MEMORANDUM OF LAW
FOR THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

Validity and Enforceability under the Law of the British Virgin Islands of Collateral Arrangements under the ISDA Credit Support Documents

~~3 March 2009~~
9 April 2010

HARNEYS

Harney Westwood & Riegels
PO Box 71
Road Town
Tortola
British Virgin Islands
Tel: +284 494 4307

RW/019603.0013

Fax: +284 494 3547

RW/019603.0013

VALIDITY AND ENFORCEABILITY UNDER THE LAW OF THE BRITISH VIRGIN ISLANDS OF COLLATERAL ARRANGEMENTS UNDER THE ISDA CREDIT SUPPORT DOCUMENTS

In this memorandum we consider the validity and enforceability under the law of the British Virgin Islands of collateral arrangements entered into in connection with a master agreement (a "**Master Agreement**") published by the International Swaps and Derivatives Association, Inc.[1] ("**ISDA**") under one of the following standard form documents published by ISDA:

1. the 1994 ISDA Credit Support Annex governed by New York law (the "**NY Annex**");

2. the 1995 ISDA Credit Support Deed governed by English law (the "**Deed**" and, together with the NY Annex, the "**Security Documents**"); and

3. the 1995 ISDA Credit Support Annex governed by English law (the "**Transfer Annex**" and, together with the Security Documents, the "**Credit Support Documents**").

Capitalised terms used and not defined in this memorandum have the meanings given to them in the Master Agreement or relevant Credit Support Document. For convenience, the term "**pledge**", when used in this memorandum, is meant to refer to any form of security interest that may be created under a Security Document, although the precise nature of the interest will vary depending on the governing law, nature of the collateral and other relevant circumstances. Similarly, the term "**Pledgor**" will be used in this memorandum to refer to a Pledgor under the NY Annex and to a Chargor under the Deed. Under the Transfer Annex the analogous term is "**Transferor**".

The issues you have asked us to address are set out below in italics, followed in each case by our analysis and conclusions.

In addition to the assumptions you have asked us to make (and which are set out in this memorandum in Part 1), where applicable we make the following assumptions:

(1) To the extent that any obligation arising under the Master Agreement or Credit Support Document falls to be performed in any jurisdiction outside the British Virgin Islands, its performance will not be illegal or ineffective by virtue of the laws of that jurisdiction.

(2) Each party is acting as principal and not as agent in relation to its rights and obligations under the Master Agreement and Credit Support Document, and no third party has any right to, interest in or claim on any right or obligation of either party under either document.

(3) The terms of the Master Agreement, including each Transaction under the Master

[1] The various master agreements published by ISDA include (i) the 1987 Interest Rate Swap Agreement, (ii) the 1987 Interest Rate and Currency Exchange Agreement, (iii) the 1992 ISDA Master Agreement (Multicurrency – Cross Border), (iv) the 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction) and (v) the 2002 ISDA Master Agreement.

Agreement, and the Credit Support Documents are agreed at arms' length by the parties so that no element of gift or undervalue from one party to the other party is involved.

(4) At the time of entry into the Master Agreement and the Credit Support Documents, no insolvency, rescue or composition proceedings have commenced in respect of either party, and neither party is insolvent at the time of entering into the Master Agreement or the Credit Support Documents or will become insolvent as a result of entering into either document.

(5) That transfers under the Transfer Annex would not be recharacterised as creating a form of security interest by an English court.

(6) The Transactions are not of a type which would be considered by a British Virgin Islands court to be contrary to any law presently in force in the British Virgin Islands or to public policy. Examples of such Transactions include transactions which relate to or facilitate terrorism, drug trafficking, money laundering or such similar undertakings which we believe are unlikely to be the subject of legal, valid and binding contracts in any developed jurisdiction.

(7) All obligations under the Master Agreement are mutual between the parties in the sense that there are only two parties and each is acting in its own right and is liable as regards obligations owing by it and as beneficial owner of obligations owed to it.

(8) Each party, when transferring collateral in the form of securities under the Credit Support Documents, will have full legal title to such securities at the time of transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).

(9) As used in this memorandum, the term "**enforceable**" means that each obligation or document is of a type and form enforced by the British Virgin Islands courts. It is not certain, however, that each obligation or document will be enforced in accordance with its terms in every circumstance, enforcement being subject to, among other things, the nature of the remedies available in the British Virgin Islands courts. The power of a British Virgin Islands court to grant an equitable remedy such as an injunction or specific performance is discretionary, and accordingly, a British Virgin Islands court might make an award of damages where an equitable remedy is sought. Enforcement is also subject to the discretion of the courts in the acceptance of jurisdiction, the power of such courts to stay proceedings, the provisions on the British Virgin Islands Limitation Act, doctrines of good faith and fair conduct and laws based on those doctrines and other principles of law and equity of general application.

(10) As used in this memorandum "**insolvent**" in relation to an insolvent party means:

(i) it has failed to comply with a statutory demand for payment served on it in accordance with the provisions of Part V of the Insolvency Act 2003 (the "**Insolvency Act**");

(ii) execution or process issued on a judgement, decree or order of a British Virgin Islands court in favour of a creditor is returned wholly or partly unsatisfied;

(iii) the value of the insolvent party's liabilities exceed its assets (the "**balance sheet test**"); or

(iv) the insolvent party is unable to pay its debts as they fall due (the "**cash flow test**").

(11) References to "**notice**" are to the relevant party having actual notice of the insolvency of another party.

(12) References to "**Rules**" are to the Insolvency Rules made pursuant to Section 498 of the Insolvency Act.

(13) References to "**netting**" are to the termination of financial contracts, the determination of the termination values of those contracts and the set off of the termination values so determined so as to arrive at a net amount due, if any, by one party to the other where each such determination and set off is effected in accordance with the terms of a netting agreement between those parties.

(14) References to a "**financial contract**" are to a contract of a type specified in the Rules (see Appendix ~~B~~C) as a financial contract and the definition is broad enough to encompass all standard derivatives and market contracts. Such contracts include those described in Appendix A.

(15) As used in this memorandum a "**netting agreement**" is an agreement between two parties only, in relation to present or future financial contracts between them the provisions of which include the termination of those contracts for the time being in existence, the determination of the termination values of those contracts and the set off of the transaction values so determined so as to arrive at a net amount due.

(16) Section 434(1) of the Insolvency Act defines a collateral arrangement as:

"any margin, collateral or security arrangement or other credit enhancement related to a netting agreement or one or more financial contracts, including:

(a) a pledge or other form of security interest in collateral, whether possessory or non-possessory;

(b) a security arrangement based on the transfer of title to collateral, whether by outright sale or by way of security, including a sale and repurchase agreement or an irregular pledge; and

(c) any guarantee, letter of credit or reimbursement obligation by or to a party to one or more financial contracts, in respect of those financial contracts."

This memorandum is given in respect of parties which are (i) within each of the following categories and incorporated or organised under the laws of this jurisdiction or (ii) branches, established or located in this jurisdiction, of entities within each of the following categories where those entities are incorporated or organised outside this jurisdiction:

(a) banks;

(b) companies;

(c) insurance companies;

(d) broker dealers;

(e) partnerships (including limited partnerships);

(f) individuals (including persons acting on behalf of a trust); and

(g) trusts (when the trustee is a company).

A company for the purposes of this memorandum is an entity incorporated ~~either~~, continued or re-registered[2] as a company (~~"**Cap Company**") under the Companies Act (Cap. 285) (the "**Companies Act**")[3] or as~~ a ~~company (~~"**BVIBC**") under the BVI Business Companies Act 2004 (No. ~~16 of 2004) (the "**BVIBC Act**") and a reference to a company may mean either or both of a Cap Company and/or a BVIBC in the context of the sentence.~~ 16 of 2004) (the "**BVIBC Act**") and identified by any of the following in the last part of the name: "Limited", 'Corporation" or "Incorporated", "Société Anonyme" or "Sociedad Anonima", "Ltd", "Corp", "Inc" or "S.A.", or in the case of an unlimited company "Unlimited" or "Unltd", or any other word or words , or abbreviations thereof, as may be specified in any regulations promulgated under the BVIBC Act. A partnership is an entity organised under ~~The~~the Partnership Act No 6 of 1996 (the "**Partnership Act**"). Where the partnership is a limited partnership, the name must have at its end the words "Limited Partnership" or "L.P.".

A British Virgin Islands trust is not a separate entity as a matter of British Virgin Islands law. The trustee will be personally liable (possibly only to the extent of the value of the trust). The applicable insolvency procedures therefore depend upon the type of legal personality of the trustee rather than its status as a trustee.

A bank is an entity regulated under the Banks & Trust Companies Act No 9 of 1990 (the "**Banking Act**"). An insurance company is an entity regulated under the Insurance Act 1994

[2] Companies originally incorporated (i) under the International Business Companies Act (Cap 291) and re-registered under the BVI Business Companies Act either voluntarily before 30 November 2006 or automatically on 1 January 2007 or (ii) under the Companies Act (Cap 285) and re-registered under the BVI Business Companies Act either voluntarily before 1 January 2009 or automatically on 1 January 2009.

