

Malta Bankers' Association
48/2, Birkirkara Road,
Attard BZN 02

20 April 2006

Dear Sirs,

Global Master Repurchase Agreement

We have been instructed to give an opinion as to the validity under the laws of Malta of the 1995 and 2000 versions of the TBMA/ISMA Global Master Repurchase Agreement (the **GMRA 1995** and the **GMRA 2000**, together the **GMRA**) and the annexes listed in Appendix 1 to this opinion.

Subject to our assumption in paragraph (i) below, the substance of our opinion shall apply to both the GMRA 2000 and the GMRA 1995 as amended by entry by the parties into the amendment agreement in the form published by ISMA and TBMA.

Terms defined in the GMRA have the same meaning in this opinion in relation to that GMRA.

This opinion is given in respect of parties which are:

- (a) companies;
- (b) banks; and
- (c) securities dealers;

in each case, incorporated, organised, established or formed under the laws of Malta and to branches of same established or located in Malta.

This opinion is confined to matters of Malta's law as at the date of this opinion and we express no opinion with regard to any system of law other than the laws of Malta. This opinion is not being delivered to you in connection with any specific transaction.

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Advocates:

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Assumptions

We have assumed that:

- (a) each party has all requisite capacity and corporate power to execute, deliver and perform its obligations under the GMRA and each party has taken all necessary steps to execute, deliver and perform the GMRA and all transactions entered into under the GMRA;
- (b) the GMRA has been duly authorised, executed and delivered by each party in accordance with all applicable laws;
- (c) other than by the annexes listed in the Appendix, or as stated in this opinion, none of the terms of the GMRA has been varied, waived or discharged in any material respects and transactions have been entered into as specified in the GMRA;
- (d) the GMRA is legal, valid, binding and enforceable under English law;
- (e) the GMRA has been entered into at arms' length by each of the parties;
- (f) the GMRA and all transactions entered into under the GMRA are entered into prior to the formal commencement of insolvency proceedings against either party;
- (g) at the time at which a transaction is entered into under the GMRA, neither party has actual notice of the insolvency of the other party;
- (h) the requirements of the law (other than the laws of Malta) governing the transfer of Securities and Margin are complied with; and
- (i) where the parties to a GMRA 1995 have subsequently executed an amendment agreement in the form published by ICMA and TBMA the effect of such amendment agreement will be to amend the terms of GMRA 1995 to conform GMRA 1995 to GMRA 2000.

Opinion

Subject to the above and the qualifications set out below, we are of the opinion that under the laws of Malta:

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1. Insolvency proceedings

1.1 The only bankruptcy, composition, rehabilitation (e.g. administration, receivership or voluntary arrangement) or other insolvency proceedings to which a party incorporated in or with a branch in Malta would be subject in Malta are the following:

(i) Dissolution and consequential winding-up in terms of Article 214 *et seq.* of the Companies Act, 1995 (Chap. 386 of the Laws of Malta). This can either take the form of a Winding-up by the Court or a Voluntary Winding-Up;

(ii) Company Recovery Procedure in terms of Article 329B *et seq.* of the Companies Act, 1995 (Chap. 386 of the Laws of Malta);

(iii) Company Reconstructions in terms of Article 327 *et seq.* of the Companies Act, 1995 (Chap. 386 of the Laws of Malta);

(iv) 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, 1995, 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 above are together called *Insolvency Proceedings*.)

1.2 We confirm that all of the Insolvency Proceedings would be adequately covered by the definition of Act of Insolvency in the GMRA.

2. Bankruptcy treaties

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

2.2 The Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “**Insolvency Regulation**”) in substance provides that the courts with jurisdiction to open insolvency proceedings are those of the Member State where the debtor has his “centre of main interests”. The Insolvency Regulation limits the instances when secondary proceedings in another Member State can be opened. In addition, the Insolvency Regulation provides that,

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unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*) to a series of issues as outlined in the Insolvency Regulation.

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 the concept of close-out netting (i.e. the wider concept involving elements in addition to set-off, such as early termination and acceleration of claims) is fully included or otherwise within the parameters of Article 6 of the Insolvency Regulation.

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.

- 2.3 The reorganisation and winding-up of credit institutions is governed by the Credit Institutions (Reorganisation and Winding Up) Regulations, 2004 (the “**Credit Institutions Regulations**”) issued under the Banking Act, 1994, which regulations transpose the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4th April, 2001 on the reorganisation and winding-up of credit institutions (the “**Credit Institutions Winding-Up Directive**”).

