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**European Association of Public
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Avenue de la Joyeuse Entrée 1-5
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22 December, 2009

Re.: **EBF Master Agreement**

Dear Sirs:

We have been asked, as legal advisors to the Malta Bankers' Association, to deliver this opinion in respect of issues arising under the laws of Malta in connection with the Master Agreement for Financial Transactions (the "**Master Agreement**") published by the Banking Federation of the European Union ("**EBF**"), the European Savings Banks Group (the "**ESBG**") and the European Association of Cooperative Banks (the "**EACB**").

In this opinion "**Malta**" means the Republic of Malta and "**Maltese**" shall be construed accordingly;



This opinion is given in respect of parties which are the following entities, namely:

- (a) a limited liability company (a *societe anonyme*), whether constituted as a public limited company or a private limited company, established under or regulated by the Companies Act (Cap. 386 of the Laws of Malta)(the “**Companies Act**”), which company could be a credit institution, an investment firm, an insurance undertaking or a trading company;
- (b) an investment company with variable share capital (SICAV), whether constituted as a multi-fund or multi-class investment company or otherwise, and whether constituted as a public limited company or a private limited company, established under or regulated by the Companies Act;
- (c) a cell company (PCC) constituted in terms of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations (S.L. 386.10), and whether registered as a public limited company or a private limited company under the Companies Act; and
- (d) a company established under or regulated by the Merchant Shipping (Shipping Organisations – Private Companies), Regulations, 2004 and qualifying as a shipping organisation in terms of article 84Z of the Merchant Shipping Act (Cap. 234 of the Laws of Malta),

and to branches of same established or located in or outside Malta (the “**Parties**”). Parts of this opinion also extend to foreign entities, and to branches thereof, whether located in Malta or otherwise, when such entities and/or branches are specifically mentioned in this opinion.

For the purposes of this opinion, we have not analysed other entities which are subject to special insolvency regimes. Nor have we analysed the insolvency of collective investment schemes which are not organised as SICAVs under the Companies Act.

1. Introduction

The Master Agreement consists of:

- (i) an agreement between the parties thereto providing a basis for financial transactions (each a “**Transaction**”) between them (the “**Special Provisions**”) to which an appendix (the “**Appendix**”), including elections and amendments, is attached,
- (ii) the General Provisions governing Transactions under such Master Agreement (the “**General Provisions**”),

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- (iii) any annexes (each an "Annex"), including Annexes concerning special types of Transactions (the "Product Annexes") and any supplement thereto (the "Supplements"),
- (iv) a Margin Maintenance Annex (the "Margin Maintenance Annex"),

or, if no Special Provisions have been agreed between the parties, the above mentioned General Provisions, any Annexes, any Supplements, the Margin Maintenance Annex in respect of all Transactions into the terms of which they have been incorporated.

As of the date of this opinion, the following Product Annexes and Supplements have been published:

- (a) the Product Annex for Repurchase Transactions,
- (b) the Product Annex for Securities Loans,
- (c) the Product Annex for Derivative Transactions,
- (d) the Product Annex for Deposits and Loans,
- (e) the Interest Rate Transactions Supplement to the Product Annex for Derivative Transactions (the "Interest Rate Supplement"),
- (f) the Option Transactions Supplement to the Product Annex for Derivative Transactions (the "Options Supplement"),
- (g) the Foreign Exchange Transactions Supplement to the Product Annex for Derivative Transactions (the "Foreign Exchange Supplement").

The Special Provisions, the General Provisions, the Margin Maintenance Annex and the Product Annexes listed in paragraphs (a) and (b) above have been published by the EBF, the ESBG and the EACB, whereas the Product Annex and Supplements listed in paragraphs (c), (d), (e) and (f) above have been published by the EBF.

In rendering this opinion, we have examined the documents listed in paragraphs (a) and (b) above, as written in the English language and in the form designated "Edition January 2001". As far as the documents listed in paragraphs (i), (ii) and (iv) and (c), (d), (e) and (f) above are concerned, we have examined such documents as written in the English language and in the form designated "Edition 2004".

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

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The opinions herein expressed relate solely to matters of Maltese law as in force at the date hereof and do not consider the impact of any laws (including insolvency laws) other than Maltese law, even in the case where, under Maltese law, any foreign law falls to be applied. We have assumed that there is nothing in the laws of another jurisdiction that affects the opinions herein expressed.

No opinion is being given on taxation matters and this opinion is not being delivered to you in connection with any specific transaction. In the case of collateral consisting of securities or other financial instruments which are situated in Malta, we recommend that you obtain specific advice on a case by case basis in connection with the requirements and formalities relating to their transfer.

This opinion is written for the benefit of the Malta Bankers' Association, the EBF, the ESBG, the EACB and the European Association of Public Banks (the "**EAPB**"), of the National Banking Associations being members of the EBF, the ESBG, the EACB and the EAPB and of the members of such National Banking Associations, the Malta Bankers' Association, the EBF, the ESBG, the EACB and the EAPB, the National Banking Associations being members of the EBF, the ESBG, the EACB and the EAPB and the members of such National Banking Associations are hereinafter collectively referred to as "**Members**"). The purpose of this opinion is to provide an aid to Members in understanding generally issues which may be relevant from the viewpoint of Maltese law when any of them want to enter into Master Agreements.

We wish to emphasize, though, with your explicit approval, that the purpose of this opinion is not to provide a basis on which any of the Members or any other person can rely with respect to, or in connection with, any specific transaction or act which any of them may undertake or omit to undertake. Accordingly, we assume no liability to any person in the context of this opinion.

This opinion constitutes a legal opinion for banking regulatory purposes and may be made available to the appropriate regulatory authorities administering capital adequacy rules, the European Central Bank and the National Central Banks of the European Union Member States.

2. **Assumptions**

For the purpose of this opinion, we have assumed that:

- (a) the parties thereto have entered into (i) the Special Provisions or, alternatively, (ii) one or more Transactions without having previously agreed on any Special Provisions and, in either case, made the General Provisions, either one, two or all of the Product Annexes (including, in the case of the

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Product Annex for Derivative Transactions, one or more Supplements) and/or the Margin Maintenance Annex a part thereof,

- (b) each party is able lawfully to enter into the Master Agreement, and the Master Agreement is within the capacity and power of, and has been validly entered into by, the parties thereto,
- (c) when governed by a law other than the laws of Malta, the Master Agreement shall, upon entry into the Special Provisions, be valid and legally binding in accordance with the laws of the jurisdiction (other than Malta) by which the Master Agreement is expressed to be governed and the choice of such governing law is recognised by the laws of such jurisdiction,
- (d) when governed by a law other than the laws of Malta, the Master Agreement and all Transactions under it are valid, legally binding and enforceable in accordance with their terms under the laws of such other jurisdiction and the choice of such governing law contained in the Master Agreement is recognised by the laws of such other jurisdiction,
- (e) when Transactions are governed by a law other than the laws of Malta, such Transactions are capable of being terminated and liquidated under such governing law in accordance with the provisions of the Master Agreement,
- (f) the requirements of the law governing the transfer of securities and margin are complied with;
- (g) unless otherwise stated herein, the Master Agreement and all Transactions carried out under the Master Agreement are entered into prior to the formal commencement of insolvency proceedings against either party and at the time at which a transaction is entered into under the Master Agreement, neither party has actual notice of the insolvency of the other party;
- (h) both parties which have entered into a Master Agreement are either:
 - (i) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund and the European Investment Bank;
 - (ii) a credit institution as defined in Article 1(1) of Directive 2000/12/EC, including the institutions listed in article 2 (3) of that Directive;
 - (iii) an investment firm as defined in Article 1 (2) of Council Directive 93/22/EC of 10 May 1993 on investment services in the securities field;
 - (iv) a financial institution as defined in Article 1(5) of Directive 2000/12/EC;

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- (v) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and a life assurance undertaking as defined in Article 1(a) of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance;
 - (vi) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1 (2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);
 - (vii) a management company as defined in Article 1a(2) of Directive 85/611/EEC as amended by Directive 2001/107/EC;
 - (viii) any other collective investment scheme which is licensed or recognised in terms of the Investment Services Act or otherwise licensed or authorised by a competent authority in a recognised jurisdiction;
 - (ix) a central counterparty, settlement agent or clearing house and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in paragraphs (a) to (i) above; or
 - (x) a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an entity as defined in paragraphs (i) to (ix) above,
- (i) to the extent that the Master Agreement makes reference to any provision of any foreign law or statute or to any foreign regulation or rule, that such provision of foreign law, statute regulation or rule does not run counter to the public policy of Malta, and
- (j) neither party is prohibited or restricted by applicable regulatory laws or regulations from entering into the Master Agreement or Transactions thereunder.