[3] ~~All Cap Companies are due to be converted to BVIBCs by the end of 2008. However since the deadline has been postponed twice it is possible that it will be further postponed. In any case we recommend confirming the status with local counsel when transacting with a Company that purports to be a Cap Company.~~

(the "**Insurance Act**")[4]. Banks and insurance companies must be organised as ~~Cap Companies or~~ BVIBCs. There is no separate licensing regime in the British Virgin Islands for broker dealers[5].

Under British Virgin Islands law it is possible to form BVIBCs which are segregated portfolio companies[6] ("SPCs")[7]. SPCs are identified by inclusion in the name of the designation "Segregated Portfolio Company" or "SPC". The assets and liabilities of segregated portfolio companies are compartmentalised and the segregated portfolios, although not separate legal entities, are treated as distinct entities for most (but not all) insolvency related purposes. Segregated portfolio companies are not specifically considered in this memorandum, however the conclusions reached are generally valid provided there is no attempt to attribute the liabilities of one asset class to the assets of a separate asset class either prior to or after the onset of insolvency.

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It is also possible to form BVIBCs which are restricted purposes companies, identified by the designation "(SPV) Limited" or "(SPV) Ltd". Unlike ordinary BVIBCs, restricted purposes companies have limitations on their powers set out in their memoranda and articles of association and actions taken outside those limitations may be *ultra vires*. Provided the entry into of a Credit Support Document is within the powers of a restricted purposes company, the conclusions reached in this memorandum are valid for restricted purposes companies.

Included at Appendix B is a summary of counterparty coverage for this memorandum.

FACT PATTERNS

You have asked us, when responding to each question, to distinguish between the following three fact patterns:

(1) The Location of the Collateral Provider is in the British Virgin Islands and the Location of the Collateral is outside the British Virgin Islands.

[4] A new insurance act has been drafted but has not yet been brought into force. We do not expect the new act to materially change any of the opinions expressed in this memorandum.

[5] A Securities and Investment Business Act has been drafted and is expected to be enacted in 2010. This will impose a licensing regime on securities dealers.

[6] ~~It is also possible for insurance companies to apply to be licensed as segregated portfolio companies under the Insurance Act. Under the new insurance act however there are no segregated portfolio company provisions distinct from the BVIBC Act provisions. In the meantime there is some ambiguity as to whether the BVIBC Act segregated portfolio company regime sits alongside and distinct from the Insurance Act segregated portfolio company regime, is intended to replace it or is intended to further regulate Insurance Act segregated portfolio companies. In practice the provisions are sufficiently similar that, unless otherwise specified, our opinions apply to all segregated portfolio companies whether registered in accordance with the Insurance Act or the BVIBC Act.~~

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(2) The Location of the Collateral Provider is in the British Virgin Islands and the Location of the Collateral is in the British Virgin Islands.

(3) The Location of the Collateral Provider is outside the British Virgin Islands and the Location of the Collateral is in the British Virgin Islands.

For the foregoing purposes:

(a) the "**Location**" of the Collateral Provider is in the British Virgin Islands if it is incorporated or otherwise organised in the British Virgin Islands and/or if it has a branch or other place of business in the British Virgin Islands; and

(b) the "**Location**" of Collateral is the place where an asset of that type is located under the private international law rules of the British Virgin Islands. See our answer to question 2 for further details in this regard.

Although we do not expressly refer to each fact pattern in our answer to each question, we have taken the fact patterns into consideration in developing our analysis. It should generally be clear from the context which of the fact patterns is being discussed in each case. In addition, it should generally be clear from the terms of the question whether the Collateral is to be considered as located in the British Virgin Islands or in a foreign jurisdiction.

Note that, as a general rule, neither the location nor the form of organisation of the Collateral Taker is relevant to consideration of the enforceability of a collateral arrangement against a Collateral Provider in the event of its insolvency in the British Virgin Islands. Accordingly, the conclusions expressed in this memorandum should apply to any Collateral Taker's group company (or entity) taking Collateral under one of the forms of collateral arrangement discussed below.

PART 1: SECURITY INTEREST APPROACH PURSUANT TO THE SECURITY DOCUMENTS

I. Validity of Security Interest: Creation and Perfection

For this purpose you have asked us to make the following assumptions:

(a) The Security Collateral Provider has entered into a Master Agreement and a Security Document with a Secured Party. The parties have entered into either (i) a Master Agreement governed by New York law and a NY Annex or (ii) a Master Agreement governed by English law and a Deed.

(b) Although each Security Document is a bilateral form in that it contemplates that either party may be required to post Collateral to the other depending on movements in Exposure under the relevant Security Document, the same party is the Security Collateral Provider at all relevant times under the applicable Security Document.

(c) Each party is either (i) a corporation or (ii) a bank or other similar financial institution.

(d) Each Master Agreement and each Security Document is enforceable under the laws of New York or England, as the case may be, and each party has duly authorised, executed and delivered, and has the capacity to enter into, each document.

(e) No provision of the Master Agreement or Security Document has been altered in any material respect. The making of standard elections in Paragraph 13 of either Security Document and the specification of standard variables (consistently with the other assumptions in this memorandum) would not in our view constitute material alterations, except where expressly indicated in the discussion below.

(f) Pursuant to the relevant Security Documents, the counterparties agree that Eligible Collateral will include cash credited to an account (as opposed to physical notes and coins) and certain types of securities (as further described below) that are located or deemed located either (i) in the British Virgin Islands, or (ii) outside the British Virgin Islands.

(g) That any securities provided as Eligible Collateral consist of (i) corporate debt securities, whether or not the issuer is organised or located in the British Virgin Islands; (ii) debt securities issued by the government of the British Virgin Islands; and (iii) debt securities issued by the government of a member of the "G-10" group of countries, in one of the following forms:

(i) directly held bearer debt securities, by which we mean debt securities issued in certificated form and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party;

(ii) directly held registered debt securities, by which we mean debt securities issued in registered form and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party so that the Secured Party is shown as the relevant holder in the register for such securities;

(iii) directly held dematerialised debt securities, by which we mean debt securities issued in dematerialised form and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party so that the Secured Party is shown as the relevant holder in the electronic register for such securities (that is, not held by the Secured Party indirectly with an Intermediary);

(iv) indirectly held debt securities, by which we mean 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 Secured Party where such interest has been credited to the account of the Secured Party in connection with a transfer of

Collateral by the Security Collateral Provider to the Secured Party under a Security Document.

The precise nature of the rights of the Secured Party in relation to its interest in indirectly held securities and as against its Intermediary will be determined, among other things, by the law of the agreement between the Secured Party and its Intermediary relating to its account with the Intermediary, as well as the law generally applicable to the Intermediary, and possibly by other considerations arising under the general law or the rules of private international law of the British Virgin Islands. The Secured Party's Intermediary may itself hold its interest in the relevant debt securities indirectly with another Intermediary or directly in one of the three forms mentioned in (i), (ii) and (iii). In practice, there is likely to be a number of tiers of Intermediaries between the Secured Party and the issuer of such securities, at least one of which will be an Intermediary that is a national or international CSD.

(h) That cash Collateral is denominated in a freely convertible currency and is held in an account under the control of the Secured Party.

(i) Pursuant to the terms and conditions of the Master Agreement, the Security Collateral Provider enters into a number of Transactions with the Secured Party. Such Transactions include any or all of the transactions described in Appendix A. Under the terms of each Security Document, the security interest created in the relevant Collateral secures the Obligations of the Security Collateral Provider arising under the Master Agreement as a whole, including the net amount, if any, that would be due from the Security Collateral Provider under Section 6(e) of the Master Agreement if an Early Termination Date were designated or deemed to occur as a result of an Event of Default in respect of the Security Collateral Provider.

(j) In the case of questions 12 to 15 below, that after entering into the Transactions and prior to the maturity thereof, an Event of Default or Specified Condition exists and is continuing with respect to the Security Collateral Provider, in the case of the NY Annex, or a Relevant Event or Specified Condition exists and is continuing with respect to the Security Collateral Provider, in the case of the Deed, and/or, in either case, an Early Termination Date has occurred or been designated as a result thereof (however, an insolvency proceeding has not been instituted, which is addressed separately in assumption (k) and questions 16 to 18 below).

(k) In the case of questions 16 to 18 below, that an Event of Default under Section 5(a)(vii) of the Master Agreement with respect to the Security Collateral Provider has occurred and a formal bankruptcy, insolvency, liquidation, reorganisation, administration or comparable proceeding (collectively, the "**insolvency**") has been instituted by or against the Security Collateral Provider.

Questions relating to the Security Documents

Validity of Security Interests

1. *Under the laws of your jurisdiction, what law governs the contractual aspects of a security interest in the various forms of Eligible Collateral deliverable under the Security Documents? Would the courts in your jurisdiction recognise the validity of a security interest created under each Security Document assuming it is valid under the governing law of such Security Document?*

If the security interest is to be given by a BVIBC over all assets comprised in the Eligible Collateral (other than Eligible Collateral comprising shares in a BVIBC (as to which see below)) and is created pursuant to the Security Documents, the laws of the British Virgin Islands do not impose any additional requirements of form or otherwise for the recognition or validity of the security interest. The security interest is binding on a BVIBC "to the extent, and in accordance with the requirements, of the chosen law."

