~~Dated~~
5 February ~~2016~~2018

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

FUTURES INDUSTRY ASSOCIATION

OPINION ON THE ENFORCEABILITY UNDER GUERNSEY LAW OF THE LIQUIDATION, SET-OFF, NETTING AND CREDIT SUPPORT PROVISIONS OF CERTAIN FUTURES ACCOUNT AGREEMENTS AND A CLEARED DERIVATIVES ADDENDUM UPON A CUSTOMER'S DEFAULT OR INSOLVENCY

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Dear Sirs

Enforceability under Guernsey law of the liquidation, set-off, netting and credit support provisions of Certain Futures Account Agreements and a Cleared Derivatives Addendum upon a Customer's Default or Insolvency

1 Introduction

We have acted as Guernsey legal advisers to ISDA and the FIA and have been requested under a letter dated 7 October 2014 (the **Instruction Letter**) by ISDA (on behalf of itself and the FIA) to provide a legal opinion as to the law of Guernsey (**Guernsey**) on the enforceability of the liquidation, set-off, netting and credit support provisions of:

(a) certain Covered Base Agreements (as defined below), entered into by an entity that is registered with the United States ~~Commodities~~ Commodity Futures Trading Commission (the **CFTC**) as futures commission merchant (**FCM**) and is a member of one or more CFTC - registered derivatives clearing organisations (each such FCM, a **Clearing Member**) and such Clearing Member's customer, setting forth the right of such Clearing Member, upon the occurrence of an event giving rise to any right of such Clearing Member to liquidate all Futures Transactions (as defined below), to liquidate such transactions and to determine amounts owing with respect thereto, to exercise remedies in respect of Futures Payment Rights (as defined below) and rights of netting and set-off with respect to obligations arising from Futures Transactions (as defined below) and to apply Futures Credit Support (as defined below) transferred by that customer in connection therewith (the **Covered Base Agreement**); and

(b) an addendum for Cleared Derivatives Transactions (a **CDA**), entered into by a Clearing Member and such Clearing Member's customer, setting forth the right of such Clearing Member, upon the occurrence of an event giving rise to any right of such Clearing Member to liquidate either (i) all Cleared Derivatives Transactions (as defined below) or (ii) any Cleared Derivatives Transactions affected by a "Tax Liquidation Event" (as defined in the form of Cleared Derivatives Addendum published by the FIA and ISDA) under a Covered Base Agreement, to liquidate such transactions and to determine amounts owing with respect thereto, to exercise remedies in respect of Cleared Derivatives Payment Rights (as defined below) and rights of netting and setoff with respect to obligations arising from Cleared Derivatives Transactions, to apply Cleared Derivatives Credit Support (as defined below) transferred by that customer in connection therewith and to offset obligations arising from Cleared Derivatives Transactions against Cleared Derivatives Credit Support transferred to that customer.

2 Definitions and Interpretation

2.1 Our opinions are provided on the basis of, and should be read together with, the assumptions, qualifications, limitations and information contained in this Opinion (including its Appendices and Schedules).

2.2 Unless the context requires otherwise, capitalised terms shall have the meanings given to them in Schedule 7.

2.3 References to **Covered Transactions** are to transactions of the type described in Appendix A and entered into pursuant to a Covered Base Agreement and CDA.

3 Scope of Opinion

3.1 This Opinion is given only in respect of customers that are Guernsey Parties (as defined in Schedule 7) specified as covered in Appendix B. For the avoidance of doubt, this Opinion does not extend to any type of entity or person save those expressly referred to above. In particular, and without limiting the generality of the foregoing, this Opinion is not given in respect of:

(a) any entities carrying on insurance business other than Guernsey Insurance Companies;

(b) building societies;

(c) friendly societies;

(d) open-ended investment companies, pension funds, hedge funds or investment funds;

(e) trusts;

(f) partnerships (whether general, limited or limited liability);

(g) Protected Cell Companies or Protected Cells but is given in respect of Incorporated Cell Companies and Incorporated Cells;

(h) any private individuals, legal entities, foundations, sovereign-related entities, public or private bodies or organisations other than Guernsey Parties; or

(i) those entities specified in Appendix B as not being covered by this Opinion.

3.2 The scope of this Opinion is limited to the questions set out herein and the responses thereto and does not extend to any matter not expressly covered in this Opinion.

4 Notes on Applicable Law

Our understanding is that, pursuant to New York law (the relevant governing law under the Covered Base Agreement and CDA), the customer grants a security interest in the Relevant Collateral transferred to the Clearing Member.

The primary Guernsey legislation governing the taking of security over intangible movables is the 1993 Law (see Schedule 5). This is relevant, in particular, where the Relevant Collateral is Guernsey *situs*.

5 Fact Patterns

For the purposes of this Opinion, we assume the following three fact patterns:

(a) the Location of the customer is *in* Guernsey and the Location of the Relevant Collateral is *outside* Guernsey;

(b) the Location of the customer is *in* Guernsey and the Location of the Relevant Collateral is *in* Guernsey; and

(c) the Location of the customer is *outside* Guernsey and the Location of the Relevant Collateral is *in* Guernsey.

For the foregoing purposes:

(d) the **Location** of the customer is in Guernsey if it is incorporated or otherwise organised under the laws of Guernsey and/or if it has a branch or other place of business in Guernsey; and

(e) the **Location** of the Relevant Collateral is the place where an asset of that type is located under the choice of law rules of Guernsey (see paragraph 8.2 relating to *situs* of Relevant Collateral and Schedule 4).

Located when used below in relation to a customer or any Relevant Collateral should be construed accordingly.

6 Covered Base Agreements and CDAs

We assume, on the basis of the Instruction Letter, the following factual background in relation to Covered Base Agreements and CDAs:

6.1 Covered Base Agreements

(a) Pursuant to a futures customer account agreement (a **Covered Base Agreement**) entered into between a Clearing Member and a customer that is a Guernsey Party, the Clearing Member agrees to carry one or more accounts on behalf of that customer (each, an **Account**) and to execute, carry and clear transactions for the purchase or sale of commodities for future delivery on, or subject to the rules of, a derivatives clearing organisation (a **DCO**) registered as such under the United States Commodity Exchange Act (the **CEA**) or traded on, or subject to the rules of, a board of trade outside the United States (such contracts executed on a contract market designated pursuant to Section 5 of the CEA and cleared by a U.S. registered DCO, **U.S. Futures**, such contracts traded on or subject to the rules of, a board of trade outside the United States, and options thereon, **Foreign Futures** and, collectively **Futures**) and/or options on U.S. Futures subject to Part 33 of the rules of the CFTC (such contracts, **Options**, and collectively with Futures, **Futures Transactions**). With respect to Foreign Futures, the Clearing Member acts for the customer by carrying Foreign Futures on the customer's behalf with, and guaranteeing the customer's performance to, clearing members (**Foreign Clearing Members**) of the relevant foreign clearinghouses, which Foreign Clearing Members may frequently be affiliates of the Clearing Member, and the Foreign Clearing Members will, in turn, enter into back-to-back futures transactions cleared by foreign clearinghouses.

(b) Each Covered Base Agreement is governed by New York law.

(c) Pursuant to a Covered Base Agreement, the customer agrees to transfer, as applicable, initial margin and variation margin payments as the Clearing Member may require in respect of the customer's Futures Transactions.

Also, pursuant to the Covered Base Agreement, the customer grants a security interest to the Clearing Member in all of the customer's rights in the following property, whether at the time of the grant or thereafter existing, and the proceeds of those rights:

(i) **Futures Credit Support**, including:

(A) with respect to U.S. Futures and Options, its Account and all assets credited thereto, including assets held by a DCO, as well as other property of the customer held in respect of Futures Transactions by or for the Clearing Member, the DCO or any agent acting for the Clearing Member, the DCO or the customer;

(B) with respect to Foreign Futures, its Account and all assets credited thereto, including assets held by a Foreign Clearing Member or foreign clearinghouse, as well as other property of the customer held in respect of Futures Transactions by or for, or for the Account and due from, the Clearing Member, any Foreign Clearing Member, any foreign clearinghouse or others, or any agent acting for the Clearing Member, any Foreign Clearing Member, any foreign clearinghouse or others; and

(ii) **Futures Payment Rights**, including:

(A) with respect to U.S. Futures and Options, its Futures Transactions and all rights to payment thereunder (whether constituting obligations of the Clearing Member or a DCO):

(B) with respect to Foreign Futures, its Futures Transactions and all rights to payment thereunder (whether constituting obligations of the Clearing Member, a Foreign Clearing Member or a foreign clearinghouse).

The security interest secures all obligations of the customer to the Clearing Member under the Covered Base Agreement.

(d) A Covered Base Agreement contains one or more events of default (whether or not described therein as "events of default") (each, an **Event of Default**) the effect of which is to give the Clearing Member the right to liquidate (and thereby terminate) the Futures Transactions held in the customer's Account (**Futures Liquidation Rights**). Among such Events of Default are defaults predicated on (A) a customer's filing under applicable bankruptcy or similar insolvency laws, (B) the filing of a petition for the commencement of involuntary proceedings in respect of the customer under applicable bankruptcy or similar insolvency laws which filing results in a judgment of insolvency or bankruptcy or an order for relief and (C) the appointment in respect of the customer or substantially all of its assets of an administrator, conservator, receiver or similar official, including the possession and control of the property of the customer by such an official pursuant to seizure orders. The terms of the Covered Base Agreement provide the Clearing Member with the right as a secured party to exercise remedies in respect of Futures Payment Rights and to net and set off amounts owing under Futures Transactions on account of their liquidation and termination (collectively, the **Futures Netting Rights**).

(e) The Covered Base Agreement includes a provision the effect of which is to permit the Clearing Member, upon the occurrence of an Event of Default in respect of a customer, to dispose of or realise all Futures Credit Support posted by the customer to the Clearing Member in respect of Futures Transactions and net or apply the foregoing or the liquidation value thereof to any obligations the customer

owes to the Clearing Member under the Covered Base Agreement. We refer to the foregoing collectively as **Futures Credit Support Rights**.

A futures account agreement that does not alone satisfy the above requirements is nevertheless a "Covered Base Agreement" to the extent it is paired with a CDA that supplies any of the otherwise unsatisfied requirements.

6.2 The Cleared Derivatives Addendum

(a) In addition to entering into a Covered Base Agreement with the customer, the Clearing Member and the customer execute the CDA. The CDA supplements a Covered Base Agreement with respect to, among other things, the liquidation and netting of Cleared Derivatives Transactions carried in the customer's account holding Cleared Derivatives Transactions (the **Cleared Derivatives Account**), as well as the application of collateral related to those Cleared Derivatives Transactions. **Cleared Derivatives Transactions** are swaps, forwards, options, or similar transactions (but excluding Futures Transactions executed on or subject to the rules of a U.S. designated contract market or on a foreign board of trade and subject to regulation in that jurisdiction) that are (a) entered into by a customer in the over-the-counter market, or (b) executed or traded by such customer on or subject to the rules or protocols of any multilateral or other trading facility, system or platform, including any communication network or auction facility permitted under applicable law or any designated contract market and, in either case, subsequently submitted to and accepted for clearing by a DCO and subject to the CFTC's Part 22 rules. To the extent that a security-based swap is, in accordance with applicable law, carried by an FCM in a cleared swaps customer account (as defined in the CFTC's Part 22 rules), such security-based swap constitutes a Cleared Derivatives Transaction. A list of example types of Cleared Derivatives Transactions appears in Appendix A.

(b) Each CDA is governed by New York law.

(c) Pursuant to the CDA, Cleared Derivatives Transactions become incorporated into the related Covered Base Agreement, which incorporation is accomplished by considering references to "Contracts," "Futures," "Futures Contracts" and similar terms in such Covered Base Agreement to include references to the Cleared Derivatives Transactions. Through this incorporation, the customer grants a security interest to the Clearing Member in all of the customer's rights in the following property, whether at the time of the grant or thereafter existing, and the proceeds of those rights:

(i) (1) its Cleared Derivatives Account and all assets credited thereto, including assets held by a DCO, and (2) other property of the customer held in respect of Cleared Derivatives Transactions by or for the Clearing Member, the DCO and any agent acting for the Clearing Member, the

DCO or the customer (collectively, **Cleared Derivatives Credit Support**); and

(ii) its Cleared Derivatives Transactions and all rights to payment thereunder (whether constituting obligations of the Clearing Member or DCO) (collectively, **Cleared Derivatives Payment Rights**).

(d) Pursuant to the CDA, following the occurrence of an Event of Default, the Clearing Member is entitled to set off or apply any obligations owed to the customer under the CDA against the customer's obligation to return any margin transferred to the customer under Cleared Derivatives Transactions (**Customer Received Margin**).

(e) The Clearing Member is entitled, upon the occurrence of an Event of Default, to designate a date and thereupon cause the liquidation of a customer's Cleared Derivatives Transactions (such rights, the **Cleared Derivatives Liquidation Rights**).

Cleared Derivatives Liquidation Rights include, without limitation, offsetting transactions (**Offsetting Transactions**) and sale/novation transactions (**Sale/Novation Transactions**).

Offsetting Transactions with respect to Cleared Derivatives Transactions of a customer are one or more cleared derivatives transactions effected in the customer's Cleared Derivatives Account which may be executed with the Clearing Member, an affiliate of the Clearing Member or an unaffiliated third party that (i) are cleared on the same DCO as the customer's Cleared Derivatives Transactions or related Risk-reducing Transactions[1], (ii) in accordance with applicable DCO rules, regulations and procedures, result in a proportional liquidation of such Cleared Derivatives Transactions and/or Risk-reducing Transactions; and (iii) are not Sale/Novation Transactions.

Sale/Novation Transactions with respect to Cleared Derivatives Transactions of a customer are (a) certain transactions consisting of sale, assignment, novation or any similar arrangement in accordance with which the Clearing Member, an affiliate of Clearing Member or an unaffiliated third party (each an **Assignee**) acquires all or part of the Cleared Derivatives Transactions or (b) the obligations of the customer are otherwise substituted or replaced in whole or in part with the obligations of an Assignee (and the old obligations are extinguished).

The Clearing Member is entitled to exercise its remedies as a secured party in respect of Cleared Derivatives Payment Rights and to net amounts owing in respect of liquidated Cleared Derivatives Transactions to determine a single lump-sum amount payable in respect of all liquidated Cleared Derivatives Transactions

[1] Risk-reducing Transactions are cleared transactions effected in customer's Cleared Derivatives Account in order to hedge or reduce the risk of the customer's Cleared Derivative Transactions (or portions thereof) on an individual or a portfolio basis.

(the **Cleared Derivatives Net Termination Amount**) and to net such Cleared Derivatives Net Termination Amount against any of the obligations owing under the Covered Base Agreement (collectively **Cleared Derivatives Netting Rights**).

(f) Upon the liquidation of a customer's Cleared Derivatives Transactions, the CDA provides the Clearing Member with rights to (a) dispose of or realize on all Cleared Derivatives Credit Support posted by the customer to the Clearing Member in respect of Cleared Derivatives Transactions and net or apply the foregoing or the liquidation value thereof to any obligations the customer owes to Clearing Member under the CDA and (b) net or apply the value of any Customer Received Margin against any obligations owed to the customer under the CDA (such rights, the **Cleared Derivatives Credit Support Rights**).

The "FIA-ISDA Cleared Derivatives Addendum" in the form published jointly by the FIA and ISDA satisfies the above requirements.

A CDA that does not alone satisfy the above requirements is nevertheless a "CDA" to the extent it is paired with a Covered Base Agreement that supplies any of the otherwise unsatisfied requirements. In addition, a single document that satisfies the above requirements for a Covered Base Agreement and a CDA is both a "Covered Base Agreement" and a "CDA."

PART 1. NETTING UNDER A COVERED BASE AGREEMENT AND CDA

7 Close-out Netting Generally

7.1 Assumptions

For the purposes of this Part (in addition to the applicable assumptions we have made elsewhere in this Opinion) we have assumed that:

(a) on the basis of the terms and conditions of a Covered Base Agreement and CDA and other relevant factors, and acting in a manner consistent with the intentions stated in the Covered Base Agreement and CDA, the parties over time enter into a number of Covered Transactions that are intended to be governed by the Covered Base Agreement and CDA. The Covered Transactions entered into include any or all of the transactions described in Appendix A;

(b) some of the Covered Transactions provide for an exchange of cash by both parties and others provide for the physical delivery of shares, bonds or commodities in exchange for cash; and

(c) after entering into these Covered Transactions and prior to the maturity thereof, the customer, which is a Guernsey Party, becomes the subject of a voluntary or involuntary case under the Guernsey Insolvency Procedures and, subsequent to the commencement of the insolvency, either the customer or an insolvency official seeks to assume the profitable Covered Transactions for the customer and reject

the unprofitable Covered Transactions for the customer or otherwise prevent the exercise of Futures Liquidation Rights, Cleared Derivatives Liquidation Rights, Futures Netting Rights or Cleared Derivatives Netting Rights by the Clearing Member.