3. Opinion

Subject to the assumptions made above and the qualifications stated below, we are of the opinion that under the laws of Malta:

3.1 General Insolvency Issues

3.1.a. Types of Insolvency Proceedings

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The only insolvency, composition or rehabilitation proceedings (which, for the purposes of this opinion, shall include all proceedings in respect of its assets, or any branch it may have in Malta) to which a party to the Master Agreement may become subject in Malta are the following:

(i) Dissolution and consequential winding-up in terms of Article 214 *et seq.* of the Companies Act. This can either take the form of a Winding-up by the Court or a Voluntary Winding-Up; &

(ii) Company Reconstructions in terms of Article 327 *et seq.* of the Companies Act;

(These proceedings are collectively referred to as “**Insolvency Proceedings**”).

In addition to Insolvency Proceedings, a party to the Master Agreement may become subject in Malta to a company recovery procedure in terms of Article 329B *et seq.* of the Companies Act. (These proceedings are collectively referred to as “**Other Relevant Proceedings**”, and together with Insolvency Proceedings, the “**Proceedings**”).

Companies which qualify as a “shipping organisation” in terms of the Merchant Shipping Act (Chap. 234 of the Laws of Malta) are, as a general rule, not governed by the Companies Act, but by the Merchant Shipping (Shipping Organisations – Private Companies) Regulations, 2004 issued under the Merchant Shipping Act. These Regulations contain provisions substantially analogous to the Companies Act in so far as concerns the dissolution and consequential winding-up, company reconstructions and the company recovery procedure.

The Proceedings would be adequately covered by the acts, events or circumstances described in Section 6(1)(a)(viii) of the General Provisions. Section 6(1)(a)(viii) of the General Provisions includes any such Proceedings.

3.1.b. Insolvency Treaties

Malta has not entered into bankruptcy treaties with any country. However, we bring to your attention the following issues.

Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings

As of 1st May, 2004, the date when Malta became a full member of the European Union, one must also take into consideration the overriding provisions of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “**Insolvency Regulation**”). The Insolvency Regulation has had a significant effect on Maltese insolvency laws, in so far as private international laws relating to insolvency are concerned. The Insolvency Regulation provides in substance that the courts with

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jurisdiction to open insolvency proceedings are those of the Member State where the debtor has his "centre of main interests". Denmark (pursuant to recital 33 of the Insolvency Regulation) is not participating in the adoption of the Insolvency Regulation and is therefore neither bound by it nor subject to its application. The Insolvency Regulation limits the instances when secondary proceedings in another Member State can be opened. In addition, the Insolvency Regulation provides that, unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (the *lex concursus*) to a series of issues as outlined in the Insolvency Regulation. Therefore, in virtue of the "centre of main interests" rule, the fact that a company is incorporated or governed by the laws of Malta does not mean that Maltese insolvency laws would automatically apply, since Malta may not be the centre of main interests of such a company. In addition, the centre of main interests may change from time to time and all this has a bearing on the applicable conflict of laws rule.

It must be noted that the Insolvency Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

One of the exceptions to the general rule of the *lex concursus* which is relevant to this opinion is set out in Article 6 of the Insolvency Regulation which reads as follows:

"1. 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.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m)."

A reading of Article 6 of the Insolvency Regulation raises legal doubts as to whether close-out netting is fully included within the parameters of Article 6 of the Insolvency Regulation or otherwise. We are aware of the arguments in European legal circles that the process of close-out netting involves elements in addition to set-off, such as early termination and acceleration of claims, and therefore the doubt as to whether the early termination mechanisms and the acceleration of claims are covered or otherwise by the exception to set-off in the Insolvency Regulation. We are also aware of the argument that set-off and netting are two distinct legal concepts and that the lack of protection for netting in the Insolvency Regulation indicates that the latter did not intend to protect close-out netting.

Although this lack of clarity may raise doubts as to the applicable conflict of laws rule relating to close-out netting, it would appear that the provisions of the Insolvency Regulation do not adversely affect the validity of close-out netting under Maltese law,

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as discussed below. If Maltese law is applicable, then close-out netting is valid, whereas if Maltese conflict of laws rules defer to the law applicable to the insolvent debtor's claim, then it is the law of the debtor's claim which must determine whether such close-out netting is valid or otherwise.

Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, 2004

In the case of insurance undertakings, regard must be paid to the Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, 2004 (the "**Insurance Undertakings Regulations**"), which transpose the provisions of Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings ("**Insurance Undertakings Winding-Up Directive**"). The Insurance Undertakings Regulations apply to member states of the European Union ("**Member States**") and to countries within the European Economic Area ("**EEA**"), namely Norway, Iceland and Liechtenstein (the EEA States together with the Member States shall hereinafter be referred to as the "**Applicable States**").

The Insurance Undertakings Regulations broadly provide that it is the home Applicable State of an insurance undertaking which will have exclusive jurisdiction to open winding-up proceedings and reorganisation measures in relation to an insurance undertaking (and their branches set up in host Applicable States). All the winding-up proceedings will be governed by the insolvency law of the home Applicable State (the *lex concursus*), subject to specified exceptions. In contrast to the provisions of the Insolvency Regulation, which allows the opening of secondary insolvency proceedings in certain circumstances, it is not possible for Applicable States where the insurance undertaking has a branch to open any local secondary insolvency proceedings in relation to the insolvent insurance undertaking.

One of the exceptions to the rule of the *lex concursus* is that set out in Regulation 24(1) which lays down that the commencement of reorganisation measures or winding-up proceedings does not affect the rights of creditors to demand the set-off of their claims against the claims of the Maltese insurance undertaking, "*where such a set-off is permitted by the law of the Member State or EEA State which is applicable to the claim of the Maltese insurance undertaking.*" Regulation 24(2) however does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Regulation 24(1) of the Insurance Undertakings Regulations is limited in its scope of application to the law of an Applicable State and therefore the above analysis will only apply to the extent that the law applicable to the claim of the Maltese insurance undertaking is that of an Applicable State.

In parallel with Article 6(1) of the Insolvency Regulation, Regulation 24(1) effectively provides that where set-off is not permitted under the *lex concursus*, creditors may rely on the provisions of the law applicable to the debtor's claim, if the latter law allows

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such set-off. Accordingly, this exception will only be relevant if the *lex concursus* does not permit such a set-off. As discussed below, Maltese law allows set-off within the context of the Master Agreement.

Credit Institutions (Reorganisation and Winding Up) Regulations, 2004

Directive 2001/24/EC on the reorganisation and winding-up of credit institutions (“**Credit Institutions Winding-Up Directive**”) has been transposed in Malta by virtue of the Credit Institutions (Reorganisation and Winding Up) Regulations, 2004 (the “**Credit Institutions Winding-Up Regulations**”). The Credit Institutions Regulations apply in relation to Applicable States.

The Credit Institutions Winding-Up Regulations broadly provide that it is the home Applicable State of a credit institution which will have exclusive jurisdiction to open winding-up proceedings and reorganisation measures in relation to the credit institution (and their branches set up in host Applicable States). All the winding-up proceedings will be governed by the insolvency law of the home Applicable State (the *lex concursus*), subject to specified exceptions. In contrast to the provisions of the Insolvency Regulation, it is not possible for Applicable States where the credit institution has a branch to open any local secondary insolvency proceedings in relation to the insolvent credit institution.

The Credit Institutions Winding-Up Regulations also apply to credit institutions not having a head office within an Applicable State, where such institution has branches in at least two Applicable States. The said Regulations imply that each such branch would be treated individually, although there must be co-operation between the respective authorities of each Applicable State where a branch is located.

Regulation 25(1) of the Credit Institutions Winding-Up Regulations provides that “*the adoption of reorganisation measures or the opening of winding-up proceedings shall not affect the rights of creditors to demand the set-off of their claims against the claims of the Maltese credit institution where such a set-off is permitted by the law of the Member State or EEA State which is applicable to the claim of the Maltese credit institution.*” Regulation 25(2) however does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Regulation 25(1) of the Credit Institutions Winding-Up Regulations is limited in its scope of application to the law of an Applicable State, and therefore the above analysis will only apply to a Master Agreement governed by the law of an Applicable State.

Regulation 26 of the Credit Institutions Winding-Up Regulations, in its turn, provides that the enforcement of proprietary rights in instruments or other rights in such instruments the existence or transfer of which presupposes their recording in a register, an account or a centralised deposit system held or located in an Applicable State, shall

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be governed by the law of the Applicable State where the register, account or centralised deposit system in which those rights are recorded is held or located.

In addition, Regulation 27 of the said regulations provides that: "*Pursuant to the provisions of the Set-Off and Netting on Insolvency Act, netting agreements shall be governed by the law of the contract which governs such agreements.*" The reference in Regulation 27 to the provisions of the Set-Off and Netting on Insolvency Act (Cap. 459 of the Laws of Malta) (the "**Set-Off Act**") adds nothing to this clause, since in fact the said Act contains no such conflict of laws rule. However, this does not detract anything from the conflict of laws rule that netting agreements are to be governed by the law of the contract which governs such agreements.