If the Eligible Collateral comprises shares in a BVIBC, in order to create a valid mortgage or charge, the BVIBC Act requires that there must be a written instrument which clearly indicates (a) the intention to create a mortgage or charge; and (b) the amount secured by the mortgage or charge or how that amount is to be calculated. Where the collateral comprises bearer shares in a BVIBC the share certificates must be deposited with a custodian which is either recognised or authorised by British Virgin Islands law.

However, the BVIBC Act also expressly provides that the parties may select their own law to govern the instrument and that in such an event the rights and remedies of the mortgage or charge are to be determined by the governing law. The difficulty that may sometimes arise is that a number of foreign laws (including English law) provide that matters relating to the constitution of companies are so intimately connected with the country of incorporation that they must fall to be adjudicated by that country's (i.e., British Virgin Islands) law.

Our view is that British Virgin Islands law mandates the application of the foreign law chosen by agreement, even when the consequence is that the foreign jurisdiction would apply British Virgin Islands law in its own courts. Usually the governing law will be recognised when necessary by the courts of the British Virgin Islands applying Section 161(2) 1 of the BVIBC Act which reads:

> *"The governing law of a charge created by a company may be the law of such jurisdiction that may be agreed between the company and the chargee and the charge shall be binding on the company to the extent, and in accordance with the requirements, of the chosen law."*

As a matter of common law, the selection of a foreign law in a contract serves to select the territorial rules of that jurisdiction and not its conflicts of laws rules.

Assuming that the choice of law in the relevant Security Document is a valid and proper choice of law, the British Virgin Islands courts would recognise the validity of a security

interest created under a Security Document if that security interest was valid under the governing law of the Security Document.

2. *Under the laws of your jurisdiction, what law governs the proprietary aspects of a security interest, (that is, the formalities required to protect a security interest in Collateral against competing claims granted by the Security Collateral Provider under each Security Document (for example, the law of the jurisdiction of incorporation or organisation of the Security Collateral Provider, the jurisdiction where the Collateral is located, or the jurisdiction of location of the Secured Party's Intermediary in relation to Collateral in the form of indirectly held securities)?*

Under British Virgin Islands rules of private international law, the relevant law governing the proprietary aspect of a transfer of a movable asset is the law of the place of its location (the "*lex situs*"). This would include the perfection of a security interest in a movable asset effected by, or in connection with, the transfer.

British Virgin Islands law would ordinarily consider the location of a registered certificated security to be the place where the register is located and that of a bearer certificated security to be the place where the certificate is located. For the purposes of determining matters relating to title and jurisdiction, the *situs* of the ownership of shares, debt obligations or other securities of a BVIBC is the British Virgin Islands (Section 245 of the BVIBC Act).

In relation to securities held on a fungible basis with a custodian or central or international securities depository, it appears that, consistent with the English law analysis, British Virgin Islands courts will recognise the relevant asset as being co-proprietary rights located in the jurisdiction of the depository. Although there are no British Virgin Islands decisions which assist on the point we note the changes made in the 13th Edition of Dicey & Morris, *The Conflict of Laws*, following the Oxford Colloquium, and consider that the likelihood of a British Virgin Islands court adopting the "place of relevant intermediary approach" has significantly increased.

Cash will be considered to be located in the place where the entity with which the cash is deposited is located (*Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas*) 1954 AC 495).

It is important to bear in mind that, in addition to any perfection requirements in the jurisdiction of the *lex situs*, the British Virgin Islands rules relating to the registration of charges in order to maintain priority are observed. These rules are described in our response to question 5 below.

3. *Would the courts of your jurisdiction recognise a security interest in each type of Eligible Collateral created under each Security Document?*

In our opinion the British Virgin Islands courts would recognise a security interest in each type of Eligible Collateral created under each Security Document, provided the security interest was valid under the governing law of the Security Document and

provided also that any perfection requirements in relation to the Eligible Collateral had been complied with in the place in which the Eligible Collateral was located (as to which see our response to question 2 above).

4. *What is the effect, if any, under the laws of your jurisdiction of the fact that the amount secured or the amount of Eligible Collateral subject to the security interest will fluctuate under the Master Agreement and the relevant Security Document (including as a result of entering into additional Transactions under the Master Agreement from time to time)? In particular:*

   (a) would the security interest be valid in relation to future obligations of the Security Provider?

   (b) would the security interest be valid in relation to future Collateral (that is, Eligible Collateral not yet delivered to the Secured Party at the time of entry into the relevant Security Document)?

   (c) 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 Security Documents the specific assets transferred by way of security?

   (d) is it necessary under the laws of your jurisdiction for the amount secured by each Security Document to be a fixed amount or subject to a fixed maximum amount?

   (e) is it permissible under the laws of your jurisdiction for the Secured Party as Secured Party to hold Collateral in excess of its actual exposure to the Security Collateral Provider under the related Master Agreement?

There is no difficulty under the law of the British Virgin Islands that the amount secured or the amount of Eligible Collateral subject to the security interest will fluctuate under the Master Agreement and the relevant Security Document.

In answer to the specific questions on this point:

(a) Yes, provided that the future obligations can be determined with sufficient certainty as and when they arise, by reference to the terms of the Master Agreement and Security Document.

(b) Yes, provided the future collateral can be ascertained as and when it is provided.

(c) No, provided the fluctuating pool of assets over which the security interest to be created is identified with sufficient certainty in order to identify the collateral at any given time.

(d) No.

(e) Yes, provided it has been agreed by the parties that such excess collateral may be held.

5. *Assuming that the courts of your jurisdiction would recognise the security interest in each type of Eligible Collateral created under each Security Document, 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 your jurisdiction to perfect that security interest?*

~~**BVIBCs**~~

Under British Virgin Islands law a security interest over each type of Eligible Collateral created under each Security Document in any jurisdiction created by a BVIBC should be registered in the British Virgin Islands in order to maintain priority in the event of an application to enforce before a British Virgin Islands court. Registration should be made on the Register of Registered Charges by submitting an application in the approved form to the British Virgin Islands Registry of Corporate Affairs (the "**Registry**"). The Company is also required to enter particulars of the Security Document on a register of charges and a copy of the register maintained by it at its registered office, although it should be noted that failure to do so does not affect the security interests but merely gives rise to penalties on the part of the Company.

Failure to register at the Registry will not affect the validity of the security interest as against the BVIBC or any liquidator on its insolvency but would result in a loss of priority as against subsequent registered secured creditors. An unregistered security interest will rank after registered secured interests but before any subsequent unregistered security interests, by an application of the rule that when the equities are equal the first in time shall prevail, and subject to the priority accorded to a fixed charge over a floating charge which does not contain a negative pledge, perfection by notice, contractual subordination or similar requirements.

No deadline for filing exists. However, filing should be immediate to minimise the risk of a subsequent competing creditor taking priority.

In our view, the security interest[8] created by the NY Annex would be characterised by a British Virgin Islands court as a security interest over the Eligible Collateral delivered by the Pledgor to the Secured Party, which is capable of being registered in the BVIBC's Register of Registered Charges in the same manner, and subject to the same conditions, as they apply to the Deed.

~~**CAP Companies**~~

[8] A court in the British Virgin Islands ought to apply an English law understanding of the concept of a security interest in determining whether a security interest exists. As such, where the equity of redemption has effectively been lost as a result of rehypothecation, it is possible that a court would hold that an outright transfer of title has taken place subject only to a claim *in personam* against the collateral taker to return equivalent securities.

~~If the Security Provider is a Cap Company, there is a statutory requirement for filing in a private register of mortgages and charges. Failure to comply with such requirement renders directors and officers liable to a fine but has no effect on the validity, effectiveness and priority of the security interest.~~

~~More importantly in relation to (i) a Cap Company; (ii) a partnership; (iii) an individual domiciled in British Virgin Islands; or (iv) a company organised under foreign law which maintains a registered office in the British Virgin Islands, any security interest created pursuant to the Deed must be registered at the Deeds Registry in the British Virgin Islands. If not so registered the Deed will be void against a subsequent purchaser for value or mortgagee and will not be admitted into evidence in the courts of the British Virgin Islands. There is a time limit for registration of three months if the Deed is executed within the British Virgin Islands and twelve months if executed outside the British Virgin Islands and priority is determined by the time of creation of the Deed.~~

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Charges over shares of BVIBCs

A BVIBC may make a notation of any security interest created over its shares in its share register. Although the notation has no statutory effect it will give notice to any party reviewing the share register of the security interest. It is also possible for the Company to file a copy of its annotated share register with the Registry to make notice of the security interest publicly available.

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

There are no documentary or any particular additional requirements or formalities to be carried out in order to ensure the validity or perfection of a security interest in relation to each type of Eligible Collateral that may be delivered under a Security Document. It is not necessary as a matter of formal validity that a Security Document be expressed to be governed by the laws of the British Virgin Islands. As the Security Documents are drafted in the English language, the question of translation does not arise. No specific form of words is necessary to create a security interest under the laws of the British Virgin Islands as long as the intention to create a security interest is clear from the terms of the document and other relevant circumstances. The Security Documents are sufficiently clear in this regard.

7. *Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements set out in the responses to questions 1 to 6 above,*

will the Secured Party or the Security Collateral Provider need to take any action thereafter to ensure that the security interest in the Eligible Collateral continues and/or remains perfected, particularly with respect to additional Collateral transferred by way of security from time to time whenever the Credit Support Amount exceeds the Value of the Collateral held by the Secured Party?