7.2 Mutuality - Discussion and Qualification

The opinions as to netting and set off contained in this Opinion only cover bilateral arrangements between the parties to a Covered Base Agreement and CDA.

Our understanding of the FCM clearing model is that the ultimate counterparties to a Covered Transaction are not the two counterparties who initially elect to enter into the Covered Transaction but, rather, the contractual counterparties, once the Covered Transaction is novated through the clearing process are (i) the FCM's customer (i.e. the customer) and (ii) each DCO that has accepted the customer's Covered Transactions for clearing. In the context of a Covered Base Agreement and CDA, the customer will interact with the DCOs via its clearing FCM (the Clearing Member), and the Clearing Member will be exposed to the customer; under applicable DCO rules, the Clearing Member must meet the customer's obligations to DCOs under the Futures Transactions and Cleared Derivatives Transactions it clears regardless of whether the customer itself performs. Thus, the DCOs will have two potential sources of payment under a Covered Transaction – the customer itself and the Clearing Member. The Clearing Member, however, does not guarantee the obligations of the DCOs to the customer.

We understand that following a customer's default, the Clearing Member (liable to the DCO for amounts owed by the customer under Futures Transactions and Cleared Derivatives Transactions it clears for the customer) would want to reduce its exposure by any amounts owing by all DCOs to the customer. However, while the Clearing Member owes the DCOs (by virtue of its obligation to perform for its customer), the DCOs, with respect to their Covered Transactions with the customer, owe not the Clearing Member (who serves only as an intermediary and one-way guarantor) but the customer.

As a matter of Guernsey customary law, absent the contractual terms, set off may arise under the concept of *compensation,* provided, amongst other things, that the obligations are reciprocal. In addition the 1979 Law (which provides for set off by agreement) also requires, amongst other things, mutuality between the parties. In respect of *compensation* and the 1979 Law generally, see Schedule 3 paragraph 8.

Whether or not mutuality (which for these purposes we treat as the existence of reciprocal obligations between the parties) arises from any direct contractual arrangements between the parties, if amounts are owed by a DCO to the customer and amounts are owed by the customer to the same DCO and guaranteed by the Clearing Member, mutuality may exist as a result of subrogation arising in the transaction, provided of course that any subrogation would be legal, valid, binding and enforceable in accordance with its terms under New York law and all other applicable laws.

Notwithstanding the above, even if set off or netting are not available, we consider that parties may achieve a similar result to traditional set off through the grant of and creation (and, where applicable, perfection) of a security interest in, and the exercise of remedies against, collateral, including in particular any security interest in the customer's right, title and interest in (i) its Futures Payment Rights and Cleared Derivatives Payment Rights and (ii) the proceeds of such rights (which we understand are typically in the form of variation margin payments made by the DCOs to the FCM on a frequent basis) (such right, title and interest in the Futures Payment Rights, Cleared Derivatives Payment Rights and the proceeds of those rights together, the **Customer Contractual ~~Rights)~~,Rights),** which the customer grants to the Clearing Member under the Covered Base Agreement and the CDA. Assuming that the grant of the security interest is effective and enforceable, the Clearing Member's security interest is created (and, where applicable, perfected) and its rights in the collateral are superior to other creditor's under applicable law, the Clearing Member, upon its customer's default, may exercise remedies against those contractual rights and rights to payments and exercise the rights of the customer with respect thereto (subject to our more detailed discussion on security arrangements below).

7.3 Issues and Analysis

Our responses in this Part 1 are qualified in their entirety by paragraph 7.2.

(a) ***Are the provisions of the Covered Base Agreement and CDA permitting the Clearing Member to exercise its Futures Liquidation Rights and Cleared Derivatives Liquidation Rights upon the insolvency of the customer enforceable under the laws of Guernsey?***

Subject to the constitutional documents of a Guernsey Party and any statutory or customary law restrictions in respect of particular transactions (and we are not aware of any applicable to the Covered Base Agreement or CDA), Guernsey law does not generally fetter the terms on which a Guernsey Party may decide to contract. In addition the Guernsey Insolvency Procedures do not provide any statutory regime for the disclaimer of onerous contracts upon the commencement of a Guernsey Insolvency Procedure.

On the basis of (i) the above, (ii) the parties contractually agreeing in the Covered Base Agreement and CDA that the Clearing Member may exercise its Futures Liquidation Rights and Cleared Derivatives Liquidation Rights upon the insolvency of the customer, (iii) neither the Covered Base Agreement nor the CDA contractually permitting the disclaimer of such provisions and (iv) such provisions being effective and enforceable as a matter of New York law, we are of the view that the provisions of the Covered Base Agreement and CDA permitting a Clearing Member to exercise its Futures Liquidation Rights and Cleared Derivatives Liquidation Rights upon the insolvency of a Guernsey Party are enforceable as a matter of Guernsey law.

In addition we note that under Guernsey law there is no general stay or freeze on contractual arrangements on the insolvency, winding up, liquidation or *désastre* of a Guernsey Party. Although, in respect of administration, during the period between the presentation of an application for an administration order and ending with the making of such order or the dismissal of the application and during the period for which an administration order is in force, (a) no resolution may be passed or order made for the relevant company's winding up and (b) no proceedings may be commenced or continued against the company except with the leave of the Royal Court and subject to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of these sections of the Companies Law).

Please also see Schedule 3 for a summary of Guernsey's insolvency regime which may apply to Guernsey Parties.

(b) ***Are the provisions of the Covered Base Agreement and CDA providing for Futures Netting Rights and Cleared Derivatives Netting Rights, including with respect to any cash collateral that is viewed as a title transfer (see discussion at 8.1(c) below), in determining a single lump-sum termination amount upon the insolvency of the customer enforceable under the laws of Guernsey?***

Subject to the constitutional documents of a Guernsey Party and any statutory or customary law restrictions in respect of particular transactions (and we are not aware of any applicable to the Covered Base Agreement or CDA), Guernsey law does not generally fetter the terms on which a Guernsey Party may decide to contract. In addition the Guernsey Insolvency Procedures do not provide any statutory regime for the disclaimer of onerous contracts upon the commencement of a Guernsey Insolvency Procedure.

On the basis of (i) the above, (ii) the parties contractually agreeing in the Covered Base Agreement and CDA to the matters described above, (iii) neither the Covered Base Agreement nor the CDA contractually permitting the disclaimer of such provisions and (iv) such provisions being effective and enforceable as a matter of New York law, we are of the view that the provisions of a Covered Base Agreement and CDA providing for Futures Netting Rights and Cleared Derivatives Netting Rights, including with respect to any cash collateral that is viewed as a title transfer, in determining a single lump sum termination amount upon the insolvency of a Guernsey Party would be enforceable under the laws of Guernsey.

In addition we note that under Guernsey law there is no general stay or freeze on contractual arrangements on the insolvency, winding up, liquidation or *désastre* of a Guernsey Party. Although, in respect of administration, during the period between the presentation of an application for an administration order and ending

with the making of such order or the dismissal of the application and during the period for which an administration order is in force, (a) no resolution may be passed or order made for the relevant company's winding up and (b) no proceedings may be commenced or continued against the company except with the leave of the Royal Court and subject to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of these sections of the Companies Law).

(c) ***Assuming the Parties have entered into a Covered Base Agreement and CDA, the customer is insolvent and the Clearing Member has determined a lump-sum termination amount in a currency other than the currency of Guernsey:***

(i) ***Would a Guernsey Court enforce a claim for the net termination amount in the currency in which it was determined?***

We consider that a claim for the net termination amount in a currency other than the currency of Guernsey would be enforceable under Guernsey law.

(ii) ***Can a claim for the net termination amount be proved in insolvency proceedings in Guernsey without conversion into the local currency?***

The Companies Law and legislation enacted pursuant thereto does not provide for any specific rules for the process of proving claims on the winding up of a Guernsey Company Party, a Guernsey Insurance Company or a Guernsey Bank, including whether or not an amount may be proved in a currency other than the currency of Guernsey. Moreover, the Companies Law does not contain any rules as to whether any claim proved can be settled in a currency other than the currency of Guernsey or must be converted to the currency of Guernsey for payment.[2] Pursuant to Section 426 of the Companies Law the liquidator of a company may seek the Royal Court's directions in relation to any matter arising in relation to the winding up of a company and upon such application the Royal Court may make such order as it thinks fit.

[2]Section 426 of the Companies Law does not clarify this but rather provides a mechanism for a liquidator to seek directions from the Royal Court, which a liquidator might do in respect of these particular issues.

PART 2. SECURITY INTEREST APPROACH PURSUANT TO THE COVERED BASE AGREEMENT AND CDA

8 Validity of Security Interests: Creation And Perfection

8.1 Assumptions

For the purposes of this Part (in addition to the applicable assumptions we have made elsewhere in this Opinion) we have, on the basis of the Instruction Letter, made the assumptions set forth in Part 1 paragraph 7.1 (as applicable) with the following modifications:

(a) pursuant to the relevant Covered Base Agreement and CDA, the Clearing Member and the customer agree that Futures Credit Support and Cleared Derivatives Credit Support (**Collateral**) will include (i) cash credited to an account (as opposed to physical notes and coins) (ii) certain types of securities (as further described below) that are located or deemed located either (x) in Guernsey, or (z) outside Guernsey and (iii) the Customer Contractual Rights (as defined in Schedule 7) (the **Relevant Collateral**);

(b) any securities provided as Relevant Collateral are denominated in the currency of Guernsey or any freely convertible currency and consist of (i) corporate debt securities whether or not the issuer is organised or located in Guernsey, (ii) debt securities issued by the government of Guernsey and (iii) debt securities issued by the government of the "G-10" group of countries, in one of the following forms:

(i) directly held bearer debt securities: meaning debt securities issued in certificated form, in bearer form (meaning that ownership is transferable by delivery of possession of the certificate) and, when held by a Clearing Member or a DCO as Collateral under a Covered Base Agreement and CDA, held directly in this form by the Clearing Member or a DCO (that is, not held by the Clearing Member or a DCO indirectly with an Intermediary (as defined below));

(ii) directly held registered debt securities: meaning debt securities issued in registered form and, when held by a Clearing Member or DCO as Collateral under a Covered Base Agreement and CDA, held directly in this form by the Clearing Member or DCO so that the Clearing Member or DCO is shown as the relevant holder in the register for such securities (that is, not held by the Clearing Member or DCO indirectly with an Intermediary);

(iii) directly held dematerialised debt securities: meaning debt securities issued in dematerialised form and, when held by a Clearing Member or DCO as Collateral under a Covered Base Agreement and CDA, held directly in this form by the Clearing Member or DCO so that the Clearing

Member or DCO is shown as the relevant holder in the electronic register for such securities (that is, not held by the Clearing Member or DCO indirectly with an Intermediary); or

(iv) intermediated debt securities: meaning a form of interest in debt securities recorded in fungible book entry form in an account maintained by a financial intermediary (which could be a central securities depositary (**CSD**) or a custodian, nominee or other form of financial intermediary, in each case an **Intermediary**) in the name of the Clearing Member or DCO where such interest has been credited to the account of the Clearing Member or DCO in connection with a transfer of Collateral by the customer to the Clearing Member under a Covered Base Agreement and CDA;

(c) due to regulatory requirements, Collateral posted will be held by intermediaries in a way that identifies the Collateral as belonging to customers of the Clearing Member. For example, if the Collateral is held by the Clearing Member or an intermediary of the Clearing Member, that account will show that it is held for customers generally and the Clearing Member's books will show that the collateral is held for the individual customer. If the Collateral is held by the DCO or an intermediary of the DCO, that account will show that it is held for customers generally and the DCO's books will show that the Collateral is held for the individual customer;

(d) cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Clearing Member or DCO; and

(e) in the case of cash Collateral that is transferred to a Clearing Member as margin, such cash Collateral can be viewed either as a transfer of title in that cash to the Clearing Member, or as collateral in which the Clearing Member can take a security interest. Under the first alternative, the Clearing Member can be viewed as receiving such cash Collateral as a principal and therefore having a right to net that cash margin against amounts owing from the customer to the Clearing Member. A supporting fact for this view is if the Clearing Member is paying the customer interest on such cash Collateral. Alternatively, if the Clearing Member holds such cash Collateral as agent, it would need to perfect its security interest in such cash Collateral.

8.2 Issues and Analysis

Issue 1: Law Governing the Creation of a Security Interest in Relevant Collateral

Under Guernsey law what law governs the contractual aspects of a security interest in the various forms of Relevant Collateral under the Covered Base Agreement and CDA?

When determining the law that governs the creation and attachment of a security interest in the various forms of Relevant Collateral deliverable under the Covered Base Agreement and CDA, the Royal Court will refer to the *situs* of Relevant Collateral, which in turn will be determined by the Royal Court in accordance with the principles of private international law (see Schedule 4). As regards choice of law and jurisdiction under the Covered Base Agreement and CDA, please see our response below at Part 2, paragraph 11.2, Issue 1.

For the purposes of this Opinion, therefore, we have distinguished between Guernsey *situs* Relevant Collateral and non-Guernsey *situs* Relevant Collateral. Generally, the former falls within the remit of Guernsey law and the latter is subject to the law of the jurisdiction of the *situs* of the Relevant Collateral.

Would the ~~Royal Court~~ courts of your jurisdiction recognise the validity of a security interest created under each Covered Base Agreement and CDA, assuming it is validly created under the governing law of such Covered Base Agreement and CDA?

Following the principles of private international law, the law used to create security over a movable asset should ordinarily be the *lex situs* of the relevant asset (see Schedule 4).

Guernsey *situs* Relevant Collateral

Where Relevant Collateral is situated in Guernsey, any security interest created pursuant to the Covered Base Agreement and CDA, will need to have complied with the provisions of the 1993 Law (see Schedule 6) to be validly created and capable of enforcement as security.

The creation of a valid security interest under the 1993 Law is dependent primarily upon the method of the creation (Section 1 of the 1993 Law) and the presence of certain elements in the security agreement (Section 2 of the 1993 Law, discussed in Issue 5 below). As to whether the creation is in accordance with Section 1 of the 1993 Law, the position in respect of the various forms of Relevant Collateral is:

(a) Cash at a Guernsey bank account (where the account bank is not the same legal entity as the Secured Party): a Guernsey security interest may be created by the assignment of title to the customer's bank account pursuant to the Covered Base Agreement and CDA and the giving of notice to the customer's account bank. This is distinct from the transfer of monies standing to the credit of the customer's

bank account to the bank account of the Secured Party. Where the account bank is the same legal entity as the Secured Party, separate advice should be sought;

(b) Securities in bearer form held by the customer; the delivery of the certificates of title to the Secured Party pursuant to the Covered Base Agreement and CDA would be sufficient to create a possessory security interest;

(c) Securities in registered form in the name of the customer: the delivery of the certificates of title to the Secured Party pursuant to the Covered Base Agreement and CDA is sufficient to create a possessory security interest under Section 1(3) of the 1993 Law. No notice is required to be given. However, if security by way of assignment of title is to be created, the formalities of transfer of legal title would need to be complied with and notice to the issuer would need to be given to satisfy Section 1(6) of the 1993 Law;

(d) Dematerialised securities in the name of the customer: as there are no certificates of title, a possessory security interest under Section 1(3) of the 1993 Law cannot be created. Therefore, the security must be created by way of assignment of title under Section 1(6) of the 1993 Law by the name of the Secured Party being entered on the register of securities and by notice being given to the issuer. (Note that Guernsey law permits shares and other securities of Guernsey companies to be traded via the CREST/Euroclear system in the United Kingdom);

(e) Rights in immobilised securities held by a central securities depositary or clearing system (a **CSD**): in our view (in reliance upon Dicey and Morris), these rights are located in the jurisdiction in which the account representing such rights is maintained. As there is no depositary or clearing system in Guernsey, we have not considered this point further; and

(f) Contractual rights (including contractual rights that are Customer Contractual Rights) or rights in a securities account: as Guernsey law does not provide for floating charges, a security interest is usually created by the assignment of the contractual right or the rights in the securities account pursuant to a security document and notice being given to the counterparty in accordance with Section 1(6) of the 1993 Law.

A further issue relates to whether a security interest under the 1993 Law can be created under a foreign law (i.e. a non-Guernsey law) governed Covered Base Agreement and CDA. The 1993 Law does not expressly prohibit this but there is no relevant Guernsey case law on the point (although there is a Jersey case (see Re Nield - Schedule 4) which, although not binding, the Royal Court might consider persuasive). Accordingly we are not able to issue an unqualified opinion that it is possible for a document governed by a law other than that of Guernsey to create security under the 1993 Law. Therefore, in our view, to avoid any doubts as to creation and to assist enforceability, we would

recommend that a security agreement relating to Guernsey *situs* assets should be expressed to be governed by Guernsey law.

We recommend, therefore, that in respect of Relevant Collateral located in Guernsey, further advice is taken, as appropriate, to ensure compliance with the 1993 Law.

