LENZ & STAEHELIN

Lenz & Staehelin
Route de Chêne 30
CH-1211 Geneva 6
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

Brandschenkestrasse 24
CH-8027 Zurich
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01

Avenue de Rhodanie 58
CH-1007 Lausanne
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

www.lenzstaehelin.com

ISDA
International Swaps and Derivatives Association, Inc.
10 East 53rd Street, 9th Floor
New York, NY 10022
United States of America

MEMORANDUM OF LAW ON THE ENFORCEABILITY OF THE TERMINATION, BILATERAL CLOSE-OUT NETTING AND MULTIBRANCH NETTING PROVISIONS OF THE

1992 ISDA MASTER AGREEMENT (MULTICURRENCY – CROSS BORDER) AND THE 1992 ISDA MASTER AGREEMENT (LOCAL CURRENCY – SINGLE JURISDICTION)

2002 ISDA MASTER AGREEMENTS

2001 ISDA CROSS-AGREEMENT BRIDGE

2002 ISDA ENERGY AGREEMENT BRIDGE

DATED AS OF FEBRUARY 25, 2021

TABLE OF CONTENTS

I. Introduction

This memorandum of law considers certain issues in relation to the enforceability under the laws of Switzerland of the termination, bilateral close-out netting and multibranch netting provisions of privately negotiated (over-the-counter) derivatives transactions entered into under an agreement between two parties based on one of the following standard forms published by the International Swaps and Derivatives Association, Inc. ("**ISDA**"): 1

1. 1992 ISDA Master Agreement (Multicurrency – Cross Border) and the 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction) (each, a "**1992 Master Agreement**" and together, the "**1992 Master Agreements**"); 2
2. 2002 ISDA Master Agreement, published in January 2003 by ISDA (the "**2002 Master Agreement**"); 3
3. 2002 ISDA Master Agreement (French law), published in June 2018 by ISDA (the "**French 2002 Master Agreement**"); and 4
4. 2002 ISDA Master Agreement (Irish law), published in June 2018 by ISDA (the "**Irish 2002 Master Agreement**", and collectively with the 2002 ISDA Master Agreement and French 2002 Master Agreement, the "**2002 ISDA Master Agreements**") 5

(each of the standard forms listed under 1. through 3. above, a "**Master Agreement**" and together, the "**Master Agreements**") as well as the: 6

5. 2001 ISDA Cross-Agreement Bridge (the "**2001 Bridge**"); and 7
6. 2002 ISDA Energy Agreement Bridge (the "**2002 Bridge**") 8

(each of the standard forms listed under 4. and 5. above, a "**Bridge Agreement**" and together, the "**Bridge Agreements**"). 9

Neither the ISDA Close-out Amount Protocol published on 27 February 2009 by ISDA (the "**Protocol**") nor the amendments set out in the Annexes to the June 2014 Amendment to the Master Agreement in relation to Section 2(a)(iii) affect the conclusions set out in this memorandum of law. 10

This memorandum of law has been issued pursuant to an instruction letter enclosed to an e-mail dated December 11, 2018 sent by ISDA to the undersigned (the "**Instruction Letter**"). It addresses the issues arising under Swiss law to which the Instruction Letter refers. 11

This memorandum of law is given in respect of the following counterparties, which are either (1) incorporated under the laws of Switzerland or (2) Swiss branches of foreign entities (each, 12

a "**Swiss Counterparty**")[1], in circumstances both before and after the commencement of insolvency proceedings, and organized as:

1. A corporation incorporated under the Swiss Code of Obligations ("**CO**")[2] and having its registered seat in Switzerland. For the purposes of this memorandum of law, corporations include (a) joint stock corporations (*Aktiengesellschaft / société anonyme*) subject to Art. 620 et seq. CO, (b) companies with unlimited partners (*Kommanditaktiengesellschaft / société en commandite par actions*) subject to Art. 764 et seq. CO, (c) limited liability companies (*Gesellschaft mit beschränkter Haftung / société à responsabilité limitée*) subject to Art. 772 et seq. CO, and (d) cooperatives (*Genossenschaft / société coopérative*) subject to Art. 828 et seq. CO; 13

2. A partnership organized under the CO and having its registered seat in Switzerland. For the purposes of this memorandum of law, partnerships include (a) general partnerships (*Kollektivgesellschaft / société en nom collectif*) subject to Art. 552 et seq. CO, and (b) limited partnerships (*Kommanditgesellschaft / société en commandite*) subject to Art. 594 CO; 14

3. A banking institution licensed under the Swiss Federal Act on Banks and Savings Banks ("**Banking Act**")[3], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Bank**"); for purposes of this memorandum of law, the term Bank shall further include a corporation or a partnership having its registered seat in Switzerland which (i) is the parent company of a finance group or a finance conglomerate (a "**Finance Parent Company**") or (ii) is a member of a finance group or finance conglomerate and serves a key function for the group's regulated activities (a "**Significant Finance Group Company**") and is subject to the particular insolvency regime applicable to a Bank in accordance with Art. 2bis Banking Act; 15

4. A securities firm (*Wertpapierhaus / maison de titres*) licensed under the Swiss Federal Act on Financial Institutions ("**FinIA**")[4] organized in the form of a joint stock corporation having its registered seat in Switzerland (a "**Securities Firm**")[5]; 16

---

1 See Annex 2 for cross-reference to the ISDA Description of Certain Counterparty Types.

2 Schweizerisches Obligationenrecht (OR) / Code des obligations (CO), SR 220.

3 Bundesgesetz über die Banken und Sparkassen (BankG) / Loi fédérale sur les banques et les caisses d'épargne (LB), SR 952.0.

4 Bundesgesetz über die Finanzinstitute (FINIG) / Loi fédérale sur les établissements financiers (LEFin), SR 954.1.

5 This includes securities dealers (*Effektenhändler*) that were until December 31, 2019 licensed under the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**"). The SESTA has been abolished concurrently with the entering into force of the FinIA. Such securities dealers are not required to obtain

5. An insurance company licensed under the Swiss Federal Act on the Supervision of Insurance Companies ("**ISA**")[6], organized in the form of a joint stock corporation or a cooperative, in each case having its registered seat in Switzerland (*Versicherungsunternehmen / Entreprise d'assurance*) (an "**Insurance Company**")[7]; for purposes of this memorandum of law the term Insurance Company shall further include a corporation having its registered seat in Switzerland which is a member of an insurance group or insurance conglomerate and serves a key function for the group's regulated activities, including as the case may be as parent company, (a "**Significant Insurance Group Company**") and is subject to the particular insolvency regime applicable to an Insurance Company in accordance with Art. 71[bis] and 79[bis] ISA; 17

6. A collective investment vehicle licensed under the Swiss Federal Act on Collective Investment Schemes ("**CISA**")[8], organized under Swiss law as (a) a contractual fund (*vertraglicher Anlagefonds / fonds de placement contractuel*) pursuant to Art. 25 et seq. CISA ("**Contractual Fund**") or (b) an investment company with variable capital (*Investmentgesellschaft mit variablem Kapital, SICAV / société d'investissement à capital variable, SICAV*) subject to Art. 36 et seq. CISA ("**SICAV**") ("a "**Collective Investment Vehicle**"); 18

7. A fund management company (*Fondsleitung / direction de fonds*) licensed under the FinIA to manage a Contractual Fund, in each case organized in the form of a joint stock corporation and having its registered seat in Switzerland (a "**Fund Management Company**"); 19

8. A pension fund organized under Swiss law in one of the permitted forms for private law entities, namely as a foundation (*Stiftung / Fondation*) pursuant to Art. 80 et seq. of the Swiss Civil Code ("**CC**")[9] registered as a pension fund (*registrierte Vorsorgeeinrichtung / institution de prévoyance enregistrée*) pursuant to Art. 48 of 20

new licenses under the FinIA. Rather, their licenses granted under the SESTA will continue to be valid under the FinIA.

6 Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (VAG) / Loi fédérale sur la surveillance des entreprises d'assurance (LSA), SR 961.01.

7 Note that the analysis and conclusions contained in this memorandum of law do not necessarily apply to other types of insurance companies and in particular not to insurance companies established under Swiss Federal or Cantonal public law.

8 Bundesgesetz über die kollektiven Kapitalanlagen (KAG), SR 951.31.

9 Schweizerisches Zivilgesetzbuch (ZGB) / Code civil suisse (CC), SR 210.

the Swiss Federal Act on Occupational Benefit Plans ("**OBPA**")[10] ("**Pension Fund**");

9. An individual to the extent such individual is subject to bankruptcy or composition proceedings under the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**")[11]; 21

(each of the entities listed under 2. through 8. above is referred to as a "**Special Insolvency Regime Swiss Entity**"). 22

10. A Swiss branch (*Zweigniederlassung / succursale*) of a foreign corporation established in Switzerland (a "**Swiss Branch**"); or 23

11. A Swiss branch of a foreign bank or of a foreign Securities Firm established and duly licensed in Switzerland under the Banking Act or, as the case may be, under FinIA (a "**Special Insolvency Regime Swiss Branch**"). 24

Excluded from the scope of this memorandum of law are certain other Swiss parties, including without limitation (a) cantonal banks within the meaning of Art. 3a Banking Act, organized under private or public law, other than a Covered Cantonal Bank, (b) investment foundation within the meaning of Art. 53g OBPA, and (c) entities subject to public law, including, without limitation, entities that are otherwise carrying on business referred to above (as e.g. public law insurance companies or pension funds), the Swiss confederation, cantons, municipalities, any subdivisions thereof, public utility companies and similar institutions. 25

The conclusions of this memorandum of law are subject to the specific terms of reference, definitions, modifications and additional assumptions and qualifications set out in the Schedules to this memorandum of law applicable to: 26

(i) Banque Cantonale Vaudoise (Annex 4, Schedule 1 Banque Cantonale Vaudoise); 27

(ii) Banque Cantonale de Genève (Annex 4, Schedule 2 Banque Cantonale de Genève); 28

(iii) Basler Kantonalbank (Annex 4, Schedule 3 Basler Kantonalbank); and 29

(iv) Zürcher Kantonalbank (Annex 4, Schedule 4 Zürcher Kantonalbank) 30

[10] Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVG) / Loi fédérale sur la prévoyance professionnelle vieillesse, survivants et invalidité (LPP), SR 831.40. Note that based on a change of the OBPA, a Pension Fund in the form of a cooperative is not possible anymore, so that a Pension Fund must be now in the form of a foundation.

[11] Bundesgesetz über Schuldbetreibung und Konkurs (SchKG) / Loi fédérale sur la poursuite pour dettes et la faillite (LP), SR 281.1.

Each of the counterparties under 27 - 30 above is referred to herein as a "**Covered Cantonal Bank**"). 31

II. Definitions

For the purposes of this memorandum of law, unless otherwise specified: 32

1. Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Master Agreement or the Bridge Agreement, as relevant; 33

2. "**Insolvency**" and "**Insolvency Proceedings**" shall be a reference to either a bankruptcy (*Konkurs / faillite*) and the declaration thereof (*Konkurseröffnung / ouverture de la faillite*), or the grant of a moratorium (*Nachlassstundung / sursis concordataire*) with the view of entering into and the proceedings leading up to a composition agreement (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*) under the SDEBA, or special liquidation proceedings in respect of Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches (all as discussed in further detail under n. 88 et seq. below). The term "**Bankrup Party**" and/or "**Bankrupt debtor**" shall be understood accordingly; and 34

3. "**Party**" means a party to a Master Agreement and/or a Bridge Agreement. 35

We do not further address in this memorandum of law execution proceedings based on a so-called special execution (Spezialexekution, i.e. the so-called *Betreibung auf Pfändung / poursuite par voie de saisie* as well as the *Betreibung auf Pfandverwertung / poursuite en réalisation de gage*). Those special execution procedures do not cover Insolvency as defined herein, covering all assets and liabilities of a Party, but only individual assets used to satisfy the creditors' claims in the context of that special execution procedure. 36

III. General Assumptions

For the purposes of this memorandum of law, we have made the following general assumptions (which are supplemented by specific assumptions made in each case under n. 237 et seq. and n. 247 et seq. below for the purpose of answering the Issues raised in the Instruction Letter): 37

(i) The Master Agreement and/or the Bridge Agreement are entered into by and between two legal entities, one of which is an entity which is organized outside Switzerland and is neither a Swiss Branch nor a Special Insolvency Regime Swiss Branch (a "**Foreign Entity**") and the other is a Swiss Counterparty, each having entered into Transactions with the other party over a period of time; 38

39

(ii) The Parties will enter into the Master Agreement and/or the Bridge Agreement and use Confirmations without amending the printed terms thereof other than by making the elections specifically provided for in the Schedule to the Master Agreement and by making provisions which are in line with industry practice (as in particular further described in the User's Guide to the Master Agreement published by ISDA from time to time), provided that such provisions do not affect the terms of the Master Agreement and/or the Bridge Agreement in any material way;

(iii) On the basis of the terms and conditions of the Master Agreement and/or the Bridge Agreement as well as of other relevant factors, and acting in a manner consistent with the intentions stated in the Master Agreement and/or the Bridge Agreement, the Parties over time have entered into a number of Transactions that are intended to be governed by the Master Agreement and/or the Bridge Agreement; 40

(iv) Each Party when entering into the Master Agreement and/or the Bridge Agreement and each Transaction has the legal capacity and power to do so and has received all consents, approvals, permits and resolutions (corporate and otherwise) necessary in order to duly authorize the entering into, execution and delivery of, and performance under the Master Agreement and/or the Bridge Agreement, including the Confirmations exchanged between the Parties confirming the Transactions; 41

(v) Each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licenses and consents required under all laws of any applicable jurisdiction (including Switzerland) to enable it to lawfully enter into and perform its obligations under the Master Agreement and/or the Bridge Agreement and each Transaction and to ensure the legality, validity and enforceability thereof; 42

(vi) The entering into the Master Agreement and/or the Bridge Agreement and each Transaction, and the execution and delivery of, and performance thereunder, does not violate any Party's constitutive documents; 43

(vii) Each Party is duly incorporated or, as the case may be, has been duly organized under the laws of its jurisdiction or the jurisdiction of its place of business, and each Party when entering into the Master Agreement and/or the Bridge Agreement initially and as of the date of the conclusion of a Transaction is neither insolvent (*zahlungsunfähig / insolvable*) nor overindebted (*überschuldet / surendetté*) within the meaning of Swiss law or any other law applicable to such Party. Each Transaction has been entered into in such Party's ordinary course of business and at arm's length terms; 44

(viii) The Master Agreement and/or the Bridge Agreement constitute legal, valid and binding obligations enforceable against each Party under all applicable laws (other than Swiss law), and in particular English law or, as the case may be, the laws of the 45

State of New York, French law or Irish law as the law chosen to govern the Master Agreement and/or the Bridge Agreement;

(ix) The Parties have specified in the Schedule to the 1992 Master Agreement that the Second Method shall apply as payment method for all Events of Default as well as Termination Events; 46

(x) Without derogation to the specific limitations and qualifications set forth herein, this memorandum of law is subject to the following general limitations: 47

- This memorandum of law is limited to Swiss law as in force and interpreted at the date hereof. 48
- The meaning and sense of certain concepts and expressions of Swiss law which are used herein and on which this memorandum of law is based do not necessarily equal the meaning and sense of concepts and expressions in the reader's jurisdiction. It is assumed by us that all words and expressions in the Master Agreement and/or the Bridge Agreement are to be understood in accordance with their plain meaning and without regard of any impact which they may have under any other applicable laws and in particular the laws of England or, as the case may be, the laws of the State of New York, French law or Irish law. 49
- This memorandum of law is limited to matters of law and does neither address any factual circumstances or statements of the Parties to the Master Agreement and/or the Bridge Agreement, whether contained in representations or warranties of the Parties thereunder or otherwise, nor any tax matters, including without limitation any tax, regulatory or accounting consequences of the entering into, execution and delivery of, and performance under the Master Agreement and/or the Bridge Agreement (e.g. any direct Swiss federal, cantonal or municipal taxes, (stamp) duties, withholdings or other "indirect" taxes, duties or charges of whatsoever). 50
- We have not reviewed the terms of any Transaction and consequently no opinion whatsoever is expressed in relation thereto. We note, in particular, that a wide variety of Transactions can be entered into under the Master Agreement and/or the Bridge Agreement. 51
- This memorandum of law assumes that no law other than Swiss law would affect or qualify the opinions expressed herein. 52
- Swiss insolvency laws are based on the principle of active universalism such that effects of the opening of Swiss insolvency proceedings would generally affect 53

all of the insolvent party's property worldwide. In practice, though, the effectiveness of the principle of active universalism depends on the reaction of the laws in the jurisdiction where specific assets of the insolvent party are located. If such jurisdiction accepts the effects of Swiss insolvency proceedings either automatically or upon a formal recognition order, the conclusions reached herein would apply mutatis mutandis. If, in turn, the jurisdiction where assets of the insolvent are located either proceeds with separate ancillary / parallel insolvency proceedings in reaction to the opening of main Swiss insolvency proceedings, then the effects of the insolvency laws in the jurisdiction where assets of the insolvent are located would prevail and may lead to conclusions which differ from the conclusions reached herein under Swiss insolvency laws. The same holds true if the jurisdiction where assets are located does not recognize the Swiss insolvency proceeding without opening ancillary / parallel proceedings.

IV. Executive Summary

This executive summary highlights those issues identified in this memorandum of law, which we, in our discretion, consider to be material in the context of the Master Agreement and/or the Bridge Agreement. It does not purport to be exhaustive and reading this executive summary is not a substitute for reading this memorandum of law in its entirety. The executive summary is in all respects subject to the in-depth discussion and the limitations as set out in this memorandum of law. 54

A. Insolvency and Early Termination

The Master Agreement and/or the Bridge Agreement provide for an optional termination mechanism and, if elected by the Parties, for an automatic termination mechanism (Automatic Early Termination). Optional termination is valid and binding on the Parties prior to Insolvency. By contrast, it is in our opinion very likely that the effectiveness of optional termination clauses will be challenged in an Insolvency by the administrator of the Insolvency, or by a creditor, based on the argument that such clauses violate the principle of equality of treatment among creditors and are to the detriment of other creditors. We, therefore, recommend that: 55

(i) For each Master Agreement, Automatic Early Termination be elected in respect of the Swiss Counterparty for any Event of Default which is a bankruptcy (*Konkurs / faillite*) or a reorganization by way of a composition agreement (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*) under the SDEBA; 56

(ii) For each Bridge Agreement, Automatic Early Termination be elected in respect of the Swiss Counterparty to trigger a Bridging Event. 57

Some of the special measures applicable to Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches may not trigger an Event of Default under Section 5(v)(a)(vii) of the Master Agreement. The drafting suggestions set forth in Annex 2 hereto address the issue. We recommend including the suggested language in the Schedule. 58

Jurisdiction clauses have no effect on actions brought under the SDEBA, i.e. to issues that relate to Swiss bankruptcy or insolvency law rather than to contractual law. These actions must be brought before the court at the place of the Insolvency Proceeding. Accordingly, the jurisdiction clauses provided for in the Master Agreements and the Bridge Agreements in favour of the courts of England or, as the case may be, the courts of the State of New York, the courts of France or the courts of Ireland would not be effective in case of actions relating to Insolvency Proceedings (e.g. avoidance actions). 59

B. Close-Out Netting

The provisions of the Master Agreements providing for the netting of termination values in the Termination Currency, determining a single lump-sum termination amount and payment thereof by the Defaulting Party (if the amount is a positive number) or by the Non-defaulting Party (if the amount is a negative number), is enforceable under Swiss law[12], irrespective of whether the terms of a Transaction provide for cash or physical settlement and irrespective of whether the terms of a Transaction provide for different categories of underlying assets (cross-category netting/set-off), subject to the following limitations: 60

(i) Any net amount due by the Swiss Counterparty to the Foreign Entity in case of the Swiss Counterparty's bankruptcy (*Konkurs / faillite*) or in case of a reorganization by way of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*) will have to be converted into, and filed in, Swiss Francs in the Swiss Counterparty's Insolvency; 61

(ii) The Foreign Entity will as a rule be entitled to set-off claims against debts due to the Swiss Counterparty in case of the latter's bankruptcy or reorganization provided that both the claims and the debts existed at the time of the adjudication of insolvency and provided the Foreign Entity has become the creditor of the Swiss Counterparty prior to the latter's adjudication of bankruptcy or reorganization. 62

The provisions of the Bridge Agreements providing that each Bridged Agreement will be considered to constitute a Terminated Transaction (and all amounts due under Bridged Transactions or Bridged Agreements will constitute amounts under Section 2(a)(i) of the Master Agreement) on the Early Termination Date are valid and binding under Swiss law. 63

V. Opinions

Based on and subject to the foregoing and subject to the assumptions and qualifications contained herein, we are of the following opinions: 64

A. Set-off / Netting outside Insolvency Proceedings

The summary description of netting and set-off under Swiss substantive law (see n. 66 et seq.), Swiss conflicts of laws rules (see n. 74 et seq.) and Swiss insolvency law (see n. 88 et seq.) does not purport to provide a comprehensive summary of the respective fields of law, but rather aims at facilitating the understanding of the answers given in respect of the specific 65

[12] See the assumption under n. 46 above regarding opting for the Second Method payment method with respect to the 1992 Master Agreements.

issues with respect to set-off and netting discussed under n. 237 et seq. of this memorandum of law.