In addition, Regulation 28 provides that "*repurchase agreements shall be governed solely by the law of the contract which governs such agreements.*" This rule is without prejudice to Regulation 26 which broadly sets out that the enforcement of proprietary rights in book-entry instruments is to be governed by the law of the Applicable State where such book-entry system is located.

We believe that the Master Agreement falls within the meaning of 'a netting agreement', whereas when the Master Agreement is utilised together with the Product Annex for Repurchase Transactions, it would fall within the meaning of a 'repurchase agreement'. Effectively therefore the practical effect of Regulation 27 (and Regulation 28 in the case of repurchase transactions) is that, on an Insolvency Proceeding of a Maltese bank, under Maltese conflict of laws rules, the validity and enforceability of the Master Agreement (including the provisions on close-out netting on insolvency) will be governed by the governing law of the Master Agreement, and in our view the said governing law would apply without regard to the effect of any mandatory insolvency rules of Malta.

Regulations 27 or 28 of the Credit Institutions Winding-Up Regulations are not limited in their scope of application to the law of an Applicable State, and therefore the above analysis will apply to the Master Agreement even if the governing law of the Master Agreement is not that of an Applicable State.

General

The views set out in this opinion are in all cases subject to the overriding provisions of the Insolvency Regulation, the Credit Institutions Winding-Up Regulations and the Insurance Undertakings Regulations, where applicable. Accordingly, by virtue of the Insolvency Regulation, the Credit Institutions Regulations or the Insurance Undertakings Regulations: (a) the insolvency proceedings of a Maltese branch of a company established outside Malta may not be carried out in Malta, and/or (b) the applicable conflict of laws rule to determine the reorganisation or winding-up of a branch in Malta may point to the laws of another jurisdiction, and/or (c) the applicable

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conflict of laws rule may point to the laws of another jurisdiction in so far as the insolvency measures, termination provisions, set-off and netting provisions are concerned.

3.2 General Opinion

When governed by the laws of Malta, the provisions of the Master Agreement constitute the legal, valid and binding obligations of the parties thereto enforceable in accordance with their respective terms under the laws, including insolvency laws, of Malta.

When governed by a law other than the law of Malta, all the provisions of the Master Agreement will be binding and enforceable in accordance with their respective terms under the laws, including insolvency laws, of Malta.

On the assumption that the other available local language versions of the Master Agreement accurately reflect the English version, we hereby confirm that the conclusions set forth in the opinion also apply to these other available local language versions of the Master Agreement.

3.3 Recharacterization

3.3.1 Delivery or transfer of Securities

As contemplated by Section 3(2)(a) of the General Provisions, under the laws of Malta, any delivery or transfer of Securities by a party to the other pursuant to the Agreement shall constitute a transfer to such other party of the unrestricted title to such securities and not the creation of a security interest. The transferee of such securities shall, *inter alia*, have an unrestricted right to dispose of such Securities.

The provisions of the Financial Collateral Arrangements Regulations, 2004¹, (the “**Financial Collateral Regulations**”), which transpose the provisions of Directive 2002/47/EC on financial collateral arrangements, have eliminated the risk of re-characterisation of the Master Agreement as the creation of a security interest, or similar arrangement, for financial collateral arrangements falling within its scope, in that the Financial Collateral Regulations provide that a financial collateral arrangement is valid and enforceable in accordance with its terms and the Financial Collateral Regulations.

The Financial Collateral Regulations are limited to those instances where, in respect of *inter alia* an agreement, both the collateral taker and the collateral provider are the parties listed in Clause 2(h) above.

¹ L.N. 177 of 2004, as amended.



It must also be brought to your attention that the applicability of the Financial Collateral Regulations is subject to the following three conditions:

- (a) the financial collateral arrangement must relate to financial collateral consisting of cash (defined as money credited to an account or similar claims for the repayment of money, including money market deposits) or instruments (as defined below);
- (b) the financial collateral has been provided (i.e. it has been delivered, transferred or is in any other manner in the possession or under the control of the collateral taker) and can be evidenced in writing; the evidencing of the provision of financial collateral must allow for the identification of the financial collateral to which it applies, but for this purpose it is sufficient to prove that the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account; and
- (c) the financial collateral arrangement itself can be evidenced in writing or in a legally equivalent manner.

The definition of 'instrument' for the purposes of the Financial Collateral Regulations is set out as follows:

(1) Transferable Securities

Those classes of securities which are negotiable on the capital market and include:

- (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depository receipts in respect of shares;
- (b) bonds or other forms of securitised debt, including depository receipts in respect of such securities;
- (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

(2) Money Market Instruments

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Those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment.

- (3) Units in collective investment schemes.
- (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or financial measures which may be settled physically or in cash.
- (5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event).
- (6) Options, futures, swaps, and any other derivative contracts relating to commodities, that can be physically settled provided that they are traded on a regulated market and/or a multilateral trading facility.
- (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled, are not for commercial purposes, are not in article 6 of this Schedule, and, which have the characteristics of other derivative instruments, having regard to whether, inter alia, they are cleared and settled throughout recognized clearing houses or are subject to regular margin calls.
- (8) Derivative instruments for the transfer of credit risk.
- (9) Rights under a contract for differences or under any other contract the purpose or intended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price for property of any description or in an index or other factor designated for that purpose in the contract.
- (10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Schedule, which have the characteristics of other derivative instruments, having regard to whether, inter alia, they are traded on a regulated market or a multilateral trading facility, are cleared and settled through recognized clearing houses or are subject to regular margin calls.

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- (11) Certificates or other instruments which confer property rights in respect of any instrument falling within the Schedule.
- (12) Foreign exchange acquired or held for investment purposes.

As far as formalities are concerned, the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement will not be dependent on the performance of any formal act. The only relevant exception to this rule is the requirement for the recording on the issuer's register of the transfer of title in the case of registered instruments. In the case of financial collateral consisting of securities or other instruments which are situated in Malta, we recommend that you obtain specific advice in connection with the particular securities or other instruments which will form part of the Master Agreement. This advice will vary depending on whether the Agreement falls within the parameters of the Financial Collateral Regulations, the nature of the collateral and other matters.

It must be pointed out to you as a matter of caution that Malta has limited the obligations which may be secured by a financial collateral arrangement to obligations which give right to: (a) cash settlement and/or (b) delivery of financial instruments / securities. Accordingly, there is a doubt at law whether the Financial Collateral Regulations apply when the underlying obligation being secured relates to physically-settled bullion and other commodities transactions. However, by virtue of the Set-Off Act insolvency close-out netting applies in Malta across the board, irrespective of the underlying nature of the transactions or obligations.

Subject to the satisfaction of all the conditions set out above, the Master Agreement stands to benefit from the favourable provisions set out in the Financial Collateral Regulations and we are of the opinion that the Master Agreement will be treated as a *sui generis* contract enforceable in accordance with its terms and the provisions of the Financial Collateral Regulations. The effect of the Financial Collateral Regulations on financial collateral arrangements entered into before the Financial Collateral Regulations came into force on the 1st May, 2004 is not clear.

Reference is made to the qualification set out in paragraph 4.15 of this opinion in relation to Transactions which do not fall within the ambit of the Financial Collateral Regulations.

Securities Loans

When the Master Agreement is utilised together with the Product Annex for Securities Loans, the loans entered into will take effect as a transfer of absolute title in the securities which are the subject of an outstanding loan from the Lender to the Borrower,



and the Borrower will have only a contractual obligation to transfer Equivalent securities upon termination of the loan. We are of the view that securities lending has all the elements required under Maltese law to enable Maltese Courts to characterise such a transaction as a loan for consumption or *mutuum*², since in virtue of such a loan, the Borrower becomes the owner of the thing lent. This view is based on the assumption that the securities lent are fungible in nature, meaning in substance that the Borrower need not deliver back the same securities but only needs to deliver equivalent securities.

3.3.2 Derivative Transactions

Gaming and Betting

Article 1717A of the Civil Code provides that no debt or other obligation arising under any contract of differences, interest cap agreement, swap, foreign currency exchange or other similar agreement the purpose or intended purpose of which is to secure a profit or avoid a loss (by reference to fluctuations in the value or price of property of any description or in an index or other factor designated for such purpose in the contract) shall be void or unenforceable by reason of any Maltese law on gaming and betting. Accordingly, subject to the following paragraph, any limitation imposed by Maltese laws on gaming and betting has no effect on the validity and enforceability of any Derivative Transaction.

Having regard to the intention of the legislator to cover all such contracts of differences and derivatives and to the drafting of the particular Article of the law, we are of the view that the parameters of Article 1717A of the Civil Code are wide enough to also cover credit linked Derivative Transactions and Derivative Transactions related to weather conditions.