The Credit Institutions Regulations broadly provide that the winding-up of a credit institution with branches in other Member States will be subject to single proceedings commenced in the Member State where the credit institution has its registered office and all the insolvency proceedings will be governed by the insolvency law of such Member State, subject to specified exceptions.

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These exceptions include the following:

- (a) netting agreements are to be governed by the law of the contract which governs such agreements,
- (b) the adoption of the reorganisation measures or the opening up of winding-up proceedings does not affect the right of creditors to demand the set-off of their claims against the claims of the credit institution, where such a set-off is permitted by the law applicable to the credit institution's claim, and
- (c) repurchase agreements are to be governed solely by the law of the contract which governs such agreements.

2.4 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 Regulations**”), which transpose the provisions of the European Parliament and Council Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings. The Insurance Regulations also broadly provide that the winding-up of an insurance undertaking with branches in other Member States will be subject to single proceedings commenced in the Member State where the insurance undertaking has its registered office and all the insolvency proceedings will be governed by the insolvency law of such Member State, subject to specified exceptions. One of these exceptions is that the opening of reorganisation measures or winding-up proceedings does not affect the right of creditors to demand the set-off of their claims against the claims of the insurance undertaking, where such a set-off is permitted by the law applicable to the insurance undertaking's claim.

2.5 The views set out in this opinion are in all cases subject to the overriding provisions of the Insolvency Regulation, the Credit Institutions Regulations and the Insurance Regulations, where applicable. Accordingly, by virtue of the Insolvency Regulation, the Credit Institutions Regulations or the Insurance Regulations: (a) the insolvency proceedings of a branch in Malta 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 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.

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3. Validity of the GMRA

3.1 The GMRA will be legal, valid, binding and enforceable under the laws of Malta and will take effect in accordance with its terms.

3.2 A court in Malta would uphold the choice of English law provided that neither the terms of such GMRA nor any provision of that law applicable thereto are found to be contrary to the public policy of Malta. Subject to the issues brought to your attention in this opinion, there are no other issues of public policy of Malta which impinge on the validity of the choice of English law in the GMRA.

A court in Malta would uphold the submission by the parties to the English courts.

The Maltese courts may be required to decline jurisdiction, in relation to matters falling within the scope of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano in 1988 (the “**European Judgments Convention**”)¹ or 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 Contracting State under the European Judgments Convention or 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 Convention or the European Judgments Regulation, the jurisdiction of the courts of Malta is not however 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 Convention and 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.

3.3 Without limiting paragraph 3.1 above, Transactions entered into under the GMRA (whether a Repurchase Transaction or a Buy/Sell Back Transaction) will

¹ The Legal Procedures (Ratification of Conventions) Act, 2002 which ratifies *inter alia* this Convention is not yet in force and accordingly the provisions of the Convention will only be applicable in Malta as from the date of the bringing into force of this Act.

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take effect as a transfer of absolute title in the Purchased Securities from the Seller to the Buyer, and the Buyer will have only a contractual obligation to transfer Equivalent Securities on the Repurchase Date. Subject to what is stated below, a court in Malta would not recharacterise the arrangements and would honour the terms of the GMRA.

The provisions of the Financial Collateral Arrangements Regulations, 2004 (Legal Notice 177 of 2004 as amended) (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 GMRA as a ‘secured loan’, or similar arrangement, for financial collateral arrangements falling within its scope, in that the Financial Collateral Regulations provide that an arrangement such as the GMRA is valid and enforceable in accordance with its terms and the Financial Collateral Regulations.

The Financial Collateral Regulations are limited to those instances where *inter alia* both the collateral taker and the collateral provider are:

- (a) a public authority,² including:
 - (i) public sector bodies of Member States charged with or intervening in the management of public debt; and
 - (ii) public sector bodies of Member States authorised to hold accounts for customers;
- (b) 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;
- (c) 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;
- (d) 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;
- (e) a financial institution as defined in Article 1(5) of Directive 2000/12/EC;
- (f) 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

² A “public authority” does not include a company or partnership whose obligations are by law guaranteed by the Government, except for those falling within the meaning of paragraphs (b) to (i) of this paragraph.

Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance;

- (g) 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);
- (h) a management company as defined in Article 1a(2) of Directive 85/611/EEC as amended by Directive 2001/107/EC;
- (i) 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;
- (j) 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
- (j) a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an entity as defined in paragraphs (a) to (j) above.

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 (i.e. securities in the wide sense of the word);
- (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.

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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 and Netting on Insolvency Act, 2003 (Chap. 459 of the Laws of Malta) insolvency close-out netting applies in Malta across the board, irrespective of the underlying nature of the transactions or obligations.