1. Close-out Netting / Set-off under Swiss substantive law

Close-out netting is neither a clear-cut concept nor specifically addressed in Swiss substantive law. It can, in particular, not be clearly distinguished from a contractual set-off arrangement. Subject to limitations of general principles of law, the Parties are free, however, to determine the conditions for and the effects of any termination of their contracts. 66

Under Swiss substantive law, the termination of an agreement and the determination of one single settlement amount in lieu of all amounts otherwise owed under various transactions entered into thereunder (which are the characteristic elements of what is referred to as close-out netting) would in our view be treated as a pre-agreed contractual liquidation of all such transactions in certain circumstances agreed upon by the parties. Under Swiss substantive law, the procedure of liquidating contractual claims can be agreed upon in advance and a close-out netting provision would, hence, be recognized under Swiss law. 67

As a matter of Swiss substantive law, the parties may also by contract stipulate a set-off of mutual claims and thereby deviate from the requirements that would otherwise apply to a unilateral right of set-off under Swiss substantive law. Such requirements that would, in the absence of a contractual agreement to the contrary, apply to a unilateral right of set-off are: 68

(i) the parties are each others' reciprocal creditor and debtor (mutuality requirement) with respect to claims to be set-off; 69

(ii) the mutual claims must be of the same kind (e.g. monetary claims)[13]; 70

(iii) the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid); and 71

(v) the counterclaim must be due. 72

However, in case of Insolvency Proceedings, such deviations are subject to limitations of Swiss insolvency laws and in particular the mutuality requirement is deemed to be mandatory (see n. 104). 73

[13] Monetary claims expressed in different currencies are treated as being of the same kind if the currencies are freely convertible and unless the parties specifically agreed or it is customary that an obligation must be effectively discharged in the agreed currency (effective clause). Even if there is such an effective clause, the parties may agree that different currencies may be set-off and this latter agreement would for the purposes of set-off prevail over the effective clause (BGE 130 II 318).

2. Netting / Set-off under Swiss conflict of laws rules

74 Under applicable Swiss law, conflicts of laws issues are governed by the Swiss Private International Law Act ("**PILA**")[14] if such issues arise in an international context. International treaties have priority over the PILA. Art. 148 of the PILA deals with set-off in an international context and addresses both the unilateral right of set-off and the contractual set-off.

75 In respect of the unilateral right of set-off, it is first to be noted that the PILA regards this right as a substantive right as opposed to a mere procedural right. Hence, it is not the *lex fori* that applies. Rather, Art. 148 para. 2 PILA refers to the law applicable to the claim owed by the party having first declared the set-off. Such claim is referred to as the main claim (*Hauptforderung / créance principale*), whereas the other claim is referred to as the set-off claim (*Verrechnungsforderung / créance compensante*) and the law applicable to the unilateral set-off pursuant to Art. 148 PILA is referred to as the set-off statute (*Verrechnungsstatut / statut de compensation*).

76 Pursuant to Art. 148 para. 2 PILA, the set-off statute determines, *inter alia*, (i) the requirements of a unilateral right of set-off (e.g. whether reciprocity/mutuality is required and what constitutes reciprocity/mutuality), (ii) how the right of set-off is exercised, and (iii) its effects.

77 Still, it is the law that governs the main claim and the set-off claim respectively (the contract statute) which determines whether the claim satisfies such requirements (e.g. whether a claim is due if that is required and it is also the contract statute that determines who is the creditor/debtor of the respective claims). We are further of the view that the question whether a claim may be subject to set-off at all is also governed by the contract statutes of the respective claims and not the set-off statute.

78 There is some controversy in Swiss legal doctrine as to whether the set-off statute governs the effects of the set-off on the main claim only or whether it also governs the effects on the set-off claim, i.e. whether it is also applicable as to the question of extinction of the latter. The prevailing view seems to be that it applies to both, unless the law applicable to the set-off claim does not know the concept of set-off at all.

79 Art. 148 para. 3 PILA, by reference to Art. 116 PILA, provides that a contractual right of set-off is governed by the law chosen by the parties in the set-off agreement. In the absence of a choice of law, a Swiss court would need to determine and apply the law of such jurisdiction that is most closely related to such agreement. Again, such law would determine

[14] Bundesgesetz über das Internationale Privatrecht (IRPG) / Loi fédérale sur le droit international privé (LDIP), SR 291.

the requirements for set-off, but also the extent to which such requirements may be freely agreed between the parties and the effects on the respective claims.

The parties are, hence, free to choose the law to govern their contractual set-off arrangement. 80

The choice of English law or, as the case may be, the laws of the State of New York, of French law or Irish law to govern the Master Agreement (Section 13 of the Master Agreement and election in the Schedule) is a valid choice of law for purposes of Swiss law and a Swiss court would accordingly have to apply such laws. 81

A Swiss court would, hence, look to English law or, as the case may be, the laws of the State of New York, French law or Irish law to determine the requirements for set-off. However, once the Swiss court has established such requirements, it may then well have to look to another law that may be applicable to the question as to whether a particular claim satisfies such requirements. It is important to note that such other laws would again be determined by the Swiss conflict of laws rules and not any conflict rules to which English law or, as the case may be, the laws of the State of New York, French law or Irish law as the set-off statute may further direct. 82

The application of the chosen law would, however, be subject to Swiss public policy (*ordre public*) pursuant to Art. 17 and 18 PILA. We have not on the face of the Master Agreement and/or the Bridge Agreement identified any provisions that we would view as contrary to the general principles of Swiss public policy (*ordre public*). 83

In our view, the provisions of the Master Agreements and the Bridge Agreements are best analyzed not as a mere modification of a unilateral right of set-off, but as a comprehensive contractual set-off arrangement and, hence, as a close-out netting mechanism. 84

3. Conclusions on Set-off / Netting outside Insolvency Proceedings

It is our understanding of the Master Agreement, and we have for purposes of this memorandum of law assumed, that all amounts to be set-off or netted pursuant to the Master Agreement, including amounts to be integrated into the close-out netting under the Bridge Agreement are expressed as monetary claims. 85

Based on the above, we are of the view that the close-out netting and set-off mechanism provided for in Sections 5 and 6 of the Master Agreement, including amounts to be integrated into the close-out netting under the Bridge Agreement would be recognized and be enforceable against a Swiss Counterparty prior to Insolvency. 86

This holds true irrespective of whether the terms of a Transaction provide for cash or physical settlement and irrespective of whether the terms of the various Transactions to be included in such netting and set-off provide for different categories of underlying assets (cross-category netting/set-off). 87

B. Netting / Set-off in the context of Insolvency Proceedings

1. Description of Swiss insolvency proceedings

a) Insolvency

Enforcement of contractual obligations is generally subject to limitations in case of insolvency proceedings being instituted against a Swiss Counterparty under applicable Swiss law. In a nutshell, the various insolvency proceedings against a Swiss Counterparty and their main impact on the Swiss Counterparty's ability to abide by its obligations under the Master Agreement can be summarized as follows: 88

b) Bankruptcy

(i) Proceedings

The legal framework as regards the enforcement of claims and the questions relating to insolvency and bankruptcy is as a rule set by the SDEBA. By way of exception, the insolvency and bankruptcy of Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches will not be governed by the SDEBA, but by the specific laws which apply in these cases. Swiss Branches are also subject to the SDEBA, but only to a limited extent[15]. 89

The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against Swiss Counterparties (other than Special Insolvency Regime Swiss Entities and Special Insolvency Regime Swiss Branches) have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs / faillite*) and, hence, a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special enforcement proceeding limited to the liquidation of the relevant collateral (*Betreibung auf Pfandverwertung / poursuite en réalisation de gage*). 90

However, if bankruptcy is declared while such a proceeding is pending, the proceeding is ceased and the creditor participates with the other creditors in the bankruptcy proceedings. 91

A bankruptcy (other than for Special Insolvency Regime Entities) is declared by the court either on the initiative of a creditor or on the debtor's request. It is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of declaration 92

[15] On the liability side only with respect to debts and obligations incurred and entered into by the Swiss Branch and on the assets side only with respect to assets located in Switzerland and, in case of assets located outside Switzerland, only to the extent that the Swiss authorities have access. Also note that all questions regarding corporate authority and capacity are governed by the law governing the foreign entity.

of bankruptcy, and all assets acquired or received subsequently, form together the bankruptcy estate, which after deduction of costs and certain other expenses, is to satisfy the creditors in accordance with their statutory ranking order.

As a rule, the declaration of bankruptcy by the competent court upon motion of a creditor needs to be preceded by a prior debt enforcement procedure (*Konkurs mit vorgängiger Betreibung / faillite avec poursuite préalable*). Any creditor or purported creditor may apply for the commencement of debt enforcement proceedings against a debtor. Upon a creditor's request, in which the creditor need not evidence its claim, the competent debt enforcement authority (*Betreibungsamt / office des poursuites*) will issue a payment summons (*Zahlungsbefehl / commandement de payer*). The debtor may object to the payment summons by simple declaration (*Rechtsvorschlag / opposition*). If the debtor does so object, the creditor needs to lift such objection by a court procedure. If the creditor has a written debt acknowledgment of the debtor, it can start a special summary procedure (*provisorische Rechtsöffnung / mainlevée provisoire*). Otherwise, full fledged litigation on the merits may need to be commenced. If the creditor prevails in the special summary procedure, but the debtor still wants to contest the claim, it is up to the debtor to commence full fledged litigation on the merits. If the creditor prevails, the payment summons comes into legal effect and the creditor may request the continuation of enforcement proceedings and the competent debt enforcement authority (*Betreibungsamt / office des poursuites*) would then notify the debtor that bankruptcy proceedings will be opened by the court upon a respective request of the creditor unless payment of the debt will be performed within 20 days. After the lapse of such deadline without payment of the debt, the creditor may request that the competent court open bankruptcy proceedings. 93

The competent court may declare a debtor bankrupt without prior enforcement proceedings (*Konkurs ohne vorgängige Betreibung / faillite sans poursuite préalable*) under the following circumstances: at the request of the debtor if (i) the debtor's board of directors declares that the debtor is overindebted (*überschuldet / surendetté*) within the meaning of Art. 725 para. 2 CO or (ii) if the debtor declares to be insolvent (*zahlungsunfähig / insolvable*), and at the request of a creditor if (i) the debtor commits certain acts to the detriment of its creditors or (ii) ceases to make payments (*Zahlungseinstellung / cessation de paiements*) or if certain events happen during composition proceedings. 94

The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the receiver in bankruptcy. 95

For the final distribution there is a ranking of creditors in three classes. For corporate entities, the first and the second class, which are privileged, comprise claims under areas including employment contracts, social security (old-age and survivors insurance, accident insurance, invalidity insurance, income compensation and unemployment insurance) and pension plans. 96

All other creditors are treated equally in the third class.

(ii) Effects in general

The declaration of bankruptcy (*Konkurseröffnung* / *ouverture de la faillite*) has, *inter alia*, the following effects with respect to a bankrupt party: 97

(i) *Loss of capacity to dispose of assets*: With the declaration of bankruptcy, the bankrupt party loses its capacity to dispose of its assets. 98

(ii) *Revocation of powers and instructions:* With the declaration of bankruptcy any mandates, powers, instructions and similar arrangements given or made by the bankrupt party prior to its bankruptcy authorising or directing a third party to legally represent it or to dispose of its assets would automatically expire. 99

(iii) *Currency of filing*: Claims in a foreign currency against a bankrupt party initially remain unaffected by the declaration of bankruptcy. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. While a creditor is free to choose a currency rate provider (such as the Swiss National Bank), the bankruptcy liquidator may decide to apply a uniform rate of exchange to ensure equal treatment of creditors or to reduce a claim in case the rate applied by the creditor differs from the rates published by other market currency rate providers. 100

(iv) *Interest*: Unless a claim is secured by collateral, interest stops to accrue following the declaration of bankruptcy. In case of secured claims, only an excess of the realization of the credit support over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 101

(v) *Performance of obligations*: With the declaration of bankruptcy all obligations of a bankrupt party become due and payable and non-monetary obligations of the bankrupt party would, as a rule, have to be converted into monetary claims. 102

(vi) *Date of calculation of a claim*: Calculations to be made with respect to a claim may have to be made as of the date of the declaration of bankruptcy in order to ascertain equal treatment of all creditors of the bankrupt party. 103

(vii) *Set-off/netting*: A set-off in a bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where a debtor of the bankrupt party seeking to set-off a claim has become the creditor of the bankrupt party in respect of such claim prior to the declaration of bankruptcy or where a creditor of the bankrupt party seeking to set-off a claim has become the debtor of the bankrupt party prior to the declaration of bankruptcy and 104

even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired by a debtor of the bankrupt party prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party 's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors.[16] In other words, Art. 213 SDEBA mirrors the Swiss substantive law requirements of a unilateral right of set-off, i.e. the claims to be set-off must have existed prior to the bankruptcy and must be mutual as between the bankrupt party and the counterparty, such mutuality existed prior to the declaration of bankruptcy and the claims must be of the same kind. Art. 214 SDEBA provides for the possibility to challenge the set-off of claims for which the mutuality has existed prior to the declaration of bankruptcy, but where such mutuality has been created under the particular circumstances set out in Art. 214 SDEBA. The analysis is to be made on the basis of each claim that is to be set-off. These provisions are supplemented by the general avoidance actions provided for in the SDEBA (n. 119 et seq. below).

(viii) *Realization of collateral*: With respect to the realization of collateral in a bankruptcy, the secured party would have to remit the collateral to the bankruptcy estate, unless the security interest qualifies as a transfer of property or if certain exemptions apply, namely in respect of book-entry securities, mandatory margin requirements, or when the collateral provider is a Bank, a Securities Firm or a Fund Management Company. 105

c) Reorganization – Composition Agreement

As an alternative to bankruptcy, and for a party other than a Special Insolvency Regime Swiss Entity, the SDEBA also provides for reorganization procedures by composition with a party's creditors. Reorganization is initiated by a party lodging a request with the competent court for a moratorium (*Nachlassstundung / sursis concordataire*) pending negotiation of the composition agreement with the creditors (majority vote) and confirmation of such agreement by the competent court. The debtor may also attempt to restructure consensually with the creditors during the composition moratorium in which case no composition agreement would be concluded. 106

A distinction is made between a composition agreement providing for the assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*), which leads to a private liquidation and in many instances has analogous effects as a bankruptcy, and a dividend composition (*Dividenden-Vergleich / concordat dividende*) providing for the 107

[16] These provisions are further supplemented by the general avoidance actions provided for in the SDEBA (see n. 119 et seq. below).

payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further, there is the possibility of a composition in the form of a mere payment term extension (*Stundungsvergleich / concordat moratoire*).

The grant of a moratorium has, *inter alia*, the following effects on the insolvent party: 108

(i) *Stay of Debt Collection Proceedings*: No debt collection proceedings, including debt collection proceedings aimed at a realization of collateral (other than real estate collateral) (*Betreibung auf Pfandverwertung / Poursuite en réalisation de gage*) can be initiated for the duration of the moratorium and pending proceedings are stayed. Furthermore, it is held in Swiss legal doctrine (albeit with as we believe valid dissenting views) that a private realization of collateral granted under a *regular pledge* is also stayed for the term of such moratorium, where the security agreement allows such private realization, unless certain exemptions apply. Furthermore, we note that there are some authors that based on the wording of Art. 324 SDEBA hold that the terms of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*) could provide for a further stay.[17] Procedural steps taken before the moratorium, however, remain in effect until a decision is taken on a composition agreement, except for (a) collection proceedings for claims of employees arising in the course of the preceding six months and certain claims based on social security laws and family law (so-called first class claims), (b) collection proceedings for debt secured by real property, and (c) collection proceedings for new debt arising out of the permitted continuation of the debtor's business. Further permitted are sequestration and other measures of securing assets for creditors. The moratorium does not preclude initiating lawsuits and continuing pending litigations. 109

(ii) *Power to dispose*: During the moratorium, the insolvent party's power to dispose of its assets and to manage its affairs is restricted. While the insolvent party may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as any instruction of the administrator is observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law from (a) disposing of or pledging any fixed assets (such as holdings in other companies or real property), (b) creating new security interests, (c) 110

[17] This is, in our view rightfully, contested by other authors on the basis that secured creditors are not parties to such composition agreement. If contrary to such view, one were to contemplate such a stay, then it would need to be based on the interest of the security provider to postpone such realization clearly outweighing the security takers interest to realize such collateral, which we do not see as a realistic scenario for the type of the Collateral provided in the context of contracts.

issuing guarantees, and (d) entering into transactions which are not at arm's length. Such acts performed without court approval are invalid. The counterparty's claims for rescission of the contract must be recorded and treated just like any other creditors' claim. Such counterparty will therefore only be entitled to receive a dividend from or a share in the liquidation proceeds of the insolvent party.

In case of a security interest without title transfer, such as a regular pledge, the secured party is, furthermore, not entitled to proceed with a private liquidation until the competent court has approved the composition agreement. The private liquidation may also be stayed for a further period. In case of a security interest with title transfer, such as an irregular pledge, however, the sale of the pledged assets may take place without delay. A secured party would participate in the settlement only for the amount of its claim not covered by proceeds from the sale of the collateral or, if the collateral is appropriated, the amount by which its claim exceeds the value ascribed to the collateral. 111

(iii) *Interest*: Unsecured debts become non-interest bearing as of the date the moratorium is granted. If the moratorium is withdrawn at a later time, the interest period will be deemed to have run during the moratorium. 112

(iv) *Conversion*: The administrator may request the conversion of non-monetary claims into monetary claims of equal value. 113

(v) *Assignment of future claims*: The assignment of claims which has been agreed prior to the grant of a moratorium with respect to claims which come into existence thereafter is no longer effective in relation to such future claims. 114

(iv) *Due Dates*: The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). Should the moratorium proceedings end in a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*) for the benefit of creditors, then all debt will fall due to allow a general liquidation. 115

(v) *Set-off*: Set-off is allowed, subject to the same limitations as in a bankruptcy (see n. 104 above), whereby the date of the publication of the grant of the moratorium is relevant for determining which claims qualify for set-off. 116

The moratorium aims at facilitating the consensual restructuring or the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the competent court. With the judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition 117

agreement to the extent that the collateral proves to be insufficient to cover the secured claims.

d) Emergency moratorium

The SDEBA further confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's request if the debtor's inability to pay its debts is temporary and due to extraordinary circumstances of general implication (e.g. a general economic crisis). The competent authority can order that the grant of any security interest during such stay be subject to its prior approval. This so-called emergency moratorium (*Notstundung / sursis extraordinaire*) is an exceptional remedy, which has been applied only rarely in the past. 118

2. Avoidance of Transactions

The receiver in bankruptcy, the liquidator under a composition agreement with assignment of assets or creditors to which the relevant right has been assigned may, by means of an appropriate lawsuit (*actio pauliana / action paulienne*) or by way of objection or otherwise, challenge certain arrangements or dispositions made by the insolvent party during a period (suspect or look-back period) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*), the grant of the moratorium. This possible challenge relates to (i) gifts and other gratuitous transactions (*Schenkungspauliana / révocation des libéralités*), (ii) certain acts of a debtor (described in more detail below), undertaken at such time as the debtor was overindebted (*Überschuldungspauliana / révocation des actes d'un débiteur surendetté*), and/or (iii) dispositions made by the debtor with the intention to disadvantage its creditors or to give a preference to certain creditors to the detriment of other creditors (*Absichtspauliana / révocation des actes dolosifs*) (all as described below). 119

For all avoidance actions it is required that the challenged transaction has caused damages to other creditors of the insolvent party which is presumed by law but may be overcome by counterproof of the defendant in an avoidance action.[18] Court precedents suggest that this requirement is to be interpreted extensively and is met if (i) the act to be set aside caused actual damages to the creditors by reducing the assets available for distribution or the quota of a specific creditor or (ii) if the position of the creditors in the insolvency proceeding has otherwise been affected negatively.[19] The targeted acts may be summarised as follows: 120

[18] BGE 99 III 27, 33, recently confirmed in BGE 137 III 268, 283.