Insurance

We are aware of the debate as to whether certain derivative transactions partake of an insurance contract. This would have two major implications: (a) any person carrying on the business of insurance in or from Malta needs to be authorised by the Malta Financial Services Authority (as the Competent Authority); and (ii) such a derivative would have to comply with the requisites of an insurance contract under Maltese law (such as the duty of utmost good faith and insurable interest). Maltese law does not throw any light as to whether a derivative contract entered into in breach of the above Maltese insurance laws would still be enforceable or otherwise by the 'insured', but it does state that no contract of insurance is void or voidable by an 'insurer' by reason only that there has been a breach of Maltese insurance regulatory laws.

² Under Title XVII 'Of Loan for Consumption or *Mutuum*' under Part II of Book Second of the Civil Code (Cap. 16 of the Laws of Malta).

Derivative transactions such as credit derivatives and weather derivatives are still rather uncommon in Malta and accordingly this debate as to their real nature under Maltese law is still in its infancy. If the matter were ever to be determined by the Malta Financial Services Authority or by the Maltese Courts, regard will be paid to the interpretation and usage obtaining in foreign jurisdictions, particularly the United Kingdom, Italy and France, in order to determine whether a particular derivative contract should be recharacterised as an insurance contract or otherwise. Although no opinion is expressed in this regard, with reference to Credit Default Swaps, on the basis of communications with the Insurance Business Unit of the Malta Financial Services Authority, we are of the view that the better interpretation should be that to the extent that Credit Default Swaps are typically structured in a manner whereby any payments become due upon the happening of a determinable event in respect an obligation of the reference entity without the requirement for either party to such a derivative to suffer a loss in respect of such obligation of the reference entity in a Transaction, a Credit Default Swap entered into pursuant to the Master Agreement should not be recharacterised as a contract of insurance.

3.4.1 Validity of the Termination and Close-Out Netting Provisions of the Master Agreement

The termination provisions contemplated under Section 6(1)(b) of the General Provisions, which provide for termination of all outstanding Transactions upon occurrence of an Event of Default, would be effective under the laws of Malta including the provisions contemplating Termination upon occurrence of an Insolvency Event referred to in Section 6(1)(a)(viii) of the General Provisions in respect of a party incorporated in Malta or operating through a branch in Malta of a party incorporated or organised outside of Malta.

The Set-off Act provides that close-out netting provisions, such as that contained in the Master Agreement, are valid and enforceable under Maltese law, whether such close-out netting takes place before or after bankruptcy provided that such mutual debts, mutual credits or mutual dealings have arisen or occurred before the bankruptcy of one of the parties.

The Set-Off Act defines a “close-out netting provision” as:

“a provision of a contract under which on the occurrence of a specified event, whether through the operation of netting or set-off or otherwise –

- (a) the benefit of time for the performance of relevant obligations by the debtor may no longer be claimed and, or the relevant obligations become immediately due and expressed as an obligation to pay an amount representing their estimated current



value, or are terminated and replaced by an obligation to pay such an amount, and,
or

- (b) any obligation of a party to deliver property to the other is immediately performable notwithstanding any benefit of time granted to the debtor and expressed as an obligation to pay an amount representing its estimated current value or replacement value or is terminated and replaced by an obligation to pay such an amount, and
- (c) an account is taken of what is due from each party to the other in respect of such obligations and those obligations fall to be discharged by the payment of an aggregate net sum equal to the balance of account by the party from whom the larger amount is due.”

The Set-Off Act does not set out any restrictions as to the type of legal person that can enter into such close out netting provisions nor does it set out any restriction as to the type of contracts or transactions to which it can relate.

The above conclusion on the validity of the provisions of the Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a counterparty is subject to the following:

- (a) the netting of termination values to determine a single lump-sum termination amount can only take into account mutual debts, mutual credits or mutual dealings which have arisen or occurred before the insolvency of the counterparty. This involves two elements: (i) the debts, credits and dealings must have arisen or occurred before the insolvency of the other party, and (ii) the element of mutuality. In terms of the Set-Off Act, set-off and netting can only take place in respect of mutual claims. Accordingly, each Party to the Master Agreement must be personally liable for its obligations under the Master Agreement and each Transaction and must in addition be the sole beneficial holder of any rights it has under the Master Agreement and each Transaction;
- (b) the rules on voidable preferences as described below in paragraph 3.7 of this opinion;
- (c) there is also another general rule found in Malta’s Civil Code which is applicable across the board. This rule, called the *actio pauliana*, basically establishes that it is competent to any creditor to impeach any act made by the debtor in fraud of his claims;
- (d) when determining the Final Settlement Amount in terms of the Master Agreement, the Non-defaulting Party must do so in good faith and in a commercially reasonable manner; and

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(e) the Set-Off Act also lays down the following exceptions to the validity and enforceability of a close-out netting provision:

(i) any close-out netting agreement entered into at a time at which the other party knew or ought to have known that an application for the dissolution and winding-up of the company by reason of the insolvency was pending, or that the company has taken formal steps under any applicable law to bring about its dissolution and winding-up by reason of insolvency; and

(ii) fraud or any similar ground.

However, the applicability of Maltese law or otherwise to the above matters must also be seen in the light of the provisions of the Insolvency Regulation, the Credit Institutions Winding-Up Regulations and the Insurance Undertakings Regulations as described above.

3.4.2 Under Maltese law, a branch of a company does not have a legal personality separate from that of the head office of the company. Accordingly, it makes no difference whether a transaction entered into by a company established in Malta is entered into through its head office in Malta, or through a branch in Malta or outside Malta, in that such a transaction is in all cases deemed to have been entered into by the company established in Malta. The analogous argument applies in the case of companies established outside Malta with branches in or outside of Malta.

Three notable exceptions to this general rule are set out in:

(a) Article 399 of the Companies Act which provides that a Court in Malta *may* wind up the affairs in Malta of a branch of a foreign company, and this irrespective of whether the foreign company is being or has been wound up. This rule of the Companies Act complements other specific provisions giving wide powers to the Malta Financial Services Authority (the "MFSA") in connection with the winding up of the main company or branches in Malta of certain licensed businesses, such as that contained in the Banking Act, 1994 (Chap. 371 of the Laws of Malta); and

(b) Article 5 of the Set-Off Act which provides that a close-out netting provision entered into by a party which is a branch in Malta of an overseas company is valid and enforceable notwithstanding the provisions of any other law which may be applicable to such party, including the law under which such company is constituted; and

(c) Article 29(8) of the Banking Act which provides that where a credit institution operates in Malta and elsewhere, the MFSA may direct that the offices and branches



in Malta of that bank be deemed to constitute a separate credit institution. To our knowledge this power has never been utilised in practice by the MFSA.

In terms of the above, if the party incorporated in Malta becomes insolvent, (i) the liquidator, special controller or other similar officer will be bound by the terms of the Master Agreement, even as regards Transactions entered into by the relevant party through branches located outside Malta and (ii) a court of Malta would require a liquidator, special controller or other similar officer to give effect to the provisions of the Agreement, in accordance with their terms (including the provisions relating to the determination of the Final Settlement Amount), not only as between the head office of the party incorporated in Malta and its counterparty but also between the party incorporated in Malta and its various branches on the one hand, and the counterparty on the other hand.

The above rules have now been in part modified by the provisions of the Insolvency Regulation, the Credit Institutions Winding-Up Regulations and the Insurance Undertakings Regulations, in that, as described above, these special laws have modified traditional Maltese law rules relating to the law governing the winding-up, as well as the winding-up itself, of branches situated in Malta.

- 3.4.3 If a party is operating through a branch in Malta of a party incorporated or organized outside of Malta, and assuming that separate insolvency proceedings would be conducted in Malta with respect to assets and liabilities of such branch operating in Malta, in such a case, Maltese law is not clear as to what the Maltese liquidator should consider for the purpose of enforcing the close-out netting provision. In our view, the *ratio legis* behind Article 5 of the Set-Off Act is that if a branch in Malta of a company enters into a close-out netting provision, but in terms of the law under which such company is incorporated, close-out netting is not enforceable, then a Maltese Court should still enforce such a close-out netting provision in accordance with the Set-Off Act.

We are of the view that the Master Agreement should be enforceable in its entirety and the liquidator in Malta should not be entitled to segregate the Transactions entered into with the Maltese Branch from those entered into with the Head Office or other branches. We believe this to be the case on the basis that the Master Agreement constitutes a single contractual relationship, and any other interpretation would mean that the close-out netting provision would not be enforceable in accordance with its terms and this would run counter to the provisions of the Set-Off Act itself. Of course, some practical problems may arise with enforcement when there are no assets in Malta on which to enforce a positive balance in favour of the Non-Defaulting Party post-netting. In addition, Article 399 (5) of the Companies Act must also be taken into account. This provision states that the winding-up of the Maltese Branch must be carried out using the normal rules of winding-up "with such modifications as are

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necessary to accommodate the fact that the oversea company, the affairs of which are being wound up, is a company constituted or incorporated outside Malta.”