Floating charges

It should be noted that floating charges and debentures are not capable of being created under Guernsey law. There is no procedure under Guernsey law for the enforcement in Guernsey of a floating charge or debenture over Guernsey *situs* property. There is, however, no restriction *per se* on a Guernsey entity granting a floating charge or debenture over Relevant Collateral held outside of Guernsey under a non-Guernsey law governed security document.

Where such agreement is governed by New York law, the property being secured is New York *situs* property, and, we assume, any enforcement action would be taken in New York, in our view the relevant provisions can be enforced (subject to local law) outside Guernsey.

Non-Guernsey *situs* Relevant Collateral

A Guernsey Party has capacity (as a matter of Guernsey law) to grant security governed by non-Guernsey law over Relevant Collateral situated outside Guernsey. Assuming that the security interest over the Relevant Collateral is valid, binding and enforceable as a matter of its governing law (and, if different, the law of the jurisdiction where the Relevant Collateral is situated), no particular Guernsey law issues arise and the validity of the non-Guernsey law security interest would be recognised by the Royal Court.

Issue 2: Law Governing the Perfection and Priority of a Security Interest in Relevant Collateral

Under Guernsey law, what law governs the proprietary aspects of a security interest (that is, the formalities required to protect a security interest in Relevant Collateral against competing claims) granted by the customer under each Covered Base Agreement and CDA (for example, the law of the jurisdiction of incorporation or organization of the customer, the jurisdiction where the Relevant Collateral is located, or the jurisdiction of location of the Clearing Member or DCO's intermediary in relation to Relevant Collateral in the form of indirectly held securities)? What factors would be relevant to this question? Where the location (or deemed location) of the Relevant Collateral is the determining factor, what are the principles governing such determination under Guernsey law with respect to the different types of Relevant Collateral? In particular, how does Guernsey law apply to each form in which securities Relevant Collateral may be held as described in assumption 8.1(b) of this Part 1 above?

In our view, the law governing the proprietary aspects of a security interest in respect of the Relevant Collateral would again be determined by the *lex situs* relating to the Relevant Collateral (see Schedule 4).

Guernsey *situs* Relevant Collateral

(a) Section 1 of the 1993 Law (see Schedule 5) sets out the requirements for creation of a security interest.

(b) Given that Section 1 of the 1993 Law refers to the requirements for creation of security, in Guernsey the relevant issue is creation of security as opposed to perfection of security (see, therefore, our response above at Part 1, paragraph 6.2, Issue 1).

(c) Section 2(1) of the 1993 Law imposes some additional formalities for the creation of a security agreement under Guernsey law (discussed in Issue 5 below). Section 2(2) of the 1993 Law provides that, subject to the provisions of Section 2(1) of the 1993 Law, a security agreement may be in such form and may contain or refer to such matters as agreed between the parties.

(d) Under Section 4 of the 1993 Law, priority between security interests in the same collateral is determined by the order of creation of such security interests.

Non-Guernsey *situs* Relevant Collateral

Following the principles set out in Dicey and Morris, in our view, perfection of a security interest would be governed by the *lex situs* relating to the Relevant Collateral (see Schedule 4).

Issue 3: Validity of Security Interest in Relevant Collateral

Would the Royal Court recognise a security interest in each type of Relevant Collateral created under ~~theCovered~~ the Covered Base Agreement and CDA? In answering this question, please bear in mind the different forms in which securities Relevant Collateral may be held, as described in assumption 8.1(b) of this Part 1 above.

We believe that the Royal Court would recognise a security interest in each type of the Relevant Collateral, provided that such security interest was validly created and perfected under the applicable law (see our responses above at Part 2, paragraph 8.2, Issues 1 and 2).

Please indicate, in relation to cash Collateral, if your answer depends on the location of the account in which the relevant obligations are recorded and/or upon the currency of those obligations.

In relation to cash Collateral, notwithstanding the location of the account in which the relevant deposit obligations are recorded, we believe that the Royal Court would recognise a security interest therein, provided that such security interest was validly created and perfected under the applicable law (see our responses above at Part 2, paragraph 8.2, Issues 1 and 2).

Issue 4: Fluctuating Amount of Secured Obligations or Relevant Collateral

What is the effect, if any, under Guernsey law of the fact that the amount secured or the amount of Relevant Collateral subject to the security interest will fluctuate under the Covered Base Agreement and CDA (including as a result of entering into additional Covered Transactions under the Covered Base Agreement and CDA from time to time)?

Guernsey *situs* Relevant Collateral

(a) Section 3 of the 1993 Law provides that a security interest may be created before or after the obligation whose payment or performance is to be secured by it comes into existence provided that, pursuant to Section 2(1)(g) of the 1993 Law, the security agreement contains provisions regarding the obligation payment or performance of which is to be secured sufficient to enable it to be identified. Accordingly, under the 1993 Law, the fact that the obligations which are being secured will fluctuate from time to time will not invalidate a security interest provided that:

(i) ~~(a)~~the method of creation under Section 1 of the 1993 Law is followed in respect of the new Relevant Collateral; and

(ii) ~~(b)~~pursuant to Section 2(1)(e) of the 1993 Law, the security agreement gives particulars of the Relevant Collateral sufficient to enable its precise identification at any time.

(b) The issue of the method of creation is relevant in this case to securities as Relevant Collateral rather than rights in a bank account, contractual rights (including Customer Contract Rights that are contractual rights) or rights in an account at the central securities depositary or clearing system since those rights are not themselves fluctuating.

Non-Guernsey *situs* Relevant Collateral

Provided that the fluctuations in the amount secured or the amount of the Relevant Collateral would not invalidate the security as a matter of New York law or the *lex situs* of the Relevant Collateral, Guernsey law will recognise the continuing validity of the security interest created under the relevant Covered Base Agreement and CDA.

(a) Future Obligations of the customer

Would the security interest be valid in relation to future obligations of the customer?

Subject to our comments at Issue 4 above, on the basis of Section 3 together with Section 2(1)(g) of the 1993 Law as set out above, yes.

(b) Future Relevant Collateral

Would the security interest be valid in relation to future Relevant Collateral (that is, Relevant Collateral not yet delivered to the Clearing Member or Customer Contract Rights not yet in existence at the time of entry into the Covered Base Agreement and CDA)?

On the basis of the above (and in particular Section 2(1)(e) of the 1993 Law as to identification) and the below, yes.

Under Guernsey law, a security interest would be created and perfected in relation to Relevant Collateral delivered to the Clearing Member or Customer Contract Rights that arise after the Covered Base Agreement and CDA are executed provided that either, (i) the steps for creating and perfecting a security interest discussed in Issue 1 above and Issue 5 below are complied with if the Relevant Collateral is situated in Guernsey, or (ii) the requisite formalities of the relevant jurisdiction are complied with if the Relevant Collateral is situated outside Guernsey.

(c) Fluctuating Amount of Secured Obligations or Relevant Collateral

Is there any difficulty with the concept of creating a security interest over a fluctuating pool of assets, for example, by reason of the impossibility of identifying in the Covered Base Agreement and CDA the specific assets transferred by way of security?

When dealing with Guernsey *situs* Relevant Collateral, under Section 2(1)(e) of the 1993 Law to have a valid agreement under the 1993 Law a security agreement must, in addition to containing the other provisions specified in Section 2 of the 1993 Law, contain provisions regarding the Relevant Collateral sufficient to enable its precise identification at any time. In addition to the above, to have a valid security interest in respect of Guernsey *situs* Relevant Collateral, the method of creation under Section 1 of the 1993 Law needs to be followed in respect of all Relevant Collateral.

As noted above under paragraph 8.2, Issue 1, floating charges over a fluctuating pool of assets are not capable of being created under Guernsey law relating to assets situated in Guernsey. However, the Royal Court will, in our view, recognise a security interest under non-Guernsey law in respect of interests in a

fluctuating pool of assets situated outside Guernsey, where such security interest is valid and enforceable under the *lex situs* of the secured assets.

(d) Fixed Secured Amount

Is it necessary under Guernsey law for the amount secured by each Covered Base Agreement and CDA to be a fixed amount or subject to a fixed maximum amount?

It is not necessary under Guernsey law for the amount secured by each Covered Base Agreement and CDA to be a fixed amount or subject to a fixed maximum amount so long as:

(i) in accordance with Section 2(1)(e) of the 1993 Law, the Covered Base Agreement and CDA is clear enough to enable precise identification of the Relevant Collateral at any time; and

(ii) in accordance with Section 2(1)(g) of the 1993 Law, the Covered Base Agreement and CDA contains provisions regarding the obligation, payment or performance of which are to be secured, sufficient to enable it to be identified.

(e) Collateral in Excess of Actual Exposure

Is it permissible under Guernsey law for the Clearing Member to hold Relevant Collateral in excess of its actual exposure to the customer under the related Covered Base Agreement and CDA?

There is nothing under Guernsey law which would restrict a Clearing Member from holding Relevant Collateral in excess of its actual exposure under the Covered Base Agreement and CDA provided that it has been agreed by the Parties that such excess Relevant Collateral may be held.

However, this is subject to the general principles of Guernsey law related to director's fiduciary duties, including, inter alia: (i) that directors of a Guernsey company are required to act in good faith and on reasonable grounds in the best interests of the company; (ii) directors must exercise their powers for a proper purpose (i.e. for the purpose for which they were conferred); (iii) a director, being in a fiduciary position with respect to the company, may not profit from his office except with the full knowledge and lawful consent of the company; (iv) a director may not take a personal profit from opportunities arising from his directorship; and (v) directors must conduct the business of the company in accordance with its memorandum and articles of incorporation.

Therefore, where the directors of a customer which is a Guernsey company agree to provide a Clearing Member with Relevant Collateral in excess of the customer's actual exposure to the Clearing Member, they must, acting in good faith and in

accordance with the principles referred to above, believe that doing so is in the best interests of customer. It is usual practice to find a statement to the effect a transaction is in the best interest of the company included in the relevant board meeting minutes. Failing to act in the best interests of the company and in accordance with the other principles would be a breach of fiduciary duty and it is possible that a transaction entered into by a Guernsey company with a third party which has actual or constructive knowledge of such breach could be set aside, unless such breach has been approved by all of the company's shareholders.

Where the Relevant Collateral is subject to a security created pursuant to the 1993 Law, the customer is entitled to the value of such excess (upon payment of certain expenses and subject to the rights of certain creditors) upon a default and subsequent sale of the Relevant Collateral on enforcement under Section 7 of the 1993 Law.

Subject to the comments above, therefore, it is permissible under the laws of Guernsey for a Clearing Member to hold Relevant Collateral in excess of its exposure under the Covered Base Agreement and CDA.

Issue 5. Perfection of a Security Interest in Relevant Collateral

Assuming that the Royal Court would recognise the security interest in each type of Relevant Collateral created under the Covered Base Agreement and CDA, is any action (filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required in Guernsey to perfect that security interest? If so, what actions must be taken and how do such actions differ depending on the type of Relevant Collateral in question.

Guernsey *situs* Relevant Collateral

There is currently no public register of security interests, charges or mortgages in Guernsey (save in respect of real property situated in Guernsey, ships in respect of which title has been entered on the Registry of British Ships maintained in Guernsey and certain Guernsey registered aircraft assets) .

Given that Section 1 of the 1993 Law refers to the requirements for creation of security, in Guernsey the relevant issue is creation of security as opposed to perfection of security.

As set out at Part 2, paragraph 8.2, Issue 1 above, the creation of the security interest over certain Guernsey *situs* Relevant Collateral requires certain actions to be taken (such as delivery of certificates or completion of transfer of legal title or notice) and the relevant Covered Base Agreement and CDA to contain the components set out in Section 2 of the 1993 Law (see Schedule 5).

Other than as referred to in the preceding paragraphs, Guernsey law currently imposes no registration, filing or consent requirements of the type referred to.

Non-Guernsey *situs* Relevant Collateral

We cannot opine on the requirements of the law of the *situs* of the Relevant Collateral, where the matter will be an issue for the law of the relevant jurisdiction.

Issue 6. Other Requirements to Ensure the Validity or Perfection of a Security Interest in Relevant Collateral under Guernsey law

If there are any other requirements to ensure the validity or perfection of a security interest in each type of Relevant Collateral created by the customer under the Covered Base Agreement and CDA, please indicate the nature of such requirements. For example, is it necessary as a matter of formal validity that the Covered Base Agreement and CDA be expressly governed by Guernsey law or translated into any other language or for the Covered Base Agreement and CDA to include any specific wording? Are there any other documentary formalities that must be observed in order for a security interest created under the Covered Base Agreement and CDA to be recognised as valid and perfected in Guernsey?

We are not aware of any other requirements under Guernsey law to ensure the validity or perfection of a security interest in Relevant Collateral under the relevant Covered Base Agreement and CDA. In particular, it is not necessary that a Covered Base Agreement and CDA be expressly governed by Guernsey law (although we would recommend this where the Relevant Collateral consists of Guernsey *situs* Relevant Collateral) or translated into any other language or for it to include any specific wording (although noting the provisions of Section 2(1) of the 1993 Law as discussed in Part 1, paragraph 8.2, Issue 5 above). There are no other documentary formalities that must be observed in order for a security interest created under the Covered Base Agreement and CDA to be perfected in Guernsey.

We have assumed that all Parties to ~~theCovered~~ the Covered Base Agreement and CDA:

(a) have the capacity and power to enter into such Covered Base Agreement and CDA and to exercise their rights and perform their obligations under such Covered Base Agreement and CDA; and

(b) have taken all corporate or other actions and obtained all necessary agreements or consents required to authorise the execution and delivery of such Covered Base Agreement and CDA and to exercise their rights and perform their obligations under such Covered Base Agreement and CDA and that such Parties have duly authorised, executed and delivered such Covered Base Agreement and CDA in accordance with such authorisations.

Issue 7. Other Requirements to Ensure the Continuity of the Perfected Security Interest

Assuming that the Clearing Member has obtained a valid and perfected security interest in the Relevant Collateral under Guernsey law, to the extent that such law applies, by complying with the requirements set forth in your responses to Questions 1 to 6 above, as applicable, will the Clearing Member or the customer need to take any action thereafter to ensure that the security interest in the Relevant Collateral continues and/or remains perfected, particularly with respect to additional Relevant Collateral transferred by way of security from time to time when required pursuant to the Covered Base Agreement and CDA?

Guernsey *situs* Relevant Collateral

Subject to the comments below, assuming that the Clearing Member has obtained a valid and perfected security interest in the Relevant Collateral under Guernsey law, neither the customer nor the Clearing Member need take any further action in addition to that described above to ensure that the security interest in the Relevant Collateral continues and/or remains perfected.

Please see Schedule 5 for an explanation of the different methods of creation of security under the 1993 Law. Section 8 of the 1993 Law provides that a security interest terminates:

(a) in the case of a security interest created under Section 1(3) or Section 1(4) of the 1993 Law, when the Clearing Member (or some person on the Clearing Member's behalf not being the debtor or some person on behalf of the debtor) ceases to have possession pursuant to the security agreement of the relevant certificates of title;

(b) in the case of a security interest created under Section 1(5) of the 1993 Law, when the bank being the Clearing Member ceases to have control pursuant to the security agreement of the relevant account; and

(c) in the case of a security interest created under Section 1(6) of the 1993 Law, when the Clearing Member ceases to have pursuant to the security agreement title to the Relevant Collateral.

Accordingly, the Clearing Member should ensure that its security interest is not terminated in accordance with Section 8 by ceasing to have possession of the relevant certificates of title or policy, control of the relevant account or title to the relevant Relevant Collateral (depending on the method of creation of security). Please see further our response below in respect of Guernsey *situs* Relevant Collateral at Part 2, paragraph 8.2, Issue 10. The debtor granting security would usually also require that the Secured Party provide a certificate of discharge as evidence of termination of the security interest.

Non-Guernsey *situs* Relevant Collateral

There are no requirements under Guernsey law in respect of security over non-Guernsey *situs* assets taken under the law of a jurisdiction other than Guernsey.

Issue 8. Recognition of a Security Interest Validly Created and Perfected under Another Jurisdiction's Law

Assuming that (a) pursuant to Guernsey law the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Relevant Collateral (for example, because such Relevant Collateral is located or deemed to be located outside Guernsey) and (b) the Clearing Member has obtained a valid and perfected security interest in the Relevant Collateral under the laws of such other jurisdiction, will the Clearing Member have a valid security interest in the Relevant Collateral so far as Guernsey law is concerned? Is any action (filing, registration, notification, stamping or notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required under Guernsey law to establish, perfect, continue or enforce this security interest? Are there any other requirements of the type referred to in question under Question 6 of paragraph 8.2, Part 2 above?

In our view, the law governing the proprietary aspects of a security interest in respect of the Relevant Collateral would be determined by the *lex situs* relating to the Relevant Collateral (see Schedule 4).

Assuming that Guernsey law does not govern the perfection of the security interest in the Relevant Collateral and the Clearing Member has obtained a valid and perfected security interest in such Relevant Collateral under the laws of the relevant jurisdiction, following the principles set out in Dicey and Morris, perfection of the security would be governed by the *lex situs* relating to the Relevant Collateral. Therefore, the Clearing Member would have a valid and perfected security interest in the Relevant Collateral so far as Guernsey law is concerned, regardless of the substantive law of Guernsey and without requiring additional filings or other actions in Guernsey.