[19] BGE 137 III 268, 283, confirmed in 5A_95/2019, c.3.1.

a) Avoidance of Gifts and Gratuitous Transactions

Art. 286 SDEBA allows the avoidance of gifts and other gratuitous transactions (as well as some further specifically mentioned transactions, which are, however, of no relevance in the context of this memorandum of law), which the insolvent party made within a suspect period of 12 months prior to being declared bankrupt or the grant of a moratorium. Not only outright gratuitous transactions, but also transactions where the obligations of the parties measured in economic terms are disproportionate to the detriment of the insolvent party are to the extent of such disproportion and for purposes of Art. 286 SDEBA treated as gratuitous transactions. 121

Any such gratuitous transaction can be challenged based on the objective elements of (i) the gratuitous nature of such transaction and (ii) established damages resulting therefrom for other creditors of the insolvent party. Where the gratuitous transaction is concluded among related parties (which includes, among other, entities of the same corporate group), the counterparty of the insolvent party bears the burden of proof that the transaction was not disproportionate in nature. 122

b) Avoidance due to Over-Indebtedness

Contrary to Art. 286 SDEBA, Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the debtor being declared bankrupt or the grant of a moratorium, where the insolvent party, as an additional objective prerequisite, was already overindebted (*überschuldet / surendetté*) at the time the relevant act was undertaken by the insolvent party. The term "overindebted" refers to the fact that the insolvent party's assets do not cover its liabilities. The existence of such over-indebtedness at the time of the relevant transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof. 123

The targeted acts include (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means and (iii) the settlement of claims prior to their stated maturity. 124

Art. 287 SDEBA, following the entry into force of the Swiss Federal Act on Book-entry Securities ("**BESA**")[20], has been amended by the addition of a new para. 3 specifying that no challenge is possible if: (1) the collateral consists of securities, Book-entry Securities or other financial instruments traded on a representative market (*repräsentativer Markt / marché* 125

[20] Bundesgesetz über Bucheffekten (Bucheffektengesetz, BEG) / Loi fédérale sur les titres intermédiés (LTI), SR 957.1.

représentatif)[21]; and (2) the collateral provider had previously (i) agreed to provide additional collateral in case of a diminution of the collateral value or an increase in the value of the obligation to be secured and/or (ii) had reserved the right to substitute other collateral.

126 There is a subjective element also, in that the insolvent's counterparty to the challenged transaction or act may avoid a challenge of the transaction or act if it can prove that it did not and, being diligent, could not know about debtor's over-indebtedness (such knowledge or deemed knowledge being one of the subjective tests). While, as mentioned above, the over-indebtedness as such needs to be proven by the challenging party, once established, the counterparty to the transaction or act is, subject to the proof of the contrary, presumed to have been aware thereof. This proof will certainly fail if the over-indebtedness was reflected in financial statements made available to such counterparty. It would in our view also fail, if the counterparty did not specifically ask for financial statements despite that due diligence warranted to ask for financial statements in the light of the nature and the magnitude of the transaction contemplated, and if the financial statements would indeed have revealed the over-indebtedness.

c) Avoidance for Intent

127 Art. 288 SDEBA subjects any act of an insolvent party within the suspect period of 5 years prior to the declaration of bankruptcy or the granting of a moratorium in respect of such insolvent party , to challenge to the extent that (i) such act was taken by the insolvent party with the intention of preferring certain creditors over others or disadvantaging certain of its creditors and (ii) this intention was, or exercising the requisite due diligence, must have been known to the counterparty.

128 The term "act" must be read in a very broad sense. It is not limited to the conclusion of contracts, but includes any act of the insolvent party, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA.

129 The subjective tests for an "avoidance for intent" are (i) the actual or presumed presence of an intention of the insolvent party to prefer or to disadvantage creditors and (ii) such intention having been recognizable to the counterparty of the relevant act.

130 The insolvent party is presumed to have such an intention where such insolvent party recognized or using the diligence required in the circumstances should have recognized that

[21] While Art. 287 SDEBA has not been amended in the context of the changes of Art. 31 BESA and Art. 27 para. 1 Banking Act we think that representative market should also be interpreted as having an objectively determinable value in the context of Art. 287 SDEBA.

the challenged act would prefer or disadvantage creditors.[22] It is sufficient if the insolvent party, even while not directly aiming for such preference or disadvantage to occur as a result of its act, merely accepted such preference or disadvantage was a possible consequence of its act.[23]

131 Jurisprudence holds that such intent is recognizable to a counterparty, if the counterparty, using the diligence warranted under the specific circumstances, should have foreseen a disadvantage to the other creditors as the consequence of the act of the party. The counterparty may have to make the necessary inquiries although recent court precedents hold that such duty to make inquiries requires clear signs for creditor preference or creditor disadvantage.[24]

132 In respect of counterparties that are banks, Swiss legal doctrine holds that the suspicion of the bank that the party when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the party's intent. Furthermore, pursuant to such scholarly opinions, the intent is deemed recognizable not only if a bank knows about the distressed financial situation of the party but also if there are indications of a distressed financial situation.

133 While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements. Moreover, where the act occurred among related parties, the counterparty of the insolvent party bears the burden of proof that the intent of the insolvent party to prefer or disadvantage creditors was not recognizable to it.

134 Neither Art. 286 SDEBA nor Art. 288 SDEBA (unlike Art. 287 SDEBA) require over-indebtedness of the insolvent party at the moment when the challenged act is undertaken. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only very generically addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios:

(i) 135 Under the first scenario, there is insufficient indication of financial difficulties when the insolvent party acts. In such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to, certain creditors if and when the debtor should be declared bankrupt or granted a moratorium (e.g. posting of collateral only concurrently or immediately preceding the declaration of

[22] Swiss Federal Supreme Court 5C.29/2000, September 19, 2000, E.3.a).

[23] BGE 137 III 268. 283 et seq.

[24] BGE 138 III 497, 510.

bankruptcy or the grant of a moratorium, so that in fact the intention is that the counterparty should only be granted a preferential right over an asset if and when the party is declared insolvent, but with no intent to treat the counterparty as a secured party other than in insolvency or an artificial creation of an overstated claim upon such declaration of insolvency in order to achieve a higher basis for a dividend or the like).

(ii) The second scenario is where the insolvent party is in financial difficulties at the time the act occurs. The scope of acts that can be challenged under such circumstances is significantly broader and, in respect of a party on the verge of an insolvency at the time such act occurs, eventually would include the payment of a matured claim or providing collateral, if the counterparty must have recognized that the party would have had to file for bankruptcy or the grant of a moratorium and, by making such payment outside the insolvency or by providing collateral, prefers or is deemed to have preferred such counterparty over other creditors (as insolvency proceedings require proportional satisfaction of claims of the same class) who will end up with a dividend that will not cover their full claims and who thereby are not getting the same *pro rata* share as the counterparty.[25] 136

3. Jurisdiction Clauses and Insolvency Actions

Note that, under Swiss law, jurisdiction clauses have no effect on actions brought under the 137

[25] In its decision 5A_892/2010 of August 22, 2011 c.4, the Federal Supreme Court first confirmed that an avoidance action under Art. 288 SDEBA was independent of the other avoidance actions and, hence, could also, if the further qualified conditions are met, affect acts that could not be challenged under such other avoidance actions. It then held in the context of a collateralized total return swap documented under a 1992 ISDA Master Agreement and presumably an English law CSA-Transfer, that in the case at hand collateral was transferred for existing obligations and without pre-existing obligation to do so and, hence, caused damages for the other creditors and was thereby subject to avoidance. The decision is in our view not properly reasoned, in particular as it denies the existence of a pre-existing obligation to transfer collateral on the basis of a perceived lack of predictability of the amount that would need to be collateralized when the parties entered into the agreement. At the same time it held that periodic balancing payments that the parties had agreed in longer intervals than the ones for the transfer of collateral with the last such payment having been made after the last transfer of collateral were part of the exchange of payments agreed by the parties at the outset and, hence, not subject to avoidance. As both the balancing payments and the transfer of collateral aim at the same reduction of exposure, are to be calculated on the same basis and were agreed at the outset, the different treatment seems inconsistent. So what in essence seems to be the immediate conclusion from this decision for derivative transactions (with secured amounts that necessarily will fluctuate), is that the risk perceived in our opinion that collateral posted under an existing security undertaking could be clawed back under Art. 288 SDEBA notwithstanding the existence of a security undertaking providing for additional collateral calls during the life of transaction(s) is confirmed by the decision, albeit with a less than convincing reasoning.

SDEBA, i.e. to issues that relate to Swiss bankruptcy or insolvency law rather than to contractual law. These actions must be brought before the Swiss court determined by the SDEBA, typically the one at the place of the applicable Insolvency Proceedings. Accordingly, a jurisdiction clause provided for in the Master Agreement would not be effective in case of actions relating to Insolvency Proceedings. With respect to avoidance actions (see n. 119 et seq. above), it seems noteworthy in this context that, contrary to earlier precedents, recent precedents suggest that the forum provided for in Art. 289 SDEBA (place of Swiss defendant; place of insolvency proceedings for non-Swiss defendants) may be disposed of, but only after the adjudication of Insolvency by an agreement entered into by the non-defaulting party with either the administrator or the creditors to which the relevant right has been assigned.

4. Seizure and Attachments of Assets

Assets located in Switzerland (either physically or, in case of claims, if the debtor of the claim is located in Switzerland) can be seized or attached as a provisional measure by a third party notwithstanding the fact that such assets may be subject to a limited in rem security interest such as a regular pledge (*reguläres Pfandrecht / gage régulier*). This, however, does not hold true for assets subject to an irregular pledge (*irreguläres Pfandrecht / gage irrégulier*) or which have been transferred outright or assigned. If a secured party seizes or attaches assets, the secured party loses its right to private liquidation, unless it is obvious that such assets do not cover the claims of the secured party in full, and hence, no excess value would be available to such third party. In case of liquidation by the competent authority the secured party retains its right to be satisfied from the proceeds of the liquidation of the assets pledged in its favor with priority over all other unsecured creditors. 138

5. Rules applicable to Banks, Securities Firms and Fund Management Companies

The Banking Act and the Ordinance of the Swiss Financial Market Supervisory Authority ("**FINMA**") on the Insolvency of Banks and Securities Firms ("**BIO-FINMA**")[26] set forth a detailed regime governing bankruptcy and insolvency proceedings against Banks and savings Banks and branches of foreign banks established in Switzerland. Pursuant to Art. 67 FinIA, the same rules apply *mutatis mutandis* also to Securities Firms[27], to branches of 139

[26] Verordnung der Eidgenössischen Finanzmarktaufsicht über die Insolvenz von Banken und Effektenhändlern (BIV-FINMA), SR 952.05.

[27] Securities Firms (*Wertpapierhäuser / maisons de titres*) regulated under the FinIA correspond to securities dealers (*Effektenhändler / négociants en valeurs mobilières*) that were regulated under the former Stock Exchange Act (SESTA) and to which the bankruptcy, rehabilitation or other insolvency or reorganisation

foreign securities firms established in Switzerland and Fund Management Companies. A reference to a Bank shall in this para. 5, hence, include Securities Firms and Fund Management Companies. Pursuant to Art. 2bis Banking Act these rules also apply to Finance Parent Companies and Significant Finance Group Entities in the definition of a Bank and a reference to a Bank shall include such Finance Parent Companies and Significant Finance Group Entities.

In relation to Banks, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the Banking Act and the BIO-FINMA applicable. The SDEBA rules regarding composition proceedings (*Nachlassverfahren / procédure concordataire*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Banks. In addition, the FINMA may deviate from the rules of the SDEBA where it deems it appropriate. Yet, according to the explanatory message accompanying the 2004 amendment of the Banking Act[28] and gathering from the BIO-FINMA, such derogation is mostly of a formal or procedural nature. 140

The Banking Act grants broad powers to the FINMA which is entitled to handle the insolvency proceedings against Banks. In particular, the FINMA has the authority to implement (i) protective measures (*Schutzmassnahmen / mesures protectrices*) in case of justified concern of insolvency, (ii) reorganization proceedings (*Sanierungsmassnahmen / mesures d'assainissement*), or (iii) solvent or insolvent liquidation proceedings relating to Banks (*Bankenkonkurse / faillites bancaires*). 141

Pursuant to the Banking Act, bankruptcy is declared and made public by the FINMA if there is no prospect of restructuring the Bank (*Aussicht auf Sanierung / perspectives d'assainissement*) or where the attempt to restructure the Bank have failed. The bankruptcy proceedings are carried out and the bankruptcy estate is managed by one or more special liquidators which are to be appointed by the FINMA (*Konkursliquidatoren / liquidateurs de la faillite*). 142

Protective measures may include a broad variety of measures such as in particular a bank moratorium (*Stundung / délai de paiement*) or a maturity postponement (*Fälligkeitsaufschub / report d'échéance*) and may be ordered by the FINMA either on a stand-alone basis or in connection with reorganization or liquidation proceedings. Such measures are largely handled by the FINMA. 143

procedures of the Banking Act also applied mutatis mutandis.

[28] Botschaft zur Änderung des Bundesgesetzes über die Banken und Sparkassen vom 20. November 2002 / Message concernant la modification de la loi fédérale sur les banques et les caisses d'épargne du 20 Novembre 2002.

Pursuant to Art. 30 Banking Act, the FINMA also has the power, by ordering reorganization proceedings (*Sanierungsmassnahmen / mesures d'assainissement*), to order that selected banking services be continued, regardless of the continued existence of the reorganized Bank. In particular, the FINMA may order the transfer of all or part of the business with assets, liabilities and contracts to another existing entity or a newly established bridge bank, with such transfer becoming effective upon the ratification of the reorganization plan by FINMA. 144

The reorganization plan can also provide for a bail-in. Where a reorganization plan affects creditors' rights, the FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) that represent in excess of 50% of the amounts of third class claims in the books of the bank reject such plan, then the reorganization plan has failed and FINMA has to order the bankruptcy[29]. 145

Art. 27 Banking Act in its para. 1 provides for the safeguard of netting arrangements (lit. a), private collateral realization arrangements (lit. b) and in addition porting arrangements (lit. c) in case of protective measures (*Schutzmassnahmen / mesures protectrices*), reorganization proceedings (*Sanierungsverfahren / procédure d'assainissement*) or an insolvent liquidation (*Konkursliquidation / faillite*) is being taken in respect of a Bank. 146

Art 27 para. 1 lit. a not only safeguards contractual netting arrangements as such, but also the methodology for such netting and the valuation thereunder. 147

The same holds true for the right to privately realize collateral in the form of securities and financial instruments even though collateral has been provided outside a title transfer collateral arrangement. Art. 27 para. 1 lit. b, however, replaces the controversial requirement of a "representative market" by a concept of an "objectively determinable value" for such collateral as a prerequisite for such private realization in case of any of the afore stated measures or proceedings being taken against a Bank. Thus, Collateral that has merely been pledged and that for the Swiss law analysis is to be treated as a mere regular pledge *(reguläres Pfandrecht / gage régulier*), may still be realized outside insolvency proceedings and even after the opening of the particular insolvent liquidation pursuant to Art. 33 Banking Act against a Bank or a Securities Firm as long as an objective value for such Collateral can be established. It is no longer required that such value be established through transactions on an exchange, trading platform or other standard market (Art. 27 para. 1 Banking Act and Art. 18 BIO-FINMA). 148

The safeguard of porting in Art. 27 para. 1 lit. c is new and thereby expands the protection previously offered with a view to the particular needs of cleared derivatives transactions. 149

[29] Pursuant to an amendment of the Banking Act in 2012 (Art. 31a para. 3 Banking Act), the reorganization plan cannot be rejected by the creditors with respect to a systemic bank.

In sum the provisions of Art. 27 para. 1 Banking Act strengthen the enforceability of netting arrangements, including the private realization of collateral, and now also protect portability of transactions with Banks. 150

At the same time, though, para. 2 of Art. 27 Banking Act provides for one exception to this overarching safeguard, in that it expressly reserves the temporary stay (*Aufschub / ajournement*) of a termination (*automatic termination*) or of the exercise of termination rights (*optional termination*) or of the exercise of netting, private realization of collateral or porting rights provided for in Art. 30a Banking Act (which came into force on January 1, 2016). 151

The stay provided for in Art. 30a Banking Act replaces the stay right stipulated in former Art. 57 BIO-FINMA and, as set out above, clearly takes precedence over the safeguard of the arrangements contemplated by Art. 27 para. 1 Banking Act. 152

Such stay can be ordered in conjunction with any protective measure (*Schutzmassnahmen / mesures protectrices*), or more likely any measure taken in reorganization proceedings (*Sanierungsverfahren / procédure d'assainissement*) (e.g. a transfer of bank services or bail-in measures such as capital reduction or capital conversion) and would take precedence over the safeguard of netting, private realization of collateral and porting rights that otherwise protects such arrangements against protective measures or reorganization proceedings. It cannot be ordered in conjunction with an outright order for the insolvent liquidation of a Bank (*Konkursliquidation / liquidation de la faillite*). However, where certain bank services should be transferred, FINMA would first order such transfer of banking services and then only order the insolvent liquidation of the reorganizing Bank. 153

It is further to be noted that the stay of a termination or of the exercise of termination rights has a significantly broader scope in that it is no longer limited to financial contracts and transactions, but applies to all contracts that provide for termination or for the exercise of termination rights predicated upon protective or reorganization measures ordered by FINMA. Transactions under an ISDA Master Agreement were, however, already within the scope of the predecessor stay of a termination or of the exercise of termination rights under the former Art. 57 BIO-FINMA. The effects of the stay of a termination or of the exercise of termination rights are also more stringent. The maximum duration of such stay is 2 business days. The stay becomes permanent with respect to the particular measure for which it was ordered, where FINMA confirms within the 2 business days stay that the protective or reorganization measure was successful in reinstating the orderly state of a Bank's business and the satisfaction of the legal requirements by such Bank in respect of which such measures have been ordered. Where the reorganization measure consists of a transfer of all or part of the Bank's business, it is sufficient that the Bank's business as transferred to another Bank and to which the agreements subject to the stay of a termination or of the exercise of 154

termination rights have been transferred satisfy such orderly state or other legal requirements.

Finally, in this context, it is to be noted that Art. 31 Banking Act remains unchanged and requires that any reorganization plan and reorganization measures contemplated therein (transfer of banking services or bail in measures such as capital reduction or conversion) adequately take into account and preserve the legal and economic connections between assets, liabilities and contractual relationships that are to be subjected to such measures. In the same vein, the safeguards of Art. 49 lit.b and Art. 50 BIO-FINMA exclude claims that are subject to set-off/netting rights or collateral arrangements from bail-in measures (capital reduction or conversion) to the extent of such set-off/netting and collateralization. A net excess claim or an unsecured excess claim against the reorganizing Bank, though, would then be subject to such measures. In the case of a transfer of a banking business, the principle of Art. 31 Banking Act translates into an obligation to see to it that claims that are subject to a set-off/netting arrangement or collateral arrangement or have other legal or economic ties only be transferred as a whole pursuant to Art. 51 lit. h no. 1 BIO-FINMA. The requirements of Art. 31 Banking Act may therefore be viewed as an additional and general safeguard for set-off rights and collateral arrangements. 155

It seems noteworthy that the prerequisites for actions for the avoidance of transactions are somewhat different from the ones in the SDEBA in that such actions can also be brought in case of a reorganization of a Bank. Further, in the first instance, the Bank itself is competent to challenge these arrangements or dispositions once the reorganization plan has been approved by the FINMA. If the reorganization plan does not provide for the challenge of these actions by the Bank itself, the creditors of the Bank may initiate these actions. 156

Finally, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal seat or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. PILA, subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors. 157

6. Rules applicable to Insurance Companies

The ISA and the implementing ordinance thereto ("**ISO**")[30] and the Ordinance of the FINMA on the Bankruptcy of Insurance Companies[31] ("**IBO-FINMA**") provide for a special 158

[30] Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen (AVO) / Ordonnance sur la surveillance des entreprises d'assurance privées (OS), SR 961.011.

[31] Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von Versicherungsunternehmen (Versicherungskonkursverordnung-FINMA, VKV-FINMA) / Ordonnance sur de l'Autorité fédérale de

bankruptcy and insolvency regime applicable to Insurance Companies. Pursuant to Art. 71bis and 79bis ISA these rules also apply to Significant Insurance Group Companies in the definition of an Insurance Company and a reference to an Insurance Company shall include such Significant Insurance Group Companies.

159 In relation to Insurance Companies, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the ISA and/or IBO-FINMA. The SDEBA rules regarding composition proceedings (*Nachlassstundung / sursis concordataire*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Insurance Companies.

160 Pursuant to the ISA, bankruptcy is declared and made public by the FINMA if it has reasonable grounds of concern that an Insurance Company is over-indebted *(Begründete Besorgnis der Überschuldung / crainte sérieuse de surendettement*) and there is no prospect of restructuring the Insurance Company (*Aussicht auf Sanierung / perspectives d'assainissement*). The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator which is to be appointed by the FINMA (*Konkursliquidator / liquidateur de la faillite*). In addition, the FINMA is granted the competence to deviate from the SDEBA rules where it deems it appropriate. This would in our view, though, be limited to procedural aspects and could not affect creditor's rights beyond what the ISA or the SDEBA provides for.