Accordingly, on the basis of the above analysis, we are of the view that: (i) the liquidator, special controller or other similar officer of the Malta branch will be bound by the terms of the Agreement, even as regards Transactions entered into through the head office of such party and through branches of such party located outside Malta and (ii) a court of Malta would require a liquidator, special controller or other similar officer to give effect to the provisions of the Agreement in accordance with their terms (including the provisions relating to the determination of the Final Settlement Amount) in respect of Transactions entered into on a multibranch basis between the branch operating in Malta and its counterparty and between the head office of such party and its various branches operating outside Malta on the one hand and the counterparty on the other hand.

In this case, one must again pay regard to the overriding provisions of the Insolvency Regulation, the Credit Institutions Winding-Up Regulations and the Insurance Undertakings Regulations, in that, these special laws have modified traditional Maltese law rules relating to the law governing the winding-up, as well as the winding-up itself, of branches situated in Malta.

- 3.4.4** The provisions of Section 6(1)(b) of the General Provisions contemplating that all Transactions shall terminate and the Termination Date shall occur automatically in case of an Event of Default mentioned in Section 6(1)(a)(viii)(1), (2), (3) or (5)(A) of the General Provisions as of the time immediately preceding the relevant event or action are effective under the laws of Malta. The Set-Off Act, in its definition of a close-out netting provision, refers to the occurrence of a specified event, and makes no distinction between whether notice is sent to the other party or otherwise. Accordingly, in terms of the wording of the law, no default notice is required to enforce a close-out netting provision. Under Maltese law, however, we perceive no advantage of opting for automatic early termination, since under Maltese insolvency laws it is clear that the exercise of close-out netting and set-off provisions is valid whether before or after insolvency.

If automatic early termination is retained, from a practical perspective, it is advisable for the non-defaulting party not to act in a manner which conflicts with such early termination.

- 3.4.5** The provisions relating to the calculation and determination of the Final Settlement Amount referred to in Section 7 of the General Provisions would be effective under the laws of Malta. In particular, the inclusion of Margin Claims in the determination of the Final Settlement Amount contemplated in Section 7(1)(a) of the General Provisions is effective under the laws of Malta.

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- 3.4.6 The provisions of Section 7(1)(b) of the General Provisions providing that any Termination Value, Amounts Due or Margin Claim not denominated in the Base Currency shall be converted in the Base Currency at the Applicable Exchange Rate is, in terms of Article 4(b) of the Set-Off Act, valid and enforceable under the laws of Malta.
- 3.4.7 The close-out netting provisions of the Master Agreement and the conclusions set forth in this respect in the opinion also apply to a Transaction if the parties have entered into a Master Agreement and have referred to the Master Agreement when subsequently exchanging Confirmations (in whatever form, including telex, fax, SWIFT or any other means of electronic transmission).

The close-out netting provisions will be enforceable in the case of a mere oral reference to the Master Agreement when entering into the relevant Transaction over the phone, but it is suggested that some evidence in writing of the agreement that the Master Agreement terms are to apply in the contractual relations between the parties should be obtained as otherwise problem of evidence of the contractual incorporation of the terms will arise.

3.5 Choice of Governing Law and Jurisdiction

- 3.5.1 When the Master Agreement is to be governed by the law of a jurisdiction as specified in the Special Provisions, such choice of law would be held to be a valid choice of law and shall be recognised and given effect to as a valid of law in any actions in the courts of Malta in accordance with the provisions of Regulation 593/2008/EC of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) of 17 June 2008 ("**Rome I Regulation**"). The Rome I Regulation applies to contracts concluded after 17 December 2009. It should be noted, however, that:
- (a) in terms of the said Regulations there are certain instances where other laws may prevail irrespective of the choice of governing law (including in the case of overruling mandatory provisions or the public policy of the forum). In particular (i) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties does not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreements; and (ii) where all other elements relevant to the situation at the time of choice are located in one or more Member States of the European Communities, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement;

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- (b) in certain instances the Rome I Regulation also imposes limits on the autonomy of the will of the parties to select the applicable law in contract.

The provision of Section 11(1) of the General Provisions providing that, failing specification, the law of the country, if identical, in which both parties' principal offices are located, shall be the governing law of the Master Agreement, is also valid and will be recognised by the laws of Malta.

- 3.5.2** The fact that the parties elect that one or more Market Standard Documents the terms of which are applicable to certain types of Transactions shall be construed by a law different from the law governing the Master Agreement does not have any adverse effect on the opinions expressed in this Opinion.
- 3.5.3** The provision of Section 11(2) of the General Provisions providing for the submission to the non-exclusive jurisdiction of the courts of Malta when so specified in the Special Provisions or, failing such specification, the courts having jurisdiction in the principal financial centre of Malta when both parties have their principal office in Malta, is valid under the laws of Malta.

The Maltese courts may be required to decline jurisdiction, in relation to matters falling within the scope of EC Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the “**European Judgments Regulation**”), where the courts of another Member State as defined in the European Judgments Regulation are first seized of the matter or have exclusive or mandatory jurisdiction. In matters not falling within the scope of the European Judgments Regulation, the jurisdiction of the courts of Malta is not excluded by the fact that a foreign court is seized with the same cause of action or with a cause connected with it;

Saving the overriding provisions of the European Judgments Regulation, in the case of an exclusive jurisdiction clause referring to a foreign jurisdiction, the courts of Malta have reserved the right and discretion to exercise a residual jurisdiction in cases where it would be just and expedient to hear the cause of action in Malta; such cases arise typically where, for instance, evidence is more readily available in Malta;

- 3.5.4** A judgement awarded by a competent court outside Malta would be recognised as a valid judgement and enforceable in the courts of Malta without re-examination of the merits of any matters treated in that judgement, subject to the following:

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(a) in the case of judgments falling within the scope of the European Judgments Regulation, the recognition and enforcement would be subject to the provisions contained in the said European Judgments Regulation;³

(b) in the case of judgments not falling within the scope of the European Judgments Regulation, the recognition and enforcement would be subject to the applicable law of Malta imposing judgement registration or confirmation in Malta, provided that the judgement (i) does not contain dispositions contrary to public policy and (ii) cannot be set aside on any of the grounds for re-trial as contemplated in the law of Malta on civil procedure.

3.5.5 The provision of Section 11(2) of the General Provisions providing that, if so specified in the Special Provisions, any dispute arising under or related to the Agreement shall be finally settled by one or more arbitrators appointed and proceeding in accordance with the rules of arbitration specified in the Special Provisions, is valid under the laws of Malta.

The validity of the provision of Section 11(2) of the General Provisions will be recognised under Maltese law irrespective of whether the dispute arising under or related to the Agreement is subject to internal or international arbitration.

Malta has signed and is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “**New York Convention**”). Malta applies the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. The Convention only applies in regard to Malta with respect to arbitration agreements entered into, and awards pursuant thereto made, after the date of Malta’s accession to the Convention, namely the 22nd June 2000. With reference to prior agreements, the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) (the “**Geneva Convention**”) will apply in accordance with its terms.

If the New York or Geneva Convention are applicable, then Article 74 of the Arbitration Act (Chap. 387 of the Laws of Malta) lays down that the awards may be registered with the Malta Arbitration Centre and they will be treated as executive titles and enforceable in Malta like a judgement. In the case of such foreign awards, a party has the right to object to recognition on the grounds respectively stated in the New York or Geneva Convention, particularly if the foreign arbitral award violates Maltese public policy.

³ Malta also has a reciprocal enforcement agreement with the United Kingdom but this operates in relation to money judgements only. Judgements are registered, by application, with the Court of Appeal in accordance with and subject to the terms of the British Judgements (Reciprocal Enforcement) Act (Cap. 52 of the Laws of Malta).

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3.6 Margin

- 3.6.1** The provisions of the Margin Maintenance Annex contemplating transfer of Cash Margin or Margin Securities to a party which has a Net Exposure are effective under the laws of Malta.
- 3.6.2** Subject to the satisfaction of all the conditions relating to the Financial Collateral Regulations, the laws of Malta will give effect to posting of Margin by way of transfer of unrestricted title to cash and Securities as contemplated in Section 3(2)(a) of the General Provisions and Section 1(1) of the Margin Maintenance Annex. The courts of Malta will not recharacterise Margin so posted as a pledge, charge or other type of security interest.
- 3.6.3** Under the laws of Malta, there are no form requirements for posting of Margin as contemplated in the Master Agreement in order to make posting of such Margin effective, other than those which apply to the transfer of the object of the Margin which as a minimum have to exist.