No additional actions need to be taken by the Secured Party or the Security Provider in order to ensure that the security interest in the Eligible Collateral continues and/or remains perfected.

8. *Assuming that (a) pursuant to the laws of your jurisdiction, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral transferred by way of security pursuant to each Security Document (for example, because such Collateral is located or deemed to be located outside your jurisdiction), and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, will the Secured Party have a valid security interest in the Collateral so far as the laws of your jurisdiction are 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 the laws of your jurisdiction to establish, perfect, continue or enforce this security interest? Are there any other requirements of the type referred to in question 6?*

As discussed in question 5 above, the registration provisions apply to BVIBCs, irrespective of where the Eligible Collateral is located or the governing law of the relevant Security Document. There are no other requirements of the type referred to in question 6.

9. *Are there any particular duties, obligations or limitations imposed on the Secured Party in relation to the care of the Eligible Collateral held by it pursuant to each Security Document?*

Under the laws of the British Virgin Islands the Secured Party is under an obligation established by case law to take reasonable steps to ensure the safe custody of any charged property in its possession.

10. *Please note that pursuant to the terms of the Deed, the Secured Party is not permitted to use any Collateral securities it holds. This is because it is thought, as a matter of English law, that any such use is or may be incompatible with the limited nature of the interest that the Secured Party has in the Collateral. On the other hand, unless otherwise agreed to by the parties, Paragraph 6(c) of the NY Annex grants the Secured Party broad rights with respect to the use of Collateral, provided that it returns equivalent Collateral when the Pledgor is entitled to the return of Collateral pursuant to the terms of the NY Annex. Such use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or simply selling the securities. Do the laws of your jurisdiction recognise the right of the Secured Party so to use such Collateral pursuant to an agreement with the Pledgor? In particular, how does such use*

of the 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 Secured Party with respect to its use of the Collateral under the laws of your jurisdiction?

As the NY Annex is governed by New York law, this question will be governed by New York law, and we do not believe there is any reason in principle why a British Virgin Islands court would seek to interfere with such an arrangement if it is valid as a matter of New York law. The Secured Party's use of the Collateral is a matter of contract between the parties.

If the NY Annex were governed by laws of the British Virgin Islands there would be a degree of tension between the Secured Party's right to use the charged property as it may be seen as extinguishing the Security Collateral Provider's "equity of redemption" in the Eligible Collateral as the right of use constitutes a "clog on the equity of redemption" or is otherwise an "unlawful collateral advantage". The position in the British Virgin Islands with regard to this issue is the same as the position under English law.

The "equity of redemption" is in essence that a mortgagor who performs all of the obligations required of him under a mortgage is entitled to have that property re-conveyed to him. The equity of redemption is both a right (as against the mortgagee) and a species of property (it is possible for the mortgagor to mortgage his equity of redemption to a third person, such that if he performs all of his obligations the first mortgagee must convey the property to the third person rather than back to the mortgagor).

Largely because of the aforementioned historical rules, the courts of equity were extremely hostile towards any provision which might interfere with the mortgagor's right to have the property re-conveyed to him (referred to as a "clog" on the equity of redemption). The rule that developed was that anything which would restrict the mortgagor's right to redeem was invalid. The rules relating to "clogs" on the equity of redemption have been expanded beyond mortgages, and now extend to any collateral which is the subject of a security interest. Stated in its simplest form, the rule is that if a party is giving security, nothing should be allowed to happen which might prevent it getting full title to its original property back once it has performed the secured obligations.

There is no British Virgin Islands authority of which we are aware which is determinative of the issue of whether a provision which is valid under its governing law might still be struck down by the British Virgin Islands courts as a clog on the equity of redemption. We consider the arguments finely balanced on this point. In principal, a document which is valid under its governed law should be upheld and enforced in the British Virgin Islands unless it is contrary to public policy. However, there is no express authority on this point, and rules relating to equities of redemption do in other respects vary from the laws which relate to contracts generally (for example, in the rules relating to the admissibility of extrinsic evidence to construe the contract). Our view is that if this provision would be held to be valid under New York law by a New York court, then the

British Virgin Islands courts would uphold this provision notwithstanding that it appeared to the British Virgin Islands court to potentially be a clog. However, the effect of rehypothecation may be that a British Virgin Islands court would characterise the collateral arrangement as a transfer of title rather than a security interest.

11. *What is the effect, if any, under the laws of your jurisdiction on the validity, continuity, perfection or priority of a security interest in Eligible Collateral under each Security Document of the right of the Pledgor to substitute Collateral pursuant to Paragraph 4(d) of the NY Annex and the Deed? How does the presence or absence of consent to substitution by the Secured Party affect your response to this question?*

Under British Virgin Islands conflicts of laws principles, which are substantially the same as those under English law, the ability to substitute or add new Eligible Collateral is a matter for the Governing Law of the Security Document. However, it may be that the question of the manner of substitution, or addition, and the nature of the Eligible Collateral capable of being substituted or added, is a matter for the *lex situs*. It is uncertain how the British Virgin Islands courts would regard this.

Although the right of substitution without consent of the Secured Party must give rise to doubt as to whether what is stated to be a fixed charge is in fact a floating charge we believe that this is not the case if done formally by a release of existing security and grant of a new fixed charge over new security. There could well be problems and loss of priority, however, if another security interest had been registered before the new charges could be registered. If the substitution is without any release or new charge, recharacterisation as a floating charge is likely.

An important point to note is that the BVIBC registration regime is not affected by this recharacterisation.

II. Enforcement of Rights Under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding

12. *Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements contained in your responses to questions 1 to 6 above, as applicable, what are the formalities (including the necessity to obtain a court order or conduct an auction), notification requirements (to the Security Collateral Provider or any other person) or other procedures, if any, that the Secured Party must observe or undertake in exercising its rights as a Secured Party under each Security Document, such as the right to liquidate the Collateral? For example, is it free to sell the Collateral (including to itself) and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the Master Agreement? Do such formalities or procedures differ depending on the type of Collateral involved?*

There are four principal remedies for a Secured Party under British Virgin Islands law. These are sale of the secured property, the appointment of a receiver, taking possession

and foreclosure. Of these, a mere chargee (that is, a holder of a charge that does not also constitute a mortgage) has only the remedies of the sale of the secured property and appointment of a receiver.

Of these, in a financial markets context, the power of sale is the remedy typically exercised by a Secured Party in relation to Collateral in the form of securities. The appointment of a receiver is generally not thought to confer any practical advantages in this context, and the Secured Party typically already has possession of the relevant securities (as would normally be the case under the Security Documents).

Foreclosure is the process under which the Secured Collateral Provider's equitable right to redeem the mortgaged property is declared by the court to be extinguished or destroyed and the Secured Party is left as owner of the property both at law and in equity (subject only to prior encumbrances). The Secured Party is then free to sell the property or to retain title to it. Foreclosure is always an act of court, and a Secured Party cannot foreclose and keep the assets for itself without a court order (*Re Farnol Eades Irvine & Co* [1915] 1 Ch 22). For this reason, it is considered too time-consuming and cumbersome to be a practical remedy in the context of a financial market security arrangement of a type exemplified by the Security Documents. In addition, in certain circumstances, the court may re-open the foreclosure order, restoring the Secured Collateral Provider's equitable right to redeem. For these reasons, foreclosure is rarely, if ever, used by a Secured Party of securities.

Accordingly, the exercise by the Secured Party of its rights contemplated by each Security Document, including the right to "liquidate" Collateral by selling it, is permitted by British Virgin Islands law. It is not necessary for any particular formalities to be followed by the Secured Party in exercising its right of sale. Accordingly, the Secured Party may on enforcement of the Security Document sell the Collateral.

In particular, a court order or auction is not required and notice of sale need not be given to the Security Collateral Provider, although in practice secured creditors do often give a short period of notice before selling Collateral. This does not differ depending on the type of Collateral involved.

In exercising its power of sale, the Secured Party is subject to a duty to take reasonable care to obtain the best price reasonably available at the time (*Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1972] Ch 949; 2 All ER 633). This will normally be the current market value of the Collateral comprising securities (*Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295).

A Secured Party may not sell Eligible Collateral to itself, either alone or with others, unless the sale is made by the court and the Secured Party has obtained leave to bid. This is because such a transaction would amount to foreclosure without the leave of the court. In addition, there is a broader policy basis for the rule, which is that a person should not put himself in a position where his duty (in this case, to obtain the best price reasonably available) and his interest (in this case, to pay as low a price as possible) conflict.

It is established that a Secured Party may sell mortgaged property to a company in which the Secured Party has an interest, provided that it can prove that the sale was in good faith and that it had taken reasonable steps to obtain the best price reasonably obtainable at that time (*Farrars v Farrars Ltd* (1888) 40 ChD 395). *A fortiori*, a Secured Party may sell mortgaged property to an affiliated company, subject to the same proviso.

In our opinion there would be a right of set-off available under Paragraph 8(a)(ii)(B) of the Deed (and Paragraph 8(a)(iii) of the NY Annex) as the provision of the Deed would fall within the definition of Financial Contracts within the Rules.