161 We note in particular that the IBO-FINMA grants a liquidator appointed by the FINMA (*Konkursliquidator / liquidateur de la faillite*) the power to challenge certain arrangements or dispositions made by the insolvent Insurance Company. The liquidator has to examine *ex officio* whether certain arrangements or dispositions made by the insolvent Insurance Company may be subject to challenge. In calculating the lapse of the suspect period, the duration of a preceding reorganization (*Sanierung / assainissement*) or of preceding reorganization measures (*Sanierungsmassnahmen / mesures d'assainissement*) as per Art. 51 ISA are not counted. If the liquidator concludes that certain arrangements or dispositions may be subject to challenge, the liquidator requires the approval of the FINMA in order to initiate the respective court proceedings. If FINMA refuses to approve, or the liquidator declines to initiate, such proceedings, the respective claims are to be offered to the creditors for assignment, all in accordance with Art. 260 SDEBA, i.e. it is up to single creditors whether they are willing to take such assignment and thereby start an avoidance action. In substance, though, the avoidance actions that are applicable to Insurance Companies as well and there consequences correspond to what is discussed above in general.

surveillance des marchés financiers du 17 octobre 2012 sur la faillite des entreprises d'assurance (Ordonnance de la FINMA sur la faillite des assurances, OFA-FINMA, SR 961.015.2.

The ISA further provides for comprehensive rights of the FINMA to order or take precautionary measures in case an Insurance Company does not comply with the solvency requirements or if it seems otherwise warranted in the circumstances to safeguard the interests of the insured persons. 162

Pursuant to Art. 51 ISA, the FINMA can, *inter alia*, take the following protective measures, which are of interest in the context discussed herein: 163

- limit the right of an Insurance Company to dispose of its assets; 164
- order a freezing of assets or order that such assets be deposited with a third party (freezing); 165
- transfer the powers of corporate bodies of an Insurance Company to a third party; 166
- order that an insurance portfolio be transferred to another insurance company together with the pertaining Allocated Assets (transfer of assets); 167
- order the liquidation of a pool of Allocated Assets (liquidation of allocated assets); 168
- allocate free assets to a pool of Allocated Assets; 169
- in the case of a threatening insolvency order a moratorium and payment deferral. 170

Finally, with regard to the recognition of foreign insolvency decisions, Art. 54d ISA refers to the relevant provision of the Banking Act (see n. 157 above). 171

An Insurance Company active in direct insurance must at all times allocate qualifying assets to a segregated pool of assets in order to cover insurance claims (Art. 17 ISA), such rule not being applicable to the reinsurance business (Art. 35 ISA). The rules applicable to, and the designation as allocated assets (*Gebundenes Vermögen / fortune liée*) (the "**Allocated Assets**") in respect of the issues relevant in this context, are harmonized for all insurance categories. An Insurance Company has to form separate pools of Allocated Assets in respect of certain business lines (Art. 77 ISO) and the FINMA may order to form further separate pools of Allocated Assets if necessary to secure the claims under the concerned contracts (Art. 77 para. 3 ISO). An Insurance Company is also free to voluntarily further sub-divide its insurance portfolio and create separate pools of Allocated Assets for each such sub-divided insurance portfolio. Hence, an Insurance Company may have several pools of Allocated Assets. Any assets, which are not so segregated in a particular pool of Allocated Assets, are referred to herein as "**Free Assets**". 172

Due to the particular function of the Allocated Assets as security for insurance claims, only assets which are unencumbered and which are not subject to any right of set-off may as a rule form part of the Allocated Assets (Art. 84 para. 2 ISO)[32]. However, Art. 91 para. 3 ISO 173

[32] Art. 84 para. 2 ISO literally stipulates that liabilities which do not form part of Allocated Assets may not be set-off against assets of the Allocated Assets. There are some doubts, though, that such a prohibition to

explicitly reserves netting in respect of financial derivatives, which form part of one and the same pool of Allocated Assets. Art. 91a para. 1 ISO also expressly provides that collateral required to secure financial derivatives under a master agreement may be provided out of the particular pool of Allocated Assets without the need to replace such encumbered assets in the Allocated Assets and specifically allows the use for both providing initial and variation margin. However, the FINMA may restrict the provision of such collateral from Allocated Assets or may grant exceptions in duly justified cases (Art. 91a para. 3 ISO). With effect as of January 1, 2016, the FINMA replaced its former investment guidelines for allocated assets (IGA 2008/18) by new investments guidelines (IGA 2016/5)[33] ("**IGA**") which provide for detailed rules in respect of the use of derivatives and providing collateral from Allocated Assets and in particular provide for a series of documentation requirements that have to be met.[34]

If an Insurance Company is dissolved and to be liquidated, FINMA appoints a special liquidator and supervises its activity (Art. 52 ISA). 174

To the extent that the pools of Allocated Assets are not being transferred to another insurance 175

set-off in a mere ordinance is a sufficient legal basis. It is more likely to be interpreted as a prerequisite for an asset to qualify for the Allocated Assets that it indeed is not exposed to a right of set-off. The FINMA, therefore, also requests that the parties to an ISDA Master Agreement clearly exclude a set-off of claims under an ISDA Master Agreement for Allocated Assets with claims outside such ISDA Master Agreement and that this waiver is meant to be applicable prior to and after insolvency of a party (IGA note 495).

33 FINMA Rundschreiben 2016/5 (*Anlagerichtlinien Versicherer / Directives de placement – assureurs*).

34 The IGA still provides for a requirement that a separate Master Agreement be used for each pool of Allocated Assets (IGA note 451) and that such Master Agreement provides that no set-off be allowed with respect to claims outside the particular pool of Allocated Assets (IGA note 462). IGA note 466 stipulates that derivative transactions in connection with Allocated Assets need to be collateralized on a bilateral basis. The Insurance Company may provide collateral from its Allocated Assets (IGA note 467) under a Swiss law regular or irregular pledge or foreign equivalent security interest (i.e. with or without title transfer) (IGA note 468). If the Insurance Company has to provide initial margin in respect of transactions of its Allocated Assets, then such initial margin must be deposited with a third party on a segregated basis and may only be used to cover derivatives transactions of the respective Allocated Assets (IGA note 468). Collateral posted by an Insurance Company from its Allocated Assets is still accounted for as part of the Allocated Assets and the Credit Support Document needs to specifically address the fact that the claim for a return of collateral which is part of a pool of Allocated Assets belongs to such pool of Allocated Assets (IGA note 465). Thresholds and minimal transfer amounts need to be kept low and need to take into account the counterparty's credit (IGA notes 473-474). Collateral received by the pool of Allocated Assets needs to be held as the Allocated Assets, i.e. be kept at the Insurance Company or deposited in Switzerland with a Swiss custodian under a particular custody agreement or, if abroad, with a foreign custodian abroad (in which case the Insurance Company must provide evidence that the respective foreign bankruptcy law will respect the priority of use of the Allocated Assets for insurance holders as described herein (IGA note 156 and 470) and such evidence can take the form of an official confirmation or an acceptable legal opinion (IGA note 157)).Collateral posted by the counterparty is legally attributed to the Allocated Assets and IGA note 475 requires that this be made evident for third parties, but no value may be allocated to it as it constitutes a mere security.

company together with the respective insurance portfolio, but rather liquidated, the proceeds of such liquidation are to be utilized in first priority to discharge the insurance claims secured by such pools of Allocated Assets. As for a bankruptcy (see below) we are of the view, that the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying Master Agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such Allocated Assets and not from its Free Assets only.

The Allocated Assets are also liquidated in the context of the bankruptcy. As mentioned above, though, the proceeds from the liquidation of the Allocated Assets are first to be used to cover the insurance claims secured by the particular Allocated Assets and only the excess becomes part of the bankruptcy estate (Art. 54a and 17 ISA)[35]. 176

Otherwise, the insolvency procedure as such is governed by the general rules of the SDEBA. 177

7. Rules applicable to Collective Investment Vehicles

a) Collective Investment Vehicles in general

The CISA (as amended with effect as of January 1, 2020) and the Ordinance of the FINMA on the Bankruptcy of Collective Investment Vehicles ("**CISBO-FINMA**")[36] provide for a special bankruptcy and insolvency regime applicable to the license holder of Collective Investment Vehicles (other than Fund Management Companies of a Contractual Fund). 178

In relation to Collective Investment Vehicles, the general bankruptcy and insolvency rules of the SDEBA apply only to the extent that the CISA and/or the CISBO-FINMA do not provide for special rules. The SDEBA rules regarding moratorium (*Nachlassstundung / sursis concordataire*) pursuant to Art. 293-336 SDEBA are expressly disapplied altogether (Art. 137 para. 2 CISA). 179

Pursuant to Art. 137 CISA, the FINMA declares the bankruptcy of a FINMA license holder of Collective Investment Vehicle, i.e. the SICAV itself[37], in case there are reasonable 180

---

35 Where an Insurance Company has more than one pool of Allocated Assets, the FINMA has in an informal conversation taken the preliminary view, that the excess of one pool of Allocated Assets would need to be used to cover a shortfall in another pool of Allocated Assets, and only the excess would be at the disposition of the general creditors. We doubt, however, that unless a timely advance allocation of a potential excess to another pool of Allocated Assets has been made, such a use of excess would be permitted.

36 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von kollektiven Kapitalanlagen (Kollektivanlagen-Konkursverordnung-FINMA, KAKV-FINMA) / Ordonnance de l'Autorité fédérale de surveillance des marchés financiers sur la faillite de placements collectifs de capitaux (Ordonnance de la FINMA sur la faillite de placements collectifs, OFPC-FINMA), SR 951.315.2.

37 For the bankruptcy directed against the Fund Management Company in case of Contractual Funds, see II. (b).

concerns (*begründete Besorgnis / crainte sérieuse*) that such person is overindebted (*überschuldet / surendetté*) or has serious liquidity problems (*ernsthafte Liquiditätsprobleme / des problèmes de liquidité importants*) and if a mere reorganization (*Sanierung / assainissement*) is not viable or has failed. The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator appointed by the FINMA (*Konkursliquidator / liquidateur de la faillite*).

The CISBO-FINMA provides for a more detailed legal framework in respect of insolvency proceedings of Collective Investment Vehicles. Having said this, the CISBO-FINMA adapts the general insolvency regime set by the SDEBA to the particularities of Collective Investment Vehicles, and to the extent that the CISBO-FINMA does not provide for particular rules, the general rules on bankruptcy as per the SDEBA apply. 181

b) Collective Investment Vehicles in the form of a SICAV

By contrast to Contractual Funds, SICAVs are incorporated forms of collective investments and it is the SICAV itself that is the holder of the relevant FINMA license under Art. 13 para. 2 lit. b CISA. 182

Insolvency proceedings may, therefore, be initiated against the SICAV as for any other company. SICAVs are, however, subject to the particular insolvency regime applicable to Collective Investment Vehicles pursuant to Art. 137 CISA and the CISBO-FINMA set-out above. 183

In the specific case of an umbrella SICAV, the insolvency of a single sub-fund of such umbrella SICAV does not necessarily trigger the insolvency of the whole SICAV. The SICAV's entrepreneurial sub-fund assets (*Unternehmerteilvermögen / compartiment entrepreneur*) are, however, on a subsidiary basis used to cover the liabilities of another investors' sub-fund not covered by such sub-fund's assets (*Anlegerteilvermögen / compartiment investisseur*) pursuant to Art. 97 para. 3 CISA and Art. 28 para. 2 CISBO-FINMA. In case of an insolvency of a sub-fund of an umbrella SICAV that is not made up by a payment by the SICAV, the Insolvency Proceedings would be initiated against the SICAV. In the Insolvency of the SICAV, Art. 35 para. 1 CISBO-FINMA provides that the special liquidator may in the interests of the SICAV's investors apply to FINMA that FINMA order based on Art. 141 CISO that the fund or a sub-fund be transferred to another solvent SICAV, which includes all of the fund's or the sub-fund's assets and liabilities rather than to dissolve and liquidate such fund or sub-fund. 184

Where a sub-fund is liquidated, the participating creditors are the creditors of the particular sub-fund. Following the enactment of the FinIA, it is now made clear that each sub-fund is only liable for its own liabilities under such structure and that there will be no cross-liability 185

between sub-funds.[38]

c) Collective Investment Vehicles in the form of a Contractual Fund

186 A Collective Investment Vehicle in the form of a Contractual Fund is not a separate legal entity but merely a separate asset pool (with its own rights and obligations)[39]. As such, it does not have legal capacity to act and is represented by its Fund Management Company in accordance with Art. 32 et seq. FinIA. The Fund Management Company is the license holder for a Contractual Fund, and the subject of bankruptcy proceedings according to Art. 137 CISA. The Fund Management Company (contrary to the Contractual Fund as such) is however not any longer regulated under the CISA, but rather the FinIA.[40] A Fund Management Company must be organized as a joint stock corporation (*Aktiengesellschaft*) and is pursuant to Art. 67 FinIA subject to the insolvency regime applicable to Banks as discussed in this memorandum of law. This has the effect that the particular safeguards with respect to set-off, netting and close-out netting as well as private realization of collateral applicable to Banks now also apply with respect to a Fund Management Company.

187 A Contractual Fund's assets are held on a fiduciary basis by the applicable Fund Management Company on behalf of such Contractual Fund's investors. In other words, the Fund Management Company is the legal owner of all assets pertaining to the Contractual Fund. Art. 40 para. 1 FinIA accordingly provides that, in case of a bankruptcy of the Fund Management Company, the Contractual Fund's assets are segregated from the Fund Management Company's bankruptcy estate in favor of the Contractual Fund's investors. However, the Fund Management Company and thereby its insolvency estate have a claim to be held harmless and indemnified for any obligation or expense incurred or fees earned in due performance in due performance of its duties with respect to the Contractual Fund and may pay such claims from the Contractual Fund's assets. Pursuant to Art. 40 para. 2 FinIA only obligations of a particular Contractual Fund may be set-off against claims of such Contractual Fund. It is being held in Swiss legal doctrine that this provision evidences the principle that the Contractual Fund's separate pool of assets not only comprises the physical

---

38 Previously, such limitation was disregarded where the limited liability was not disclosed to the counterparty when entering into the respective obligations.

39 According to Art. 92 and 93 CISA.

40 Fund Management Companies were until December 31, 2019 licensed under the CISA. Following the enactment of the FinIA, Fund Management Companies are now subject to the FinIA instead and the insolvency regime applicable to Fund Management Companies is not any longer the one under Art. 137 CISA, but pursuant to Art. 67 FinIA, in principle the regime applicable to Banks under the Banking Act. However, such Fund Management Companies are not required to obtain new licenses under the FinIA. Rather, their licenses granted under the CISA will continue to be valid under the FinIA.

assets and rights of such Contractual Fund but also its obligations.

In case of an insolvency of a Fund Management Company, unless a transfer of a Contractual Fund to a solvent Fund Management is deemed to be in the interest of the investors in such Contractual Fund and such transfer can be achieved, the FINMA orders the dissolution and liquidation of the Contractual Funds managed by such Fund Management Company in accordance with Art. 20a BIO-FINMA. Where a Contractual Fund is liquidated, the creditors participating in such liquidation are solely the creditors of the particular Contractual Fund, or in case of a sub-fund the respective sub-fund. 188

As mentioned above, a Contractual Fund has no legal personality of its own and neither the CISA nor the FinIA grant a Contractual Fund capacity to act or to seek Insolvency Proceedings against the Contractual Fund. Hence, in our view enforcement would have to be sought against the Fund Management Company and would ultimately result in Insolvency Proceedings directed against the Fund Management Company that are governed by Art. 67 FinIA, and by reference therein, the Insolvency Proceedings applicable to Banks. We recommend that, the documentation for transactions with Contractual Funds make it clear that an event of default (including with respect to Insolvency) is triggered if the relevant event arises with respect to either the Contractual Fund itself or with respect to the applicable Fund Management Company. 189

8. Rules applicable to Pension Funds

The OBPA and the OBPO 2[41] do not provide for a special insolvency regime with respect to Pension Funds under the OBPA. Hence, in principle, the rules set forth in the SDEBA are applicable to insolvency proceedings against a Pension Fund which are, pursuant to Art. 39 SDEBA, subject to bankruptcy (*Konkurs / faillite*) or a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung / concordat par abandon d'actifs*). 190

However, the following seems noteworthy in the context of this memorandum of law. 191

Broadly speaking, the OBPA and the implementing ordinances provide for a number of measures to be taken in case of underfunding (*Unterdeckung /sous-couverture*) (i.e. net asset coverage of actual and estimated liabilities to beneficiaries). 192

With respect to foundations, it is to be noted that the foundation's supervisory authority (*Stiftungsaufsicht / autorité de surveillance des fondations*) has, in case of over-indebtedness 193

[41] Verordnung vom 18. April 1984 über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVV2) / Ordonnance du 18 avril 1984 sur la prévoyance professionnelle vieillesse, survivants et invalidité (OPP2), Ordinance of the 18th of April 1984 on the professional retirement, survivor and disabled provison SR 831.441.1.

or insolvency, (i) the right to order remedial measures (such as to amend the foundation's purposes or to reduce the foundation's administration), and (ii) to initiate for insolvency proceedings against the foundation, if necessary (Art. 84a CC).

Please note that, if a pension fund is organized as a public law entity, and not as a foundation (*Stiftung*) pursuant to Art. 80 et seq. CC, then the situation must, as for public law cantonal bank, be analysed in light of the circumstances applicable to each particular public law pension fund. In this context, the Articles of such public law pension fund as well as the relevant cantonal or federal laws are applicable to it. 194

However, the measures addressed under n. 193 or 195 above do not in our view affect the conclusions reached in this memorandum of law. 195

9. Rules applicable to Swiss Branches

Three proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs / faillite d'une succursale*) pursuant to Art. 50 para. 1 SDEBA (see n. 197 below), (ii) the ancillary insolvency proceeding (*Hilfskonkurs / faillite ancillaire*) pursuant to Art. 166 et seq. PILA (see n. 198 et seq. below) and (iii) the special Insolvency Proceedings applicable to Special Insolvency Regime Swiss Branches (see n. 202 below). 196

If a foreign debtor has a branch (*Zweigniederlassung / succursale*) in Switzerland, claims against this debtor can, to the extent that they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs/ faillite d'une succursale*) (Art. 50 para. 1 SDEBA). Note in this context that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung / succursale*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, agreements entered into by the principal office in accordance with applicable law are binding also on the branch. 197

Art. 166 et seq. PILA, on the other hand, provide for the so-called ancillary insolvency proceeding (*Hilfskonkurs / faillite ancillaire*) pursuant to which a foreign bankruptcy decree is recognized in Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor or in the state of debtor's main interest (COMI) provided that the debtor was not incorporated in Switzerland at the time of the opening of the foreign insolvency proceeding, (ii) it is enforceable in the state where it was rendered, and (iii) there is no ground to deny recognition based on formal and material principles of Swiss public policy (*ordre public*). 198

The same conditions apply to the recognition of a foreign restructuring proceeding (Art. 175 PILA).

If the above requirements are met, on application of the foreign receiver in bankruptcy, the debtor, or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding all assets of the debtor located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss insolvency law (Art. 170 PILA), including the provisions on avoidance actions (Art. 285 et seq. SDEBA) or limitations on abusive set-off (Art. 213 and 214 SDEBA) as discussed herein (see n. 104 above). 199

While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency proceeding, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral located in Switzerland and forming part of the ancillary insolvency estate secures such claims, (ii) Swiss resident privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA) and (iii) regular creditors with claims arising from liabilities entered into for the account of a branch of the debtor entered in the commercial register will be admitted (the "**Ancillary Insolvency Proceedings Creditors**"; Art. 172 para. 1 PILA). If there is an excess, then such excess would be made available to the foreign receiver or the creditors of the foreign insolvency proceedings. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss resident creditors. The foreign receiver in bankruptcy may request not to open an ancillary insolvency proceeding if there are no Ancillary Insolvency Proceedings Creditors and the claims of non-privileged and unsecured Swiss resident creditors are adequately taken into account in the foreign proceedings and such creditors were granted an opportunity to be heard. In such a case, the foreign receiver in bankruptcy may carry out all actions in Switzerland to which it is authorized pursuant to the applicable foreign law and which are in compliance with Swiss law, including e.g. the transfer of assets of a foreign debtor located in Switzerland to the foreign insolvency estate (Art. 174a PILA). 200

A branch insolvency can only be opened until the publication of the recognition of the foreign bankruptcy decree pursuant to Art. 169 PILA. If a branch insolvency has been opened before such date of publication of the opening of ancillary insolvency proceeding and, in such branch insolvency, the 20-day deadline pursuant to Art. 250 SDEBA to contest the schedule of claims (*Kollokationsplan / état de collocation*) has not yet expired, the branch insolvency would be closed and all the claims included in the schedule of claims (*Kollokationsplan /* 201

état de collocation) will be taken into consideration in the ancillary insolvency proceeding pursuant to Art. 172 PILA.