The Financial Collateral Regulations provide that where a financial collateral arrangement contains an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or where such arrangement contains a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be declared invalid or void or be reversed on the sole basis that:

- (a) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order making that commencement or in a prior prescribed period; and/or
 - (b) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral.
- 3.6.4** In order to perfect Margin and to make such Margin effective or to make such Margin otherwise binding upon third parties, it is not necessary for the Master Agreement or any part to be registered or filed with any court, governmental, judicial or public authority.
- 3.6.5** The provision of Section 3 of the Product Annex for Repurchase Transactions, to which Section 3 of the Margin Maintenance Annex is referring, and which contemplates the right to substitute Securities, including Margin Securities, is effective under the laws of

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Malta. Subject to the provisions of clause 3.7 below, such substitution would not result in a voidable preference.

- 3.6.7** When such collateral arrangements fall outside the parameters of the Financial Collateral Regulations, the transfer of cash and securities by way of collateral pursuant to the Master Agreement may not be recognised by a court in Malta as a transfer of absolute title in the assets transferred with an obligation on the transferee to repay the collateral or deliver Equivalent collateral as appropriate. In such an event, there is a risk that a Maltese Court may recharacterise such an arrangement as a pledge, which may fail due to the lack of observance of the formalities relating to the validity and perfection of the said pledge.

3.7 Voidable Preference or Claw-Backs

The basic company law rule as set out in Article 303 of the Companies Act is that there is a six month period before the effective date of the dissolution of the company whereby practically any transaction can be deemed to be a fraudulent preference against its creditors if it constitutes a “transaction at an undervalue” or if a “preference” is given. The latter two expressions are defined.

A company enters into a transaction at an undervalue if:

- the company makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no consideration; or
- the company enters into a transaction for a consideration the value of which, in money or money’s worth, is significantly less than the value in money or money’s worth of the consideration provided by the company.

A company gives a preference to a person if:

- that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities; and
- the company does anything or suffers anything to be done which, in either case, has the effect of putting that person into a position which, in the event of the company going into insolvency winding-up, will be better than the position he would had been had that act or omission not occurred.

The only exception to this so-called fraudulent preference rule is where the other party proves that it did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency. In its turn Article 3(8) of the Set-Off Act lays down that the said Article 303 is only applicable in relation to a close-out netting provision where there is fraud on the part of the party to the agreement not being the insolvent party. Effectively, therefore, the Set-Off Act has laid down an additional test

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which needs to be satisfied before a close-out netting provision can be declared void on the basis of the six month fraudulent preference rule.

In addition, the Financial Collateral Regulations also broadly provide that a financial collateral arrangement and the provision of financial collateral thereunder cannot be declared invalid or reversed on the sole basis that it has come into existence or has been provided:

- (a) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order making that commencement; or
- (b) within the six month suspect period.

It must be pointed out that companies established under or regulated by the Merchant Shipping (Shipping Organisations – Private Companies), Regulations, 2004 do not have equivalent rules relating to claw-backs, although the Maltese Courts always retain a general remedy to annul actions which are tainted with fraud.

In the case of credit institutions in respect of which the Malta Financial Services Authority (the “**MFSA**”) has appointed a controller to assume control under the Banking Act, 1994 (Chap. 371 of the Laws of Malta) (the “**Banking Act**”), the provisions of the Controlled Companies (Procedure for Liquidation) Act, 1995 (Chap. 383 of the Laws of Malta) (the “**Controlled Companies Act**”) are also relevant⁴. The Controlled Companies Act makes the provisions of Article 485 of the Commercial Code (Chap. 13 of the Laws of Malta) applicable to such credit institutions. In substance, Article 485 lays down that:

- (i) every act transferring property, whether corporeal or incorporeal, and every obligation incurred or other act made by the bankrupt under a gratuitous title (a term which broadly speaking means without consideration) for the purpose of defrauding his creditors is null and void as regards the body of creditors, of whatever kind they may be, even though the interested parties be in good faith; and
- (ii) every act of the same kind and every obligation, act or payment made or incurred under an onerous title (a term which broadly speaking means against consideration) can be annulled if there was also fraud on the part of the interested party. Any such acquisition, obligation, act or payment shall be deemed to be fraudulent as regards the interested party, if it is proved that such party knew of the bankruptcy or of the existence of circumstances giving rise to a declaration of bankruptcy.

⁴ The Controlled Companies Act makes provision for the liquidation and the distribution of assets belonging to controlled banks.



In addition, in terms of the Controlled Companies Act, where any act has been made or omitted to be made by a so-called 'controlled asset' (being either a credit institution or asset/s thereof which have been placed under 'control' pursuant to the Banking Act) or by the owner, director or manager of such 'controlled asset' which results in the "fraudulent deprivation of the rights of the creditors of such a controlled asset", the Controller appointed pursuant to the Banking Act is entitled "*to ignore the act so made or to deem the act as having been made despite the omission to make such act*"⁵.

In terms of Article 4(2)(m) of the Insolvency Regulation, Regulation 11(2)(1) of the Credit Institutions Winding-Up Regulations and Regulation 10(3)(m) of the Insurance Winding-Up Regulations, rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (such as those discussed in relation to Article 303 of the Companies Act above) are governed by the law of the Member State of the opening of the proceedings.

However, Article 13 of the Insolvency Regulation lays down that where the person who benefited from an act detrimental to all the creditors (the "**Detrimental Act**") provides proof that:

- (i) the Detrimental Act is subject to the law of a Member State other than that of the state of the opening of the proceedings; and
- (ii) that law does not allow any means of challenging the Detrimental Act in the relevant case,

then the laws on claw backs in the Member State of the opening of the proceedings will not apply. The same rule finds reflection in Regulation 31 of the Credit Institutions Winding-Up Regulations and Regulation 26 of the Insurance Undertakings Regulations, with the difference that under the latter two Regulations, the Detrimental Act may be governed by the laws of an Applicable State (rather than just that of a Member State of the European Union).

Effectively, therefore, the Maltese rules set out in Article 303 of the Companies Act may not always be applicable.

3.8 Attachments

Under the laws of Malta, the Termination provisions of the Master Agreement and the mode of calculation and determination of the Final Settlement Amount are binding upon seizing creditors attempting to seek an attachment order (including any order for seizure

⁵ Art. 5(5) of the Controlled Companies (Procedure for Liquidation) Act, 1995 (Chap. 383 of the Laws of Malta).



sequestration, garnishment or other judicially enforced application of a debtor's asset to a debt, hereinafter "Attachment") against assets of a party to the Master Agreement.

3.9 Investment Companies with Variable Share Capital (SICAV) constituted as an Umbrella or Multi-class Company

The Companies Act (Investment Companies with Variable Share Capital) Regulations (S.L.386.02) govern multi-fund companies in Malta. A multi-fund company is an investment company with variable share capital (SICAV) which elects to have the assets and liabilities of each sub-fund comprised in that company treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of the other sub-funds of such company. The multi-fund company is obliged to keep assets and liabilities of each sub-fund segregated from the other.

The Regulations (Regulation 9(2)) provide that save for such proportions of the liabilities of a multi-fund company which by virtue of the memorandum of association of the company or by virtue of the terms of issue of the shares constituting a sub-fund are, or are to be attributable to, one or more sub-funds in the proportion established therein, the liabilities incurred in respect of each sub-fund shall be paid out of the assets forming part of its patrimony and the creditors in respect thereof shall have no claim or right of action against the other assets of the company.

In addition, the Regulations also lay down that:

- (a) proceedings in relation to the multi-fund company must respect the legal status of each sub-fund as a patrimony separate from the assets and liabilities of each other sub-fund of the company; and
- (b) proceedings under the Companies Act, 1995 relating to insolvency proceedings of a company shall apply *mutatis mutandis* to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a company; and any proceedings in relation to one sub-fund shall not have any effect on the assets of any other sub-fund of the company or of the company itself.

Individual sub-funds do not have separate legal personality *per se* and therefore they need to enter into contracts through the legal personality of their multi-fund company, for instance **XYZ SICAV Limited in respect of 123 Sub-Fund**. If a Party proposes to enter into the Agreement with more than one sub-fund, then the said Party should enter into separate Agreements with each and every sub-fund.

Moreover, for clarity's sake, you might wish to consider adding the following clause in relation to the definition of "Insolvency Events":

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“For the avoidance of doubt, Section 6(1)(a)(viii) shall also apply mutatis mutandis to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a company.”

3.10 Protected Cell Companies

For the sake of completeness, Maltese law also allows insurance companies to be constituted as or converted into a Protected Cell Company (“PCC”) which although sharing a number of features with the multi-fund companies described above merit their own treatment. In terms of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations (SL.386.10), a cell company may create within itself one or more cells for the purpose of segregating and protecting cellular assets, that is assets attributable to a particular cell. PCCs will also have a core or non-cellular fund which is comprised of assets of the PCC not attributable to a particular cell. The directors of a PCC are obliged to keep (i) cellular assets separate and separately identifiable from non-cellular assets, (ii) cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells, as well as to (iii) keep separate records, accounts, statements and other documents as may be necessary to evidence the assets and liabilities of each cell as distinct and separate from the assets and liabilities of other cells in the same company.

