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February 1, 2006

Minister L.J. Brinkhorst
Ministry of Economic Affairs
Bezuidenhoutseweg 30
P.O. Box 20101
2500 EC The Hague
The Netherlands

Re: ET/EM/6005347 - Cross Border Lease Transactions

Dear Minister:

This is in response to the letter from A. Jurjus, Deputy Director, Energy Markets Department, Ministry of Economic Affairs, to R. K. Meilman of Chadbourne & Parke LLP whereby he stated that the Committee on Economic Affairs of the Second Chamber of the Dutch Parliament has requested Chadbourne & Parke LLP to analyze a representative number of U.S./Dutch cross border lease transactions ("CBLs") and answer certain questions. As you are aware, we are not in a position to respond to questions about specific CBL transactions. We would, however, be pleased to respond to the Committee's questions based on our experience with CBLs and other leasing transactions generally.

The approach we have taken is to restate each of the questions and then immediately thereafter attempt to respond in as straight forward a fashion as possible. A more detailed memorandum as to the legal analysis is attached hereto. For purposes hereof we have assumed that New York law will be the governing law. There are circumstances, however, where Dutch law may be the governing law.

1. To what extent are American investors obliged to, together with their (CBL) counterparties seek alternatives (for example, letters of credit) in case such investors call an "event of default or loss" and such call is recognized by a U.S. court?

Response: Some background may be helpful to put this question in context. The documentation for CBLs generally sets forth a procedure to be followed upon the occurrence of an event that may trigger an event of default or loss. This includes establishing a time frame in which certain action is required to be taken, and, in the case of an event of default, provides periods of time during which the lessee can cure a default. In the case of certain events of loss, possible cures, such as posting of additional collateral, may have been agreed to in the documentation. In the case of either an event of loss or an event of default, once the applicable time periods have elapsed with no successful curative action on the part of the lessee, an obligation to pay damages to the American investor, or lessor (the "lessor"), may mature. At that point, one option would be to require the lessee to pay the lessor the full amount of the damages and for the lessor to transfer back the assets to the lessee.

In making any decision to declare an event of default and pursue remedies under the lease, the lessor will have an obligation under New York law to act in good faith. Failure to do so may give rise to "lender liability" claims against the lessor. For example, a court would be reluctant to permit the exercise of remedies upon the occurrence of a "technical" default which did not put the lessor at risk.

Lessors are not obliged under New York law to seek alternate remedies and/or damages in the case of event of default or loss under a lease, assuming a New York court agrees that an event of default or loss has occurred. New York law encourages the parties to a lease to agree in advance on the measure of damages in such cases. Accordingly, assuming that the parties to a CBL have agreed in advance as to what the measure of damages will be, a New York court would be reluctant to require them to seek alternatives.

2. To what extent do the American investors have a right to receive the contractually agreed upon "termination fee", in the event they call in an "event of default or loss", such call is recognized by a U.S. court, in the event these investors are not obliged to, as posed by the previous question, seek alternatives with their contractual counterpart?

Response: As stated in response to question 1, New York law invites parties to liquidate their damages in the case of an event of default or loss under a lease and to contractually agree upon a "termination fee". A New York court would enforce payment of such "termination fee" if such court determines that it is a reasonable estimate of the damages in light of the then anticipated harm caused by such event of default or loss.

3. In the event the first scenario (an obligation to negotiate) applies, what are the maximum costs involved with obtaining the required "letters of credit", as established by an independent financial specialist?

Response: As stated in response to question 1, we do not feel that the American investors have an obligation to negotiate. Notwithstanding this response, we are not investment or commercial bankers and it is not an appropriate area of our expertise to advise upon the costs of obtaining letters of credit.

Should you have any further questions, please do not hesitate to contact Roy K. Meilman .

Sincerely,

Chadbourne & Parke LLP

Chadbourne & Parke LLP

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Attachment

Memorandum on Certain Aspects of Cross-Border Leases

We understand that the Minister of Economic Affairs of the Netherlands (the "Minister") intends to propose legislation which will require that energy companies in the Netherlands unbundle their energy business. These companies would be required under the proposed legislation to separate network assets and activities ("network assets") from energy generation and supply assets and activities ("non-network assets"). The Committee on Economic Affairs of the Second Chamber of the Dutch Parliament has requested the Minister to ask us to address certain questions concerning U.S.-Dutch cross-border leases which involve either network assets or non-network assets ("CBLs").

For purposes of this Memorandum, we have assumed that (i) the parties to the CBLs have chosen New York law to govern the CBLs; (ii) the CBLs will be determined to be leases of goods[1] (i.e. all things that are moveable at the time the CBLs were entered into or are fixtures, which is defined to mean goods which become so related to particular real estate that an interest in them arises under real estate law) under New York law as opposed to a sale of, or a security interest in, goods; (iii) an event of default has occurred by the lessee under a particular CBL and all notices, demands and actions required by the U.S. lessor as a precondition to the exercise of remedies under such CBL have been taken; and (iv) one of the remedies contained in a defaulted CBL allows the U.S. lessor to demand payment from the lessee of liquidated damages based on a formula equal to the sum of past due lease payments and an amount determined from a stipulated loss value or termination value schedule, less the net proceeds of disposition (whether by sale or re-lease) ("Liquidated Damages"), in circumstances where an event of default has occurred.