202 If the Swiss branch is a Special Insolvency Regime Swiss Branch, the special rules discussed under n. 139 et seq. above are applicable. In this case, FINMA has supervisory authority over such Special Insolvency Regime Swiss Branches, has the power to appoint a liquidator to liquidate the assets attributable to the Swiss branch and to supervise that liquidation proceeding. In this context, all assets entered into by a Swiss branch, whether located in Switzerland or outside Switzerland, as a result of actions by duly authorized officers or employees of the Swiss branch are considered to form part of the assets attributable to the Swiss branch. As a result of this, the insolvency of the Swiss branch does not include only assets located in Switzerland, but also assets located abroad, if required or entered into by authorised offices or employees for the account of the Swiss branch. Furthermore, Art. 37g of the Banking Act expressly provides, that FINMA is the competent authority for the recognition of foreign insolvency orders, or measures, which have been rendered abroad against foreign banks. In this context, FINMA may be authorized to transfer assets attributable to the Swiss branch to the foreign insolvency, without implementing Swiss insolvency proceedings, provided that (a) claims which are privileged or covered by a pledge pursuant to Art. 219 SDEBA of creditors having their domiciles in Switzerland are equally treated in the context of the foreign bankruptcy proceedings and (b) the other claims of other creditors, who are resident in Switzerland, are duly considered in the context of those foreign insolvency proceedings. FINMA is also authorized to recognize insolvency orders and measures, which are issued abroad at the Head Office of the foreign Insolvent Bank. In case Insolvency Proceedings are conducted by FINMA over the assets of the Swiss branch, then non Swiss resident and unprivileged creditors are also accepted in the context of the collocation of the claims relating to the assets of the Swiss branch.

10. Termination and Close-out Netting in case of Insolvency

a) Termination and Step-in Right in general

203 Insolvency does not as a rule *per se* result in a termination of all bankrupt party's contracts unless the applicable substantive contractual law governing a specific contract provides otherwise. Subject to the Step-in Right (as defined and discussed below), though, all non-monetary claims against the bankrupt party are converted into monetary claims in case of a declaration of bankruptcy (*Konkurseröffnung / ouverture de la faillite*) or a ratification of a composition agreement with assignment of assets (*Bestätigung des Nachlassvertrages mit Vermögensabtretung / homologation du concordat par abandon d'actifs*) (each an "**Insolvency Event**") or, in case of a moratorium (*Nachlassstundung / sursis*

concordataire)[42], upon notification of such conversion by the administrator to the counterparty pursuant to Art. 297 para. 9 SDEBA. In turn, parties are pursuant to the almost unanimous view among legal scholars free to stipulate in their contract that an Insolvency shall give rise to a termination of such contract, be it automatically or, subject to certain limitations discussed below, by notice.[43]

In a bankruptcy, the receiver in bankruptcy may pursuant to Art. 211 para. 2 SDEBA request the fulfilment of any undischarged obligations resulting from bilateral contracts by the other contractual party provided that the bankruptcy estate also fully fulfils its obligations under the relevant contract (the "**Step-in Right**"). The Step-in Right is by analogy available to the liquidator in case of a composition agreement with assignment of assets. Any obligation resulting from a contract for which the relevant Insolvency Representative exercised the Step-in Right becomes a direct and own obligation of the relevant Insolvency estate (*Massaverbindlichkeit / dettes de la masse*) and must be satisfied from such Insolvency estate ahead of other creditors. This is *inter alia* the reason why an Insolvency Representative will only exercise the Step-in Right with respect to obligations that it views as critical or beneficial for an orderly and favorable liquidation of an insolvent person and thereby as benefitting all creditors. Insofar as long term agreements (*Dauerschuldverhältnisse / contrats de durée*) are concerned, though, the consequence of obligations becoming obligations of the Insolvency estate only applies to obligations which come into existence after the occurrence of the Insolvency Event and for as long as the receiver in bankruptcy exercises the Step-in Right (Art. 211a para. 2 SDEBA; the "**Partial Step-in**"). It is not further specified in the SDEBA what types of agreement would qualify as long term agreement. Typical examples include rental contracts, employment contracts, license agreements and similar. In the context of the Master Agreements, it is noteworthy that some authors take the view that swap contracts may also qualify as long term agreements in the broader sense and there is one author that seems to suggest that swaps may therefore fall under Art. 211a SDEBA unless the relevant swap contracts do meet the definition of Qualifying Contracts (as defined and discussed under n. 214 below) where the Step-in Right is excluded. 204

Exercising the Step-in Right presupposes that the relevant contract has not been terminated 205

[42] It is our view that each Insolvency Event and the grant of a moratorium would be covered by Section 5(a)(vii) (*Bankruptcy*) of the Master Agreements.

[43] There is one recent dissenting view in Swiss legal doctrine that holds that any contractual termination right, whether optional or automatic, would be void and the same consequence is also proposed as a rule for contractual liquidation provisions due to an alleged violation of the principle of equal treatment of creditors. On this basis, the author further states that close-out netting would not be enforceable in a bankruptcy, unless protected by a particular netting safeguard provision, including where transactions qualify as Qualify Transactions within the meaning of Art. 211 para. 2bis SDEBA (see below n. 214). It is a singular view with which we disagree, in that we deem it to be contrary to the legislative intention and history and contrary to the predominant view in Swiss legal doctrine.

as confirmed by a recent precedent of the Swiss Federal Supreme Court.[44]

b) Step-in Right and contractual termination arrangements

206 There are no court precedents to date as to whether the statutory Step-in Right could interfere with or preclude contractual termination arrangements of the parties.

207 According to the predominant view in Swiss legal doctrine, and supported by decisions of the Swiss Federal Supreme Court[45], the Step-in Right is held to constitute a mere procedural provision rather than a substantive law rule. As per the legislative history, the introduction of the Statutory Close-out (as defined and discussed under n. 214 below) of Art. 211 para. 2bis SDEBA did not aim at altering the qualification of Art. 211 para. 2 SDEBA as a procedural provision.

208 Based on such qualification as a procedural provision and the reference in Art. 211 para. 3 SDEBA which reserves termination provisions under substantive law, the almost unanimous view in Swiss legal doctrine holds that the Step-in Right does not preclude a termination arrangement validly agreed by the parties prior to the commencement of an Insolvency Procedure. Many authors when discussing the Step-in Right highlight the fact that Art. 211 para. 2 SDEBA only grants the Insolvency Representative a Step-in Right into contractual obligations as the same were agreed between the Parties and as they stand as per the occurrence of an Insolvency Event, i.e. the Insolvency Representative cannot claim any more rights than the Insolvent party could have claimed, or disregard any rights that the non-defaulting party has under the respective contract.

209 The foregoing view is expressed in connection with both automatic and optional termination rights. We note, though, that one statement in doctrine could be read to imply that unless an optional termination right has been exercised before the occurrence of an Insolvency Event such exercise would not be possible any longer due to the Step-in Right. The statement is not entirely clear, though and would be a singular view whereas the clear majority of scholars accepts that optional termination rights may be exercised also after the occurrence of an Insolvency Event. That said, certain additional requirements are being discussed in doctrine for the exercise of the relevant optional termination to be admissible. On the one hand, it is proposed by some authors that such termination rights should be exercised shortly after the occurrence of the relevant termination event. While some scholars argue this on the basis of Swiss substantive contract law and the principle of good faith, others appear to draw this

[44] The Swiss Federal Supreme Court has ruled on November 5, 2018 (4A_203/2018) that the Step-in Right cannot be exercised for contracts that are already terminated due to bankruptcy. Although the precedent was about a mandate agreement that terminated by operation of law in the event of bankruptcy, we are of the view that the same logic should apply to a contractual termination.

[45] BGE 104 III 84 S. 94 of October 26, 1978, confirmed by 5A_823/2015 of September 7, 2015.

conclusion directly on the basis of the SDEBA (in which case it would apply irrespective of the law governing the relevant contract). Other authors suggest that, under optional termination, notice will have to be given with (retroactive) effect as per the occurrence of the Insolvency Event (and not with effect as of a date thereafter). We note in this respect that the Master Agreements may not accept the concept of a retroactive termination. Finally, one author appears to suggest that an optional termination right cannot be invoked any longer where the Insolvency Representative has exercised its Step-in Right in the interim. The statement lacks clarity and is not widely discussed in doctrine but we are aware of at least two statements which come to the opposite result.[46]

On the basis of the foregoing, it is our view, that the Step-in Right does not preclude a contractual termination arrangement and that the Step-in Right could not any longer be exercised upon the effectiveness of any such termination. The calculation of one single amount pursuant to a close-out netting provision under such circumstances is in our view also generally valid and binding (subject to the discussion as outlined in more detail below under 225). 210

We note, though, that no court precedents are available on this very point and we further refer to the controversial discussion on certain additional requirements which are being discussed in doctrine on the timing to give a termination notice and the proposed effective date of the termination and the further discussion on whether an intermediate exercise of the Step-in Right may overrule or limit the effectiveness of an optional termination. Also, we note that at least one author may suggest that the Step-in Right trumps optional termination which, however, is a singular view and has not been articulated very clearly. 211

c) Statutory Close-out (Art. 211 para. 2bis SDEBA)

Art. 211 para. 2bis SDEBA excludes the Step-in Right in respect of certain types of agreements, i.e. (i) fixed term agreements (*Fixgeschäfte / engagements à terme strict*) within 212

[46] If this author were correct, a further question would arise as to whether the Step-in Right could be validly exercised for some (but not all) transactions (cherry picking) which are covered by a Master Agreement (which does not appear to be discussed in doctrine). Where a single agreement clause as contemplated in the Master Agreements is agreed or would otherwise be deemed to apply as a matter of the applicable substantive law governing the relevant Master Agreement, any such intermediate exercise of the Step-in Right by the bankruptcy administration would in our view have to cover all (rather than selected) transactions concluded under a Master Agreement on the basis that the bankruptcy administration would have to accept the scope of the agreement as agreed by the parties. Where individual transactions were held to qualify as long term agreements within the meaning of Art. 211a SDEBA and would not meet the definition of Qualifying Contracts so as to be exempted from the Step-in Right (see n. 212 below), such cherry picking may be possible irrespective of a contractual arrangement or substantive law to the contrary. The reason for this is that, unlike Art. 211 para. 2 SDEBA, Art. 211a para. 2 SDEBA specifically allows the Partial Step-in for long term agreements which may not only allow the performance of the underlying long term agreements for a limited period of time but also for a limited scope.

the meaning of Art. 108 ciph. 3 CO[47], and (ii) certain financial derivative transactions, including financial swaps, forward agreements and options (each, a "**Qualifying Contract**") and in turn provides for statutory liquidation of such contracts in case of bankruptcy[48] and the abstract calculation of a liquidation amount based on market or exchange quoted prices as compared to the contractual value (the "**Statutory Close-out**"). Such calculation does not as per its wording and as supported by the majority view in legal doctrine, however, take into account any further damages or costs of either party.

213 The Statutory Close-out as per its terms applies to individual Qualifying Contracts. The calculation examples given in the legislative materials appear to suggest, though, that in case of multiple Qualifying Contracts between the same parties the liquidation amounts with respect to each liquidated Qualifying Contracts will be subject to a statutory netting (i.e. not dependent on a specific declaration of set-off by either party or a set-off or netting agreement). We note, though, that the statutory netting is not really discussed as such in the legislative materials and that the wording of Art. 211 para. 2bis SDEBA does not mention such netting. There is no further guidance available in court precedents or legal doctrine on the topic. If the Statutory Close-out does not result in a statutory netting of liquidation amounts under multiple Qualifying Contracts, it is our view that set-off would generally be available (subject to the discussion under n. 227 below).

d) Statutory Close-out and contractual termination arrangements

214 There are no court precedents to date as to whether the Statutory Close-out could interfere with or preclude contractual termination arrangements of the parties.

215 Art. 211 para. 2bis SDEBA was introduced in the light of close-out netting agreements that had become customary in the financial community and primarily aimed at backing the viability of close-out netting in an Insolvency Proceeding. This, in our view, needs to be borne in mind when interpreting Art. 211 para. 2bis SDEBA, which, as outlined above, does not limit itself to excluding the Step-in Right of Art. 211 para. 2 SDEBA, but establishes a Statutory Close-out in that it provides that the relevant contracts are automatically terminated and lays down an abstract calculation of a liquidation amount, which is similar but not identical to typical close-out netting provisions and may therefore be more restrictive as to e.g. further costs and damages. It was also stated in the report of the expert commission addressed to the Federal Office of Justice that the entire Art. 211 SDEBA is procedural

[47] Any agreement in which the parties agree that specific performance should only be permissible on or up to a certain date or at least would only be permitted if the other side were to specifically agree to it, qualifies as such fixed term agreement (*Fixgeschäft / engagement à terme strict)*. Furthermore, the predominant view is that the exclusion of the Step-in Right pursuant to Art. 211 para. 2bis SDEBA applies to all fixed term agreements rather than to financial agreements only.

[48] Same applies by analogy in case of a ratification of a composition agreement with assignment of assets.

(rather than substantive) law in nature.

This raises the question whether Art. 211 para. 2bis SDEBA may be modified, most noteworthy as to the automatic character of a termination / liquidation of underlying contracts and the calculation method of the amount to be paid following such termination. While there are various nuances among the growing number of legal scholars discussing this point, it is our view that the prevailing view accepts (within certain limitations as discussed under 228 below) contractually agreed deviations from the abstract calculation of a liquidation amount as set out in Art. 211 para. 2bis SDEBA whereas termination provisions are accepted by a majority view, provided that they are triggered by an event which occurs not later than the occurrence of an Insolvency Event. Accordingly, Art. 211 para. 2bis SDEBA is not generally viewed as mandatory law in its entirety. That said, there is more controversy as to whether an optional termination taking place after the occurrence of an Insolvency Event should be effective or replaced by the automatic termination upon the opening of bankruptcy in the light of Art. 211 para. 2bis SDEBA than as to the dispositive nature of the calculation method. 216

Insofar as the validity of a contractual termination as such is concerned, this is predominantly discussed in the context of optional early termination but does not typically give rise to much debate where automatic early termination is agreed. An important number of scholarly opinions holds that in the absence of a termination by (or, as proposed by some authors, with effect as per) the occurrence of an Insolvency Event, the liquidation of contracts ordered under the Statutory Close-out becomes mandatory. This is sometimes (but not always) argued on the basis of the alleged substantive law nature of Art. 211 para. 2bis SDEBA. That said, a qualification as a substantive rather than as a procedural rule does not in our view *eo ipso* exclude its modification by contract, which view is also supported by scholarly opinions. A number of authors, thus, concludes that an optional early termination would trump the Statutory Close-out. The enforceability of optional termination for Qualifying Contracts is further challenged by some authors based on concerns of a violation of the equal treatment of creditors in Insolvency Proceedings. While discussed in the context of the Step-in Right, the argument is made on the basis that optional termination may allow a counterparty to speculate against the Insolvency estate and to the detriment of other creditors of the Insolvent debtor. In the absence of a pre-agreed short notice period, it should, therefore, be disregarded according to some scholars. It is further held in this respect that if the termination notice provides for an effective date which is later than the date of the occurrence of an Insolvency Event, then notwithstanding any designation of another date, all calculations may need to be made as of such date. To address this concern, some authors hold that the optional termination must be declared with retroactive effect as of the occurrence of the Insolvency Event. It is unclear, though, whether this truly means that the termination as such would need to have a retroactive effect as of such date, which seems a somewhat fictitious concept, or whether this is not rather meant to require a calculation of the single net amount as of such 217

date, which would be sufficient to satisfy the rationale of equal treatment of creditors. We note in this respect that the Master Agreements may not accept the concept of a retroactive termination.

Certain authors further suggest that the calculation method set out by Art. 211 para. 2bis SDEBA is mandatory. Some authors consider that the calculation rules under the Statutory Close-out are applicable to contracts that provide for automatic early termination, but do not provide for close-out netting provisions. The mandatory nature of the statutory calculation method is more prominently discussed for optional early termination but, also here, we consider it the majority view that the contractual calculation method should prevail subject to the limitations discussed under 228 below. Some scholars come to this view even if they challenge the effectiveness of the optional termination as such because the relevant termination right has not been exercised by (or with effect as per) the occurrence of an Insolvency Event. 218

e) Optional Early Termination and Automatic Early Termination – Conclusions and recommendation to apply Automatic Early Termination

While optional early termination ("**Optional Early Termination**") is valid and binding on the Parties prior to an Insolvency, the effectiveness of Optional Early Termination is more questionable in case of the occurrence of an Insolvency Event. 219

In connection with the Step-in Right, we refer to the controversial discussion in legal doctrine on certain additional requirements in relation to the timing to give a termination notice and the proposed effective date of the termination and the further discussion on whether an intermediate exercise of the Step-in Right may overrule or limit the effectiveness of an optional termination. Also, we note that at least one author may suggest that the Step-in Right trumps optional termination which, however, is a singular view and has not been articulated very clearly (see the discussion under 209 and 211 above). 220

Further, the Statutory Close-out for Qualifying Contracts, if and to the extent viewed as mandatory for contract termination, could overrule the optional termination chosen by the Parties pursuant to their close-out netting provisions if such optional termination has not been exercised at the latest on (or with effect as per) the occurrence of the Insolvency Event. 221

As highlighted above 150, Art. 27 para. 1 of the Banking Act gives in our view a strong argument to allow Optional Early Termination for Banks and Securities Firms, but there is to date no precedent or authoritative guidance that would support this view. 222

By contrast, it is largely uncontested, that Automatic Early Termination (as provided for in the Master Agreement) ("**Automatic Early Termination**") is valid and binding under Swiss law and would be upheld in an Insolvency. 223

In the light of the uncertainties discussed with respect to Optional Early Termination upon the occurrence of an Insolvency Event we strongly recommend to elect Automatic Early Termination rather than to provide for a short term period within which Optional Early Termination would need to be declared.[49] 224

11. Determination of Single Lump-Sum Termination Amount

The close-out netting by means of calculating a single lump-sum termination amount (as contemplated by Section 6(e) of the Master Agreement) constitutes a valid pre-agreed contractual liquidation of all Transactions. Such close-out netting would generally be upheld in an Insolvency. We refer, though, to the discussion of termination and close-out netting under n. 214 et seq. above and the views expressed in legal doctrine as to the potential mandatory nature of the calculation of the liquidation amount under the rules on Statutory Close-out namely where termination of Qualifying Contracts does not otherwise occur at the latest on (or with effect as per) the date on which an Insolvency Event is being declared. 225

As mentioned under n. 67 above, the provisions of Sections 5 and 6 of the Master Agreements on the close-out netting mechanism are best analyzed from a Swiss law perspective as a comprehensive contractual liquidation and set-off arrangement. This question, which eventually would have to be decided under English law or, as the case may be, the laws of the State of New York, French law or Irish law as the law governing the Master Agreement, has, however, no impact in our view that the determination of a single lump-sum termination amount is generally enforceable following the occurrence of an Insolvency Event against the background of the discussion under n. 214 et seq. above. 226

We further note in this respect that, pursuant to the SDEBA, the exercise of a set-off right remains possible post-insolvency. However, post-insolvency set-off is subject to the limitations of Art. 213 and 214 SDEBA (see n. 104 above). As a result, set-off is permissible only to the extent that the claims to be set-off have existed prior to the Insolvency and were mutual between the bankrupt party and the counterparty prior to the occurrence of an Insolvency Event or the grant of a moratorium (*Nachlassstundung / sursis concordataire*) and are of the same kind (as to the latter see n. 70 et seq. above). We have, for purposes of this memorandum of law, assumed the satisfaction of the above requirements and, in particular, that the claims are mutual (i.e. no intermediate assignment nor inclusion of affiliate claims) under applicable law.[50] As a matter of Swiss substantive law, precedents of 227

[49] As mentioned above (see n. 209) there is one author that holds that close-out netting would be null and void where it violates equal treatment of creditors and under such circumstances also views a termination, be it optional or automatic, that facilitates such close-out netting, as null and void.

[50] We note in this respect that, in case Automatic Early Termination is selected by the parties, each Insolvency Event and the grant of a moratorium would trigger Automatic Early Termination. Accordingly, this should facilitate the conclusion that this assumption is met under applicable laws, in particular the law governing

the Swiss Federal Supreme Court state that claims resulting from a contract termination are pre-existing claims and where contract termination is triggered by an event of Insolvency, Art. 213 and 214 SDEBA would not prevent set-off of claims resulting from such contract termination[51].