In view of the above, we are of the opinion that the GMRA 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 9.11 of this opinion in relation to Transactions which do not fall within the ambit of the Financial Collateral Regulations.

- 3.4 Similarly, the transfer of cash and securities by way of Margin pursuant to paragraph 4 of the GMRA would 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 Cash Margin or deliver Equivalent Margin Securities as appropriate. A court in Malta would not upset or recharacterise transfers made pursuant to paragraph 4.

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:

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- (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.

Reference is also made to the qualification set out in paragraph 9.11 (b) of this opinion in relation to Transactions which do not fall within the ambit of the Regulations.

- 3.4 A court in Malta would uphold the alternative margin methods provided for in paragraphs 4(i), (j) and (k).

The discussion in paragraph 3.3 above on the Financial Collateral Regulations applies *mutatis mutandis* to this paragraph and reference is also made to the qualification set out in paragraph 9.11 of this opinion in relation to Transactions which do not fall within the ambit of the Financial Collateral Regulations.

4. Netting provisions

- 4.1 The central provisions of the GMRA which provide for set-off following an Event of Default are contained in paragraph 10 (Event of Default), and in particular sub-paragraphs (b) to (d) of GMRA 1995 and sub-paragraphs (b) to (f) of GMRA 2000.

The Set-off and Netting on Insolvency Act, 2003 (Chap. 459 of the Laws of Malta) was enacted in 2003 and came into force with effect from the 1st June, 2003. The said Act provides that close-out netting provisions, such as that contained in the GMRA, 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 exceptions to this general rule are:

- (a) 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

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company has taken formal steps under any applicable law to bring about its dissolution and winding-up by reason of insolvency; and

(b) fraud or any similar ground.

- 4.2 If an Event of Default has occurred, either because of an Act of Insolvency in respect of a party incorporated, established or formed in or with a branch in Malta or following any other default by that party, the set-off provisions of paragraph 10 would be effective and the effect of those provisions would be that one party would be under a single obligation to pay a net amount in the Base Currency to the other party.
- 4.3 In the case of an Agency Transaction the provisions of paragraph 10 will apply so that the netting is effected between the principal and the other party. The provisions of paragraph 10 will be effective as between the Agent in its capacity as agent for each Principal and the other party and will create an obligation on the part of the other party and the Principal to pay a single net amount in the Base Currency in respect of all transactions carried out under the GMRA between the other party and the Agent acting as agent for that Principal in isolation from other transactions between the other party and the Agent.

Although as a general rule under Maltese law, a mandate is terminated on the declaration of insolvency of either the mandator or mandatary, our opinion above is based on the fact that in terms of the Set-Off and Netting on Insolvency Act, 2003, 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.

It is to be noted that a contract of mandate is of its nature revocable. Accordingly, the Agent can be changed or dismissed at any time by the Principal.

Reference is also made to the qualification set out in paragraph 9.7 of this opinion.

- 4.4 Where agreed to in the GMRA, in terms of Article 4(b) of the Set-Off and Netting on Insolvency Act, 2003, the conversion of any cash payment obligation into the Base Currency would be valid under the laws of Malta and such a provision is not inconsistent with the public policy of Malta. g



4.5 The provisions of paragraph 10 would be upheld notwithstanding that the Default Market Value may be calculated as late as close of business on the second dealing day in the appropriate market after the day of the relevant Event of Default under GMRA 1995 or as late as close of business on the fifth dealing day in the appropriate market after the day of the relevant Event of Default (or the date on which the non-Defaulting Party became aware of the Event of Default) or, in certain circumstances, at some time thereafter under GMRA 2000.

5. Annexes

5.1 The use by the parties of any of the annexes specified in the Appendix to this opinion will not affect the substance of our opinion on the provisions of the GMRA and their effect under Maltese law, nor will it affect the substance of our opinion on the validity of the GMRA as a whole under Maltese law.

6. Location of securities

6.1 The substance of our opinion would not be affected if Purchased Securities or Margin Securities are held outside Malta.

6.2 Under the laws of Malta, if the transfer of Purchased Securities or Margin Securities is made in accordance with the formalities required under the laws governing the transfer of Securities or Margin (which is the law which Maltese law would refer to), the transfer would be respected as an outright transfer and would not be recharacterised.

7. Other matters

7.1 On the assumption that under English law the unenforceability or illegality of a provision of the GMRA would not undermine the efficacy of the remainder of the GMRA generally or of paragraph 10 in particular, the unenforceability or illegality of any provision of the GMRA (other than a Core Provision) would not undermine the efficacy of the remainder of the GMRA generally or of paragraph 10 in particular under Maltese law.