13. *Assuming that (a) pursuant to the laws of your jurisdiction, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Eligible Collateral transferred by way of security pursuant to each Security Document (for example, because such Collateral is located or deemed located outside your jurisdiction) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, are there any formalities. notification requirements or other procedures, if any, that the Secured Party must observe or undertake in your jurisdiction in exercising its rights as a Secured Party under each Security Document?*

No.

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

There are no laws or regulations in the British Virgin Islands that would limit or distinguish a creditor's enforcement rights with respect to the Collateral comprised in the Eligible Collateral.

There are statutory "preferential claims" in the British Virgin Islands which are claims of a type prescribed by the Rules as such.

15. *How would your response to questions 12 to 14 change, if at all, assuming that an Event of Default, Relevant Event or Specified Condition, as the case may be, exists with respect to the Secured Party rather than or in addition to the Security Collateral Provider (for example, would this affect the ability of the Security Party to exercise its enforcement rights with respect to the Collateral?)*

If an Event of Default, Relevant Event or Specified Condition is subsisting in relation to the Secured Party rather than the Security Collateral Provider, the Secured Party will be able to exercise its enforcement rights if there is also an Event of Default, Relevant Event or Specified Condition subsisting in relation to the Security Collateral Provider or an Early Termination Date has been designated (or deemed to occur) as a result of an Event of Default or Specified Condition in relation to the Secured Party.

In any other case, the Security Collateral Provider may not enforce its security. Note that in these circumstances Paragraph 8(b) of the NY Annex applies to protect the Security Collateral Provider as Pledgor. An equivalent provision was not considered necessary in the Deed.

III. Enforcement of Rights Under the Security Documents by the Secured Party after the Commencement of an Insolvency Proceeding

16. General Comments

16.1 The British Virgin Islands insolvency regime, generally speaking, accords greater emphasis to the protection of creditors' rights than to the preservation of the businesses as going concerns. There are currently no reorganisation proceedings such as Chapter 11 or administration in the British Virgin Islands (see below in respect of administration).

Ordinarily, the rights of secured creditors are recognised and enforced. It is possible for secured creditors to appoint receivers if this right is expressly given in the relevant security agreement or for the court to do so in its discretion. The regime is premised upon the concept of *pari passu* distribution of assets amongst the creditors of the insolvent party.

16.2 **Insolvency Proceedings**

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

(i) liquidation under Part VI (*Liquidation*) of the Insolvency Act;

(ii) receivership under Part IV (*Receivership*) of the Insolvency Act;

(iii) administration under Part III (*Administration*) of the Insolvency Act, except that this part has not yet been, and there is currently no clear indication of when it may be, brought into force;

(iv) creditor's arrangements under Part II (*Creditor's arrangements*) of the Insolvency Act; and

(v) receivership under the Conveyancing and Law of Property Act (Cap 220), which is regulated under Part IV of the Insolvency Act;

((i) to (iv) are collectively referred to as "**Insolvency Proceedings**"; a party which is insolvent or is subject to Insolvency Proceedings is called the "**insolvent party**" and the other party is called the "**solvent party**").

16.3 **Administration**

Where a Secured Party is or is likely to become unable to pay its debts within the meaning of the Insolvency Act, the court may make an administration order. The purposes of an administration are, amongst other things, the survival of the Secured Party or the approval of a voluntary arrangement or the sanctioning of a scheme of arrangement for a more advantageous realisation of the Secured Party's assets than would be effected in a winding up.

When an administration order is petitioned for or is made, no resolution may be passed or order made for the winding up of the Secured Party, no steps may be taken to enforce any security over the Secured Party's property and no other proceedings and no execution or other legal process may be commenced or continued except with the leave of the court or the administrator's consent.

This would not prevent, however, the designation (or deemed occurrence) of an Early Termination Date under Section 6(a) of the Master Agreement or the operation of the close-out netting provisions of Section 6(e), even if the relevant Event of Default occurred after the administration order was petitioned for or made. Neither could this prevent the exercise of contractual rights of set-off or enforcement of Security Interests (see paragraph 18 below).

A secured creditor holding security under substantially all of the assets of the Secured Party, typically under a floating charge, can effectively block the appointment of an administrator, but this would not apply in the case of the Security Documents (assuming that the Eligible Collateral provided by the Pledgor does not comprise substantially all its assets). Accordingly, if an administration order was petitioned for, or made, in relation to the Secured Party, our answers in Section II 1 and 2 above would be modified as described above.

16.4 **Further Reorganisational Processes**

There are a number of additional reorganisational processes under British Virgin Islands law in respect of BVIBCs which are not necessarily related to the insolvency of the party:

(i) voluntary liquidation (either solvent or insolvent in which case it is subject to the provisions of Part VI of the Insolvency Act) or dissolution under Part XII (*Liquidation, Striking-Off and Dissolution*) of the BVIBC Act;

(ii) a reorganisation under Part IX (*Merger, Consolidation, Sale of Assets, Forced Redemptions, Arrangements and Dissenters*) of the BVIBC Act; and

(iii) continuation under foreign law under Part X (*Continuation*) of the BVIBC Act.

16.5 There are no special provisions relating to banks, insurance brokers, financial services corporations, hedge funds or broker dealers, although there is usually a requirement that the relevant regulatory body be notified and the insolvency proceedings are conducted in

the same fashion as for other entities. However, the following exceptions in particular should be noted:

(a) the liquidation of insurance companies is regulated separately in Part VII (*Liquidation of Insurance Companies*) of the Insolvency Act; and

(b) for the purposes of making an administration order against a regulated insurance company, the balance sheet test is modified to reflect the minimum margin of solvency prescribed by the Insurance Regulations 1995, and administration orders in respect of regulated insurance companies can only be made with the consent of the Financial Services Commission.

16.6 **Bankruptcy treaties**

(i) There are no bankruptcy treaties in force under the laws of the British Virgin Islands.

(ii) However:

(a) Part XIX (*Orders in aid of foreign proceedings*) of the Insolvency Act regulates the making of orders by the British Virgin Islands courts in aid of foreign insolvency proceedings; and

(b) Part XVIII (*Cross-border insolvency*) of the Insolvency Act contains provisions relating to cross-border insolvency drafted based to a great extent on the UNCITRAL model law on cross-border insolvency. This Part has not yet been brought into force and in its press release No. 6 of 2004 the Financial Services Commission of the British Virgin Islands indicated that it is not proposed to have that Part brought into force until the UNCITRAL model becomes "a commonly viable global standard". We would interpret this as putting its coming into force as being beyond any foreseeable time horizon.

16.7 **Vulnerable Transactions**

Under British Virgin Islands law, certain transactions may be set aside or otherwise be varied or amended by orders of the British Virgin Islands court when an insolvent party goes into liquidation or into administration. Principally these are where the transaction is:

(i) an unfair preference;

(ii) an undervalue transaction; or

(iii) an extortionate credit transaction.

Unfair preferences, undervalue transactions and extortionate credit transactions are all regulated by the Insolvency Act, and in each the transaction must have been entered into

within the relevant vulnerability period, being the period prior to the commencement of winding up or making of the administration order and (except in the case of extortionate credit transactions) the transaction must either have been entered into at a time that the insolvent party was insolvent, or caused the insolvent party to become insolvent (for these purposes, insolvent excludes insolvent under the balance sheet test).

An unfair preference is a transaction that has the effect of putting a creditor into a position which, in the event of the insolvent party going into insolvent liquidation, would be better than the position would be if the transaction had not been entered into. A transaction is not an unfair preference if it took place in the ordinary course of the insolvent party's business. The relevant vulnerability period is six months, except if the creditor is a connected person, in which case it is two years.

An undervalue transaction is a transaction where the insolvent party makes a gift or otherwise receives no consideration for the transaction, or the value of the consideration that it receives in money or money's worth is considerably less than the consideration provided to the insolvent party. A transaction is not an undervalue transaction if the insolvent party enters into the transaction in good faith and for the purposes of its business and if at the time it entered into the transaction there were reasonable grounds for believing that the transaction would benefit the insolvent party. The relevant vulnerability period is six months, except if the creditor is a connected person, in which case it is two years.

An extortionate credit transaction is a transaction for or involving the provision of credit and having regard to the risk accepted by the person giving credit the terms are such as to require grossly exorbitant payments to be made (either unconditionally or in certain contingencies) or the transaction otherwise grossly contravenes ordinary principles of fair trading. The relevant vulnerability period is five years.

In addition, any conveyance made by any person with intent to defraud creditors is voidable at the instance of the person thereby prejudiced under British Virgin Islands law. It is not a requirement that the relevant transaction was entered into at a time when one party was insolvent or became insolvent as a result of the transaction. It is not a requirement that the transferring party subsequently went into liquidation or administration. However, no conveyance entered into for valuable consideration and in good faith to a person who did not have notice of the intention to defraud may be impugned.

16.8 **Insolvency Transactions**

A transaction is an insolvency transaction if:

(i) it is entered into at a time when the Company is insolvent; or

(ii) it causes the Company to become insolvent;

16.9 **Connected Person**

In relation to a Company, "connected person" means any one or more of the following:

(i) a promoter of the Company;

(ii) a director or member of the Company or of a related company;

(iii) a beneficiary under a trust of which the Company is or has been a trustee;

(iv) a related company;

(v) another company one of whose directors is also a director of the Company;

(vi) a nominee, relative, spouse or relative of a spouse of a person referred to in paragraphs (i) to (iii) above;

(vii) a person in partnership with a person referred to in paragraphs (i) to (iii); and

(viii) a trustee of a trust having as a beneficiary a person who is, apart from this paragraph, a connected person.