Issue 9. Duties Imposed on the Secured Party

Are there any particular duties, obligations or limitations imposed on the Clearing Member in relation to the care of the Relevant Collateral held by it pursuant to each Covered Base Agreement and CDA?

Subject to any contractual duties, obligations or limitations, or any other duties, obligations or limitations imposed by the laws of a jurisdiction other than Guernsey, we are aware of no duties, obligations or limitations imposed on the Clearing Member (other than in respect of a security interest under the 1993 Law, for which the Clearing Member will have various statutory duties on enforcement, as discussed in our response at Part 2, paragraph 8.2, Issue 1).

Issue 10. Re-hypothecation

A Covered Base Agreement and CDA may grant the Clearing Member broad rights with respect to the use of Relevant Collateral. Additionally, the Covered Base Agreement and CDA are subject to the rules of DCOs, which may also grant DCOs similar rights with respect to the use of Collateral that has been on-posted from a Clearing Member to a DCO. Such use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or selling the securities. Do the laws of Guernsey recognise the right of the Clearing Member or DCO so to use such Relevant Collateral pursuant to an agreement with the customer? In particular, how does such use of the Relevant Collateral affect, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the Clearing Member or DCO with respect to its use of the Relevant Collateral under Guernsey law? In considering the above question in relation to a DCO, please limit your response to the extent that rights or duties applicable to the DCO under the laws of Guernsey are relevant to the validity, continuity, perfection or priority of Clearing Member's security interest.

Guernsey *situs* Relevant Collateral

We assume that each Covered Base Agreement and CDA grants the Clearing Member broad rights with respect to the use of Relevant Collateral, including the rights to pledge or re-hypothecate securities, transfer securities under a securities repurchase agreement or simply sell securities or pledge or use cash Collateral.

There is, as far as we are aware, no Guernsey case law on whether the secured party in respect of a security interest under the 1993 Law can re-hypothecate. However, given that the debtor has a right to expect the redelivery of the collateral upon satisfaction of the secured obligations, in our view, a re-hypothecation or other dealing in the assets to the detriment of this right may not be upheld by the Royal Court. This is analogous to the position taken by the English courts in respect of the principle of clogging of the equity of

redemption (which, although an English common law concept, could be persuasive if argued before the Royal Court).

Where any Guernsey *situs* Relevant Collateral subject to a security interest pursuant to the 1993 Law is to be hypothecated by the Clearing Member, pursuant to Section 8 of the 1993 Law, the action to hypothecate (e.g. delivery of certificates or assignment of title) may result in the original security terminating.

Please see our comments on the creation of security at paragraph 8.2 Issue 1 above. There would no longer be valid and continuing security where there was failure to hold Relevant Collateral in accordance with such provisions to the extent the secured party (or its nominee in respect of possessory security) no longer has possession of the Relevant Collateral subject to possessory security, or is no longer entitled to the benefit of the Relevant Collateral assigned to it by way of security, or no longer controls Relevant Collateral secured by taking control. In this regard please also see our comments on the termination of security taken under the 1993 Law at paragraph 8.2 Issue 7 above (and the summary in Schedule 5).

The issue for the Clearing Member will be that the priority between security interests in the same Relevant Collateral is determined in the order of the creation of such security interests (Section 4 of the 1993 Law) and, therefore, the Clearing Member's security interest in respect of the Relevant Collateral will only arise upon the redelivery of the equivalent Relevant Collateral to the Clearing Member and completion of the formalities required to create a security interest under Guernsey law.

Non-Guernsey *situs* Relevant Collateral

The issue will be one for New York law and the *lex situs* of the Relevant Collateral.

Issue 11. Substitution

What is the effect, if any, under Guernsey law on the validity, continuity, perfection or priority of a security interest in Relevant Collateral under each Covered Base Agreement and CDA of the ability of the customer to substitute Relevant Collateral by transferring additional Relevant Collateral to an Account or Cleared Derivatives Account and withdrawing excess Relevant Collateral from that Account or Cleared Derivatives Account? Please comment specifically on whether the customer and the Clearing Member are able validly to agree in the Covered Base Agreement and CDA that the customer may substitute Relevant Collateral without specific consent of the Clearing Member and whether and, if so, how this may affect the nature of the security interest or otherwise affect your conclusions regarding the validity or enforceability of the security interest.

Non-Guernsey *situs* Relevant Collateral

On the basis that such right does not affect the validity of the security under New York law there is no restriction under Guernsey law of such right of substitution granted to the Clearing Member and such substitution should not affect the continuity, perfection or priority of the security interest in non-Guernsey *situs* Relevant Collateral (which would be determined in accordance with the *lex situs* of the Relevant Collateral). The presence or absence of consent to substitution does not affect the Guernsey law analysis (including on validity and enforceability of the security interest) and the customer and the Clearing Member may validly agree in the security document that the customer may substitute Relevant Collateral without specific consent of the Clearing Member.

Guernsey *situs* Relevant Collateral

In respect of security taken over Guernsey *situs* collateral please see our comments on the creation of security at paragraph 8.2 Issue 1 above, the termination of security at paragraph 8.2 Issue 7 and the summary contained in Schedule 5 of certain provisions of the 1993 Law regarding termination of security taken in accordance with the 1993 Law. Where any Guernsey *situs* collateral is subject to a security interest pursuant to the 1993 Law, pursuant to Section 8 of the 1993 Law, an action to substitute (e.g. the delivery of certificates or assignment of title) is likely to result in the termination of the original security.

For there to be binding security under the 1993 Law in respect of substituted Relevant Collateral it will be necessary for all the requirements for creating valid security (as previously discussed) to be fulfilled in respect of the substituted Relevant Collateral. In respect of priority please see Part 1, paragraph 8.2, Issue 2 above.

9 Enforcement of Relevant Collateral, including Futures Credit Support Rights and Cleared Derivatives Credit Support Rights under the Covered Base Agreement and CDA by the Clearing Member in the absence of a Guernsey Insolvency Procedure

9.1 Assumptions

For the purposes of this paragraph 9 we assume the same facts as set out in paragraph 8.1 above as modified below:

After entering into the Covered Transactions and prior to the maturity thereof, an event of default exists and is continuing with respect to the customer, and/or the Clearing Member has designated a date to begin exercising its Futures Liquidation Rights or Cleared Derivatives Liquidation Rights (a **Liquidation Date**) as a result thereof (however, an insolvency proceeding has not been instituted, which is addressed separately in the assumption at paragraph 10.1 of this Part 2 and under Issues 1 to 3 of paragraph 10.2 of this Part 1 below).

9.2 Issues and Analysis

Issue 1. Exercise of the Clearing Member's Rights as Secured Creditor with respect to Security Interest perfected under Guernsey law

Assuming that the Clearing Member has obtained a valid and perfected security interest in the Relevant Collateral under Guernsey law, to the extent such laws apply, by complying with the requirements set forth in questions 1 to 6 under paragraph 8 above, as applicable, what are the formalities (including the necessity to obtain a court order or conduct an auction), notification requirements (to the customer's or any other person) or other procedures, if any, that Clearing Member must observe or undertake in enforcing its security interest in Relevant Collateral and exercising its Futures Credit Support Rights and Cleared Derivatives Credit Support Rights (Credit Support Rights) as a Clearing Member under each Covered Base Agreement and CDA, such as the right to liquidate the Relevant Collateral? For example, is it free to sell the Relevant Collateral (including to itself) and apply the proceeds to satisfy the customers outstanding obligations under the Covered Base Agreement and CDA? Do such formalities or procedures differ depending on the type of Relevant Collateral involved?

We assume, for the purposes of this answer, that the Collateral forming the Relevant Collateral is Guernsey *situs* and that a security interest has been granted pursuant to the 1993 Law. (Please see Issue 2 below in respect of Relevant Collateral that is non-Guernsey *situs*~~.~~)).

A power of sale or application of the Collateral will arise in accordance with Section 7 of the 1993 Law (see Schedule 5, paragraph 2.9). A power of sale or power of application is not exercisable unless the secured party has served on the customer a notice specifying the particular event of default complained of (Section 7(3) of the 1993 Law).

Further, if a security agreement provides that a power of sale or application shall be exercised only on the authority of an order of the Royal Court then a power of sale or power of application is not exercisable unless an order of the Royal Court has been obtained (which may be subject to conditions). This requirement for a court order need not be (and invariably is not) included in Guernsey security documents.

In exercising the power of sale or application, the Clearing Member must take all reasonable steps to ensure that the sale or application is made within a reasonable time and for a price corresponding to the value on the open market at the time of the Collateral being sold or applied or where there is no open market value, the best price reasonably obtainable.

The proceeds of sale should be applied in the order of priority set out in Section 7(5) of the 1993 Law (see Schedule 3, paragraph 2.10).

The provisions of the 1993 Law relating to power of sale or application do not differentiate on the basis of different types or different forms of Collateral.

Issue 2. Exercise of Clearing Member's rights as Secured Creditor with respect to a Security Interest perfected under laws other than Guernsey law.

Assuming that (a) pursuant to Guernsey law, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Relevant Collateral pursuant to each Covered Base Agreement and CDA (for example, because such Relevant Collateral is located or deemed to be located outside Guernsey) and (b) the Clearing Member has obtained a valid and perfected security interest in the Relevant Collateral under the laws of such other jurisdiction, are there any formalities, notification requirements or other procedures, if any, that the Clearing Member must observe or undertake in Guernsey in exercising its Credit Support Rights as a Clearing Member under each Covered Base Agreement and CDA?

We assume for the purpose of this answer, that the Collateral forming the Relevant Collateral is non-Guernsey *situs*.

Under Guernsey law, there are no formalities, notification requirements or other procedures that the Clearing Member must observe or undertake in Guernsey when exercising its rights as secured party if Guernsey law does not govern the creation and/or perfection of a security interest in the Relevant Collateral, including Customer Contractual Rights.

Issue 3. Limitation of the Secured Party's Rights.

Are there any laws or regulations in Guernsey that would limit or distinguish a creditor's enforcement rights with respect to Relevant Collateral depending on (a) the type of Covered Transaction underlying the creditor's exposure, (b) the type of Relevant Collateral or (c) the nature of the creditor or the debtor? For example, are there any types of "statutory liens" that would be deemed to take precedence over a creditor's security interest in Relevant Collateral?

As a matter of Guernsey law, on the basis that security is being created by delivery and/or assignment of title, the types of Relevant Collateral will not be subject to any laws or regulations in Guernsey which would limit or distinguish a creditor's enforcement rights with respect to Relevant Collateral. We also confirm that the types of Covered Transaction and the nature of the parties has no impact on our reply.

Issue 4. Event of Default or Specified Condition with respect to the Secured Party.

How would your responses to questions 1 to 3 above change, if at all, assuming that an insolvency proceeding described above has occurred with respect to the Clearing Member (notwithstanding that the Covered Base Agreement and CDA may not provide for any events of default in respect of the Clearing Member) rather than or in addition to the customer (for example, would this affect the ability of the Clearing Member to exercise its enforcement rights with respect to the Relevant Collateral)?

Assuming the customer would choose to terminate a Covered Base Agreement and CDA upon a default by the Clearing Member, the foregoing responses to Issues 1 to 3 of this Part 2 would not change assuming the event of default exists with respect to the Clearing Member rather than or in addition to the customer. The Clearing Member's ability to exercise its enforcement rights with respect to the Relevant Collateral would not be affected.

10 Enforcement of Rights under the Covered Base Agreement and CDA by the Clearing Member after commencement of a Guernsey Insolvency Procedure

10.1 Assumptions

For the purposes of this paragraph 10 we assume the same matters as set forth in paragraph 8.1 above as modified below:

That a formal bankruptcy, insolvency, liquidation, reorganisation, administration or comparable proceeding (collectively, the **Insolvency**) has been instituted by or against the customer and an event of default has accordingly occurred under the Covered Base Agreement and CDA.

If there are different types of insolvency proceedings under Guernsey law (for example, bankruptcy or liquidation proceedings where an entity does not emerge as a going concern, on the one hand, and a reorganisation or administration proceeding where an entity is restructured and does continue as a going concern, on the other hand) please briefly describe the different types of proceedings and answer each question with respect to each such proceeding.

Summary of Insolvency under Guernsey Law

A summary of insolvency under Guernsey law is included at Schedule 3.

10.2 Issues and Analysis

Issue 1. Priority of Security Interests.

How are competing priorities between creditors determined in Guernsey? What conditions must be satisfied if the Clearing Member's security interest is to have

priority over all other claims (secured or unsecured) of an interest in the Relevant Collateral, other than claims of a DCO?

There are a number of laws in Guernsey, including the Companies Law, the 1979 Law, the Preferred Debts Law and the 1993 Law which contain priority provisions. A detailed description of the priority of debts is contained in Schedule 3, paragraph 9. For the purposes of this paragraph as it relates to Collateral under the Covered Base Agreement and CDA, we will focus on the priority provisions of the 1979 Law and the 1993 Law.

Under the 1979 Law, where a valid contractual set-off exists, any third party right is only enforceable against the net balance after set-off, in the absence of any agreement amounting to a fraudulent and void preference given within six months of the material party being declared *en désastre*.

Section 4(1) of the 1993 Law provides that priority between security interests in the same collateral is determined by their order of creation (although it is rare in practice that there will be successive security interests in the same collateral). Section 4(2) of the 1993 Law provides that nothing in Section 4 prevents the postponement by a secured party of his rights.

Section 5(1) of the 1993 Law provides that upon a debtor becoming insolvent, or upon his affairs being declared in a state of *désastre*, where the secured party does not have title to the collateral, to the extent that the collateral is sufficient, the amount due to the secured party in respect of a security interest created under Sections 1(3), 1(4) or 1(5) of the 1993 Law (see paragraph 8.2, Issue 1) shall be paid in priority to all other claims.

Subject to the provisions of Section 5 and Section 7 of the 1993 Law, Section 5(2) and Section 5(3) of the 1993 Law provide that where the secured party has title to the Collateral, the fact of the debtor becoming insolvent, his affairs being declared in a state of *désastre*, or he or his property being subjected (whether in Guernsey or elsewhere) to any other judicial arrangement or proceeding consequent upon insolvency or a declaration of *désastre*, shall not affect the power of the secured party to realise or otherwise deal with the Collateral in the same manner as he would have been entitled to realise or deal with it if the debtor or his property had not been subject of such insolvency, *désastre* or other judicial proceedings or arrangement.

Should an event of default occur under a security document, a power of sale or application will arise under Section 7(2) of the 1993 Law. Section 7(5) of the 1993 Law prescribes certain steps to be taken upon the exercise of a power of sale or application and the order in which the proceeds of sale or application must be applied is as listed below:

(a) in payment of the costs and expenses of the sale;

(b) in discharge of any prior security interest;

(c) in discharge of all monies properly due in respect of the obligations secured by the security agreement;

(d) in payment, in due order of priority, of secured parties whose security interests were created after his own, and on whose behalf (as well as on his own behalf) he was, immediately before exercising his power of sale or application, holding possession of documents or exercising control of collateral (whether by himself or through some other person on his behalf) for the purposes of Section 1 of the 1993 Law; and

(e) as to the balance (if any remains) in payment to the debtor, or in the event that the debtor has become insolvent or been subjected to any other judicial arrangement consequent upon insolvency, to the Sheriff or other proper person.

The 1993 Law is silent on the priority of a secured party holding foreign law security in respect of non-Guernsey *situs* collateral.

Issue 2. The Secured Party's Right to Liquidate the Relevant Collateral.

Would the Clearing Member's right to enforce its security interest in the Relevant Collateral and exercise its Credit Support Rights under each Covered Base Agreement and CDA, such as the right to liquidate the Relevant Collateral, be subject to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how does the institution of an insolvency proceeding change your responses to questions 1 and 2 in paragraph 9.2 of this Part 2 above, if at all)?

Under Guernsey law there is no general stay or freeze on the insolvency, winding up, liquidation or *désastre* of a Guernsey Party.

In respect of administration, during the period between the presentation of an application for an administration order and ending with the making of such order or the dismissal of the application and during the period for which an administration order is in force, (a) no resolution may be passed or order made for the relevant company's winding up and (b) no proceedings may be commenced or continued against the company except with the leave of the Royal Court and subject to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of these sections of the Companies Law).

Additionally, subject to Issue 3 of this paragraph 8.2 of this Part 1 below:

(a) in the case of Guernsey *situs* Relevant Collateral subject to a security interest pursuant to the 1993 Law:

(i) Section 5(3) of the 1993 Law provides that the Secured Party's power to realise or deal with the Relevant Collateral (including by exercise of the power of sale) is not affected by the insolvency of the debtor; and

(ii) Section 5(4) of the 1993 law provides that, where the debtor has been declared *en désastre* the arresting creditor may apply to the Royal Court for an order vesting in him the rights of the secured party to the collateral and directing that it be sold or applied (and the proceeds applied) by HM Sheriff in accordance with Section 7(5) and Section 7(6) of the 1993 Law, subject to such conditions as the Royal Court sees fit. In our view, an arresting creditor is most likely to make such application to the Royal Court if the secured party is acting in a way that the arresting creditor considers detrimental to the conduct of the *désastre*, for example, by the secured party being dilatory in exercising his power of sale or application.