7.2 The GMRA may be used by any party with any other party wherever either is incorporated, formed or established.

Provided that this opinion relates only to companies, banks and securities dealers, in each case incorporated or organised in Malta, or branches of

companies incorporated or organised outside Malta located or established in Malta.

- 7.3 The provisions of paragraph 10 would be enforceable in all Insolvency Proceedings (which term for the avoidance of doubt also includes all proceedings which under Maltese law may be classified as non-liquidation insolvency, such as the Company Recovery Procedure).
- 7.4 There is no necessity for the set-off effected under paragraph 10 to be reflected in the records of the parties for it to be effective and no other action is required including, without limitation, any filing or registration, for the set-off to be effective.
- 7.5 Under the laws of Malta it is necessary for the efficacy of paragraph 10 that all transactions should be treated as a single agreement.
- 7.6 The use of the GMRA with branches of a party in a number of jurisdictions, including one where the legal basis for set-off is not clear, would not jeopardise the validity of paragraph 10 in respect of a party incorporated, formed or organised in or with a branch in Malta.

Reference is however made to the opinion set out in Clause 2 (Bankruptcy Treaties) above.

- 7.7 The provisions of paragraph 10 would be enforceable in Malta notwithstanding that actions may be taken by insolvency officials in other jurisdictions.
- 7.8 We have no reason to believe that the GMRA would be unenforceable because of the law of any other jurisdiction.
- 7.9 With the exception of an Event of Default which is the presentation of a petition for winding-up or any analogous proceeding, or the appointment of any analogous officer of the Defaulting Party, the close-out and set-off provisions of paragraph 10 are at the option of the non-defaulting party. We do not consider that the provisions of the paragraph 10 of the GMRA would be more likely to be upheld if their operation were automatic. The discretion and flexibility given to the non-defaulting party under this paragraph do not affect the validity of the close-out and set-off provisions of that clause.
- 7.10 The basic company law rule as set out in Article 303 of the Companies Act, 1995 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

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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.

The Set-Off and Netting on Insolvency Act provides that 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. 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.

8. Transactions entered into as agent

8.1 A court in Malta would uphold the provisions of the Agency Annex in accordance with their terms.

Provided that a contract of mandate is of its nature revocable. Accordingly, the Agent can be changed or dismissed at any time by the Principal.

Qualifications

This opinion is subject to the qualifications outlined below:

- 9.1 the enforceability of the rights and remedies provided for in the GMRA are limited by and subject to:
- (i) except as herein provided, insolvency, bankruptcy, moratorium and other similar laws affecting the enforceability of creditors' rights generally;
 - (ii) the pleas of set-off and counter-claim; and
 - (iii) the plea of prescription;
- 9.2 Save in circumstances where it is required to exercise jurisdiction under the European Judgments Convention or 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;

- 9.3 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 Maltese Liri 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 in Maltese Liri be made using the rate of exchange obtaining at the time of the delivery of the judgement.
- 9.4 All external transactions and related payments may be carried out without restriction and accordingly the proceeds of any judgement obtained in respect of the GMRA in the courts of Malta may be remitted out of Malta. Information on the appropriate form relating to such remittance must be disclosed for statistical purposes to the Central Bank of Malta in terms of the External Transactions Act, 1972 (Chap. 233 of the Laws of Malta).
- 9.5 The waiver by any of the Parties of certain procedural rights and remedies in the GMRA may not be valid due to the fact that all procedural laws are treated as rules of public policy.
- 9.6 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 (Financial Transactions) Order, 2005 (Legal Notice 323 of 2005), 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 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 amongst others: 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

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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 1(1) of the Directive 2000/12/EC and an investment firm as defined in Article 1(2) of Council Directive 93/22/EC. Accordingly, to the extent that one of the Parties qualifies as a “designated entity” under the said Order, and the Agreements qualify as “financial transactions”, no limitation arises under Maltese law in connection with interest rates or the compounding thereof.

- 9.7 With reference to Section 17 of the GMRA, under our Civil Code, a 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. This does not seem to be the case as here we are dealing with an outright title transfer and not security collateral and including wording to the effect that this mandate is part of the security might raise issues of recharacterisation which we would rather avoid. Furthermore, under our Civil Code, a mandate is terminated by virtue of a declaration of bankruptcy of either the mandator or the mandatary.
- 9.8 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 the GMRA be transferred, it is advised that judicial notification of the transfer be effected or an acknowledgement in writing of the transfer sought from the other party. This acknowledgement need not take any specific form so long as it is clear that the other party is acknowledging the assignment of any right under the GMRA.
- 9.9 Agreements relating to pre-liquidated damages 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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9.10 The Financial Collateral Regulations provide that a collateral taker must ensure that any action taken pursuant to the GMRA, 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.