In terms of the Regulations, where any liabilities of a PCC are incurred in respect of a particular cell then:

- i. the cellular assets attributable to that cell shall be primarily used to satisfy the liability;
- ii. the company’s non-cellular assets shall be secondarily used to satisfy the liability, provided that the cellular assets attributable to the relevant cell have been exhausted; and
- iii. any cellular assets not attributable to the relevant cell shall not be used to satisfy the liability.

Liabilities incurred by a PCC which are not attributable to a particular cell are in terms of Regulation 14(2) to be a liability solely of the PCC’s non-cellular assets or core.

The secondary recourse to the core described in paragraph ii. above may only be derogated in certain limited instances and even in such cases only by means of a specific written agreement with a creditor. The prohibition in paragraph iii. above is further reinforced by Regulation 12 which provides that in every transaction entered into by a PCC, the following terms are to be implied:

- i. no party shall seek, whether in any proceedings or by any other means whatsoever, to make or attempt to use any cellular assets attributable to any cell of the company to satisfy a liability not attributable to that cell; and

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- ii. if any party succeeds by any means whatsoever in using any cellular assets attributable to any cell of the company to satisfy a liability not attributable to that cell, that party shall be liable to the company to pay a sum equal to the value of the benefit thereby obtained by him.

Accordingly, in the light of the above, contracts with PCCs need to either identify the cell in respect of which they are transacting (e.g. **XYZ PCC Limited in respect of ABC Cell**) or if no such cell is identified then the contract will be attributable to the non-cellular assets of the PCC.

As regards bankruptcy of cells, other than the rules described above regarding secondary recourse and non-recourse to non-related cells, the regulations do not amend the general rules contained in the Companies Act and the Insurance Undertakings Regulations described elsewhere herein.

You might wish to consider adding the following clause in relation to the definition of "Insolvency Events":

"For the avoidance of doubt, Section 6(1)(a)(viii) shall also apply mutatis mutandis to the cell as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the cell is not a company."

4. Qualifications

This opinion is subject to the qualifications outlined below:

- 4.1 The enforceability of the rights and remedies provided for in the Agreements are limited by and subject to:

- (i) insolvency, bankruptcy, moratorium and other similar laws affecting the enforceability of creditors' rights generally, except in relation to matters on which we have specifically expressed our opinion herein;

- (ii) the pleas of set-off and counter-claim; and

- (iii) the plea of prescription;

- 4.2 Save in circumstances where it is required to exercise jurisdiction under the European Judgments Regulation, where a foreign court has a concurrent jurisdiction, the courts of Malta have a discretion to declare a defendant non-suited or to stay proceedings in Malta on the ground that if the action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant;

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- 4.3 The jurisdiction of the courts of Malta is not excluded in an absolute manner by the existence of an arbitration agreement (whether the arbitration proceedings have commenced or not). If any party to an arbitration agreement commences any legal proceedings before the courts of Malta, the latter must, at the request of one of the parties, refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.
- 4.4 Money judgements awarded by the courts of Malta, as well as any precautionary and executive warrants, are denominated in the lawful currency for the time being of Malta. In cases involving a foreign currency, the established principle is that the courts of Malta order that payment be made in the currency which is legal tender in Malta and that the rate of exchange be that obtaining at the time when the obligation was due and not that obtaining at the time of delivery of the judgment. There have been instances however where the courts of Malta have ordered that payment be made using the rate of exchange obtaining at the time of the delivery of the judgement.
- 4.5 Exchange control limitations have been abolished in Malta⁶ and Maltese persons may enter into foreign currency transactions without limitation. The only requirement in this regard is that statistical data relating to certain foreign currency transactions is submitted by Maltese credit institutions on the appropriate forms to the Central Bank of Malta in terms of the External Transactions Act, 1972 (Chap. 233 of the Laws of Malta). Failure to so notify will not impinge on the ability of the non-Maltese counterparty to claim payment and will have no impact on the validity of the underlying transaction. In the event however that for any reason a party needs to prove / claim in a Maltese liquidation, the solvent party's claim must be expressed in Euro and the general rule is that the rate of exchange will be the rate applicable at the point in time when the underlying obligation was due.
- 4.6 The waiver by any of the Parties of certain procedural rights and remedies in the Agreement may not be valid due to the fact that procedural laws are generally treated as rules of public policy.
- 4.7 As a general rule, under the Civil Code, interest can only be charged up to 8% per annum. In addition, the compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures prescribed in the Civil Code are followed. However, in virtue of the recently enacted Interest Rate (Exemption) Regulations, 2009 (Legal Notice 142 of 2009), issued under the Civil Code, a number of transactions were liberalised. In particular, where the interest rate or the compounding of interest rates arises in relation to debts and other

⁶ There are two exceptions to this rule relating to (i) exceptional circumstances, namely a sudden crisis in Malta's balance of payments or serious difficulties for the stability of the financial system; and (ii) powers under the National Interest (Enabling Powers) Act (Cap. 365 of the Laws of Malta);

obligations from so-called “financial transactions” and where one of the parties is a “designated entity”, the said limitations have been completely liberalised. The definition of “financial transaction” includes: contracts for differences, derivative contracts including options, forwards, swaps, foreign currency exchange contracts and similar agreements, securities lending transactions, sale and buy back agreements, repurchase and reverse repurchase agreements and similar agreements, as well as any pledges, hypothecs and other charges and any other collateral agreements, whether by way of title transfer or otherwise, which are entered into for the purpose or in connection with any of the foregoing transactions. The definition of “designated entity” includes amongst others a credit institution as defined in Article 4 of Directive 2006/48/EC, an investment firm as defined in Article 4 of Council Directive 2004/39/EC and a collective investment scheme which is authorised or otherwise exempt in terms of the Investment Services Act, 1994 (Cap. 370 of the Laws of Malta). Accordingly, on the assumption that a party qualifies as a “designated entity” under the said Regulations and on the basis that the Master Agreement should, in our view, qualify as a “financial transaction”, no limitation arises under Maltese law in connection with interest rates or the compounding thereof. This exemption will not however apply when one or more of the parties to the financial transaction is a natural person.

- 4.8 Under our Civil Code, mandate is of its nature revocable, unless it can be shown that the appointment was made as part of the security to the other party. Accordingly, with reference to clause 10(10) of the General Provisions, the Agent may be changed or dismissed at any time by the Principal. Furthermore, as a general rule, mandate is terminated by virtue of a declaration of bankruptcy of either the mandator or the mandatary. By way of an exception to this general rule, in terms of the Set-Off Act, any authority or mandate in a contract to implement any close-out netting provision is not revoked by the declaration of insolvency of any other party to the contract but other mandates will be revoked.
- 4.9 The law of Malta requires that a debtor acknowledges or be judicially notified of any assignment of a right for the assignment to be effective in barring the application of certain legal effects relative to the assignor (e.g. set-off); consequently, should any interest in an Agreement be transferred, it is advised that judicial notification of the transfer be effected or an acknowledgement of the transfer sought from the other party.
- 4.10 Certain provisions in the Master Agreement relating to pre-liquidated damages or to interest payable in a default scenario, may be re-characterised by the courts of Malta as other agreements (such as an agreement on interest or as a penalty clause), which would then be subject to certain limitations or discretions applicable to the re-characterised transaction; with reference to penalties and by way of elucidation, the courts of Malta have a discretion to abate the penalty, particularly in case of part-performance by the debtor so as to ensure that the penalty faithfully reflects the loss suffered by the non-defaulting party.

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- 4.11 The Financial Collateral Regulations provide that a collateral taker must ensure that any action taken pursuant to a financial collateral agreement, including any realisation or valuation of the financial collateral, be conducted in a commercially reasonable manner and in good faith so as to ensure fair treatment to the collateral provider. In the event that a Court determines that this was not the case, the collateral taker or provider, as the case may be, would have a further obligation to settle the difference to the counter-party in order to achieve a commercially reasonable realisation or valuation.
- 4.12 The Financial Collateral Regulations also provide that where on the day of, but after the moment of the commencement of winding-up proceedings or reorganisation measures: (a) a financial collateral arrangement has come into existence; or (b) a relevant financial obligation has come into existence; or (c) financial collateral has been provided, the same will be enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor ought to have been aware, of the commencement of such proceedings or measures;
- 4.13 An option to purchase or sell, such as that contained in the Supplement to the Derivatives Annex – Option Transactions, falls to be classified as a promise to purchase or promise to sell under the Civil Code of Malta and this is relevant if the option is governed by Maltese law.