(b) In the case of non-Guernsey *situs* Relevant Collateral subject to foreign law security no issue is likely to arise with respect to *désastre* proceedings as these are only relevant to certain types of Guernsey *situs* Collateral.

Issue 3. Suspect Periods.

Will the customer (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Collateral made to the Clearing Member during a certain "suspect period" preceding the date of the insolvency as a result of such transfer constituting a "preference" (however called and whether or not fraudulent) in favour of the Clearing Member or on any other basis? If so, how long before the insolvency does this suspect period begin? If such a period exists, would the substitution of Collateral by the customer during this period invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing? Would the posting of additional "variation margin" (an amount that reflects a change in the mark-to-market value of one or more Covered Transaction) during the suspect period be subject to avoidance, either because the Collateral was considered to relate to an antecedent or pre-existing obligation or for some other reason?

Guernsey law does provide for circumstances, which apply in respect of both Guernsey *situs* Collateral and non-Guernsey *situs* Collateral where transactions may be voidable and/or set-aside by application to the Royal Court as more fully set in paragraphs 6 and 7 of Schedule 3.

11 Miscellaneous

11.1 Assumptions

We assume the same facts as set forth in paragraph 8.1 above (as applicable).

11.2 Issues and Analysis

Issue 1. Governing Law/Submission to Jurisdiction.

Would the Parties' agreement on governing law of each Covered Base Agreement and CDA and submission to jurisdiction be upheld in Guernsey, and what would be the consequences if they were not?

The Parties agreement on the governing law of each Covered Base Agreement and CDA and submission to jurisdiction would be recognised in Guernsey; provided that the choice of New York law was bona fide, legal and not contrary to public policy.

Guernsey *situs* Relevant Collateral

If the Relevant Collateral is Guernsey *situs* Relevant Collateral, it is possible that the Royal Court would not view the choice of New York law as the governing law of the Covered Base Agreement and CDA, as being bona fide and legal (see our comments on Re Nield in Schedule 4). The potential consequences are that security over Guernsey *situs* Collateral purported to be created by the Covered Base Agreement and CDA would not be valid under Guernsey law.

Non-Guernsey *situs* Relevant Collateral

The issue would be subject to the law of the relevant jurisdiction where the Collateral is located and New York law as the governing law of the Covered Base Agreement and CDA.

Issue 2. Other Local Law Considerations.

Are there any other local law considerations that you would recommend the Clearing Member to consider in connection with taking and realising upon the Relevant Collateral from the customer?

We are not aware of any other local law considerations that we would recommend to the Clearing Member to consider in connection with taking and realising the Relevant Collateral.

Issue 3. Other Circumstances.

Are there any other circumstances you can foresee that might affect the Clearing Member's ability to enforce its security interest in Guernsey?

We cannot foresee any other circumstances that might affect the Clearing Member's ability to enforce its security interest in Guernsey.

12 Governing Law and Reliance

12.1 This Opinion shall be governed by and construed in accordance with the laws of Guernsey and is limited to the matters expressly stated herein. This Opinion~~–~~, which replaces and supersedes our previous Guernsey legal opinion addressed to ISDA and the FIA in respect of the matters opined on in this Opinion, is confined to and given on the basis of the laws and practice in Guernsey at the date hereof. We express no opinion with regard to the laws of any other jurisdiction and we have not made any investigation into any such laws.

12.2 As at the date of this Opinion we are not aware of any pending developments under Guernsey law that would materially affect the conclusions reached in this Opinion ~~(although we~~. We are however aware that as at the date of this Opinion there ~~is~~ has been an industry consultation regarding ~~possible~~ reform of the Guernsey insolvency regime~~, that consultation is at a preliminary stage and no definitive proposals have been made). We express no opinion with regard to the laws of any other jurisdiction and we have not made any investigation into any such laws~~ and the States of Guernsey has directed the preparation of legislation necessary to give effect to proposed amendments to the Companies Law arising out of such consultation. No draft legislation has been made available to the public for comment as at the date of this opinion.

12.3 ~~12.2~~This Opinion is given for the sole benefit of ISDA~~–~~, the FIA and ~~its~~ their members ~~or the FIA~~ in connection with the Covered Base Agreements and CDAs. With the exception of any professional advisers of ISDA~~–~~, FIA (or ~~its~~ their members) or ~~the FIA and~~ any regulatory or supervisory bodies (to whom this Opinion may be disclosed on a non-reliance basis), this Opinion may not be disclosed to or relied upon by any person or used for any other purpose or referred to or made public in any way without our prior written consent.

Yours faithfully

OGIER (GUERNSEY) LLP

APPENDIX A

August 2015

Certain Derivatives Transactions under the Covered Base Agreements and CDAs

(as provided by ISDA)

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of

Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index or floating commodity price payer on the floor.

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price, and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. A Commodity Forward may be settled by the physical delivery of the commodity in exchange for the specified price or may be cash settled based on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index based on the price of one or more commodities.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on

the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

Credit Default Swap Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to enter into a Credit Default Swap.

Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity and shares to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed or floating rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A deliverable or non-deliverable transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a "Fund Interest"), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based

on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA

Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

APPENDIX B

September 2009

Certain Counterparty Types

(as provided by ISDA)

Description	**Guernsey Party (covered by this Opinion)?**	**Legal form(s) (of categories covered by this Opinion)/Naming conventions or rules**
Bank/Credit Institution. A legal entity, which may be organized as a corporation, partnership or in some other form, that conducts commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individuals and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" category below.) This type of entity is referred to as a "credit institution" in European Community (**EC**) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity	Yes, on the basis it is: (a) a Guernsey Bank (i.e. a company incorporated under the Companies Law which is licensed to carry on deposit-taking business pursuant to the Banking Law); or (b) a Foreign Bank acting through its Guernsey Branch (i.e. a company or body corporate incorporated or organised outside of Guernsey acting through its Guernsey Branch which is licensed pursuant to the Banking Law to carry on deposit-taking business).	For Guernsey Banks see the naming conventions for Guernsey companies under the Corporation heading below. Save for the mandatory words for inclusion in the name of a Guernsey company, there are no mandatory words for inclusion in the name of a Guernsey Bank or Guernsey Branch. However, in accordance with the Banking Law, a Guernsey Bank or a Foreign Bank acting through its Guernsey Branch may have a name that indicates, whether in English or any other language, that it is a bank or a banker or is carrying on banking business.

(as in the case of a building society in the United Kingdom (**UK**)).		
Central Bank. A legal entity that performs the function of a central bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).	No (further analysis would be required in respect of this counterparty type).	
Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix B.	Yes, on the basis it is a company incorporated under Companies Law (excluding Protected Cell Companies, Protected Cells and any entity excluded under paragraph 3.1, but including Incorporated Cell Companies, Incorporated Cells and a Guernsey company acting as trustee of a Trust).	Under the Companies Law: (a) a Guernsey company limited by shares will have one of the following words at the end of its name: "Limited", "With limited liability", "Ltd", "Avec responsabilité limitée" or "ARL"; (b) a Guernsey company limited by guarantee (excluding certain charitable companies) will have one of the following words at the end of its name: "Limited by guarantee" or "LBG"; (c) a mixed liability company will have one of the following words at the end of its name: "Mixed Liability" or "ML"; (d) the name of an Incorporated Cell Company shall include "Incorporated Cell Company", "ICC" or such cognate expression as may be approved in writing by the Guernsey Financial Services Commission; and (e) the name of an Incorporated Cell shall include: "Incorporated Cell", "IC" or such cognate expression as may be approved in writing by the

		Guernsey Financial Services Commission.
Hedge Fund/Proprietary Trader. A legal entity, which may be organized as a corporation, partnership or in some other legal form, the principal business of which is to deal in and/or manage securities and/or other financial instruments and/or otherwise to carry on an investment business predominantly or exclusively as principal for its own account.	No (further analysis would be required in respect of this counterparty type).	
Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.	Yes, on the basis it is a Guernsey Insurance Company (i.e. a company incorporated under the Companies Law which is licensed to carry on insurance business pursuant to the Insurance Law).	For Guernsey Insurance Companies see the naming conventions for Guernsey companies under the "Corporation" heading above. Save for the mandatory words for inclusion in the name of a Guernsey company, there are no mandatory words for inclusion in the name of a Guernsey Insurance Company. However, in accordance with the Insurance Law, a Guernsey Insurance Company may have a name that indicates, whether in English or any other language, that it is carrying on insurance business or that it is a licensed insurer.
International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and similar organizations	No (further analysis would be required in respect of this counterparty type).	

established by treaty.

Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.	No (further analysis would be required in respect of this counterparty type).
Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or	No (further analysis would be required in respect of this counterparty type).

more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	
Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.	No (further analysis would be required in respect of this counterparty type).
Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this Appendix B. If it does not have legal personality, it may nonetheless be treated as though it were a legal person for certain purposes (for example, for insolvency purposes) and not for other purposes (for example, tax or personal	No (further analysis would be required in respect of this counterparty type).

liability).

Pension Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide pension benefits to a specific class of beneficiaries, normally sponsored by an employer or group of employers. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by pensions legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Pension Fund (for example, a trustee of a pension scheme in the form of a common law trust) contract on behalf of the Pension Fund and are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	No (further analysis would be required in respect of this counterparty type).
Sovereign. A sovereign nation state recognized internationally as such, typically acting through a direct agency or instrumentality of the central government without separate legal personality, for example, the ministry of finance, treasury or national debt office. This category does not include a State of a Federal Sovereign or other political sub-division of a sovereign nation state if the sub-division has separate legal personality (for example, a	No (further analysis would be required in respect of this counterparty type).

Local Authority) and it does not include any legal entity owned by a sovereign nation state (see "Sovereign-owned Entity").	
Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "Sovereign Wealth Fund" excludes a Central Bank.	No (further analysis would be required in respect of this counterparty type).
Sovereign-Owned Entity. A legal entity wholly or majority-owned by a Sovereign, other than a Central Bank, or by a State of a Federal Sovereign, which may or may not benefit from any immunity enjoyed by the Sovereign or State of a Federal Sovereign from legal proceedings or execution against its assets. This category may include entities active entirely in the private sector without any specific public duties or public sector mission as well as statutory bodies with public duties (for example, a statutory body charged with regulatory responsibility over a sector of the domestic economy). This category does not include local governmental authorities (see	No (further analysis would be required in respect of this counterparty type).

"Local Authority").

State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.	No (further analysis would be required in respect of this counterparty type).

SCHEDULE 1

Assumptions

For the purposes of this Opinion, in addition to the assumptions that we have made elsewhere in this Opinion, we have assumed:

(a) that the Parties, at least one of which is a Guernsey Party, have entered into a Covered Base Agreement and CDA which are governed by New York law;

(b) that all Parties to the Covered Base Agreement and CDA have been duly and properly established;

(c) that all Parties to the Covered Base Agreement and CDA have the capacity and power to enter into such Covered Base Agreement and CDA and to exercise their rights and perform their obligations under such Covered Base Agreement and CDA;

(d) that all Parties to the Covered Base Agreement and CDA have taken all corporate or other actions and obtained all necessary agreements or consents required to authorise the execution and delivery of such Covered Base Agreement and CDA and to exercise their rights and perform their obligations under such documents and that such Parties have duly authorised, executed and delivered such Covered Base Agreement and CDA in accordance with such authorisations;

(e) that all Parties to the Covered Base Agreement and CDA have obtained and continue to hold all consents, authorisations, approvals, registrations, permits and/or licences of whatsoever nature required under any applicable law for each Party to carry on its business, to enter into the Covered Base Agreement and CDA and to exercise their rights and perform their obligations under such Covered Base Agreement and CDA (including, without limitation, in the case of a Guernsey Bank or a Guernsey Branch, a licence pursuant to the Banking Law and in the case of a Guernsey Insurance Company, a licence pursuant to the Insurance Law) and such consents, authorisations, approvals, registrations, permits and/or licences remain valid and in full force and effect;

(f) that the entering into of a Covered Base Agreement and CDA and any Covered Transactions by a Party (or an authorised entity on its behalf) and the exercise by it of its rights and the performance by it of its obligations thereunder will not conflict with, or result in a breach of, any consents, authorisations, approvals, registrations, permits or licences to which the Party (or an authorised entity on its behalf) is subject (or any conditions attaching thereto) and that any such consents, authorisations, approvals, registrations or licences are and will continue to be valid and in full force and legal effect;

(g) that each Party (and any authorised entity acting on its behalf) in entering into a Covered Base Agreement and CDA and any Covered Transactions is acting, and will be acting at all times, in compliance with the legislation, rules, regulations and guidances that it is subject to;

(h) that the execution and delivery of a Covered Base Agreement and CDA and the performance of the obligations of the parties thereunder will not contravene any provision of the relevant Party's constitutional documents, memorandum and articles of incorporation or, in the case of a Guernsey Insurance Company, it's business plan as submitted to the Commission;

(i) that each of the Covered Base Agreement and CDA, when executed and delivered by the Parties, will constitute the legal, valid and binding obligations of the Parties thereto, enforceable in accordance with its terms under New York law (by which law such Covered Base Agreement and CDA are expressed to be governed) and all other applicable laws;

(j) that none of the opinions expressed hereunder will be adversely affected by the laws or public policies of any jurisdiction other than Guernsey and, in particular but without limitation, there are no provisions of the laws of any jurisdiction other than Guernsey which would be contravened by the execution or delivery of the Covered Base Agreement and CDA or by any Party to such Covered Base Agreement and CDA exercising its rights or performing its obligations under them;

(k) that the choice of New York law to govern the Covered Base Agreement and CDA is bona fide and not made with any intention to evade the laws of the jurisdiction with which the Covered Transactions under such Covered Base Agreement and CDA have the closest and most real connection;

(l) that there are no agreements, documents or arrangements other than the documents expressly referred to herein as having been examined by us which materially affect, amend or vary the Covered Transactions envisaged in the Covered Base Agreement and CDA or restrict the powers and authority of the directors of the Guernsey Party in any way;

(m) the Covered Base Agreement, the CDA and all Covered Transactions under them have been entered into for bona fide commercial reasons and at an arm's length by each of the Parties and, in resolving to enter into such Covered Base Agreement, CDA and all Covered Transactions pursuant to them, each of the directors of the Guernsey Party is not exercising their powers for improper purposes and is acting in good faith with a view to the best interests of the Guernsey Party and exercising the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;

(n) immediately after the Parties entered into the Covered Base Agreement, CDA and any Covered Transactions under them, each Guernsey Party is able to meet its debts in full as they fell due;

(o) that there are no specific terms of a Covered Base Agreement or CDA which adversely impact on the analysis of the questions contained in this Opinion, which analysis is based solely on the assumed terms of the Covered Base Agreement and CDA (as set out in paragraph 6 of this Opinion);

SCHEDULE 2

Qualifications and Limitations

Qualifications

This Opinion is subject to the following qualifications:

1 The term "enforceable", when used in this Opinion, means that the relevant obligations are of a type which the Royal Court will enforce, but it does not mean that such obligations will necessarily be enforced in all circumstances or in accordance with their terms. In particular, but without limitation:

(a) save as expressly set out in paragraphs 7 to 11 of this Opinion, the enforceability of any Covered Base Agreement or CDA may be limited by dissolution, bankruptcy, liquidation, administration, reorganisation, insolvency or other laws of general application relating to, or affecting the rights of, creditors. Please see Schedule 3 for a general summary of Guernsey's insolvency regime which may apply to Guernsey companies (as read with Schedule 6 in respect of Guernsey Insurance Companies);

(b) enforcement may be limited by general principles of equity and, in particular, equitable remedies (to the extent applicable in Guernsey) such as specific performance and injunction are discretionary and may not be available where damages are considered to be an adequate remedy;

(c) claims may be barred under the laws relating to the prescription and limitation of actions or may be subject to the general doctrine of estoppel in relation to representations, acts or omissions of any relevant Party or may become subject to the defence of set-off or counterclaim;

(d) the Royal Court will not enforce provisions of the Covered Base Agreement or the CDA to the extent that they may be illegal or contrary to public policy in Guernsey or purport to exclude the jurisdiction of the Royal Court or, if obligations are to be performed in a jurisdiction outside Guernsey, to the extent that such performance would be illegal or contrary to public policy under the laws of that jurisdiction. However, although we have not made any specific investigations into such matter, there is nothing contained in the assumed contents of the Covered Base Agreement or the CDA that would lead us to believe that the Royal Court would hold enforcement of the Covered Base Agreement or the CDA to be illegal or contrary to public policy in Guernsey;

(e) the Royal Court may not enforce provisions of the Covered Base Agreement or the CDA to the extent that the Covered Transactions contemplated under them conflict with or breach economic or other sanctions imposed in respect of certain states or jurisdictions by any treaty, law, order or regulation applicable to Guernsey;

(f) the enforcement of the obligations of the Parties to the Covered Base Agreement and CDA may be limited by the provisions of Guernsey law applicable to documents held to have been frustrated by events happening after their execution;

(g) the effectiveness of any provisions in the Covered Base Agreement or the CDA exculpating any Party from a liability or duty otherwise owed may be limited by law;

(h) any provisions of the Covered Base Agreement or the CDA purporting to provide for a payment to be made in the event of breach of the Covered Base Agreement and CDA would not be enforceable to the extent that the Royal Court were to construe such payment to be a penalty which was excessive, in that it unreasonably exceeds the maximum damages which an obligee could have suffered as a result of the breach of an obligation;

(i) any provisions of the Covered Base Agreement or the CDA purporting to fetter any statutory power of a Guernsey Party may not be enforceable;

(j) the Royal Court may refuse to give effect to any provisions in an agreement for the payment of the costs of enforcement (actual or contemplated) or of unsuccessful litigation brought before the Royal Court or where the Royal Court has itself made an order for costs;

(k) the Royal Court may refuse to give effect to any provisions in an agreement which would involve the enforcement of any foreign revenue or penal laws;

(l) the Royal Court may refuse to allow unjust enrichment or to give effect to any provisions of an agreement that it considers usurious;

(m) enforcement of any obligations may be invalidated or vitiated by reason of fraud, duress, misrepresentation or undue influence.

