Jurisdiction may have effect so that any discretion or determination to be exercised or made by a party under the Master Agreement must be exercised or made reasonably. The courts of this Jurisdiction may regard any calculation, determination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified.
- 4.1.4 The courts of this Jurisdiction may decline jurisdiction if the courts of another jurisdiction: (a) have already been seised in respect of proceedings involving the same parties and relating to the same matter (*lis alibi pendens*); or (b) are more appropriate for the determination of the dispute (*forum non conveniens*). In relation to (a), the courts of this Jurisdiction would be bound to stay proceedings or decline jurisdiction if the courts of a contracting state to the 1968 and 1988 Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (respectively the Brussels Convention and the Lugano Convention) have already been seised in respect of such proceedings and either

of the conventions applies. In relation to (b), in deciding whether the courts of another jurisdiction would be more appropriate, the courts of this Jurisdiction look to connecting factors such as the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence, and expense.

- 4.1.5 Enforcement of rights may be or become limited by the lapse of time or may be or become subject to defences of set off or counterclaim arising in respect of other dealings between the Parties.
- 4.1.6 The obligation to pay interest on a defaulted amount may, to the extent that it does not constitute a genuine pre-estimate of loss, be held to be unenforceable on the grounds that it constitutes a penalty. Similarly, to the extent there are other provisions in the Master Agreement entitling a Party to claim an amount in respect of loss or damage suffered by it in respect of a non performance by the other Party, to the extent that amount exceeds a genuine pre-estimate of loss it may be held to be unenforceable.
- 4.1.7 Whilst, in the event of any proceedings being brought in a court of this Jurisdiction in respect of a monetary obligation expressed to be payable in a currency other than pounds sterling of the United Kingdom, that court would have power to give judgement expressed as an order to pay such currency, it may decline to do so in its discretion.
- 4.1.8 The Master Agreement may be held to be invalid or not binding in the event of any misrepresentation, illegality, fraud, duress, undue influence or mistake of fact. Accordingly, we express no opinion if any of these elements is present.
- 4.1.9 We do not opine on the legality, validity or enforceability of any Principal Agreement or any transaction. Unless and until transactions are entered into under Principal Agreements the provisions of the Master Agreement regarding calculation of Settlement Amounts and their discharge will have no practical application. If a Principal Agreement or any transaction is not itself valid, legally binding and enforceable, the Master Agreement will not be either in relation to it. Moreover, it is possible that the terms of a Principal Agreement or a transaction could amend or affect the Master Agreement in relation to any other Principal Agreement or transaction. Our opinion is subject to this.
- 4.1.10 The ability of the Master Agreement to terminate all Principal Agreements may be limited by contrary intention contained in any Principal Agreements or in any transaction.
- 4.1.11 A judgment on the Master Agreement, whether in the courts of this Jurisdiction or elsewhere, may be held to supersede the Master Agreement so that the obligations to pay interest and regarding contractual currency may not survive such judgment.

- 4.1.12 Any payment under the Master Agreement involving the government of any country which is the subject of United Nations sanctions (an "**Affected Country**"), any person or body resident in, incorporated in, or constituted under the laws of, any Affected Country or exercising public functions in any Affected Country, or any person or body controlled by any of the foregoing may be subject to restrictions pursuant to such sanctions as implemented in the laws of this Jurisdiction.
- 4.1.13 The power of the courts of this Jurisdiction to order specific performance of an obligation or to order any other equitable remedy is discretionary and, accordingly, such courts might make an award of damages where specific performance of an obligation or any other equitable remedy was sought.
- 4.1.14 In proceedings in the courts of this Jurisdiction, the effectiveness of a waiver of immunity is subject to the provisions of the State Immunity Act 1978. This Act provides that a state (including the sovereign or other head of state, the government of that state or any department of that government) is immune from the jurisdiction of the courts of this Jurisdiction except as otherwise provided in the Act. There are a number of exceptions in the Act to the general immunity, including where the state has submitted to the jurisdiction of the courts of this Jurisdiction and in respect of proceedings relating to a commercial transaction, as defined in the Act, entered into by the state.
- 4.1.15 In order to be effective, a submission to the jurisdiction of particular courts may require compliance with specific requirements because of the nature or location of the submitting Party and, accordingly, the submission made by such Party may not be effective if such requirements have not been complied with.
- 4.1.16 Waiver of jury trial is not relevant for the purposes of contractual enforcement proceedings in relation to the Master Agreement in the courts of this Jurisdiction.

This opinion is stated as of its date and is rendered solely to TBMA for its and its members' use in connection with the Master Agreement. No other person may rely on it, nor may the contents of this opinion be disclosed to any other person without our prior consent.

Yours faithfully,

Clifford Chance
Limited Liability Partnership