228 Moreover, any calculation and valuation to be made in the context of the close-out netting, which pursuant to the relevant terms has been made as of a date *after* the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets is likely to be disregarded in case it proves to be to the detriment of the bankruptcy estate and adjusted for a calculation of such more favorable amount as of the date of the Insolvency Event. Other grounds for a (partial) rejection of the calculation contemplated under a close-out netting would be a unilateral waiver of claims deemed to apply to the claims of the bankruptcy estate resulting from close-out netting (such as under First Method as set out in the 1992 Master Agreement), the extension of indemnity or similar obligations to costs of representation in the Swiss Insolvency (which would be contrary to Art. 27 SDEBA) or the pre-agreed inflation of claims in Insolvency (see n. 119 et seq. for similar concerns in this respect under applicable Swiss avoidance rules).

a) Currency of filing

229 Claims in a foreign currency against an insolvent party initially remain unaffected by the institution of Insolvency Proceedings. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. A claim of the solvent party under a Master Agreement for a single lump-sum termination amount denominated in a currency other than Swiss Francs would thus only be enforceable in an Insolvency Proceeding if converted as of the date of the adjudication of bankruptcy (in case of a bankruptcy) or as of the confirmation of the composition agreement (in case of a composition agreement with assignment of assets). While a creditor is free to choose a currency rate provider (such as the Swiss National Bank), the bankruptcy liquidator may decide to apply a uniform rate of exchange to ensure equal treatment of creditors or to reduce a claim in case the rate applied by the creditor differs from the rates published by other market currency rate providers.

b) Date

230 The calculations to be made in determining the single lump-sum termination amount may have to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets in order to ascertain equal treatment of all

the Master Agreements.

51 BGE 107 III 28.

creditors of the bankrupt party. The second sentence of Section 6(a) of the Master Agreement provides for such date in case of Automatic Early Termination.

c) Accrual of Interest

Unless a claim is secured by collateral, interest stops to accrue following the adjudication of bankruptcy or the grant of a moratorium. Any interest element would, hence, under such premises be disallowed for purposes of calculating a single lump-sum termination amount or applying a set-off and no interest would be allowed on the single lump-sum termination amount as of the relevant date. 231

In case of secured claims, only an excess of the realization of the collateral over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 232

12. Close-out Netting after Insolvency – Conclusions

Close-out netting as provided for in the Master Agreement is in our view available after the occurrence of an Insolvency Event, provided that the calculation of the single lump-sum termination amount may need to be made as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets and any fluctuation of amounts owed based on market or currency fluctuations to the detriment of the bankrupt party thereafter would be disregarded as would any interest amount, which is not calculated in respect of a collateralized obligation or in excess of what is so secured by collateral. 233

However, in view of the uncertainties discussed with respect to Optional Early Termination and potential mandatory effects of the Statutory Close-out, we strongly recommend to elect Automatic Early Termination. 234

In the case of Banks, Securities Firms and Fund Management Companies the safeguards of Art. 27 Banking Act further support the enforceability of Close-out netting, subject only to the exception of a stay of termination rights ordered by FINMA under Art. 30a Banking Act. 235

VI. Specific Questions

Set forth below in italics are the specific questions raised in the Instruction Letter, followed by our responses. 236

A. Close-out Netting under the Master Agreements

1. Specific Assumptions

The Foreign Entity and the Swiss Counterparty have entered into a Master Agreement. The Parties have selected either New York law, French law, Irish law or English law as the governing law and neither party has specified that the provisions of Section 10(a) apply to it. 237

The provisions of the Master Agreement that are crucial to this memorandum of law have not been altered in any material respect (whereby any selections contemplated by Sections 5 and 6 of the Master Agreement and made pursuant to a Schedule to the Master Agreement or in a Confirmation of a Transaction are not considered material alterations). 238

On the basis of the terms and conditions of the Master Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Master Agreement, the Parties over time have entered into a number of Transactions that are intended to be governed by the Master Agreement. The Transactions entered into include any or all of the Transactions described in Annex 1 hereto. 239

Some of the Transactions provide for an exchange of cash by both parties and others provide for the physical delivery of shares, bonds or commodities in exchange for cash. 240

In case the parties have executed a 1992 Master Agreement, it is assumed that the parties have validly chosen the Second Method under Section 6(e)(i). 241

After entering into these Transactions and prior to the maturity thereof, the Swiss Counterparty becomes the subject of a voluntary or involuntary case under the insolvency laws in Switzerland and subsequent to the commencement of the insolvency, either a creditor or the bankrupt party admit to seek to assume the Confirmations representing profitable Transactions for the bankrupt party and reject the Confirmations representing unprofitable Transactions for the bankrupt party. 242

2. Issues

1. Assuming the parties have not selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in your jurisdiction, are the provisions of the ISDA Master Agreement permitting the Non-defaulting Party to terminate

all the Transactions upon the insolvency of its counterparty enforceable under the laws of your jurisdiction?

The provisions of the Master Agreement permitting a Foreign Party to terminate all the Transactions upon insolvency of the Swiss Counterparty would be enforceable under the laws of Switzerland, subject to the discussion and limitations set forth in this memorandum of law (in particular, n. 203 et seq. above and the recommendation to apply Automatic Early Termination for the reasons set out therein). 243

2. *Assuming the parties have selected Automatic Early Termination upon certain insolvency events to apply to the insolvent counterparty organized in your jurisdiction, are the provisions of the ISDA Master Agreement automatically terminating all the Transactions upon the insolvency of a counterparty enforceable under the laws of your jurisdiction?*

The provisions of the Master Agreement automatically terminating all the Transactions upon insolvency of a Swiss Counterparty would be enforceable under the laws of Switzerland, subject to the discussion and limitations set forth in this memorandum of law (in particular, n. 203 et seq. above and the recommendation to apply Automatic Early Termination for the reasons set out therein). 244

3. *Are the provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Counterparty enforceable under the laws of your jurisdiction?*

The provisions of the Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of Swiss Counterparty would be enforceable under the laws of Switzerland, subject to the discussion and limitations set forth in this memorandum of law (in particular, n. 203 et seq. above). 245

4. *Assuming the parties have entered into either a 1992 ISDA Master Agreement (Multicurrency-Cross Border) or one of the 2002 ISDA Master Agreements, one of the parties is insolvent and the parties have selected a Termination Currency other than the currency of the jurisdiction in which the insolvent party is organized, will the payment of the net termination amount in the Termination Currency be enforceable under the law of your jurisdiction?*

Reference is made to n. 229 above. 246

B. Close-out Netting for Multibranch Parties

1. Assumptions

In addition to the assumptions under sub-chapter A.1. above, the assumptions below apply. 247

For the purpose of Issue 1. below, a Swiss Counterparty in one of the forms listed under n. 13 through 24 above (the "**Swiss Party**")[52] has entered into a Master Agreement on a multibranch basis. In the Master Agreement, the Swiss Party has specified that Section 10(a) applies to it. The Swiss Party then has entered into Transactions under the Master Agreements through the Swiss Party and also through one or more branches located in other countries that had been specified in the Schedule. After entering into these Transactions and prior to the maturity thereof, the Swiss Party becomes the subject of a voluntary or involuntary proceeding under the insolvency laws of Switzerland. 248

For the purpose of Issues 2. and 3. below, a bank ("**Bank F**") organized and with its headquarters in a country ("**Country H**") other than Switzerland has entered into Master Agreements on a multibranch basis. Bank F has entered into Transactions under Master Agreements through Bank F and also through one or more branches located in other countries that Bank F had specified in the Schedule, including in each case a branch of Bank F located in and subject to the laws of Switzerland (the "**Swiss Branch**"). After entering into these Transactions and prior to the maturity thereof, Bank F becomes the subject of voluntary or involuntary proceedings under the insolvency laws of Country H. 249

2. Issues

1. Would there be any change in your conclusions concerning the enforceability of close-out netting under the ISDA Master Agreements based upon the fact that the Swiss Party has entered into ISDA Master Agreements on a multibranch basis and then conducted business in that fashion prior to its insolvency?

The close-out netting mechanism provided for in the Master Agreements is valid and enforceable under Swiss law. This conclusion would not be affected if the Swiss Party entered into the Master Agreements and Transactions thereunder through a branch established in a jurisdiction other than Switzerland, provided that the laws applicable to such foreign branch characterise the branch as being legally part of the Swiss Party and hence recognise that the branch is not a separate legal entity. In this case, the requirement of reciprocity allowing the set-off of claims is met. A different question is whether the laws of such foreign jurisdiction recognize multibranch close-out netting for purposes of insolvency proceedings in such foreign jurisdiction. This question is answered under Swiss conflict of laws rules by the applicable foreign law to which the PILA refers. 250

While we understand it to be outside the scope of this Issue 1., we note that the conclusions set forth in this memorandum of law would also not be affected if the designated office of the Swiss Party was a branch (*Zweigniederlassung / succursale*) established in Switzerland. 251

[52] See Annex 2 for cross-reference to the ISDA Description of Certain Counterparty Type.

2. *Would there be a separate proceeding in Switzerland with respect to the assets and liabilities of the Swiss Branch at the start of the insolvency proceeding for the Bank F in Country H? Or would the relevant authorities in Switzerland defer to the proceedings in Country H so that the assets and liabilities of the Swiss Branch would be handled as part of the proceeding for Bank F in Country H? Could local creditors of the Swiss Branch initiate a separate proceeding in Switzerland even if the relevant authorities in Switzerland did not so?*

252 The first question is whether there would be a separate proceeding in Switzerland with respect to the assets and liabilities of the Swiss Branch at the start of the insolvency proceeding for the Bank F in Country H. The Swiss Branch of the insolvent Bank F is neither automatically subject to the insolvency proceedings initiated against Bank F in Country H nor automatically subject to separate insolvency proceedings in Switzerland. The creditors and the receiver of Bank F are, however, entitled to start separate insolvency proceedings in Switzerland, as more fully discussed under n. 196 through 202 above.

253 The second question is whether the Swiss authorities would defer to the proceedings in Country H so that the assets and liabilities of the Swiss Branch would be handled as part of the proceeding for Bank F in Country H. FINMA may be authorized to transfer assets attributable to the Swiss branch to the foreign insolvency, without implementing Swiss insolvency proceedings, provided that (a) claims which are privileged or covered by a pledge pursuant to Art. 219 SDEBA of creditors having their domiciles in Switzerland are equally treated in the context of the foreign bankruptcy proceedings and (b) the other claims of other creditors, who are resident in Switzerland, are duly considered in the context of those foreign insolvency proceedings. FINMA is also authorized to recognize insolvency orders and measures, which are issued abroad at the head office of one of the afore stated foreign regulated entities. In case auxiliary proceedings are opened by FINMA over the assets of one of the afore stated foreign regulated entities, then non Swiss resident and unprivileged creditors are also accepted in the context of the collocation of the claims relating to such foreign regulated entity.

254 The third question is whether legal creditors of the Swiss Branch could initiate a separate proceeding in Switzerland even if FINMA did not do so. In this respect, please note that claims against the Swiss Branch can, to the extent that they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs/ faillite d'une succursale*) (Art. 50 para. 1 SDEBA). A branch insolvency can be opened against the Swiss Branch, but in case ancillary bankruptcy procedures have been requested only until the ancillary insolvency proceeding reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan / état de collocation*). If opened, the bankruptcy of the Swiss Branch will take precedence over the ancillary insolvency proceeding. For details, please refer to n.

196 et seq. above.

3. *If there would be a separate proceeding in Switzerland with respect to the assets and liabilities of the Swiss Branch, would the receiver or liquidator in Switzerland and the Swiss courts, on the facts above, include Bank F's position under an ISDA Master Agreement, in whole or in part, among the assets of the Swiss Branch and, if so, would the receiver or liquidator and the Swiss courts recognize the close-out netting provisions of the ISDA Master Agreements in accordance with their terms? The most significant concern would arise if the Swiss receiver, liquidator or court considering a single ISDA Master Agreement would require a counterparty of the Swiss Branch of Bank F to pay the mark-to-market value of Transactions entered into with the Swiss Branch to the liquidator or receiver of the Swiss Branch while at the same time forcing the counterparty to claim in the proceedings in Country H for its net value from other Transactions with Bank F under the same ISDA Master Agreement. In considering this issue, please assume that close-out netting under all the relevant ISDA Master Agreements would be enforced in accordance with its terms in the proceedings for Bank F in Country H.*

Swiss law provides for three types of proceedings relevant in the context of insolvency proceedings against a Swiss Branch (which under applicable Swiss law forms legally part of Bank F): (i) the branch insolvency (*Zweigniederlassungskonkurs / faillite d'une succursale*) (as more fully discussed under n. 197), (ii) the ancillary insolvency proceeding (*Hilfskonkurs / faillite ancillaire*) (as more fully discussed under n. 198 et seq. above) and (iii) the special Insolvency Proceedings applicable to Special Insolvency Regimes with Swiss Branches (as fully discussed under n. 202 above). In all scenarios, a Swiss receiver (respectively FINMA in case of a Special Insolvency Regime Swiss Branch) would be bound by the set-off and netting rights of the counterparty of the Swiss Branch under a Master Agreement, whether entered into on a multibranch basis or not. The ability of the counterparty to set-off its claims against the claim of the Swiss Branch would thus extinguish the latter's claim, provided the counterparty's claim exceeds such claim. Accordingly, there would be no asset of the Swiss Branch available to the Swiss receiver after close-out netting under a Master Agreement entered into on a multibranch basis. 255

Furthermore, a Swiss court, or a Swiss receiver, or liquidator (respectively FINMA in case of a Special Insolvency Regime Swiss Branch), would be bound by the principles on which the Master Agreements and/or the Bridge Agreements are based as a matter of substantive law, including the "single agreement concept". We are thus of the opinion that a Swiss court would give effect to the "single agreement concept" on which the Master Agreements as well as the Bridge Agreements are based. We also note that this recognition would be in line with the principle of the universality which applies in the context of any Insolvency in Switzerland as well as based on the principle that, to the extent Art. 211 para. 2 SDEBA is of a mere 256

procedural nature, a Swiss court, or a liquidator or Swiss receiver (or FINMA in case of a Special Insolvency Regime Swiss Branch) would be bound by the contractual arrangements entered into by the parties prior to bankruptcy. In summary, separate insolvency proceedings with respect to the Swiss Branch would not in our view adversely affect the multibranch close-out netting.

4. *As indicated above thus far ISDA has obtained legal opinions indicating that bilateral and multibranch close-out netting, would be enforceable in numerous jurisdictions.*

*However, we would like you to confirm that your answers to Issues 1., 2. and 3. immediately above remain the same, notwithstanding possible actions that could be taken by an insolvency official or court in another jurisdiction where close-out netting may be unenforceable (the "**Non-Netting Jurisdiction**"). Such actions taken by an insolvency official of a Non-Netting Jurisdiction include the following scenarios:*

*(1) In the case of an insolvency proceeding for a Swiss Bank, the Swiss Bank, acting as a multibranch party, has booked Transactions through its home office and one or more branches located in Non-Netting Jurisdictions (the "**Non-Netting Branches**").*
(2) In the case of an insolvency proceedings for a Swiss Branch of Bank F, Bank F acting as a multibranch party, has booked Transactions through (i) its home office, (ii) its Swiss Branch and (iii) one or more Non-Netting Branches in other jurisdictions.

ISDA would like us to confirm that where courts in Switzerland have jurisdiction over the assets of a Swiss Bank or a Swiss Branch, a multibranch master agreement such as the ISDA Master Agreement would be treated as a single, unified agreement by a Swiss receiver under the laws of Switzerland regardless of the treatment of the ISDA Master Agreement or Transactions thereunder by an insolvency official in a country where close-out netting may be unenforceable.

Subject to the above discussion and limitations, the conclusions set forth in this memorandum of law with respect to the multibranch provisions of the Master Agreement would not, from a Swiss law perspective, be affected by the treatment of the Master Agreement or Transactions thereunder in a Non-Netting Jurisdiction. 257

VII. Pending Developments

As of the date of this memorandum of law, we are not aware of any pending legal or regulatory developments which would have a material and adverse impact on the conclusions herein. 258

* * *

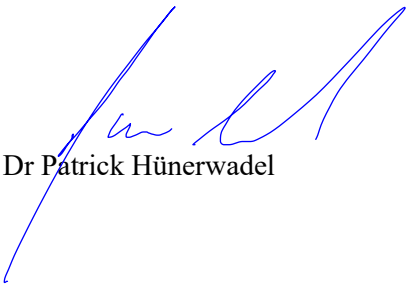
This memorandum of law is governed by and construed in accordance with Swiss law and shall be subject to the exclusive jurisdiction of the ordinary courts of Geneva, Switzerland.

This memorandum of law is solely addressed to you and solely for the benefit of your members. It may not be relied upon by any other person, entity or corporation whatsoever and may, save as set forth hereinafter, not be disclosed to any other person, entity or corporation whatsoever without our prior written consent. This memorandum of law may be disclosed to professional advisors of your members and to the appropriate bank regulatory and supervisory authorities for informational purposes, on the basis that we assume no responsibility to such professional advisors, authorities or any other person as a result.

Yours faithfully,

LENZ & STAEHELIN

Dr François Rayroux Dr Patrick Hünerwadel



Annex 1

APPENDIX A (AUGUST 2015)

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. A Commodity Forward may be settled by the physical delivery of the commodity in exchange for the specified price or may be cash settled based on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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

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

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation

amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

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

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

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

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

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

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

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

notional amount.

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

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

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

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

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

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

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other

party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

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

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

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

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

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

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

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

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

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

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

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

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

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

Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

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

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a

"Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

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

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

Annex 2

APPENDIX B
SEPTEMBER 2009
CERTAIN COUNTERPARTY TYPES

Description	Covered by opinion	Legal form(s)
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**)).	Yes	Banks (see n. 15) and Securities Firms (see n. 16)
Central Bank. A legal entity that performs the function of a central Bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).	No	Additional analysis required.
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	Yes	Corporations (see n. 13)

Description	Covered by opinion	Legal form(s)
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.	No	Additional analysis required.
Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.	Yes	Insurance Companies (see n. 17)
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.	No	Additional analysis required.
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.	Yes	Securities Firms (see n. 16)

Description	Covered by opinion	Legal form(s)
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.	Yes	Collective Investment Vehicles in the form of Contractual Funds and SICAV (see n. 18 and 19)
Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.	No	Additional analysis required.
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	Yes	Partnerships (see n. 14)

Description	Covered by opinion	Legal form(s)
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.	Yes	Pension Funds (see n. 20)
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").	No	Additional analysis required.
Sovereign Wealth Fund. A legal entity, often	No	Additional analysis required.

Description	Covered by opinion	Legal form(s)
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").	No	Additional analysis required.
State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.	No	Additional analysis required.

Annex 3

RECOMMENDED AMENDMENTS TO DOCUMENTS*

This Appendix aims to assist firms in the consumption and processing of information. We recommend that readers review all relevant sections of this opinion and satisfy themselves as to the conclusions reached prior to making any determinations and do not rely solely upon the information contained in this Appendix.