For a promise of purchase and sale agreement to be recognised as such, a clear obligation to buy and sell must be entered into by both parties and this obligation must be contained in a private writing. Recent judgments have emphasised that a private writing needs to be signed on one document (rather than in counterparts) but it is our view that there is a usage of trade to the effect that signatures in counterparts should be valid under Maltese law where the same document is being signed by the parties thereto. In the circumstances, both counter-parties should sign a Confirmation and, in order to remove any doubts of interpretation under Maltese law, there should be a clause to the effect that two separately signed versions (including fax copies) of the same Confirmation shall be deemed to constitute one document for all intents and purposes.

Under Maltese law, in the absence of a period of validity of a promise to purchase or sale agreement, the said promise will be deemed to be valid for a period of three months only. Accordingly, the Confirmation should clearly state that the transaction is valid for a determinate period.

- 4.14 Without prejudice to the validity and enforceability of close-out netting provisions as set out in this opinion, to the extent that any transactions may be classified as a promise to purchase or promise to sell under the Civil Code of Malta (this is particularly relevant for options), then specific formalities apply for the preservation of rights and their enforcement. The formalities arise in terms of Article 1357(2) of the Civil Code and failure to observe them within the strict time limits stated in the Civil Code will result in the loss, under Maltese Law, of the remedy of specific performance and possibly also

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the lapse of the right to damages for non-performance of the promise to re-sell. On the assumption that a remedy for specific performance in terms of the option is sought in Malta, these rules may be deemed to be of a procedural nature and as a result Maltese law as the law of the forum would override the choice of law in the Master Agreement limited to these formalities.

- 4.15 With reference to clause 3(5) of the General Provisions, a judgement at law amounts to a novation of the debt and so, to the extent, if at all, that the judgement provides, the provision dealing with the accrual of interest after judgement will not be effective. It must be added that this is a very technical point on which there is no consensus among legal circles.
- 4.16 The position at law for repurchase agreements which do **not** fall within the parameters of the Financial Collateral Regulations is that as outlined in this opinion, saving for the following differences:
- (a) there is a remote risk of recharacterisation of the repurchase agreement as a security interest. A number of laws have made explicit reference to repurchase agreements, thereby pointing to a specific 'usage of trade' which, in terms of article 3 of the Commercial Code, prevails over civil law, saving where issues of public policy are concerned. Furthermore repos contain the essential elements for the repurchase agreement to be classified under Maltese civil law:
- (i) partly as a sale when the securities are sold and bought initially (Articles 1346 and 1347 of the Civil Code); and
- (ii) partly as a promise of sale agreement relating to the bilateral obligation for the purchase and delivery of equivalent securities either on demand or at a determinate future date (Articles 1357 - 1360 of the Civil Code).

The fact that the repurchase involves the sale of "equivalent" securities is in line with Maltese law which recognizes in Article 983(1) of the Civil Code that things determinable according to species can be the object of a sale.

However, in those instances which fall outside the scope of the Financial Collateral Regulations, the Courts in Malta will give importance to the real intention of the parties before entering into the repurchase agreement. In our view, when the Master Agreement is utilised together with the Product Annex for Repurchase Transactions, the wording used evidences an intention of the parties not to wish to create a security interest.

- (b) we draw your attention to the Margin Maintenance Annex within the context of repurchase transactions. Whereas in general a transfer of securities should be validly concluded upon the initial transfer, the Margin Maintenance Annex could raise some doubts whether a repurchase transaction is actually a transfer.

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If one party has transferred securities to the other, then the other party becomes the full owner thereof and there is usually no further juridical relationship between the two parties except in so far as relates to any warranties. However, the obligation to make margin maintenance adjustments by additional payments or the provision of other securities throughout the duration of a particular transaction could imply that (i) the securities had not actually been transferred but were rather pledged as security and that (ii) their values were adjusted so that during the pendency of the "loan" the parties would be in the same position irrespective of any market fluctuations in the value of the securities.

Having said that, there is a counter-argument to the effect that the adjustment is being made so that the re-transfer of the securities would be at a fair price bearing in mind the value of those securities. Thus, the adjustments would be linked with the future promise of sale rather than the sale, both agreements together constituting a *sui generis* arrangement which is recognised elsewhere in the laws of Malta. It is our view that there are very strong grounds to argue that the transfer in the taking of margin is indeed enforceable as a matter of Maltese law, even when such transfers do not fall under the Financial Collateral Regulations. The only instance where problems might be encountered with margin payments is where the counter-party is a company and where a payment or transfer is effectively made after a declaration of insolvency. This payment of margin may be reversed on the basis of normal legal principles of prohibition of fraudulent preferences. In such an event, any close-out netting provision will only be enforceable to the extent of the net sum obtained after disregarding such margin payment/transfers.

- (c) in the unlikely event of a re-characterisation by the Maltese courts of a repurchase agreement as a security interest over the securities, the adverse consequences are that not all the procedural requirements for the constitution and perfection of a valid pledge would have been satisfied. Accordingly, the "intended" pledge could be disregarded with the consequence that the other party will end up being an unsecured creditor.
- (d) in so far as the repurchase limb of a repurchase transaction or any other repurchase of transferred securities are concerned, such repurchase falls to be classified as a promise of sale agreement under the Civil Code. Accordingly, in the event that the repurchase transaction is governed by Maltese law, reference must be made to both Clauses 4.13 and 4.14 above. If, on the other hand, the repurchase transaction is governed by a foreign law, then reference must be made to Clause 4.14 above.

4.17 It is pointed out that certain further consequences might arise if Maltese law is the governing law of the Master Agreement. There is an argument, backed by judgements, that it is only a Court of law which can declare a contract to be terminated, when

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termination is conditional on an event. This argument holds even if there is an express termination clause in the particular agreement. There is another school of thought, also backed by judgements, to the effect that when there is an express termination clause, this operates automatically, or on compliance with the express conditions in the contract, without the necessity of obtaining a judicial declaration to this effect. We subscribe to the latter view.

The recent Set-Off Act lays down in Article 3(6) that notwithstanding the provisions of any other law, nothing shall limit or delay the application of any provision of any contract providing for or relating to set-off or netting which would otherwise be enforceable and no order of any court nor any warrant or injunction or similar order issued by a court or otherwise and no proceedings of whatever nature shall have any effect in relation thereto. On the basis of the said Article 3(6), we are of the view that a termination clause and the consequential close-out netting provisions are enforceable automatically, or upon due notice according to the agreement, without the need of any court declaration. In order to strengthen this interpretation, we are of the view that, whenever Maltese law is chosen as the governing law of the Agreement, the following provision should be inserted in Section 5 (*Other provisions*) of the Special Provisions: "Termination pursuant to Section 6 of the General Provisions will occur strictly in accordance with the terms of the Master Agreement and this without the need of any authorisation or confirmation by any court."

- 4.18 No opinion is expressed by us to the extent that the Master Agreement or a Transaction under it is or gives rise to either: (a) a "transfer order" or netting effected through payments or securities settlement systems or action taken under the rules of a designated system, or (b) constitutes "collateral security" provided in relation to the participant's operations within such systems, in each case as defined in the Central Bank of Malta Directive No. 2 (the "Settlement Finality Directive") issued under the Central Bank of Malta Act (Chapter 204 of the Laws of Malta), which transposes the provisions of the Directive 98/26/EC on settlement finality in payment and securities settlement systems.

The purpose of the Settlement Finality Directive is to preserve the validity of certain instructions (transfer orders) and to enable collateral security to be realised in priority to the application of certain insolvency laws.

A "transfer order" is, broadly, any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, settlement agent or the Central Bank of Malta, or any instruction which results in the assumption or discharge of a payment obligation, or any instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise.

"Collateral security" means, broadly, all realisable assets provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or

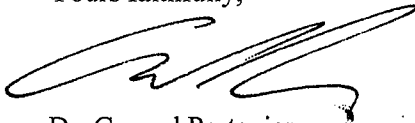
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otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system.

- 4.19 In terms of the Investment Services Act (the "ISA"), a person who provides or holds himself out as providing an investment service "in or from within Malta" must be in possession of a valid investment services licence or otherwise comply with the applicable rules governing the exercise of passporting rights in Malta. It is our view that the provision of services relating to many of the Transactions contemplated by the Master Agreement falls within the scope of the ISA. There are no local guidance notes as to what constitutes the provision of services *in or from* Malta. For the purposes of this opinion, we assume that no person entering into the Master Agreement requires a licence under the ISA, or to the extent that they are operating in or from Malta, they are in possession of such a licence. Specific advice should be sought on a case by case basis in order to determine whether a party providing an investment service "in or from within Malta" would require a licence from the Malta Financial Services Authority.
- 4.20 This opinion is further subject to the various powers vested in the competent authorities under applicable regulatory laws, such as under the Banking Act, the Investment Services Act, the Insurance Business Act, the Controlled Companies Act and other such legislation.

Yours faithfully,



Dr. Conrad Portanier
Ganado & Associates