2 The Royal Court may decline to accept jurisdiction in an action where it determines that there is another more appropriate forum in another jurisdiction or that a court of competent jurisdiction has already made a determination of the relevant matter or where there is litigation pending in respect thereof in another jurisdiction or it may stay proceedings if concurrent proceedings are instituted elsewhere.

3 The question of whether or not any provision of a Covered Base Agreement or CDA which may be invalid on account of illegality may be severed from the other provisions thereof would be determined by the Royal Court in their discretion.

4 Any provision of a Covered Base Agreement or CDA which purports to give conclusive effect to any calculation, determination or certification may be held by the Royal Court not to be conclusive as such court may review the grounds on which such calculation, determination or certification is made or given.

5 Where any Party to a Covered Base Agreement and CDA is vested with a discretion or may determine a matter in its opinion, the Royal Court, if called upon to consider the issue, may require that such discretion is exercised reasonably or that such opinion is based on reasonable grounds.

6 There is no dedicated netting legislation under Guernsey law, limited modern Guernsey case law on netting and/or contractual set-off, and very little case law on insolvency issues generally, and accordingly, it is difficult to predict the attitude that the Royal Court would take with respect to these issues.

7 This Opinion is given only in respect of Guernsey Parties, which without limitation excludes Protected Cell Companies and Protected Cells, but includes Incorporated Cell Companies and Incorporated Cells. The law relating to Protected Cell Companies, Protected Cells, Incorporated Cell Companies and Incorporated Cells is set out in the Companies Law. An Incorporated Cell is a separate legal entity in its own right, a company for the purposes of the Companies Law and therefore a Guernsey Company Party. A Protected Cell Company is a single legal person and a Protected Cell is not, in its own right, a legal person or company separate from the applicable Protected Cell Company. There are important differences between Protected Cell Companies and Incorporated Cell Companies and Guernsey legal advice should be obtained when dealing with a Protected Cell Company and any Protected Cell.

8 We have not examined a standard form of Covered Base Agreement or CDA and, as per the Instruction Letter, have relied on and based this Opinion on the assumptions describing the Covered Base Agreement and CDA as provided in the Instruction Letter and repeated in paragraph 6.

Limitations

This Opinion is limited to the matters stated in it and, in particular, we offer no opinion:

(a) in relation to the laws of any jurisdiction other than Guernsey (and we have not made any investigation into any such laws);

(b) on the effect, validity or enforceability of or the validity or effectiveness of any document, save as expressly set out herein;

(c) in relation to any representation or warranty made or given in any documents or, save as expressly set out herein, as to whether any party will be able to perform its obligations under any documents;

(d) as to the commerciality of the transactions envisaged in any documents or, save as expressly stated in this Opinion, whether any documents referred to in this Opinion achieve the commercial, tax, legal, regulatory or other aims of the parties to such documents; or

(e) save in relation to the questions expressly answered and matters expressly addressed in our Opinion, on Guernsey Banks, Guernsey Branches and Guernsey Insurance

Companies generally, on regulatory matters in respect of Guernsey Banks, Guernsey Branches or Guernsey Insurance Companies or on the treatment of and manner in which Guernsey Banks, Guernsey Branches and Guernsey Insurance Companies are required to carry on business or transact.

SCHEDULE 3

Summary of Guernsey's Insolvency Regime

1 Overview of Guernsey's insolvency procedures

The principal circumstances in which someone may be appointed to take control of either a Guernsey Party or the movable assets of a Guernsey Party are as follows:

(a) Winding up under the Companies Law

This applies to Guernsey companies and is discussed further below. The procedure is set out in paragraph 2 of this Schedule. The preference provisions of the Companies Law and other laws are discussed in paragraph 6 and paragraph 7 of this Schedule.

(b) Bankruptcy under the 1929 Law

Although broad enough to extend to companies, the 1929 Law appears to be intended for individuals. The procedures under it are, moreover, little used even for individuals with the *désastre* ~~proceeding~~ proceedings referred to below being generally preferred for recovery by creditors. The preference provisions under the 1929 Law are discussed in paragraph 7 of this Schedule.

(c) Administration under the Companies Law

This applies to Guernsey Company Parties and is discussed further in paragraph 3 of this Schedule.

(d) *Désastre*

Désastre is an informal procedure whereby, in the event that the proceeds of execution by HM Sheriff against a debtor's assets in Guernsey are insufficient to satisfy the debts of the arresting creditor and other debts notified to HM Sheriff, the Royal Court may appoint a commissioner to establish the claims of creditors and whether any are preferred. This is however, in essence, a procedure for the recovery of debts and it is not a requirement that the debtor be insolvent or likely to become insolvent in order for *désastre* proceedings to be commenced. The process is briefly explained in paragraph 4 of this Schedule.

(e) *Saisie*

There is also a further procedure known as *Saisie* which applies to Guernsey realty and which is briefly explained in paragraph 5 of this Schedule.

These procedures (the **Guernsey Insolvency Procedures**) are discussed further in paragraphs 2 to 9 of this Schedule. In respect of Guernsey Insurance Companies they should also be considered together with Schedule 6.

2 Winding Up

2.1 Under the Companies Law, a company can be wound up compulsorily or voluntarily.

2.2 Under the Companies Law, the company, any director, a member, a creditor or any other interested party may apply for a company to be compulsorily wound up if, inter alia, the company is unable to pay its debts (as set out in the Companies Law and discussed below) or the Royal Court is of the opinion that it is just and equitable that the company should be wound up.

2.3 For the purposes of the Companies Law a company is deemed to be unable to pay its debts if (i) (a) a creditor to whom the company owes a sum exceeding £750 which is then due serves on the company through HM Sergeant a written demand for payment at the company's registered office; and (b) the company for a period of 21 days immediately following the date of service, neglects to pay the sum or to secure payment to the reasonable satisfaction of the creditor; or (ii) if it is proved to the satisfaction of the Royal Court that the company fails to satisfy the Solvency Test.

2.4 On the making of an application for the compulsory winding up of a company or at any time thereafter, any creditor of the company may apply to the Royal Court for an order restraining, on such terms and conditions as the Royal Court thinks fit, any action or proceeding pending against the company and/or appointing a provisional liquidator to ascertain the company's assets and liabilities, manage its affairs and do all acts authorised by the Royal Court.

2.5 Under the Companies Law a company may be wound up voluntarily (1) in either of the following cases: (i) the period (if any) fixed by its articles for the duration of the company expires, or (ii) if an event occurs on the occurrence of which the articles provide that the company shall be dissolved; provided that in each case the company resolves in general meeting that it be wound up voluntarily; or (2) if it passes a special resolution to that effect.

2.6 A company which is being or which is to be voluntarily wound up may, by special resolution, delegate to its creditors or to any committee thereof the power to: (i) appoint a liquidator and to fill any vacancy in the office of liquidator; or (ii) enter into any arrangement regarding the powers to be exercised by the liquidator and the manner in which they are to be exercised and any act done by the creditors in pursuance of such delegated power shall have effect as if done by the company.

2.7 Any arrangement entered into between a company which is being or which is to be voluntarily wound up, and its creditors shall, (subject to a right of appeal by a creditor or shareholder of the company to have such arrangement set aside within 21 days of the date of completion of the arrangement), be binding if sanctioned by a special resolution of the company and by three quarters in number and value of the creditors.

2.8 A liquidator appointed by the Royal Court will be sworn and will have the powers set out in the Companies Law (upon which we can advise further if required) or authorised by the

Royal Court. There is, however, no express power under the Companies Law for a liquidator to disclaim onerous assets.

2.9 All costs, charges and expenses properly incurred in the voluntary or compulsory winding up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims.

2.10 Subject to the provisions of the Companies Law and of any rule of law as to preferential payments, any agreement between the company and any of its creditors as to the subordination of one debt to other debts, and any agreement between the company and any creditor thereof as to set-off, the company's assets in a winding up will be realised and applied in satisfaction of the company's debts and liabilities pari passu.

2.11 In respect of an Incorporated Cell Company, winding up shall be carried out in such way as to not prejudice the affairs, business and property of any of its Incorporated Cells, and accordingly, during the winding up, the Incorporated Cell Company shall continue to carry on business to the extent necessary for the continuance of business of its Incorporated Cells.

2.12 An Incorporated Cell Company that is being wound up shall not be dissolved until each of its cells ceases to exist as an Incorporated Cell of that Incorporated Cell Company, and the Royal Court may stay such dissolution on such terms as it thinks fit.

3 Administration

3.1 Under the Companies Law, if the Royal Court is satisfied that a company does not satisfy or is likely to become unable to satisfy the Solvency Test, and considers that the making of an order may achieve one or more of the purposes set out in paragraph 3.3 of this Schedule, the Royal Court may make an order (an **administration order**) in relation to such company.

3.2 An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person (the **administrator**) appointed for the purpose by the Royal Court.

3.3 The purposes for the achievement of which an administration order may be made are:

(a) the survival of the company, and the whole or any part of its undertaking, as a going concern,

(b) a more advantageous realisation of the company's assets than would be effected on a winding up,

and the order shall specify the purpose for which it is made.

3.4 An administration order may be made notwithstanding that,

(a) an order for the company's winding up has been made by the Royal Court, or

(b) the company has passed a resolution for voluntary winding up,

and, if an administration order is so made, then,

(c) the order for the company's winding up shall be discharged or suspended, or

(d) the resolution for voluntary winding up shall cease to have effect or shall be suspended,

on such terms and conditions as the Royal Court thinks fit.

3.5 During the period between the presentation of an application for an administration order and ending with the making of such an order or the dismissal of the application:

(a) no resolution may be passed or order made for the company's winding up; and

(b) no proceedings may be commenced or continued against the company, except with the leave of the Royal Court and subject to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set-off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of this paragraph).

However, nothing summarised in paragraph 3.5 of this Schedule requires the leave of the Royal Court for the presentation of an application for the company's winding up.

3.6 On the making of an administration order any application for the company's winding up shall be dismissed.

3.7 During the period for which an administration order is in force:

(a) no resolution may be passed or order made for the company's winding up; and

(b) no proceedings may be commenced or continued against the company except with the consent of the administrator or the leave of the Royal Court and subject (where the Royal Court gives leave) to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set-off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of this paragraph).

3.8 The administrator of a company may do all such things as may be necessary or expedient for the management of the affairs, business and property of the company.

3.9 The administrator of a company shall, on his appointment, take into his custody or under his control all the property to which the company is or appears to be entitled. The administrator shall manage the affairs, business and property of the company in accordance with any directions given by the Royal Court.

4 *Désastre*

There is no clear code of procedure for *désastre*, but a brief outline of the process is set out below:

(a) *Désastre* proceedings arise out of the arrest of a debtor's personalty in Guernsey by HM Sheriff, either at the instance of a judgment creditor or a creditor without a judgment where there is good reason for an immediate arrest.

(b) Following confirmation of the arrest by the Court and realisation of the assets, the Court may institute *désastre* procedures where HM Sheriff has insufficient resulting funds to cover the debt of the arresting creditor and any other debts notified to him.

(c) The Court will order the arresting creditor, the debtor and other creditors to appear before a Jurat appointed by the Court to act as Commissioner for the purpose of establishing the claims of debtors and any preferences.

(d) At a meeting attended by the arresting creditor and HM Sheriff the Commissioner declares the debtor to be *en désastre* (in a state of financial disaster) and fixes the place, date and time at and on which he will examine the claims and preferences of the various creditors and declare a dividend amongst them.

(e) The arresting creditor must publish a notice on two occasions in the Gazette Officielle stating that a meeting of creditors is to be held at and on the appointed place, date and time.

(f) At the meeting of creditors, each creditor submits his claims and these are duly marshalled by the Commissioner, having regard to any preferred debts. The debtor is again summoned formally to attend this meeting.

(g) Once this has been done and HM Sheriff has disclosed the amount of the monies in his hands, the Commissioner declares a dividend and makes a report on the proceedings held before him.

(h) The monies in the hands of HM Sheriff are then distributed among the creditors, preferential claims being satisfied in full and the other claims met in part according to the dividend declared by the Commissioner.

5 *Saisie*

Saisie is a process involving the enforcement of a judgment debt of the Royal Court against the realty of the debtor situate in Guernsey. Although usually commenced by a single judgment creditor, the process allows all creditors to participate, although in so doing, they will be renouncing any right thereafter to proceed against personalty.

During the process debts will be ranked in order of priority and will include debts secured against the realty. The process culminates in one of the creditors, usually the most

senior, taking outright ownership. A lower ranking debtor may elect to take the property, but would have to pay off all the prior ranking creditors.

6 Preferences

6.1 The liquidator of a company may apply to the Royal Court for an order under the Companies Law if the company has given a preference to any person at any time after the commencement of a period of six months immediately preceding the relevant date. For the purposes of the Companies Law, a company gives a preference to a person if:

(a) that person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities; and

(b) the company does anything, or permits anything to be done, which improves that person's position in the company's liquidation.

6.2 The relevant date is the earlier of the date of any application for the compulsory winding up of the company under the Companies Law and the date of the passing by the company of any resolution for the voluntary winding up of the company.

6.3 If, on such an application by the liquidator, the Royal Court is of the opinion that:

(a) the company was at the time of giving the preference, or became as a result of giving the preference, unable to pay its debts within the meaning of the Companies Law; and

(b) the company was influenced in deciding to give a preference by a desire to produce the effect mentioned in paragraph 6.1(b) of this Schedule,

the Royal Court may make such order as it thinks fit for restoring the position to what it would have been if the company had not given the preference.

6.4 In the application of these provisions of the Companies Law to any case where the person given a preference is connected with the company:

(a) the reference in paragraph 6.1 of this Schedule to six months is to be read as a reference to two years; and

(b) the company is presumed, unless the contrary is shown, to have been influenced in deciding to give the preference by such desire as is mentioned in paragraph 6.3(b) of this Schedule.

6.5 For these purposes, a person is connected with the company at any time if the company knew or ought to have known at that time that:

(a) that person had any significant direct or indirect proprietary, financial or other interest in or connection with the company (other than as a creditor, surety or guarantor); or

(b) another person had any such interest in or connection with both that person and the company.

6.6 The fact that something is done or permitted pursuant to a court order does not, without more, prevent it from being a preference.

6.7 These provisions of the Companies Law are without prejudice to any other remedy. See, for example, the provisions of the 1979 Law with respect to contractual set-off agreements, discussed in paragraph 8 of this Schedule.

7 Transactions at an undervalue / Fraudulent Preference

7.1 Article IX of the 1929 Law provides that every conveyance of property whether movable or immovable, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if such conveyance, charge, payment, obligation, or judicial proceeding has been made, taken, suffered or obtained within three months prior to the debtor's application for a declaration of insolvency, be deemed fraudulent and void as against the committee of creditors.

7.2 Section 1(2) of the 1979 Law provides that where a jurat presiding over a meeting of arresting creditors in a *désastre* proceeding has reasonable cause to believe that any contractual set-off agreement was entered into by the party whose state of affairs have been declared in a state of *désastre* (the **debtor**) less than six months before the date of the meeting, the matter of the agreement shall be referred to the Royal Court and if the Royal Court is satisfied that the agreement was entered into with a view of giving a preference over other creditors of the debtor, the Court may make an order directing that the agreement shall be treated as fraudulent and void as against the other creditor of the debtor. See paragraph 8 below.