Application (counterparties)	**Application (documents)**	**Required or optional?**	**Information on amendment**	**Summary of amendment**	**Example wording**
All counterparties in scope of Opinion	Schedule to ISDA Master Agreement (English Law)	Optional	Annex 3 of this Opinion	Minor amendments to Section 6(a) of the Master Agreement may be considered by the Parties because some of the special measures applicable to Banks, Securities Firms and insurance companies, such as the protective measures (Schutzmassnahmen / mesures protectrices) and the reorganization proceedings (Sanierungsmassnahmen / mesures d'assainsissement), may not trigger	"(10) in addition to the foregoing in respect of a Swiss Bank or a Swiss branch of a Bank licensed under the Swiss Federal Act on Banks and Savings Banks (the "**Banking Act**", or in respect of a Swiss Securities Firm or a Swiss branch of a Securities Firm, or in respect of a Swiss Fund Management Company licensed under the Swiss Federal Act on Financial Institutions (the "**FinIA**"), it has imposed on it or with respect to it, by the Swiss Financial Market Supervisory

				an Event of Default under Section 5(a)(vii) of the Master Agreement. The suggested amendments may be included by the Parties in the Schedule of each Master Agreement if such Parties wish to address such measures as additional Events of Default under Section 5(a)(vii). In this case, the Parties will have to specify whether such events trigger Automatic Early Termination (by amending Section 6(a) of the Master Agreement and electing for Automatic Early Termination to be applicable in respect of the Swiss Counterparty) or an optional termination right.	Authority FINMA, (aa) protective measures (Schutzmassnahmen/ mesures protectrices) under Article 26 para. 1 lit. e, f, g or h of the Banking Act or other protective measures establishing a payment moratorium of general applicability or ordering the termination of its business operations, (bb) restructuring procedures (Sanierungsverfahren /procédure d'assainissement) under Articles 28-32 of the Banking Act." [AND / OR] "[…] in respect of a Swiss Insurance Company or a Swiss branch of an Insurance Company, the implementation or order of measures under Article 51 of the Swiss Federal Act on the Supervision of Insurance Companies (the "**ISA**") which have a similar or

					comparable effect as the events described in this Section."
Counterparty to the Banque Cantonale Vaudoise ("**BCV**")	Schedule to ISDA Master Agreement (English Law)	Optional but recommended	Annex 4, Schedule 1 to this Opinion	Recommendation to insert a specific representation, deemed repeated whenever BCV enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that the Eligible Credit Support does not constitute administrative assets.	"Additional representation of [Designation of BCV] [Designation of BCV] represents and such representation shall be deemed repeated whenever [Designation of BCV] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of BCV] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of BCV] and is not subject to any immunity."
Counterparty to the Banque Cantonale de Genève ("BCGE")	Schedule to ISDA Master Agreement (English Law)	Optional but recommended	Annex 4, Schedule 2 to this Opinion	Recommendation to insert a specific representation (see proposed wording set out below), deemed repeated	"Additional representation of [Designation of BCGE] [Designation of BCGE] represents

				whenever BCGE enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that such Eligible Credit Support does not constitute administrative assets.	and such representation shall be deemed repeated whenever [Designation of BCGE] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of BCGE] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of BCGE] and is not subject to any immunity."
Counterparty to the Basler Kantonalbank ("**BSKB**")	Schedule to ISDA Master Agreement (English Law)	Optional but recommended	Annex 4, Schedule 3 to this Opinion	Recommendation to insert a specific representation (see proposed wording set out below), deemed repeated whenever BSKB enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that	"Additional representation of [Designation of BSKB] [Designation of BSKB] represents and such representation shall be deemed repeated whenever [Designation of BSKB] enters into a Transaction under the Agreement, that all Transactions and any

				such Eligible Credit Support does not constitute administrative assets.	[Eligible Credit Support] provided by [Designation of BSKB] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of BSKB] and is not subject to any immunity."
Counterparty to Zürcher Kantonalbank ("**ZKB**")	Schedule to ISDA Master Agreement (English Law)	Optional but recommended	Annex 4, Schedule 4 to this Opinion	Recommendation to insert a specific representation (see proposed wording set out below), deemed repeated whenever ZKB enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that such Eligible Credit Support does not constitute administrative assets.	"Additional representation of [Designation of ZKB] [Designation of ZKB] represents and such representation shall be deemed repeated whenever [Designation of ZKB] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of ZKB] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermög

					en) of [Designation of ZKB] and is not subject to any immunity.”

Annex 4

Schedule 1 (*Banque Cantonale Vaudoise*)

1. Status of Banque Cantonale Vaudoise

Banque Cantonale Vaudoise ("**BCV**") is a public law corporation (*Aktiengesellschaft des kantonalen öffentlichen Rechts / société anonyme de droit public*) within the meaning of Art. 763 of the Swiss Code of Obligations ("CO"), established under and governed by Vaud Cantonal law, i.e. the Vaud Cantonal Bank Act of June 20, 1995[53], and if the mentioned Act that takes precedence does not deviate from the CO, by the CO (Art. 620 et seq.) (Art. 1 Vaud Cantonal Bank Act). Being a corporation, it has legal personality of its own and has its seat in Lausanne. The Canton of Vaud has, by law, a majority shareholding (Art. 6 Vaud Cantonal Bank Act) in BCV. Its activity is, as specifically addressed in Art. 4 of the Vaud Cantonal Bank Act, that of a universal bank. 1

BCV does not benefit from a cantonal state guarantee. 2

Its banking business is supervised by the Swiss Financial Market Supervisory Authority (the "**FINMA**"). 3

2. Insolvency and Unwinding Regime

Before the amendment of the Swiss Federal Banking Act ("**Banking Act**") as of July 1, 2004, BCV being a *Aktiengesellschaft des kantonalen öffentlichen Rechts / société anonyme de droit public* was subject to the general rules of the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**"), but in principle neither subject to bankruptcy (*Konkurs*) nor any of the reorganization procedures (*Nachlassverfahren*), i.e. the liquidation procedures encompassing all of the assets and liabilities pursuant to the SDEBA did not apply as it is not mentioned as qualifying therefor under Art. 39 SDEBA. 4

As a consequence of the amendment of the Banking Act, the reorganization and liquidation procedures set forth in the Banking Act apply to BCV. Although in our view it seems contrary to the legal system that a public law entity shall be the subject of bankruptcy proceedings, the amended Banking Act does not make any exemptions for such entities. However, given that the explanatory message accompanying the amendment does not comment on this change subjecting a public law entity to general liquidation by bankruptcy, and while we do not deem it likely, it cannot be ruled out that a court would decide that the Banking Act is incomplete and should indeed be deemed to provide for an exemption of 5

[53] Loi organisant la Banque Cantonale Vaudoise du 20 juin 1995, 951.01 (as last amended on 1 May 2010).

public law entities. In such a case, the debt collection against BCV would need to be taken in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*).

6 Literature on this point is still very scarce. Two important commentators consider, however, that cantonal banks are fully subject to the Banking Act insolvency proceedings irrespective of whether they would otherwise be subject to the bankruptcy proceedings of the SDEBA or not. [54]

7 As BCV is fully subject to the banking license requirements of the Banking Act and is according to Article 21 of the Vaud Cantonal Bank Act under the supervision of the FINMA, it is also subject to a withdrawal of such banking license by the FINMA. The dissolution and liquidation of BCV as a consequence of such withdrawal of its banking license would also be governed by the Banking Act. Pursuant to what seems to be the predominant view in literature, the procedure for the dissolution itself would be governed by the bankruptcy and liquidation provisions of the Banking Act.

8 According to Art. 22 of the Vaud Cantonal Bank Act, BCV is subject to a dissolution by the legislator of the Canton of Vaud (*Grand Conseil*). Except for this Art. 22, the Vaud Cantonal Bank Act does not address a dissolution (solvent or insolvent) of BCV. If the Vaud Cantonal legislator would proceed to a dissolution, such dissolution could not, however, interfere with creditors' rights in a manner incompatible with private law as private law is regulated at the Swiss Federal level and, in our analysis, should be coordinated with the FINMA. Furthermore, as mentioned above, a dissolution and liquidation pursuant to the Banking Act would take precedence.

9 The institution of liquidation proceedings by the FINMA would in our view be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement. However, not all protective measures are covered by an Event of Default under Section 5a (vii) of the Master Agreement.

10 Having said this, to the extent protective measures are granting relief, such measures would be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement, and the appointment of a commissioner for the inquiry of facts (*Untersuchungsbeauftragter*) by the FINMA should be covered by the Event of Default of Section 5a (vii) (6) of the Master Agreement. Whether the implementation of reorganization proceedings qualifies as an Event

[54] This view has been taken as well in a most recent doctorate thesis, with the further distinction, that while FINMA can order a bankruptcy in accordance with Art. 33 of the Banking Act, creditors of a Cantonal Bank that is established as a public law establishment or corporation can only initiate the debt collection in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*).

of Default under Section 5a (vii) of the Master Agreement depends on the restructuring measures taken. However, one might argue that the appointment of a reorganization commissioner (*Sanierungsbeauftragter*) would suffice to trigger an Event of Default under Section 5a (vii) (6) of the Master Agreement.

11 Further, in case of financial difficulties, including lack of adequate equity or over-indebtedness of BCV not timely resolved by it or the Canton of Vaud, the FINMA would in our view need to withdraw the banking license and the order to dissolve and liquidate BCV as a consequence thereof would be covered by Section 5a (vii) (1) and/or (5) and, in addition, the institution of any of the aforementioned procedures could also evidence an inability to pay debts when they become due within the meaning of Section 5a (vii) (2). Finally, a dissolution with ensuing liquidation of BCV by act of the Vaud Cantonal legislator would also fall under Section 5a (vii) (1) and/or (5) (see drafting suggestions in Annex 3 of the ISDA Netting Opinion).

12 In case BCV were to be considered exempt from the rules of the Banking Act with respect to bankruptcy, the seizure (*Pfändung*) and the foreclosure of assets granted as collateral (*Betreibung auf Pfandverwertung*), as mentioned above, would have to go against singular assets and, hence, would in our view not be covered by the Events of Default of Section 5a (vii) of the Master Agreement, unless such proceedings went against all or substantially all of BCV's assets[55] as provided in (7) of such Section 5a (vii).

3. Administrative Assets (Verwaltungsvermögen) and Financial Assets (Finanzvermögen)

13 As BCV is a public law entity which serves a public interest, one does in principle need to distinguish administrative assets, the use of which is directly dedicated (*gewidmet*) to public interest tasks (*Verwaltungsvermögen*) and other assets not so dedicated (*Finanzvermögen*). As a rule, no foreclosure would be allowed in administrative assets. And more generally, the application of private law to such administrative assets may be limited to the extent such application would prove incompatible with the continued achievement of such public interest tasks. The grant of a security interest in an administrative asset would, thus, in principle call for a proper revocation of the act by which an asset was specifically dedicated to such public task (*Entwidmung*) and, hence, change of the qualification from an administrative to a financial asset prior to the grant of such security interest.

14 Transactions (other than a Credit Support Document) under a Master Agreement are not in our view of a nature that could be directly dedicated to public interest tasks and, hence, would

[55] In such analysis there are good reasons in our view, though, to apply the test on the basis of financial assets (*Finanzvermögen*) as discussed below only.

qualify as financial assets.

15 In the context of a Credit Support Document as per the assumptions made in the ISDA Collateral Opinion as to Eligible Credit Support such Eligible Credit Support consists of directly and indirectly held securities (certificated and uncertificated), cash and money claims, all of which are of a fungible nature and with regard to which again a specific dedication (*Widmung*) to a public interest task, if at all conceivable, would be limited to very extraordinary circumstances.

16 Hence, such Eligible Credit Support provided by BCV would, but for extraordinary circumstances, qualify as financial assets and therefore not be an administrative asset subject to the limitations discussed herein. We are further of the view that, due to the very nature of these assets, any such dedication (*Widmung*) made by BCV would be deemed revoked (*Entwidmung*) by BCV if it were to use such assets as Eligible Credit Support and transfer it to a counterparty.As a result, BCV or any party claiming on behalf of BCV could not any longer assert any immunity of such assets transferred to such counterparty as Eligible Credit Support in particular if the counterparty is in good faith relying on an explicit representation and warranty of BCV that the Eligible Credit Support provided by BCV does not constitute administrative assets.

17 Based on the above we would recommend to insert a specific representation (see proposed wording set out below), deemed repeated whenever BCV enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that such Eligible Credit Support does not constitute administrative assets:

"Additional representation of [Designation of BCV]

[Designation of BCV] represents and such representation shall be deemed repeated whenever [Designation of BCV] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of BCV] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of BCV] and is not subject to any immunity."

18 It should furthermore be noted that the Swiss Federal Supreme Court has in a case involving a cantonal bank organized as a cantonal public law entity in the form of a *selbständige Anstalt* confirmed that the applicability of private law on administrative assets should only be limited where the achievement of the public interest task would otherwise be frustrated and then held that where, as was the case for this cantonal bank, a public law entity, while serving a public interest, did so in competition with private providers of the same services, the grant of a private legal lien in its banking building (which eventually could lead to foreclosure in such

building) could not be rejected on grounds of the banking building's qualification as administrative asset, which qualification the Swiss Federal Supreme Court otherwise specifically accepted. The Swiss Federal Supreme Court thereby considerably narrowed down the immunity of assets of providers of public interest services and for all practical purposes such immunity seems to be eliminated for assets dedicated to public interest services that can be offered by private competitors.

19 In the light of the above, the risk that Eligible Credit Support otherwise duly transferred by BCV under a Credit Support Document to a counterparty acting in good faith and relying on a specific representation to the contrary would still be qualified as administrative assets with the result of disallowing the security interest or transfer of title for security purposes granted by BCV therein seems largely academic and remote and can, therefore, in our view be ruled out as a practical matter. There are, however, to our knowledge neither precedents nor doctrine available to the very issue.

4. Conclusions

20 Based on the above our conclusions can be summarized as follows:

21 Subject to the particular status as described above (n. 1-12), which may limit the insolvency procedures available against BCV and may not give rise to an insolvency event under Section 5a (vii) of the Master Agreement as referred to under n. 12 and the more detailed discussion in the opinion and the recommendation therein to elect Automatic Early Termination, the conclusions reached in this opinion as to the enforceability under Swiss law of the close-out netting and set-off provisions apply to BCV as such conclusions in the opinion apply to a Bank.

Schedule 2 (*Banque Cantonale de Genève*)

1. Status of Banque Cantonale de Genève

Banque Cantonale de Genève ("**BCGE**") is a public law corporation (*Aktiengesellschaft des kantonalen öffentlichen Rechts / société anonyme de droit public*) within the meaning of Article 763 of the Swiss Code of Obligations, established under and governed by Geneva Cantonal law, i.e. the Geneva Cantonal Bank Act of June 24, 1993[56]. Being a corporation, it has legal personality of its own and has its seat in Geneva (Article 1 of the Geneva Cantonal Bank Act). Its activity is, as specifically addressed in Article 2 of the Geneva Cantonal Bank Act, that of a universal bank. 1

The former state guarantee of the Canton of Geneva was abrogated and expired on December 31, 2016 pursuant to Article 25 para. 1 of the Geneva Cantonal Bank Act. 2

Its banking business is supervised by the Swiss Financial Market Supervisory Authority (the "**FINMA**"). 3

2. Insolvency and Unwinding Regime

Before the amendment of the Swiss Federal Banking Act ("**Banking Act**") as of July 1, 2004, BCGE being a *Aktiengesellschaft des kantonalen öffentlichen Rechts société / anonyme de droit public* was subject to the general rules of the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**"), but in principle neither subject to bankruptcy (*Konkurs*) nor any of the reorganization procedures (*Nachlassverfahren*), i.e. the liquidation procedures encompassing all of the assets and liabilities pursuant to the SDEBA did not apply as it is not mentioned as qualifying therefor under Art. 39 SDEBA. 4

As a consequence of the amendment of the Banking Act, the reorganization and liquidation procedures set forth in the Banking Act apply to BCGE. Although in our view it seems contrary to the legal system that a public law entity shall be the subject of bankruptcy proceedings, the amended Banking Act does not make any exemptions for such entities. However, given that the explanatory message accompanying the amendment does not comment on this change subjecting a public law entity to general liquidation by bankruptcy, and while we do not deem it likely, it cannot be ruled out that a court would decide that the Banking Act is incomplete and should indeed be deemed to provide for an exemption of public law entities. In such a case, the debt collection against BCGE would need to be taken in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf* 5

[56] Loi sur la Banque cantonale de Genève (LBCGe) du 24 juin 1993, rs/GE D 2 05.

Pfandverwertung).

6 Literature on this point is still very scarce. Two important commentators consider, however, that cantonal banks are fully subject to the Banking Act insolvency proceedings irrespective of whether they would otherwise be subject to the bankruptcy proceedings of the SDEBA or not. [57]

7 As BCGE is fully subject to the banking license requirements of the Banking Act and is according to Article 21 of the Vaud Cantonal Bank Act under the supervision of the FINMA, it is also subject to a withdrawal of such banking license by the FINMA. The dissolution and liquidation of BCGE as a consequence of such withdrawal of its banking license would also be governed by the Banking Act. Pursuant to what seems to be the predominant view in literature, the procedure for the dissolution itself would be governed by the bankruptcy and liquidation provisions of the Banking Act.

8 The Geneva Cantonal Bank Act does not address a dissolution and liquidation (solvent or insolvent) of BCGE. If the Geneva Cantonal legislator would proceed to a dissolution and liquidation, though, such dissolution and liquidation could not, however, interfere with creditors' rights in a manner incompatible with private law as private law is regulated at the Swiss Federal level and, in our analysis, should be coordinated with the FINMA. Furthermore, as mentioned above, a dissolution and liquidation pursuant to the Banking Act would take precedence.

9 The institution of liquidation proceedings by the FINMA would in our view be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement. However, not all protective measures are covered by an Event of Default under Section 5a (vii) of the Master Agreement.

10 Having said this, to the extent protective measures are granting relief, such measures would be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement, and the appointment of a commissioner for the inquiry of facts (*Untersuchungsbeauftragter*) by the FINMA should be covered by the Event of Default of Section 5a (vii) (6) of the Master Agreement. Whether the implementation of reorganization proceedings qualifies as an Event of Default under Section 5a (vii) of the Master Agreement depends on the restructuring measures taken. However, one might argue that the appointment of a reorganization commissioner (*Sanierungsbeauftragter*) would suffice to trigger as an Event of Default

[57] This view has been taken as well in a most recent doctorate thesis, with the further distinction, that while FINMA can order a bankruptcy in accordance with Art. 33 of the Banking Act, creditors of a Cantonal Bank that is established as a public law establishment or corporation can only initiate the debt collection in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*).

under Section 5a (vii) (6) of the Master Agreement.

Further, in case of financial difficulties, including lack of adequate equity or over-indebtedness of BCGE not timely resolved by it or the Canton of Geneva, the FINMA would in our view need to withdraw the banking license and the order to dissolve and liquidate BCGE as a consequence thereof would be covered by Section 5a (vii) (1) and/or (5) and, in addition, the institution of any of the aforementioned procedures could also evidence an inability to pay debts when they become due within the meaning of Section 5a (vii) (2). Finally, a dissolution with ensuing liquidation of BCGE by act of the Geneva Cantonal legislator would also fall under Section 5a (vii) (1) and/or (5) (see drafting suggestions in Annex 3 of the ISDA Netting Opinion). 11

In case BCGE were to be considered exempt from the rules of the Banking Act with respect to bankruptcy, the seizure (*Pfändung*) and the foreclosure of assets granted as collateral (*Betreibung auf Pfandverwertung*), as mentioned above, would have to go against singular assets and, hence, would in our view not be covered by the Events of Default of Section 5a (vii) of the Master Agreement, unless such proceedings went against all or substantially all of BCGE's assets[58] as provided in (7) of such Section 5a (vii). 12

3. Administrative Assets (Verwaltungsvermögen) and Financial Assets (Finanzvermögen)

As BCGE is a public law entity which serves a public interest, one does in principle need to distinguish administrative assets, the use of which is directly dedicated (*gewidmet*) to public interest tasks (*Verwaltungsvermögen*) and other assets not so dedicated (*Finanzvermögen*). As a rule, no foreclosure would be allowed in administrative assets. And more generally, the application of private law to such administrative assets may be limited to the extent such application would prove incompatible with the continued achievement of such public interest tasks. The grant of a security interest in an administrative asset would, thus, in principle call for a proper revocation of the act by which an asset was specifically dedicated to such public task (*Entwidmung*) and, hence, change of the qualification from an administrative to a financial asset prior to the grant of such security interest. 13

Transactions (other than a Credit Support Document) under a Master Agreement are not in our view of a nature that could be directly dedicated to public interest tasks and, hence, would qualify as financial assets. 14

[58] In such analysis there are good reasons in our view, though, to apply the test on the basis of financial assets (*Finanzvermögen*) as discussed below only.

In the context of a Credit Support Document as per the assumptions made in the ISDA Collateral Opinion as to Eligible Credit Support such Eligible Credit Support consists of directly and indirectly held securities (certificated and uncertificated), cash and money claims, all of which are of a fungible nature and with regard to which again a specific dedication (*Widmung*) to a public interest task, if at all conceivable, would be limited to very extraordinary circumstances. 15

Hence, such Eligible Credit Support provided by BCGE would, but for extraordinary circumstances, qualify as financial assets and therefore not be an administrative asset subject to the limitations discussed herein. We are further of the view that, due to the very nature of these assets, any such dedication (*Widmung*) made by BCGE would be deemed revoked (*Entwidmung*) by BCGE if it were to use such assets as Eligible Credit Support and transfer it to a counterparty. As a result, BCGE or any party claiming on behalf of BCGE could not any longer assert any immunity of such assets transferred to such counterparty as Eligible Credit Support in particular if the counterparty is in good faith relying on an explicit representation and warranty of BCGE that the Eligible Credit Support provided by BCGE does not constitute administrative assets. 16

Based on the above we would recommend to insert a specific representation (see proposed wording set out below), deemed repeated whenever BCGE enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that such Eligible Credit Support does not constitute administrative assets: 17

"Additional representation of [Designation of BCGE]

[Designation of BCGE] represents and such representation shall be deemed repeated whenever [Designation of BCGE] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of BCGE] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of BCGE] and is not subject to any immunity."