You have asked questions as to two aspects of a CBL. First, whether a New York court in a properly presented case would enforce a remedy provision in a CBL allowing the U.S. lessor to demand payment of Liquidated Damages in the case of an event of default thereunder. Second, whether a New York court in a properly presented case would enforce a provision in a CBL allowing the U.S. lessor to demand payment of Liquidated Damages in the case of an event of loss occurring as to the goods during the term of the CBL (i.e., loss, destruction or other negotiated events). As a related question to either of the above, you have also asked us to address whether New York law would impose an obligation on the U.S.

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[1] The issue of what law applies is extremely complex, and it is quite possible that Dutch law, as opposed to New York law, may apply.

lessor to accept a letter of credit or other alternative arrangements in lieu of payment of Liquidated Damages.

The applicable provisions of New York law which govern these questions can be found in Article 2A of the New York Uniform Commercial Code ("NYUCC"). In codifying the law with respect to leases of goods, Article 2A attempted to preserve the parties' freedom of contract in structuring, negotiating and documenting a lease of goods. In recognition of the fact that "[m]any leasing transactions are predicated on the parties' ability to stipulate an appropriate measure of damages in the event of default," Article 2A adopted a flexible rule with respect to liquidated damages. NYUCC § 2A-101, Official Comment. It provides in Section 2A-504(1) of the NYUCC that "[d]amages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission."

In creating this liquidated damages provision, the drafters of the UCC made this comment:

> Many leasing transactions are predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission. The rule with respect to sales of goods (Section 2-718) may not be sufficiently flexible to accommodate this practice. Thus, consistent with the common law emphasis upon freedom to contract with respect to bailments for hire, this section has created a revised rule that allows greater flexibility with respect to leases of goods.
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> .... The impact of local, state and federal tax laws on a leasing transaction can result in an amount payable with respect to the tax indemnity many times greater than the original purchase price of the goods. By deleting the references to unreasonably large liquidated damages [contained in Section 2-718(1)] the parties are free to negotiate a formula, restrained by the rule of reasonableness in this section. These changes should invite the parties to liquidate damages. NYUCC § 2A-504(1), Official Comment.

Most, if not all, CBLs contain a damage formula predicated in part on a termination value or stipulated loss schedule which the parties agree to at the commencement of the various CBLs. Under this formula the amount of liquidated damages would more than likely be reduced by the net proceeds of disposition of the goods by the U.S. lessor (whether

by sale or re-lease). Whether a particular formula is enforceable would be determined in the context of a specific CBL by application of a standard of reasonableness in light of the harm anticipated when the formula was agreed to. As to what is reasonable, courts are likely to find a liquidated damages formula to be a reasonable pre-estimate of probable loss if the "formula puts the lessor in no better position than it would otherwise be in had the lease been fully performed." *In re Baldwin Rental Centers, Inc., 228 B.R. 504, 509 (Bankr. S.D. Geo. 1998). See also, ePlus Group, Inc. vs Panoramic Communications LLC, 2003 U.S. Dist. LEXIS 4657 (S.D.N.Y. 2003).* Accordingly, in our view a New York court would enforce payment of Liquidated Damages where a U.S. lessor elects that as a remedy in the case of an event of default by the lessee under a CBL, subject to such court's determination that the provision is reasonable.

As to the second question, namely, whether a New York court would enforce a provision in a CBL allowing the U.S. lessor to demand payment of Liquidated Damages in the case of an event of loss occurring as to the goods during the term of the CBL, we believe that the court would reach the same conclusion to that discussed above with regard to an event of default. You will note that Section 2A-504(1) applies not only in a default context, but also to damages payable as a result of "any other act or omission." Clearly in the case of an event of loss, where the parties negotiated a provision that provides for the lessee to pay Liquidated Damages, a New York court would be very reluctant to change this negotiated provision, even though one party now feels that it is not appropriate or too harsh.

Your final question was whether a New York court would impose an obligation on the U.S. lessor to accept some alternative arrangements in lieu of the payment of Liquidated Damages in the case of either an event of default or an event of loss. Again, given Article 2A's emphasis on freedom to contract in leasing transactions, in our view a New York court would look to the negotiated remedy provisions in a particular CBL, and, even if the liquidated damages provision contained in such CBL were found to be unreasonable, the court would attempt to analyze the other negotiated remedies to find an appropriate result. In any event we do not feel that a New York court would require a lessor to accept a letter of credit in lieu of damages if that was not a pre-negotiated remedy.

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This Memorandum addresses solely the questions presented. This Memorandum is for the benefit of the Minister and no other person. Dutch energy companies, and other interested persons other than the Minister, should consult their own U.S. legal advisors as to the matters discussed in this Memorandum, and must rely solely on the advice of their own advisors and not on anything contained in this Memorandum.

Chadbourne & Parke LLP