7.3 The Jersey courts have applied customary law principles in cases including the so-called Pauline Action to provide victims of fraud with rights in certain circumstances to revoke transfers by fraudsters of the victim's assets to a third party recipient. The elements of the cause of action differ depending on whether the transfer is at full value (*aliénation onéreuse*) or at less than full value (*aliénation lucrative*). Although the Guernsey courts have not ruled on such matters (certainly in recent times), the customary law principles invoked by the Jersey courts in such actions and the reasoning of the Jersey courts would be persuasive to the Guernsey courts should they be called upon to consider similar issues. In the Batty v Bourse case referred to above, the Royal Court recognised that a Pauline Action brought to recover assets has similar characteristics to proceedings brought under section 423 of the Insolvency Act 1986 in the United Kingdom.

8 Set-off under Guernsey law

Contractual Set-off

The 1979 Law provides that where there is for the time being in force an agreement (whether written or oral and whether express or implied) whereby, in respect of mutual dealings between them, any debt from one party is to be set off against any debt from the other party, the effect of that agreement is, unless the parties have expressly or by implication agreed to a different effect, that the only action which may be taken at any time in relation to what would otherwise be those mutual debts (whether by or at the instance of either party or any third party, and whether by way of enforcement, assignment, arrest, restraint or otherwise) is in respect of the balance (if any) then due after that set-off.

This is subject to the following exceptions:

(a) in ascertaining the balance due as described above (but only for the purposes of the above), if a contingent liability is to be taken into account the contingency is to be treated as having occurred, and if a future liability is to be taken into account it is to be treated as if presently payable; and

(b) in a case where the affairs of one party have been declared in a state of *désastre* at a meeting of his arresting creditors held before a Jurat as Commissioner of the Royal Court, where a Jurat has reasonable cause to believe that any set-off agreement was entered into by the party whose affairs have been declared in a state of *désastre* less than six months before the date of the creditors' meeting, the matter of the agreement shall be referred to the Royal Court to determine whether the agreement was entered into with a view to giving to the other party a preference over the other creditors of the debtor, in which case the Royal Court may make an order directing that the agreement shall be treated as being fraudulent and void as against the other creditors of the debtor.

Customary Law

There is also under Guernsey customary law a concept of *compensation.* There is some ambiguity as regards the customary law position although it has been stated[3] that the principal features of *compensation* were:

(a) that there were two debts between two parties in respect of which they were reciprocally creditors and debtors the one of the other;

(b) that the two parties were creditor and debtor in the same right, i.e. a party indebted personally could not set off against it a sum due to him as agent or trustee of another;

(c) both debts must be *certaine* and *liquide*. A disputed claim could not be set off against a certain debt. Nor could a claim for an unliquidated sum be used in set off;

(d) both debts must be presently due; and

[3]Set-Off, P.R. Collas, January 1986

(e) compensation occurred "ipso facto", i.e. automatically when the features were present.

9 Priority of debts

In making distributions to creditors of a person whose affairs have been declared to be in a state of *désastre* or in a winding up of a company which is insolvent, there are a number of creditors who have priority by law. These are set out in a number of laws including the Companies Law, the 1979 Law, the Preferred Debts Law and the 1993 Law. The order of priority, generally, will be determined with primary regard to the following principles:

9.1 Where a valid contractual set-off exists the only action which may be taken at any time is in respect of the balance (if any) then due after that set-off.

(1979 Law, Section 1)

9.2 A party with a valid security interest under the 1993 Law (the **secured party**):

(a) without title to the collateral, to the extent that the collateral is sufficient, has priority over all other claims for the amount due to the secured party; and

(b) with title to the collateral, may realise or otherwise deal with the collateral notwithstanding insolvency, *désastre* or other judicial proceedings or arrangements with respect to the debtor (subject to the terms of the 1993 Law, including the right of an arresting creditor to apply to the Royal Court for an order vesting in him the rights of the secured party to the collateral).

(1993 Law, Section 5)

9.3 An award of damages by the Royal Court to a person granting security under the 1993 Law or pursuant to an assignment under the 1979 Law (a **debtor**) following:

(a) a failure to cancel or discharge all or part of a security interest under the 1993 Law upon payment by the debtor;

(b) the arrest of collateral the subject of a security interest under the 1993 Law by HM Sheriff or the winding up of the secured party and tender of full discharge, payment or performance by the debtor; or

(c) an action for breach of a proviso or condition for re-assignment of the collateral to the debtor,

shall be paid in full in priority to all other debts, other than a debt secured by way of a bond or judgment registered in the Livre des Obligations kept at the Greffe (effectively, a debt or judgment secured against Guernsey real property).

(*1993 Law, Section 6; 1979 Law, Section 3(3)*)

9.4 The remuneration of an administrator and any costs, charges and expenses properly incurred in the administration of a company, an Incorporated Cell Company or an Incorporated Cell are payable from the assets of the company, Incorporated Cell Company or the Incorporated Cell in priority to all other claims.

(Companies Law, Section 383)

9.5 All costs, charges and expenses properly incurred in the winding up of a company (voluntary or compulsory), including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims.

(Companies Law, Sections 404 and 418 - also Preferred Debts Law, Section 6, with respect to costs in a *désastre*)

9.6 The Preferred Debts Law provides that certain preferred creditors in a *désastre* or winding up shall be paid in priority to all other debts, including:

(a) firstly, (subject to certain exceptions set out in the Preferred Debts Law) landlords in respect of any debts owing to the landlord by his tenant in respect of the rent of any immovable property to the extent that such debt is secured by goods present in or upon that immovable property which is subject to tacit hypothecation by operation of law (in the French language tacite hypothèque) for the payment of that rent;

(b) thereafter and ranking equally among themselves, and to be paid in full (but subject to certain limits) unless the assets are insufficient, in which case they shall abate in equal proportions:

(i) employees' wages or salary due for period(s) not exceeding four months in aggregate in respect of services rendered to the debtor during the six years immediately preceding the relevant date;

(ii) employees' accrued holiday remuneration becoming payable on the termination of his employment before, or by the effect of the insolvency or winding-up;

(iii) all income tax deducted during period(s) not exceeding twelve months in aggregate in accordance with Section 81A of the Income Tax (Guernsey) Law, 1975, as amended, by an employer for the emoluments of an employee within the six years immediately preceding the relevant date and not paid by the employer;

(iv) all primary Class I social security payments deducted by employers in respect of employees during period(s) not exceeding twelve months in aggregate, in accordance with Section 13 of the Social Insurance (Guernsey) Law, 1978, as amended, for earnings of and within the six years immediately preceding the relevant date and not paid by the employer.

(Preferred Debts Law, Section 1)

9.7 The Companies Law recognises on a winding up subordination agreements between a Guernsey company and its creditors.

(Companies Law, Section 419)

9.8 Subject to the above, remaining assets in a *désastre* or winding up will be realised and applied in satisfaction of debts and liabilities pari passu.

(Companies Law, Section 419)

The information is this Schedule 3 is summary in nature and should not be considered to be exhaustive.

SCHEDULE 4

Conflict of laws and *lex situs*

Conflict of laws

As a general principle, the Royal Court will, when considering issues relating to conflicts of law, have regard to the principles established under English law. On this basis, English law principles will be relevant to:

(a) ~~(i)~~determining the *lex situs* of an asset;

(b) ~~(j)~~determining the governing law of a transfer of movables; and

(c) ~~(k)~~determining the proper law of a contract.

However, with regard to paragraph (c), please note that the United Kingdom Contracts (Applicable Law) Act 1990 and the Rome Convention of 1980 (and the successor Conventions and Regulations) do not apply in Guernsey and, therefore, the Royal Court will have regard the English common law principles set out in the English case of Amin Rasheed Shipping Corp. v Kuwait Insurance Co. ([1984] A.C. 50). In particular, the effect of this is that the express choice of governing law will be the proper law provided that such choice is bona fide and legal and not contrary to public policy.

We would draw your attention to the Jersey case of Re Nield (1983), where the Jersey Courts were asked to consider the validity of a purported English law mortgage over Jersey law life insurance policies. It was held that "the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law and under which the agreement would not be valid." Therefore, to the extent that the Covered Base Agreement and CDA purport to create security over Guernsey *situs* Collateral in a manner that does not satisfy the requirements of the 1993 Law, it is, in our view, possible that the Royal Court would reject the choice of New York law as the governing law of the Covered Base Agreement and CDA. Accordingly, if any party intends to take a security interest over Guernsey *situs* Collateral, we would recommend that the parties enter into a Guernsey law security interest agreement in respect of such Collateral governed by Guernsey law and complying with the requirements of the 1993 Law to ensure that the Secured Party has an enforceable security interest under Guernsey law.

Lex situs

The United Kingdom Financial Collateral Arrangements (No. 2) Regulations 2003 are not applicable in Guernsey. However, we believe that the Royal Court would have regard to the following principles in determining the location of the Collateral, which principles we understand are established under English common law (which we understand is based on principles as set out in Dicey and Morris):

(a) Cash: the *situs* will be the jurisdiction where the bank account is located.

(b) Rights in a Guernsey bank account: the *situs* will be the jurisdiction where the bank account is located.

(c) Securities in bearer form: the *situs* will be the jurisdiction where the certificate of title representing the security is from time to time to be found.

(d) Securities in registered form: the *situs* will be the jurisdiction where, under the law of the country in which the issuer of such securities was incorporated, the registered securities can be effectively dealt with as between the owner for the time being and the issuer. In effect, this will be the place where the register of securities is kept. If they are transferable by reference to more than one register, the securities will be situated at the place of the register on which they are dealt with in the ordinary course of affairs by the registered owner for the time being.

(e) Dematerialised securities: the *situs* will be the jurisdiction of the place where the register of securities is kept (see paragraph (d) above).

(f) Rights in immobilised securities held by a CSD: in our view (in reliance upon Dicey and Morris), the proprietary rights are located at the place where the account with the depositary or clearing system is maintained and the *lex situs* will be the law governing its relationship with the depositary or clearing system.

(g) Rights in a contract (including contractual rights that are Customer Contractual Rights): the *situs* will be the location of the proper law of the contract.

The Instruction Letter states that each Covered Base Agreement and CDA will be governed by New York law.

On the basis that:

(i) the choice of New York law to govern each of the Covered Base Agreement and CDA is bona fide and not made with any intention to evade the laws of the jurisdiction with which the transactions thereunder have the closest and most real connection; and

(ii) such choice of law is legal, valid, binding and enforceable under all applicable law other than Guernsey law, including New York law,

we consider that the proper law of the Covered Base Agreement and CDA (and of the contractual rights arising thereunder that are Customer Contractual Rights) should be considered by the Royal Court to be New York law. Subject to this Schedule 4, there is nothing in the Instruction Letter that would lead us to believe that the Royal Could would hold the choice of New York law to govern the Covered Base Agreement and CDA to not be bona fide or to be made with an intention to evade the laws of the jurisdiction with which the transaction have the closest and most real connection.

SCHEDULE 5

Summary of Guernsey Security Interest Laws

1 The 1979 Law

One of the 1979 Law's main purposes was to clarify and confirm the right of set-off pursuant to an agreement governing mutual dealings between the parties (see Schedule 3, paragraph 8 for a discussion on contractual set off under the 1979 Law).

The 1979 Law also confirms that the legal right of a debt or other thing in action and all legal remedies connected to a debt or thing in action may effectively be assigned to a third party. The assignment is effective regardless of whether there is a proviso or condition for re-assignment.

2 The 1993 Law

As a matter of Guernsey law, security over intangible moveable property situated in Guernsey (other than a lease) may be taken pursuant to the 1993 Law.

2.1 Security under the 1993 Law must be created by one of the following methods (as set out in Section 1 of the 1993 Law):

(a) a security interest in securities is created where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has possession pursuant to a security agreement of the certificates of title to such securities (Section 1(3) of the 1993 Law);

(b) a security interest in a policy of life assurance is created where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has possession pursuant to a security agreement of the policy (Section 1(4) of the 1993 Law);

(c) a security interest in a bank account is created where the bank which holds such account for its customer is the secured party and that bank has control of the account pursuant to a security agreement and its customer and the debtor are one and the same person (Section 1(5) of the 1993 Law); or

(d) a security interest in any intangible immoveable property (other than a lease) is created where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has title to the collateral pursuant to a security agreement (Section 1(6) of the 1993 Law) and, where that title is acquired by assignment, has given express notice in writing to the person from whom the debtor would have been entitled to claim the collateral (Section 1(8) of the 1993 Law). The reference to title is a reference to title acquired (a) in the case of a bearer certificate or a negotiable instrument, by delivery with any necessary endorsement; and (b) in any other case, by assignment of the collateral (with or without a proviso or condition for reassignment) (Section 1(7) of the 1993 Law).

2.2 Under Section 2 of the 1993 Law, a security agreement must:

(a) be in writing;

(b) be dated;

(c) identify and be signed by the debtor;

(d) identify the secured party;

(e) contain provisions regarding the collateral sufficient to enable its precise identification at any time;

(f) specify the events which are to constitute events of defaults; and

(g) contain provisions regarding the obligation payment or performance of which is to be secured sufficient to enable it to be identified.

2.3 Section 2(2) of the 1993 Law provides that, subject to the matters referred to in paragraph 2.2 above, a security agreement may be in such form, and may contain or refer to such matters, as may be agreed between the parties.

2.4 Under Section 3 of the 1993 Law, a security agreement may be created before or after the obligation whose payment or performance is to be secured by it comes into existence provided that pursuant to Section 2(1)(g) of the 1993 Law, the security agreement must contain provisions regarding the obligation sufficient to enable it to be identified.

2.5 Section 4 provides that the priority between security interests in the same collateral is determined by the order of creation of those securities, however, it also provides that a secured party may postpone his rights.

2.6 Under Section 5 of the 1993 Law, where the debtor either becomes insolvent or is declared *en désastre*, where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) does not have title to the collateral, to the extent that the collateral is sufficient, the amount due to the secured party in respect of a security interest created under Sections 1(3), 1(4) and 1(5) of the 1993 Law shall be paid in priority to all other claims. Further that the power of the title-holding secured party to realise or otherwise deal with the collateral is unaffected by the debtor either becoming insolvent or having his property being subject to any other judicial arrangement or proceeding consequent upon insolvency or a declaration of *désastre*.

2.7 Section 5(4) of the 1993 Law provides that where the debtor has been declared en *désastre*, the arresting creditor may apply to the Royal Court for an order vesting in him the rights of the secured party to the collateral and directing that it be sold or applied by HM Sheriff in accordance with Section 7 of the 1993 Law. The proceeds of that sale or application of the collateral shall be applied by HM Sheriff in accordance with Section 7 of the 1993 Law. Subject to the above, the Royal Court may make an order directing such vesting and sale upon such terms and subject to such conditions as the Royal Court

thinks fit. In our view, an arresting creditor is most likely to make such application to the Royal Court if the secured party is acting in a way that the arresting creditor considers detrimental to the conduct of the *désastre*, for example, by the secured party being dilatory in exercising his power of sale or application.

2.8 Section 6 of the 1993 Law makes provisions for the discharge and cancellation of security interests. Subject to any other rights or interests of which the secured party has notice and unless the security agreement expressly provides otherwise, upon the discharge, payment or other performance of the obligation payment or performance of which is secured, the secured party must transfer to the debtor the documents, control of the account or the title collateral as the case may be. The secured party must also provide the debtor with a certificate of discharge, either partial or full, of the security interest.

2.9 A power of sale or application of the collateral under Section 7 of the 1993 Law arises after an event of default (as specified in the security agreement) occurs. The power of sale is not exercisable unless the secured party has served on the debtor a notice specifying the particular event of default complained of.

2.10 Upon a sale or application under the 1993 Law, the secured party shall apply the proceeds of sale in the order set out in Section 7(5)(b) of the 1993 Law, as follows:

(a) in payment of the costs and expenses of the sale;

(b) in discharge of any prior security interest (such priority being determined by the order of creation);

(c) in discharge of all monies properly due in respect of the obligations secured by the security agreement;

(d) in payment, in due order of priority, of secured parties whose security interests were created after his own, and on whose behalf (as well as on his own behalf) he was, immediately before exercising his power of sale or application, holding possession of documents or exercising control of collateral (whether by himself or through some other person on his behalf) for the purposes of Section 1 of the 1993 Law;

(e) as to the balance (if any remains), in payment to the debtor or, in the event that the debtor has become insolvent or been subjected to any other judicial arrangement consequent upon insolvency, to HM Sheriff or other proper person.

2.11 For the purposes of enforcement, a power of application must be exercised on the same basis as a power of sale, and the proceeds of its exercise must be applied in the same way as the proceeds of a sale (see paragraph 2.10 above).