16.10 **Related Company**

A company is related to another company if (a) it is a subsidiary or holding company of that other company; (b) the same person has control of both companies; and (c) the company and that other company are both subsidiaries of the same holding company.

17. *How are competing priorities between creditors determined in your jurisdiction? What conditions must be satisfied if the Secured Party's security interest is to have priority over all other claims (secured or unsecured) of an interest in the Eligible Collateral?*

Under the laws of the British Virgin Islands a security interest over any assets in any jurisdiction created by a BVIBC should be registered in the British Virgin Islands in order to maintain priority in the event of an application to enforce before a British Virgin Islands court. If an application is made to the British Virgin Islands courts they will apply their own priority rules. Secured claims take precedence over unsecured claims.

The rules relating to priority in the British Virgin Islands are complex. However, they can in outline be summarised as follows.

BVIBCs

(a) A charge entered in the Register of Relevant Charges has priority over any subsequent charge.

(b) Priorities between unregistered security interests are determined by the common law. Briefly those rules can be summarised as follows:

(i) security interests in the nature of a legal estate acquired for value without notice of a security interest in the nature of an equitable interest takes priority over that equitable interest;

(ii) as between themselves, security interests which are in the nature of a legal estate rank in order of creation; and

(iii) as between themselves, security interests which are in the nature of equitable interests rank in order of the giving of notice to the holder of the legal estate[9].

(c) The order of priorities is subject to the express consent of the holder of a prior charge or agreement between creditors.

(d) A registered floating charge is postponed to a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the BVIBC to create any future charge ranking in priority to or equally with the charge.

IBCs

Charges created by a BVIBC in its previous corporate form as an International Business Company ("**IBC**") are subject to the priority rules applicable to IBCs.

(a) Fixed security took priority over floating security save for cases described in (c) below.

(b) Security interests created before 1 January 1991 had priority over all security interests created on or after 1 January 1991 and as between themselves ranked in order of creation.

(c) Where an IBC created a register of mortgages, charges and other encumbrances (an "**IBC Register of Charges**"), all security interests recorded in the IBC Register of Charges took priority over all security interests which had not been entered in the IBC Register of Charges (except for security interests created prior to 1 January 1991) and as between themselves rank in order of their entry into the IBC Register of Charges, whether fixed or floating.

(d) Priorities between unregistered security interests created on or after 1 January 1991 were determined by the common law rules outlined above.

Transitional priority rules for a BVIBC that was formerly an IBC

Priority of charges between those created by a BVIBC and those created by a BVIBC in its previous corporate form as an IBC are a matter for transitional provisions.

[9] Dearle v Hall (1828) 3 Russ 1

(a) Charges registered in the IBC Register of Charges take priority over subsequent charges.

(b) Our view as to the priority between unregistered charges created by a BVIBC in its previous corporate form as an IBC and charges entered in the Register of Registered Charges under the BVIBC regime is that, notwithstanding registration in the Register of Registered Charges, priority is determined in accordance with the common law rules outlined above.

Note that the transitional provisions provide that a charge created by a BVIBC in its previous corporate form as an IBC may be entered in the Register of Registered Charges and take priority in accordance with the BVIBC regime.

Other entities

There is no registration regime under British Virgin Islands statute in respect of ~~Cap Companies,~~ partnerships or trusts and we believe that a British Virgin Islands court would apply common law principles to questions of priority[10].

18. *Would the Secured Party's rights under each Security Document, such as the right to liquidate the 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 12 and 13 above, if at all)?*

The Secured Party's rights under each Security Document, such as the right to liquidate the Collateral, would not be subject to any stay or freeze or otherwise be affected by commencement of the insolvency of the Pledgor.

Section 435(1)(a) of the Insolvency Act deals with the enforcement of netting agreements and collateral arrangements and it provides:

> "*the provisions relating to netting, the set off of money provided by way of security, the enforcement of a guarantee and the enforcement of a collateral arrangement and the set off of the proceeds thereof, as contained within a netting agreement or a guarantee provided for in such agreement shall be legally enforceable against a party to the agreement and where applicable, against a guarantor or other person providing security*".

Section 435(1)(b) applies in almost identical terms to master netting agreements.

This clear provision is expressly stated to apply notwithstanding any other provisions of the Insolvency Act or the Rules or any rule relating to insolvency. The scope of Section 435 of the Insolvency Act is to preserve all provisions relating to netting and set off and

[10] In practice we believe the better view is that, in the absence of an applicable statutory priority regime, the British Virgin Islands court should first apply conflicts of law rules and priority would therefore be determined in accordance with the *lex situs* of the assets. However there is no judicial guidance on the issue.

collateral arrangement as being legally enforceable notwithstanding the insolvency of one of the parties to the netting agreement and notwithstanding the other provisions of the Insolvency Act, such as insolvency set off provisions and, the right of a liquidator to disclaim onerous contracts or any provision relating to administration or voidable transactions.

The Specified Transactions set out in Appendix A would be characterised as financial contracts. The definition of financial contracts under the Insolvency Act is set out in full at Appendix ~~B~~C.

19. *Will the Security Collateral Provider (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Collateral made to the Secured Party during a certain "suspect period" preceding the date of the insolvency as a result of such a transfer constituting a "preference" (however called and whether or not fraudulent) in favour of the Secured Party 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 a counterparty 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 Collateral pursuant to the mark-to-market provisions of the Security Documents 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?*

As discussed above, Part XVII (*Netting and Market Contracts*) of the Insolvency Act provides that notwithstanding anything contained in that Act, the Rules or in any rule of law relating to insolvency, the provisions relating to the netting of obligations under a netting agreement shall be enforceable against each party to that contract.

As mentioned above, the Insolvency Act defines netting agreement as an agreement "in relation to present or future financial contracts", the (presumably unintended) consequence being that if financial contracts have been entered into before 16 August 2004 it would take a further financial contract to bring the netting agreement within the scope of the Insolvency Act. Otherwise, the Insolvency Act is clear on its face that it is not possible to challenge a netting agreement on the basis that it constitutes a preference or transaction at an undervalue.

IV. Miscellaneous

20. *Would the parties' agreement on governing law of each Security Document and submission to jurisdiction be upheld in your jurisdiction, and what would be the consequences if they were not?*

The parties' choice of the governing law as the proper law of the Security Documents would be upheld as a valid choice of law by the courts of the British Virgin Islands and applied by such courts in proceedings in relation to each of the Security Documents as

the proper law thereof (see question 1 above) and the submission to the jurisdiction would be upheld assuming the choice of law and submission to the jurisdiction is made in good faith and was not intended to evade the provisions of another legal system with which the Security Documents had a closer connection.

21. *Are there any other local law considerations that you would recommend the Secured Party to consider in connection with taking and realising upon the Eligible Collateral from the Security Collateral Provider?*

No.

22. *Are there any other circumstances you can foresee that might affect the Secured Party's ability to enforce its security interest in your jurisdiction?*

No.

PART 2: TITLE TRANSFER APPROACH PURSUANT TO THE TRANSFER ANNEX

Assumptions

1. Party A has entered into a Master Agreement governed by English law and a Transfer Annex with the Transferee. Pursuant to the terms of the Transfer Annex, and as a matter of English law, transfers of Eligible Credit Support involve an outright transfer of title, free and clear of any liens, claims, charges or encumbrances or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance system). If an Event of Default exists with respect to either party, an amount equal to the Value of the Credit Support Balance is deemed to be an Unpaid Amount under the Master Agreement and therefore is taken into account for purposes of determining the amount due upon close-out of the Transaction pursuant to Section 6(e) of the Master Agreement. Although such arrangement is in substance and effect similar to the collateral arrangements evidenced by the Security Documents, the Transfer Annex is not intended to create any form of security interest. There are also significant differences to the rights of the parties under the Transfer Annex, as further described in the Summary of the Credit Support Documents earlier herein.

2. That transfers under the Transfer Annex would not be recharacterised as creating a form of security interest by an English court, provided that the Transfer Annex was not amended in any material way and provided further that the parties by their conduct did not otherwise clearly evidence an intention to create a security interest in the transferred Collateral.

Issues

23. *Would the laws of your jurisdiction characterise each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred? Is there any*

risk that any such transfer would be recharacterised as creating a security interest? If so, is there any way to minimise such risk? What would be the consequences of such a recharacterisation (referring back to issues related to perfection, priority and formal requirements for establishing both as discussed with regard to the Security Documents in Part 1 above)?

The laws relating to recharacterisation of title transfer transactions such as the transfer of Eligible Credit Support pursuant to the Transfer Annex under British Virgin Islands law may be summarised as follows:

(i) generally speaking, British Virgin Islands law will give effect to the expressed intentions of the parties. Accordingly, if the parties intend a transaction to take effect as an outright transfer of title, unless there were very good reasons for recharacterising the transaction, a British Virgin Islands would not do so;

(ii) the courts of the British Virgin Islands would be extremely slow to recharacterise a transaction governed by English law if it would not be recharacterised under English law; and

(iii) the courts of the British Virgin Islands would only recharacterise a transfer of title transaction if satisfied that that the transferor retained an equity of redemption in the property transferred.