9.11 The position at law for financial collateral arrangements 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) we are still of the view that the risk of recharacterisation is very low. A number of laws have, over the past few years, 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. These laws include the following:

(i) the Central Bank of Malta Act, 1967;

(ii) the Central Bank of Malta Directive No. 2, issued under the Central Bank of Malta Act, which transposes the provisions of Directive 98/26/EC on settlement finality in payment and securities settlement systems;

(iii) the Financial Collateral Arrangements Regulations, 2004, which transposes the provisions of the Directive 2002/47/EC on financial collateral arrangements;

(iv) the Credit Institutions (Reorganisation and Winding Up) Regulations, 2004, issued under the Banking Act, which transposes the provisions of the Directive 2001/24/EC on the reorganisation and winding-up of credit institutions.

Furthermore, the GMRA contains the essential elements for it to be classified under Maltese civil laws:

(A) partly as a sale when the securities are sold and bought initially (Articles 1346 and 1347 of the Civil Code); and

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(B) 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 GMRA;

- (b) in particular we draw your attention to Paragraph 4 on ‘Margin Maintenance’. Whereas a sale should be validly concluded upon the initial transfer, Paragraph 4 of the GMRA could raise some doubts whether this limb of the transaction is actually a sale. 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 under Para. 4 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 sold but were rather pledged as security for the money lent and that (ii) their values were adjusted so that during the term 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-sale and re-purchase 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 taking of margin is indeed enforceable as a matter of Maltese law. The only instance where problems might be encountered with margin payments where the counter-party is a company is 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 the repo transaction as a loan secured by a pledge 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) For a promise of sale agreement to be recognized as such, a clear obligation to buy and sell must be entered into by both parties. In the circumstances, both counter-parties should sign Annex II, 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 Annex shall be deemed to constitute one document for all intents and purposes;
- (e) In the case of a transaction terminable on demand, Annex II should state that the transaction is valid for a determinate period (which period is to be indicated clearly in the Annex) with the right of either party to demand termination / performance at any time prior to expiration of the said period. This is necessary since under Maltese law, in the absence of a period of validity of a promise of sale agreement, the said promise of sale agreement will be deemed to be valid for a period of 3 months only;
&
- (f) It should be noted that, in so far as the repurchase obligations in repurchase agreements and buy/sell back agreements are concerned, particular formalities, such as the sending of a judicial intimation to perform the contract, apply for the preservation of rights and their enforcement when they arise from a contract which is characterised as a promise of sale. The formalities arise in terms of section 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 the lapse of the right to damages for non-performance. On the assumption that a remedy is sought in Malta, these rules are of a procedural nature and consequently

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Maltese law as the law of the forum would override the choice of law in the GMRA limitedly to these formalities.

- 9.12 The Financial Collateral Regulations 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.
- 9.13 No opinion is expressed by us to the extent that the GMRA 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 otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system.

- 9.14 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”

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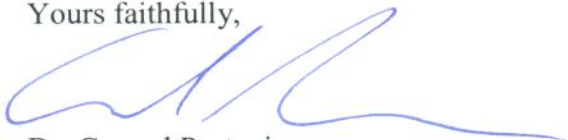


must be in possession of a valid investment services licence or otherwise comply with the applicable rules governing the exercise of passporting rights in Malta. We have been involved in transactions in the past where the Maltese regulator (the Malta Financial Services Authority) has interpreted certain sections of the law to the effect that even the carrying out of investment services relating to repurchase and similar agreements falls within the parameters of the ISA. There are no local guidance notes as to what constitutes the provision of services *in* or *from* Malta. However, working on the assumption that the foreign counter-party will not solicit the initial contact in Malta, then the foreign counter-party will not require an investment services licence and does not need to comply with the passporting rules in Malta.

There are no other material issues relevant to the issues raised by this opinion which we wish to draw to your attention.

This opinion is given for the sole benefit of the Malta Bankers' Association and its members and may not be relied upon by any other person without our prior written consent.

Yours faithfully,



Dr. Conrad Portanier
Ganado & Associates

Appendix 1

List of annexes

GMRA 1995	GMRA 2000
<ul style="list-style-type: none"> • Buy/Sell Back annex • Agency Annex • Bills of exchange annex • EMU annex • Equities annex • Gilts annex • Italian annex • Net paying securities annex • Japanese securities annex 	<ul style="list-style-type: none"> • Buy/Sell Back annex • Agency Annex • Bills of exchange annex • Equities annex • Gilts annex • Italian annex • Japanese securities annex • Canadian annex