2.12 Section 8 of the 1993 Law sets out, for the avoidance of doubt, when a security interest taken under the 1993 Law ceases:

(a) a security interest created under Section 1(3) or 1(4) of the 1993 Law (as summarised in paragraphs 2.1 (a) and (b) above) terminates when the secured party (or some person on his behalf not being the debtor or some person on behalf of the debtor) ceases to have possession pursuant to the security agreement of the relevant documents for the purposes of Sections 1(3) and 1(4) of the 1993 Law. The "documents relevant for the purposes of Sections 1(3) and 1(4)" meaning a certificate of title to securities, or a policy, as the case may be;

(b) a security interest created under Section 1(5) of the 1993 Law (as summarised in paragraph 2.1(c) above) terminates when the bank being the secured party ceases to have control pursuant to the security agreement of the account relevant for the purposes of Section 1(5) of the 1993 Law;

(c) a security interest created under Section 1(6) of the 1993 Law (as summarised in paragraph 2.1(d) above) terminates when the secured party ceases to have pursuant to the security agreement title to the collateral relevant for the purposes of Section 1(6) of the 1993 Law; and

(d) a security interest also terminates forthwith:

(i) when the Royal Court so orders under certain provisions of the 1993 Law; or

(ii) unless the security agreement creating it expressly provides to the contrary, upon the discharge, payment or other performance of the obligation secured by it.

2.13 Section 10 of the 1993 Law provides that a person incorporated, resident or domiciled in Guernsey is not to be considered as lacking capacity, or as ever lacking capacity, to give security governed by foreign law over property situated outside Guernsey, by reason only that the law of Guernsey does not permit security to be given by the method or in the circumstances permitted by that foreign law.

~~2.14~~Section 11 of the 1993 Law defines a security interest as meaning an interest in intangible moveable property that secures payment or performance of an obligation under the provisions of the 1993 Law. An obligation is defined as including a debt, a contingent obligation and a guarantee of payment or performance of an obligation. Moveable property is defined as meaning all property, wherever situated, whether tangible or intangible, and whether vested, contingent or future, which is not regarded by the law of Guernsey as immeubles, and includes choses or things in action.

SCHEDULE 6

Guernsey Insurance Companies - Summary of Additional Matters

1 Introduction

The Guernsey regulatory regime applicable to the carrying on of insurance business is governed by the Insurance Law and the Ordinances, rules and regulations made thereunder. For the avoidance of doubt, the conduct of insurance managers and insurance intermediaries is dealt with under separate legislation.

Briefly, a person shall not carry on, or hold himself out as carrying on, insurance business in or from within the Bailiwick of Guernsey unless (i) if that business is long term business (as defined in the Insurance Law), that person is licensed by the Commission as an insurer in respect of long term business; or (ii) if that business is general business (as defined in the Insurance Law), that person is licensed by the Commission as an insurer in respect of general business. Additionally, a Bailiwick body shall not carry on, or hold itself out as carrying on, insurance business in or from within a country outside of the Bailiwick unless it is licensed under the Insurance Law and it complies with certain other restrictions and conditions.

The Commission may, when granting a licence, impose conditions in respect of the licence, which conditions may include a prohibition on entry into certain types of transactions.

2 General Restrictions and Restrictions on Trade in Derivatives

Pursuant to the Insurance Law a Guernsey Insurance Company shall not without the prior written consent of the Commission (i) write business, insurance or otherwise, other than that which conforms, in all material respects, with its current business plan or (ii) trade in derivatives except in accordance with the relevant provisions of any rules of the Commission made under the Insurance Law.

3 Capital Resources of a Guernsey Insurance Company

A Guernsey Insurance Company is required to maintain capital resources in accordance with any rules (as modified by the Commission in any particular case) made by the Commission under sections 38A to 38C of the Insurance Law.

4 Separation of Assets and Liabilities Attributable to Long Term Business

Under the Insurance Law, a Guernsey Insurance Company that carries on long term business is required to maintain a separate account in respect of that business and the receipts of that business shall be entered into the account maintained for that business and shall be carried to, and shall form, a separate insurance fund with an appropriate name. Further, if any part of the long term business of a licensed insurer consists of contracts under which the benefits payable to policyholders are determined directly by reference to the value of, or the income from, property of any description, the receipts of

that part of that business shall be carried to, and shall form a separate part of the fund maintained and described in the preceding sentence.

A licensed insurer which carries on long term business shall maintain such accounting and other records as are necessary for identifying the assets representing the fund described above and each part of that fund and the liabilities attributable to that business and to each of part of that business.

Subject to certain exceptions, the Insurance Law restricts the transfer or other application of assets representing a long term business fund otherwise than in respect of claims and expenses relating to that business.

5 Guernsey Insurance Company - Winding Up

The winding up of Guernsey Insurance Companies will, in common with other Guernsey companies, be governed by the applicable provisions of the Companies Law as described in Schedule 3. In addition, a Guernsey Insurance Company is a "supervised company" for the purposes of the Companies Law and an application for an order for the compulsory winding up of a Guernsey Insurance Company shall not be heard unless the Commission has been served with a copy of the application and at the hearing the Commission may make representations to the Court.

There are other provisions that relate specifically to the winding up of a Guernsey Insurance Company and these are summarised below.

5.1 Deemed insolvency

Under the Insurance Law a Guernsey Insurance Company which carries on general business (as defined in the Insurance Law) shall be deemed to be unable to pay its debts for the purposes of the Companies Law (see paragraphs 2.2 and 2.3 of Schedule 3) if at any time it does not comply with the margin of solvency requirement applicable to it (as discussed in paragraph 3 above) and the provisions of the Companies Law as to winding up shall, subject to the provisions of the Insurance law as summarised below, have effect accordingly.

Notwithstanding the above, the Royal Court may, whether to protect the interests of the public, policy holders or potential policy holders or for any other reason, and without prejudice to its powers under the Companies Law, decline to make a winding up order in respect of a company which does not comply with the margin of solvency requirement applicable to it under the Insurance Law if the Royal Court is satisfied that it would not be reasonable or expedient to make such an order and in any such case the Royal Court may make such alternative order, subject to such conditions as, it thinks fit.

5.2 Winding up of a Guernsey Insurance Company under the Companies Law

The Royal Court may order the winding up, in accordance with the Companies Law, of a Guernsey Insurance Company and the provisions of the Companies Law shall apply, subject to the modification that the Guernsey Insurance Company may be ordered to be

wound up on the application of (i) any 10 % or more of the number of its policyholders, in the case where the insurer has more than 100 policyholders or (ii) any 10 or more of its policy holders, in any other case.

In such an instance, an application shall not be presented to the Royal Court except by leave of the Royal Court, and leave shall not be granted until a prima facie case has been established to the satisfaction of the Royal Court and until security for costs for such amount as the Royal Court thinks reasonable has been given.

5.3 Winding up on application of the Commission

The Commission may present an application for the winding up, in accordance with the Companies Law, of a Guernsey Insurance Company, on the grounds:

(a) that the insurer is unable to pay its debts within the meaning of the Companies Law (see paragraph 2.3 of Schedule 3) as it has effect by virtue of the provisions of the Insurance law as described in paragraph 5.1 above;

(b) that the insurer has failed to satisfy an obligation to which it is or was subject by virtue of the Insurance Law or any Ordinance, regulation or rule under it;

(c) that the insurer has (i) failed to file the required annual return, (ii) failed to transfer shareholder funds to make good a deficit on any long term insurance fund, (iii) contravened any condition on its licence or direction imposed on it under the Insurance Law or (iv) that the Commission is unable to ascertain the financial position of the insurer; or

(d) that the Royal Court is of the opinion that it is just and equitable that the company should be wound up.

5.4 Winding up of an Insurer with Long Term Business

Notwithstanding the voluntary winding up provisions contained in the Companies Law, a Guernsey Insurance Company which carries on long term business shall not be wound up voluntarily.

In any winding up or other dissolution of a Guernsey Insurance Company which carries on long term business, (i) the assets representing the fund maintained by the insurer in respect of its long term business shall be available only for meeting the liabilities of the insurer attributable to that business and (ii) the other assets of the insurer shall be available only for meeting the liabilities of the insurer attributable to its other business (see paragraph 4 above).

Where the value of the assets mentioned in (i) or (ii) exceeds the amount of the liabilities mentioned in that paragraph then the restriction shall not apply to so much of those assets as represents the excess.

5.5 Continuation of long term business of insurer in liquidation

In the case of the winding up of a Guernsey Insurance Company which carries on long term business, the liquidator shall, unless the Royal Court orders otherwise, carry on the long term business of the insurer with a view to its being transferred as a going concern to another body, whether an existing body or a body formed for that purpose, and in carrying out that business the liquidator may agree to the variation of any contracts of insurance in existence when the act of the Royal Court ordering the winding up is made, but shall not effect any new contracts of insurance.

The Royal Court may, if it thinks fit and subject to such conditions (if any) as it may determine, reduce the value of the contracts made by the insurer in the course of carrying on its long term business. The Royal Court may also, on application of the liquidator or the Commission, appoint an independent actuary to investigate the long term business of the company and to report to the liquidator and to the Commission on the desirability or otherwise of that business being continued and on any reduction in the value of the contracts made in the course of carrying on that business that may be necessary for its successful continuation.

5.6 Responsibility for Fraudulent Trading

If, in the course of the winding up of a Guernsey Insurance Company, it appears that any insurance business of the insurer has been carried on:

(a) with intent to defraud creditors, shareholders, policyholders or former policy holders or the insurer or creditors of any other person; or

(b) for any fraudulent purpose;

the Royal Court on application by certain persons may, if the Royal Court thinks proper to do so, and after giving him the opportunity to be heard, declare that any person who was knowingly party to the carrying on of that business in that manner shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the insurer as the Royal Court may direct.

5.7 Reduction of Contracts as Alternative to Winding Up

In the case of a Guernsey Insurance Company which has been proved to be unable to pay its debts, the Royal Court may, if it thinks it proper to do so, and having regard to the best interests of the insurer's policy holders, reduce the amount of the contracts on such terms and subject to such conditions as the Court thinks just, in place of ordering the winding up of the insurer.

6 Repayment of Monies from Unlawful Business and the Appointment of a Receiver

6.1 If on application of the Commission it appears to the Royal Court that a person has carried on business in contravention of the Insurance Law, the Court may:

(a) order him and any other person who appears to the Royal Court to have been knowingly concerned in the contravention to repay monies accepted from or paid

over by policyholders, clients or other persons in the course of his so carrying on that business; or

(b) appoint a receiver (upon such terms and conditions and with such functions as the Royal Court may direct) to recover those monies.

If on the application of the Commission it appears to the Royal Court that profits have accrued to a person as a result of any insurance business having been carried on in contravention of the Insurance Law, the Royal Court may order him to pay to Her Majesty's Greffier, or may appoint a receiver (upon such terms and conditions and with such functions as the Royal Court may direct) to recover from him such sums as appear to the Royal Court to be just having regard to the profits appearing to the Royal Court to have accrued to him.

6.2 Where the Royal Court has appointed a receiver it may, on application of the receiver or of any other person appearing to the Royal Court to have a sufficient interest in the matter, direct any person holding or having possession or control of any monies, profits or assets in respect of which the receiver was appointed to give possession of them to the receiver or otherwise to deal with them, or not to deal with them, in any manner specified by the Royal Court.

Note: The above schedule is a summary of certain provisions of the Insurance Law only and does not purport to be comprehensive advice on contracting with a Guernsey Insurance Company generally.

SCHEDULE 7

Definitions

In this Opinion (including its Appendices and Schedules), unless the context requires otherwise:

1929 Law means the Law relating to Debtors and Renunciation, 1929;

1979 Law means the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979, as amended;

1993 Law means the Security Interests (Guernsey) Law, 1993, as amended;

Account has the meaning given thereto on page 4;

Appendix means, unless the context requires otherwise, an appendix to this Opinion;

Assignee has the meaning given thereto on page 7;

Banking Law means the Banking Supervision (Bailiwick of Guernsey) Law, 1994, as amended;

CDA has the meaning given thereto on page 1;

CEA has the meaning given thereto on page 4;

CFTC's means an entity that is registered with the United States Commodity Futures Trading Commission;

Cleared Derivatives Account has the meaning given thereto on page 6;

Cleared Derivatives Credit Support has the meaning given thereto on page 6;

Cleared Derivatives Credit Support Rights has the meaning given thereto on page 7;

Cleared Derivatives Liquidation Rights has the meaning given thereto on page 7;

Cleared Derivatives Net Termination Amount has the meaning given thereto on page 7;

Cleared Derivatives Netting Rights has the meaning given thereto on page 7;

Cleared Derivatives Payment Rights has the meaning given thereto on page 6;

Cleared Derivatives Transactions has the meaning given thereto on page 6;

Clearing Member has the meaning given thereto on page 1;

Collateral has the meaning given thereto on page 13;

Commission means the Guernsey Financial Services Commission established by the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended;

Committee means the Guernsey States Advisory and Finance Committee or such other committee or body as the States of Guernsey may by ordinance appoint;

Companies Law means the Companies (Guernsey) Law, 2008, as amended;

Covered Base Agreement has the meaning given thereto on page 1;

Covered Transactions has the meaning given thereto on page 2;

Credit Support Rights has the meaning given thereto on page 25;

CSD has the meaning given thereto on page 11;

customer means a customer of the Clearing Member that is a Guernsey Party;

Customer Contractual Rights has the meaning given thereto on page 10;

Customer Received Margin has the meaning given thereto on page 6;

DCO has the meaning given thereto on page 4;

Dicey and Morris means Dicey and Morris on "The Conflicts of Law" (14th edition);

Event of Default has the meaning given thereto on page 5;

FCM means an entity that is registered with the CFTC as a futures commission merchant;

Foreign Bank means a Bank/Credit Institution (as described in Appendix B) Party which is a company or body corporate incorporated or organised outside of Guernsey and licensed in that jurisdiction to carry on banking business;

Foreign Clearing Member has the meaning given thereto on page 4;

Futures Credit Support Rights has the meaning given thereto on page 5;

Foreign Futures has the meaning given thereto on page 4;

Futures Liquidation Rights has the meaning given thereto on page 5;

Futures Netting Rights has the meaning given thereto on page 5;

Futures Payment Rights has the meaning given thereto on page 5;

Futures Transactions has the meaning given thereto on page 4;

Futures Credit Support has the meaning given thereto on page 4;

Greffe means the office of Her Majesty's Greffier in Guernsey including, for the purposes of this opinion, the principal registry for public records;

Guernsey Bank means a Bank/Credit Institution (as described in Appendix B) which is a company incorporated under the Companies Law and which is licensed to carry on deposit-taking business pursuant to the Banking Law;

Guernsey Branch means the branch in Guernsey of a Foreign Bank licensed to carry on deposit-taking business in Guernsey pursuant to the Banking Law;

Guernsey Company Party means a Corporation (as described in Appendix B) incorporated under the laws of Guernsey pursuant to the Companies Law (save, for the purposes of this Opinion, does not include a Protected Cell Company or a Protected Cell but includes Incorporated Cell Companies, Incorporated Cells);

Guernsey Insolvency Procedures has the meaning given thereto in paragraph 1 of Schedule 3.

Guernsey Insurance Company means an Insurance Company (as described in Appendix B) which is a company incorporated under the Companies Law and which is licensed to carry on insurance business pursuant to the Insurance Law;

Guernsey Party means any Party which is a Guernsey Company Party, a Guernsey Insurance Company, a Guernsey Bank or a Foreign Bank acting through its Guernsey Branch;

Incorporated Cell means an incorporated cell as defined in the Companies Law;

Incorporated Cell Company means an incorporated cell company as defined in the Companies Law;

Insurance Law means the Insurance Business (Bailiwick of Guernsey) Law, 2002, as amended;

Jurat means one of 16 officers of the Royal Court, elected in accordance with the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950;

Liquidation Date has the meaning given thereto on page 25;

Location has the meaning given thereto on page 3;

Master Agreement means any of the Master Agreements as defined in paragraph 1 of this Opinion;

Non-Netting Jurisdiction has the meaning given to such term in paragraph 4.4 of this Opinion;

Offsetting Transaction has the meaning given thereto on page 7;

Options has the meaning given thereto on page 4;

Other Jurisdiction means, in respect of a Foreign Bank, the jurisdiction in which such Foreign Bank is incorporated or organised;

Parties means the parties to a Covered Base Agreement and CDA and **Party** shall be construed accordingly;

Protected Cell means a cell (as defined in the Companies Law) of a Protected Cell Company;

Protected Cell Company means a protected cell company as defined in the Companies Law;

Preferred Debts Law means the Preferred Debts (Guernsey) Law, 1983, as amended;

Relevant Collateral has the meaning given thereto on page 13;

Risk-reducing Transactions has the meaning given thereto on page 7;

Royal Court means the Royal Court of Guernsey and, in the context of *désastre* proceedings, includes a Commissioner of the Royal Court;

Sale/Novation Transactions has the meaning given thereto on page 7;

Schedule means, unless the context requires otherwise, a schedule to this Opinion;

Section means, unless the context requires otherwise, a section of a Master Agreement;

Secured Party means the "Clearing Member";

Solvency Test: For the purposes of the Companies Law a company satisfies the solvency test if:

(a) the company is able to pay its debts as they become due,

(b) the value of the company's assets is greater than the value of its liabilities, and

(c) in the case of a supervised company (as defined in the Companies Law but, which for the avoidance of doubt, includes a Guernsey Bank and a Guernsey Insurance Company), the company satisfies any other requirements as to solvency imposed in relation to it by or under certain regulatory legislation stipulated in the Companies Law; and

U.S. Futures has the meaning given thereto on page 4.