In reaching the above conclusions the following points are of significance:

(a) Applicable laws

You have phrased the question in terms of "the laws of the British Virgin Islands". However, our response is necessarily based on the assumption that the issue is brought before a British Virgin Islands court and whilst it is tolerably clear that a British Virgin Islands court will apply its mandatory rules (*lex fori*) to the issue of recharacterisation, this is not to say that other systems of laws will not be relevant to the process.

(b) British Virgin Islands domestic law

Conceptually there are two possible routes by which a British Virgin Islands court might "recharacterise" the Transfer Annex. We do not consider that the narrow common law concept of a sham (i.e., a document intended to conceal the true transaction between the parties) would be applied to the Transfer Annex except in exceptional factual circumstances. The more problematic area is that of "legal characterisation". Although the authorities cited below relate to a number of wider characterisation issues (in particular fixed/floating and sale and repurchase analysis) the issues should not be materially different in the case of the Transfer Annex.

As already stated, British Virgin Islands law effectively follows English law so that "It is the legal consequences of the agreement which is determinative rather than the label which the parties have chosen to attach to it" per Lord Jauncey, *Bruton v London & Quadrant Housing Trust* [1999] 3 WLR 150 at 153.

The decision of the English Court of Appeal in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC is helpful in that it clearly supports the propositions that: (i) there is nothing illegal or contrary to public policy in parties raising finance by way of sale or repurchase and (ii) that in the absence of extrinsic evidence to the contrary where there is a commercial agreement between properly advised parties a British Virgin Islands court should not attempt to discern substance or intention other than by looking at the language which the parties have used.

In some ways this is difficult to reconcile with *Re Brumark Investments Limited* [2001] BCC 259 where Lord Millet said:

> *"The question is not merely one of construction. In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage, it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used but the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties."*

However, our view is that the Transfer Annex would not be recharacterised under this test or any other since the rights and obligations intended to be granted are the transfer of title. The two stages of the Brumark test may however be helpful in analysing the conflict of laws issue correctly. For the sake of completeness the emphasis of Lord Millett in *Orion Finance v Crown Financial Management* [1996] 2 BCLC 78 that there is no single objective criterion for determining whether a transaction documented as a sale and repurchase is in law one of security should also be noted but it remains clear that it is not sufficient to show that the same economic effect could have been achieved by a different kind of transaction.

(c) Impact of foreign law

In exercising its jurisdiction and in particular in ascertaining whether a charge has been created, a British Virgin Islands court will apply British Virgin Islands law. Based on our opinion as to the validity of the choice of English law, evidence that recharacterisation will not occur as a matter of English law would in our view be extremely persuasive in arguing before a British Virgin Islands court that there is no equity of redemption, and no evidence of intent to create a charge, which might support recharacterisation. *Re Weldtech Equipment* [1991] BCLC 393 involved an English court considering the

characterisation of an assignment of debts governed by German law. Hoffmann J considered the effect of the assignment under German law and then decided whether that effect was as a matter of English law to create a charge. However, given that British Virgin Islands law follows so closely English law the decision is likely to be of limited impact to an English law governed agreement such as the Transfer Annex.

We cannot suggest any amendments to the drafting of the Transfer Annex to reduce the recharacterisation risk in the British Virgin Islands and note that it helpfully refers to the intention that the Transfer Annex is not intended to create a charge. However, the mere fact of such language could be seen as demonstrating that characterisation as a charge was within the contemplation of the parties. On balance we consider that this language should be retained.

Notwithstanding the conclusion reached above that recharacterisation is unlikely, you have asked us to consider the consequences of recharacterisation. The position in the British Virgin Islands is more favourable than that in England because failure to register a charge does not lead to its being void against a liquidator of a company. There are perfection issues which arise from failure to register a charge but these relate solely to priority as against other charges which have been registered as detailed in Part 1.5 of this memorandum.

Registration of the Transfer Annex as a charge in the British Virgin Islands would be necessary to preserve priority, were a deemed security to arise, against other charges of the Eligible Collateral. However as a matter of evidence such a registration gives credence to any allegation that the parties in truth intended a form of security to arise. It is therefore a matter of commercial judgment whether it is best to stand on the agreement as drawn, taking into account our opinion on the likelihood of recharacterisation, and deliberately choose not to register in the British Virgin Islands. Much turns on the likelihood of recharacterisation under English law including whether a security registration in the British Virgin Islands would weaken the case, under English law, for an outright transfer transaction. If there is a material risk, then you may well feel registration in the British Virgin Islands would be prudent. It could however be in a "without prejudice" form such as the following wording: "[Registration is made of] any deemed charge under [the Transfer Annex]. Registration of such deemed charge is made without prejudice to the applicant's intent and contention that [the Transfer Annex] is a transaction of outright transfer."

We have assumed that this question is primarily concerned with transfers by the Transferor to the Transferee of Eligible Credit Support in the form of securities. We will, however, comment briefly on transfers of cash.

Paragraph 3(a)(i) of the Transfer Annex indicates that a transfer of cash is intended to take effect as an outright payment (as opposed to, say, a payment in trust or the assignment of the benefit of an account). There is nothing elsewhere in the Transfer Annex to indicate otherwise. A transfer by the Transferor to the Transferee under Paragraph 2(a) or 3(c) of the Transfer Annex creates a conditional debt obligation of the Transferee to the Transferor. The debt obligation is conditional on the performance by the

Transferor of its obligations under the Master Agreement. The debt is either repaid pursuant to Paragraph 2(b) of the Transfer Annex or in the case of a default by the Transferor, included within the close-out netting effected under Section 6(e) of the Master Agreement.

24. *Assuming that the Transferee receives an absolute ownership interest in the Eligible Credit Support, will it need to take any action thereafter to ensure that its title therein continues? Are there any filing or perfection requirements necessary or advisable, including taking any of the actions referred to in question 5? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained to establish, enforce or continue such ownership interest?*

Under the laws of the British Virgin Islands, there are no ongoing actions of this kind that are required to ensure a continuation of title. There are no filing or perfection requirements of this kind that are necessary or desirable, and no consents or regulatory approvals would be required.

25. *What is the effect, if any, under the laws of your jurisdiction of the right of the Transferor to substitute Eligible Credit Support pursuant to Paragraph 3(c) of the Transfer Annex? Does the presence or absence of consent to substitution by the Transferee have any bearing on this question?*

Under the laws of the British Virgin Islands the effect upon the contractual arrangements between the parties of the right of the Transferor to substitute collateral pursuant to Paragraph 3 (c) of the Transfer Annex will depend upon its effect as a matter of English law. Assuming that the right of exchange is not inconsistent with the transfer analysis under English law, we do not believe that there is any material risk that a British Virgin Islands court would take a different view.

26. *The Transferee's rights in relation to the transferred Eligible Credit Support upon the occurrence of an Event of Default will be governed by Section 6 of the Master Agreement. Assuming that Section 6 of the Master Agreement is valid and enforceable in your jurisdiction insofar as it relates to the determination of a net amount payable by either party on the termination of the Transactions, could you please confirm that Paragraph 6 of the Transfer Annex would also be valid to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of the net amount payable under Section 6(e) of the Master Agreement.*

There is no material risk that a British Virgin Islands court would fail to uphold the Master Agreement and the Transfer Annex, and in particular Section 6 of the Master Agreement and Paragraph 6 of the Transfer Annex respectively, as the Master Agreement is in acceptable and proper legal form, and the Transferee is subject to civil and commercial law with respect to its obligations and with respect to the Master Agreement and the Transfer Annex.

Outstanding obligations (Settlement Amounts and Unpaid Amounts) under the Master

Agreement constitute and will constitute, unless otherwise provided for, primary, direct obligations and will rank unconditionally at least *pari passu* in point of priority and security with all other direct or contingent interests and with secured and unsubordinated liabilities of the Transferee.

According to the general principles of British Virgin Islands law, the measure of an innocent party's claim for damages for breach of contract is such amount as will place the innocent party in a position as close as possible to the position the innocent party would have been in if the contract had been fulfilled. The Master Agreement makes specific provision, which is *prima facie* equitable, for the calculation of the damages which the Defaulting Party suffers and specifically provides for calculation of the Settlement Amount and Unpaid Amounts. Accordingly, where the Master Agreement includes the Transfer Annex and on review of both Section 6 and Paragraph 6, we believe that a British Virgin Islands court would hold that the Value of the Credit Support Balance should be included as an Unpaid Amount in the calculation of the net amount payable under Section 6(e) of the Master Agreement.

The provisions for the calculation of the net termination values in Section 6(e) of the Master Agreement would be valid under the laws of the British Virgin Islands and the inclusion of provisions of this kind is not inconsistent with the public policy of the British Virgin Islands.

27. *Would the rights of the Transferee be enforceable in accordance with the terms of the Master Agreement and the Transfer Annex, irrespective of the insolvency of the Transferor?*

The rights of the Transferee would be enforceable in accordance with the terms of the Master Agreement and the Transfer Annex, irrespective of the insolvency of the Transferor.

28. *Will the Transferor (or its administrator, provisional liquidator. conservator, receiver, trustee or other similar official) be able to recover any transfers of Eligible Credit Support made to the Transferee during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does this suspect period begin? If such a period exists, would the substitution of Eligible Credit Support by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the asset they are replacing? Would the transfer of additional Eligible Credit Support pursuant to the mark-to-market provisions of the Transfer Annex during the suspect period be subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

The analysis set out in question 19 above would apply equally to transfers of Eligible Credit Support under the Transfer Annex.

29. *Would the parties' agreement on governing law of the Transfer Annex and submission to jurisdiction be upheld in your jurisdiction, and what would be the consequences if it were*

not?

The analysis set out in question 19 above applies equally to the Transfer Annex.

30. *Is the Transfer Annex an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee? If there are any other requirements to ensure the validity of such transfer in each type of Eligible Credit Support by the Transferor under the Transfer Annex, please indicate the nature of such requirements. For example, are there any requirements of the type referred to in question 6?*

The Transfer Annex is in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee and there are no other requirements to ensure the validity of such transfer in each type of Eligible Credit Support created by the Transferor under the Transfer Annex. There are no documentary formalities that must be observed in order for a title transfer to be recognised as valid and perfected in the British Virgin Islands. However, in respect of bearer securities, title is transferred by delivery of possession of the certificates representing the securities.

CLOSE-OUT AMOUNT PROTOCOL

We refer to the Close-out Amount Protocol published by ISDA on 27 February 2009 (the "**Protocol**"). On the assumption that the changes intended by the Protocol are effective as a matter of the governing law of the Covered Master Agreement (as defined in the Protocol) and the relevant Credit Support Document, we confirm that the changes made by the Protocol including, without limitation, Annexes 10, 11 and 12 are not material to and do not affect the conclusions reached in this memorandum.

This memorandum is addressed to ISDA solely for the benefit of its members in relation to their use of one or more of the Master Agreements. No other person may rely on this memorandum for any purpose without our prior written consent. This memorandum may, however, be shown by ISDA or an ISDA member to their respective advisors or to a competent regulatory authority or supervisory body for such ISDA member for the purposes of information only, on the basis that we assume no responsibility to such advisor, such authority or body or any other person as a result or otherwise.

~~Yours faithfully~~
HARNEY WESTWOOD & RIEGELS

APPENDIX A

November 2008

CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

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. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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 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.

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APPENDIX B

September 2009

CERTAIN COUNTERPARTY TYPES[11]

Counterparty type	Covered	Relevant BVI entities
Bank/Credit Institution	Yes	BVIBCs regulated by the Banking Act
Central Bank	Not applicable	
Corporation	Yes	BVIBCs (including SPCs and restricted purposes companies)
Hedge Fund/Proprietary Trader	Yes	BVIBCs (including SPCs), trusts, partnerships (including limited partnerships), in each case whether regulated by the Mutual Funds Act or not
Insurance Company	Yes	BVIBCs (including SPCs) regulated by the Insurance Act
International Organization	Not Applicable	
Investment Firm/Broker Dealer	Yes	BVIBCs
Investment Fund	Yes	BVIBCs (including SPCs), trusts, partnerships (including limited partnerships), in each case whether regulated by the Mutual Funds Act or not
Local Authority	Yes but see qualifications	BVIBCs, trusts, partnerships (including limited partnerships)
Partnership	Yes	partnerships (including limited partnerships)
Pension Fund	Yes	BVIBCs (including SPCs), trusts, partnerships (including limited partnerships), in each case whether regulated by the Mutual Funds Act or not
Sovereign	Yes but see qualifications	BVIBCs, trusts, partnerships (including limited partnerships)
Sovereign Wealth Fund	Yes but see qualifications	BVIBCs, trusts, partnerships (including limited partnerships)
Sovereign-Owned Entity	Yes but see qualifications	BVIBCs, trusts, partnerships (including limited partnerships)
State of a Federal Sovereign	Not applicable	

[11] In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

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 individual 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 (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).

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.

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.

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.

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 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.

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 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.

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 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.

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 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.

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 "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.

APPENDIX C

EXTRACT FROM THE INSOLVENCY RULES

PART XII

NETTING AND FINANCIAL CONTRACTS

321. (1) For the purposes of Part XVII of the Act a financial contract is a contract, including any terms and conditions incorporated into any such contract, pursuant to which payment or delivery obligations that have a market or an exchange price are due to be performed at a certain time or within a certain period of time.

(2) Without limiting paragraph (1), the following are financial contracts:

(a) a currency, cross-currency or interest rate swap agreement;

(b) a basis swap agreement;

(c) a spot, future, forward or other foreign exchange agreement;

(d) a cap, collar or floor transaction;

(e) a commodity swap;

(f) a forward rate agreement;

(g) a currency or interest rate future;

(h) a currency or interest rate option;

(i) equity derivatives, such as equity or equity index swaps, equity options and equity index options;

(j) credit derivatives, such as credit default swaps, credit default basket swaps, total return swaps and credit default options;

(k) energy derivatives, such as electricity derivatives, oil derivatives, coal derivatives and gas derivatives;

(l) weather derivatives, such as weather swaps or weather options;

(m) bandwidth derivatives;

(n) freight derivatives;

(o) carbon emissions derivatives;

(p) a spot, future, forward or other commodity contract;

(q) a repurchase or reverse repurchase agreement;

(r) an agreement to buy, sell, borrow or lend securities, such as a securities lending transaction;

(s) a title transfer collateral arrangement;

(t) an agreement to clear or settle securities transactions or to act as a depository for securities;

(u) any other agreement similar to any agreement or contract referred to in paragraphs (a) to (t) with respect to reference items or indices relating to (without limitation) interest rates, currencies, commodities, energy products, electricity, equities, weather, bonds and other debt instruments and precious metals;

(v) any derivative or option in respect of, or combination of, one or more agreements or contracts referred to in paragraphs (a) to (u); and

(w) any agreement or contract designated as such by the Commission.

EXTRACTS FROM THE INSOLVENCY ACT

PART XVII

NETTING AND FINANCIAL CONTRACTS

434. (1) In this section and section 435,

"financial contract" means a contract of a type specified in the Rules as a financial contract;

"master netting agreement" has the meaning specified in subsection (4);

"netting" means the termination of financial contracts, the determination of the termination values of those contracts and the set off of the termination values so determined so as to arrive at a net amount due, if any, by one party to the other where each such determination and set off is effected in accordance with the terms of a netting agreement between those parties;

"netting agreement" has the meaning specified in subsection (2);

"party" means a person constituting one of the parties to an agreement.

(2) A netting agreement is an agreement between two parties only, in relation to present or future financial contracts between them the provisions of which include the termination of those contracts for the time being in existence, the determination of the termination values of those contracts and the set off of the termination values so determined so as to arrive at a net amount due.

(3) A netting agreement may provide for

(a) a guarantee to be given to one party on behalf of the other party solely to secure the obligation of either party in respect of the financial contracts concerned; and

(b) the set off against the net amount due under subsection (2) and that amount only of

(i) any money provided solely to secure the obligation of either party in respect of the financial contracts concerned,

(ii) the proceeds of the enforcement and realisation of any collateral in the form of

(I) security interests or other assets provided, or

(II) money, security interests or other assets provided solely to secure the obligation of the guarantor under paragraph (a),

solely to secure the obligation of either party in respect of the financial contracts concerned;

(4) A master netting agreement is an agreement between two parties only, in relation to netting agreements between them

(a) the provisions of which include the set off of the net amounts due under two or more netting agreements between them; and

(b) which may provide for a guarantee to be given to one party on behalf of the other party solely to secure the obligation of either party in respect of the netting agreements concerned; and

(c) which may provide for the set off against the net amount due under paragraph (a) and that amount only of

(i) any money provided solely to secure the obligation of either party in respect of the netting agreements concerned,

(ii) the proceeds of the enforcement and realisation of any collateral in the form of

(I) security interests or other assets provided, or

(II) money, security interests or other assets provided solely to secure the obligation of the guarantor under paragraph (b),

solely to secure the obligation of either party in respect of the netting agreements concerned.

435. (1) Notwithstanding anything contained in this Act or the Rules or in any rule of law relating to insolvency,

(a) the provisions relating to netting, the set off of money provided by way of security, the enforcement of a guarantee and the enforcement and realisation of collateral and the set off of the proceeds thereof, as contained within a netting agreement or a guarantee provided for in such an agreement shall be legally enforceable against a party to the agreement and, where applicable, against a guarantor or other person providing security, and

(b) the provisions relating to set off of the net amounts due under netting agreements, the set off of money provided by way of security, the enforcement of a guarantee and the enforcement and realisation of

collateral and the set off of the proceeds thereof, as contained within a master netting agreement or a guarantee provided for in such an agreement shall be legally enforceable against a party to the agreement and, where applicable, against a guarantor or other person providing security.

(2) Nothing in subsection (1)

(a) prevents the application of this Act, any other enactment or rule of law which would prevent the legal enforceability of netting, set off, enforcement and realisation in any particular case, on the grounds of fraud or misrepresentation or on any similar ground; or

(b) permits the enforceability of netting, set off, enforcement and realisation if any provision of an agreement between the two parties concerned would make netting, set off, enforcement and realisation void whether because of fraud or misrepresentation or any similar ground.