It should furthermore be noted that the Swiss Federal Supreme Court has in a case involving a cantonal bank organized as a cantonal public law entity in the form of a *selbständige Anstalt* confirmed that the applicability of private law on administrative assets should only be limited where the achievement of the public interest task would otherwise be frustrated and then held that where, as was the case for this cantonal bank, a public law entity, while serving a public interest, did so in competition with private providers of the same services, the grant of a private legal lien in its banking building (which eventually could lead to foreclosure in such building) could not be rejected on grounds of the banking building's qualification as 18

administrative asset, which qualification the Swiss Federal Supreme Court otherwise specifically accepted. The Swiss Federal Supreme Court thereby considerably narrowed down the immunity of assets of providers of public interest services and for all practical purposes such immunity seems to be eliminated for assets dedicated to public interest services that can be offered by private competitors.

19 In the light of the above, the risk that Eligible Credit Support otherwise duly transferred by BCGE under a Credit Support Document to a counterparty acting in good faith and relying on a specific representation to the contrary would still be qualified as administrative assets with the result of disallowing the security interest or transfer of title for security purposes granted by BCGE therein seems largely academic and remote and can, therefore, in our view be ruled out as a practical matter. There are, however, to our knowledge neither precedents nor doctrine available to the very issue.

4. Conclusions

20 Based on the above our conclusions can be summarized as follows:

21 Subject to the particular status as described above (n. 1-12), which may limit the insolvency procedures available against BCGE and may not give rise to an insolvency event under Section 5a (vii) of the Master Agreement as referred to under n. 12 and the more detailed discussion in the opinion and the recommendation therein to elect Automatic Early Termination, the conclusions reached in this opinion as to the enforceability under Swiss law of the close-out netting and set-off provisions apply to BCGE as such conclusions in the opinion apply to a Bank.

Schedule 3 (*Basler Kantonalbank*)

1. Status of Basler Kantonalbank

Basler Kantonalbank ("**BSKB**") is a public law entity (*selbständige Anstalt des kantonalen öffentlichen Rechts*), established under and governed by Basel Cantonal law, i.e. the Basel Cantonal Bank Act of December 9, 2015[59] (§ 1 Basel Cantonal Bank Act). It has legal personality of its own and has its seat in Basel-Stadt. Its activity is, as specifically addressed in § 2 of the Basel Cantonal Bank Act, that of a universal bank. 1

Its liabilities, other than (i) its participation capital, (ii) subordinate liabilities, (iii) BSKB's liabilities towards subsidiaries and corporations over which BSKB has majority control or towards their creditors or shareholders, (iv) liabilities of subsidiaries and corporations over which BSKB has majority control, are guaranteed subsidiarily by the Canton of Basel pursuant to § 9 of the Basel Cantonal Bank Act. 2

Its banking business is supervised by the Swiss Financial Market Supervisory Authority (the "**FINMA**"). 3

2. Insolvency and Unwinding Regime

Before the amendment of the Swiss Federal Banking Act ("**Banking Act**") as of July 1, 2004, BSKB being a *selbständige öffentlich rechtliche Anstalt* was subject to the general rules of the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**"), but in principle neither subject to bankruptcy (*Konkurs*) nor any of the reorganization procedures (*Nachlassverfahren*), i.e. the liquidation procedures encompassing all of the assets and liabilities pursuant to the SDEBA did not apply as it is not mentioned as qualifying therefor under Art. 39 SDEBA. 4

As a consequence of the amendment of the Banking Act, the reorganization and liquidation procedures set forth in the Banking Act apply to BSKB. Although in our view it seems contrary to the legal system that a public law entity shall be the subject of bankruptcy proceedings, the amended Banking Act does not make any exemptions for such entities. However, given that the explanatory message accompanying the amendment does not comment on this change subjecting a public law entity to general liquidation by bankruptcy, and while we do not deem it likely, it cannot be ruled out that a court would decide that the Banking Act is incomplete and should indeed be deemed to provide for an exemption of public law entities. In such a case, the debt collection against BSKB would need to be taken in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced 5

[59] Gesetz über die Basler Kantonalbank vom 30. Juni 1994, 915.200 as last amended on 9 December 2015, entered into force on 6 June 2016.

realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*).

6 Literature on this point is still very scarce. Two important commentators consider, however, that cantonal banks are fully subject to the Banking Act insolvency proceedings irrespective of whether they would otherwise be subject to the bankruptcy proceedings of the SDEBA or not. [60]

7 As BSKB is fully subject to the banking license requirements of the Banking Act and is according to § 17 of the Basel Cantonal Bank Act under the supervision of the FINMA, it is also subject to a withdrawal of such banking license by the FINMA. The dissolution and liquidation of BSKB as a consequence of such withdrawal of its banking license would also be governed by the Banking Act. Pursuant to what seems to be the predominant view in literature, the procedure for the dissolution itself would be governed by the bankruptcy and liquidation provisions of the Banking Act.

8 Except for the above-mentioned reference to the regulatory provisions in § 17, the Basel Cantonal Bank Act does not address a dissolution and liquidation (solvent or insolvent) of BSKB. The Basel Cantonal legislator could still subsidiarily provide for such dissolution and liquidation, though. Such dissolution and liquidation could not, however, interfere with creditors' rights in a manner incompatible with private law as private law is regulated at the Swiss Federal level and, in our analysis, such dissolution and liquidation should be coordinated with the FINMA as BSKB is subject to FINMA supervision pursuant to § 17 of the Basel Cantonal Bank Act for the withdrawal of the authorization discussed above. Furthermore, as mentioned above, a dissolution and liquidation ordered by the FINMA pursuant to the Banking Act would take precedence.

9 The institution of liquidation proceedings by the FINMA would in our view be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement. However, not all protective measures are covered by an Event of Default under Section 5a (vii) of the Master Agreement.

10 Having said this, to the extent protective measures are granting relief, such measures would be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement, and the appointment of a commissioner for the inquiry of facts (*Untersuchungsbeauftragter*) by the FINMA should be covered by the Event of Default of Section 5a (vii) (6) of the Master Agreement. Whether the implementation of reorganization proceedings qualifies as an Event

[60] This view has been taken as well in a most recent doctorate thesis, with the further distinction, that while FINMA can order a bankruptcy in accordance with Art. 33 of the Banking Act, creditors of a Cantonal Bank that is established as a public law establishment or corporation can only initiate the debt collection in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*).

of Default under Section 5a (vii) of the Master Agreement depends on the restructuring measures taken. However, one might argue that the appointment of a reorganization commissioner (*Sanierungsbeauftragter*) would suffice to trigger as an Event of Default under Section 5a (vii) (6) of the Master Agreement.

11 Further, in case of financial difficulties, including lack of adequate equity or over-indebtedness of BSKB not timely resolved by it or the Canton of Basel, the FINMA would in our view need to withdraw the banking license and the order to dissolve and liquidate BSKB as a consequence thereof would be covered by Section 5a (vii) (1) and/or (5) and, in addition, the institution of any of the aforementioned procedures could also evidence an inability to pay debts when they become due within the meaning of Section 5a (vii) (2). Finally, a dissolution with ensuing liquidation of BSKB by act of the Basel Cantonal legislator would also fall under Section 5a (vii) (1) and/or (5) (see drafting suggestions in Annex 3 of the ISDA Netting Opinion).

12 In case BSKB were to be considered exempt from the rules of the Banking Act with respect to bankruptcy, the seizure (*Pfändung*) and the foreclosure of assets granted as collateral (*Betreibung auf Pfandverwertung*), as mentioned above, would have to go against singular assets and, hence, would in our view not be covered by the Events of Default of Section 5a (vii) of the Master Agreement, unless such proceedings went against all or substantially all of BSKB's assets[61] as provided in (7) of such Section 5a (vii).

3. Administrative Assets (Verwaltungsvermögen) and Financial Assets (Finanzvermögen)

13 As BSKB is a public law entity which serves a public interest, one does in principle need to distinguish administrative assets, the use of which is directly dedicated (*gewidmet*) to public interest tasks (*Verwaltungsvermögen*) and other assets not so dedicated (*Finanzvermögen*). As a rule, no foreclosure would be allowed in administrative assets. And more generally, the application of private law to such administrative assets may be limited to the extent such application would prove incompatible with the continued achievement of such public interest tasks. The grant of a security interest in an administrative asset would, thus, in principle call for a proper revocation of the of the act by which an asset was specifically dedicated to such public task (*Entwidmung*) and, hence, change of the qualification from an administrative to a financial asset prior to the grant of such security interest.

14 Transactions (other than a Credit Support Document) under a Master Agreement are not in our view of a nature that could be directly dedicated to public interest tasks and, hence, would

[61] In such analysis there are good reasons in our view, though, to apply the test on the basis of financial assets (*Finanzvermögen*) as discussed below only.

qualify as financial assets.

15 In the context of a Credit Support Document as per the assumptions made in the ISDA Collateral Opinion as to Eligible Credit Support such Eligible Credit Support consists of directly and indirectly held securities (certificated and uncertificated), cash and money claims, all of which are of a fungible nature and with regard to which again a specific dedication (*Widmung*) to a public interest task, if at all conceivable, would be limited to very extraordinary circumstances.

16 Hence, such Eligible Credit Support provided by BSKB would, but for extraordinary circumstances, qualify as financial assets and therefore not be an administrative asset subject to the limitations discussed herein. We are further of the view that, due to the very nature of these assets, any such dedication (*Widmung*) made by BSKB would be deemed revoked (*Entwidmung*) by BSKB if it were to use such assets as Eligible Credit Support and transfer it to a counterparty. As a result, BSKB or any party claiming on behalf of BSKB could not any longer assert any immunity of such assets transferred to such counterparty as Eligible Credit Support in particular if the counterparty is in good faith relying on an explicit representation and warranty of BSKB that the Eligible Credit Support provided by BSKB does not constitute administrative assets.

17 Based on the above we would recommend to insert a specific representation (see proposed wording set out below), deemed repeated whenever BSKB enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that such Eligible Credit Support does not constitute administrative assets:

"Additional representation of [Designation of BSKB]

[Designation of BSKB] represents and such representation shall be deemed repeated whenever [Designation of BSKB] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of BSKB] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of BSKB] and is not subject to any immunity."

18 It should furthermore be noted that the Swiss Federal Supreme Court has in a case involving a cantonal bank organized as a cantonal public law entity in the form of a *selbständige Anstalt* confirmed that the applicability of private law on administrative assets should only be limited where the achievement of the public interest task would otherwise be frustrated and then held that where, as was the case for this cantonal bank, a public law entity, while serving a public interest, did so in competition with private providers of the same services, the grant of a private legal lien in its banking building (which eventually could lead to foreclosure in such

building) could not be rejected on grounds of the banking building's qualification as administrative asset, which qualification the Swiss Federal Supreme Court otherwise specifically accepted. The Swiss Federal Supreme Court thereby considerably narrowed down the immunity of assets of providers of public interest services and for all practical purposes such immunity seems to be eliminated for assets dedicated to public interest services that can be offered by private competitors.

19 In the light of the above, the risk that Eligible Credit Support otherwise duly transferred by BSKB under a Credit Support Document to a counterparty acting in good faith and relying on a specific representation to the contrary would still be qualified as administrative assets with the result of disallowing the security interest or transfer of title for security purposes granted by BSKB therein seems largely academic and remote and can, therefore, in our view be ruled out as a practical matter. There are, however, to our knowledge neither precedents nor doctrine available to the very issue.

4. Conclusions

20 Based on the above our conclusions can be summarized as follows:

21 Subject to the particular status as described above (n. 1-12), which may limit the insolvency procedures available against BSKB and may not give rise to an insolvency event under Section 5a (vii) of the Master Agreement as referred to under n. 12 and the more detailed discussion in the opinion and the recommendation therein to elect Automatic Early Termination, the conclusions reached in this opinion as to the enforceability under Swiss law of the close-out netting and set-off provisions apply to BSKB as such conclusions in the opinion apply to a Bank.

Schedule 4 (*Zürcher Kantonalbank*)

1. Status of Zürcher Kantonalbank

Zürcher Kantonalbank ("**ZKB**") is a public law entity (*selbständige Anstalt des kantonalen öffentlichen Rechts*), established under and governed by Zurich Cantonal law, i.e. the Zurich Cantonal Bank Act of September 28, 1997[62] (§ 1 Zurich Cantonal Bank Act). It has legal personality of its own and has its seat in Zurich. Its activity is, as specifically addressed in § 7 of the Zurich Cantonal Bank Act, that of a universal bank. 1

Its liabilities, other than obligations under its subordinated debt, are guaranteed by the Canton of Zurich pursuant to § 6 of the Zurich Cantonal Bank Act. 2

Its banking business is supervised by the Swiss Financial Market Supervisory Authority (the "**FINMA**"). 3

2. Insolvency and Unwinding Regime

Before the amendment of the Swiss Federal Banking Act ("**Banking Act**") as of July 1, 2004, ZKB being a *selbständige Anstalt des kantonalen öffentlichen Rechts* was subject to the general rules of the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**"), but in principle neither subject to bankruptcy (*Konkurs*) nor any of the reorganization procedures (*Nachlassverfahren*), i.e. the liquidation procedures encompassing all of the assets and liabilities pursuant to the SDEBA did not apply as it is not mentioned as qualifying therefor under Art. 39 SDEBA. 4

As a consequence of the amendment of the Banking Act, the reorganization and liquidation procedures set forth in the Banking Act apply to ZKB. Although in our view it seems contrary to the legal system that a public law entity shall be the subject of bankruptcy proceedings, the amended Banking Act does not make any exemptions for such entities. However, given that the explanatory message accompanying the amendment does not comment on this change subjecting a public law entity to general liquidation by bankruptcy, and while we do not deem it likely, it cannot be ruled out that a court would decide that the Banking Act is incomplete and should indeed be deemed to provide for an exemption of public law entities. In such a case, the debt collection against ZKB would need to be taken in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*). 5

Literature on this point is still very scarce. Two important commentators consider, however, that cantonal banks are fully subject to the Banking Act insolvency proceedings irrespective 6

[62] Kantonalbankgesetz vom 28. September 1997, 951.1.

of whether they would otherwise be subject to the bankruptcy proceedings of the SDEBA or not.[63]

As ZKB is fully subject to the banking license requirements of the Banking Act and is under the supervision of the FINMA, it is also subject to a withdrawal of such banking license by the FINMA. The dissolution and liquidation of ZKB as a consequence of such withdrawal of its banking license would also be governed by the Banking Act. Pursuant to what seems to be the predominant view in literature, the procedure for the dissolution itself would be governed by the bankruptcy and liquidation provisions of the Banking Act. 7

The Zurich Cantonal Bank Act does not address a dissolution (solvent or insolvent) of ZKB. If the Zurich Cantonal legislator would proceed to a dissolution, though, such dissolution could not interfere with creditors' rights in a manner incompatible with private law as private law is regulated at the Swiss Federal level and, in our analysis, should be coordinated with the FINMA. Furthermore, as mentioned above, a dissolution and liquidation pursuant to the Banking Act would take precedence. 8

The institution of liquidation proceedings by the FINMA would in our view be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement. However, not all protective measures are covered by an Event of Default under Section 5a (vii) of the Master Agreement. 9

Having said this, to the extent protective measures are granting relief, such measures would be covered by the Event of Default of Section 5a (vii) (4) (A) of the Master Agreement, and the appointment of a commissioner for the inquiry of facts (*Untersuchungsbeauftragter*) by the FINMA should be covered by the Event of Default of Section 5a (vii) (6) of the Master Agreement. Whether the implementation of reorganization proceedings qualifies as an Event of Default under Section 5a (vii) of the Master Agreement depends on the restructuring measures taken. However, one might argue that the appointment of a reorganization commissioner (*Sanierungsbeauftragter*) would suffice to trigger as an Event of Default under Section 5a (vii) (6) of the Master Agreement. 10

Further, in case of financial difficulties, including lack of adequate equity or over-indebtedness of ZKB not timely resolved by it or the Canton of Zurich, the FINMA would in our view need to withdraw the banking license and the order to dissolve and liquidate ZKB as a consequence thereof would be covered by Section 5a (vii) (1) and/or (5) and, in addition, the institution of any of the aforementioned procedures could also evidence an inability to 11

[63] This view has been taken as well in a most recent doctorate thesis, with the further distinction, that while FINMA can order a bankruptcy in accordance with Art. 33 of the Banking Act, creditors of a Cantonal Bank that is established as a public law establishment or corporation can only initiate the debt collection in the form of seizure (*Betreibung auf Pfändung*) of singular assets subject to forced realization or foreclosure of such assets granted as collateral (*Betreibung auf Pfandverwertung*).

pay debts when they become due within the meaning of Section 5a (vii) (2). Finally, a dissolution with ensuing liquidation of ZKB by act of the Zurich Cantonal legislator would also fall under Section 5a (vii) (1) and/or (5) (see drafting suggestions in Annex 3 of the ISDA Netting Opinion).

12 In case ZKB were to be considered exempt from the rules of the Banking Act with respect to bankruptcy, the seizure (*Pfändung*) and the foreclosure of assets granted as collateral (*Betreibung auf Pfandverwertung*), as mentioned above, would have to go against singular assets and, hence, would in our view not be covered by the Events of Default of Section 5a (vii) of the Master Agreement, unless such proceedings went against all or substantially all of ZKB's assets[64] as provided in (7) of such Section 5a (vii).

3. Administrative Assets (Verwaltungsvermögen) and Financial Assets (Finanzvermögen)

13 As ZKB is a public law entity which serves a public interest, one does in principle need to distinguish administrative assets, the use of which is directly dedicated (*gewidmet*) to public interest tasks (*Verwaltungsvermögen*) and other assets not so dedicated (*Finanzvermögen*). As a rule, no foreclosure would be allowed in administrative assets. And more generally, the application of private law to such administrative assets may be limited to the extent such application would prove incompatible with the continued achievement of such public interest tasks. The grant of a security interest in an administrative asset would, thus, in principle call for a proper revocation of the the act by which an asset was specifically dedicated to such public task (*Entwidmung*) and, hence, change of the qualification from an administrative to a financial asset prior to the grant of such security interest.

14 Transactions (other than a Credit Support Document) under a Master Agreement are not in our view of a nature that could be directly dedicated to public interest tasks and, hence, would qualify as financial assets.

15 In the context of a Credit Support Document as per the assumptions made in the ISDA Collateral Opinion as to Eligible Credit Support such Eligible Credit Support consists of directly and indirectly held securities (certificated and uncertificated), cash and money claims, all of which are of a fungible nature and with regard to which again a specific dedication (*Widmung*) to a public interest task, if at all conceivable, would be limited to very extraordinary circumstances.

[64] In such analysis there are good reasons in our view, though, to apply the test on the basis of financial assets (*Finanzvermögen*) as discussed below only.

Hence, such Eligible Credit Support provided by ZKB would, but for extraordinary circumstances, qualify as financial assets and therefore not be an administrative asset subject to the limitations discussed herein. We are further of the view that, due to the very nature of these assets, any such dedication (*Widmung*) made by ZKB would be deemed revoked (*Entwidmung*) by ZKB if it were to use such assets as Eligible Credit Support and transfer it to a counterparty. As a result, ZKB or any party claiming on behalf of ZKB could not any longer assert any immunity of such assets transferred to such counterparty as Eligible Credit Support in particular if the counterparty is in good faith relying on an explicit representation and warranty of ZKB that the Eligible Credit Support provided by ZKB does not constitute administrative assets. 16

Based on the above we would recommend to insert a specific representation (see proposed wording set out below), deemed repeated whenever ZKB enters into a Transaction or transfers Eligible Credit Support under the Credit Support Document, that such Eligible Credit Support does not constitute administrative assets: 17

"Additional representation of [Designation of ZKB]

[Designation of ZKB] represents and such representation shall be deemed repeated whenever [Designation of ZKB] enters into a Transaction under the Agreement, that all Transactions and any [Eligible Credit Support] provided by [Designation of ZKB] under a [Credit Support Document] constitutes financial (Finanzvermögen) rather than administrative assets (Verwaltungsvermögen) of [Designation of ZKB] and is not subject to any immunity."

It should furthermore be noted that the Swiss Federal Supreme Court has in a case involving a cantonal bank organized as a cantonal public law entity in the form of a *selbständige Anstalt* confirmed that the applicability of private law on administrative assets should only be limited where the achievement of the public interest task would otherwise be frustrated and then held that where, as was the case for this cantonal bank, a public law entity, while serving a public interest, did so in competition with private providers of the same services, the grant of a private legal lien in its banking building (which eventually could lead to foreclosure in such building) could not be rejected on grounds of the banking building's qualification as administrative asset, which qualification the Swiss Federal Supreme Court otherwise specifically accepted. The Swiss Federal Supreme Court thereby considerably narrowed down the immunity of assets of providers of public interest services and for all practical purposes such immunity seems to be eliminated for assets dedicated to public interest services that can be offered by private competitors. 18

In the light of the above, the risk that Eligible Credit Support otherwise duly transferred by ZKB under a Credit Support Document to a counterparty acting in good faith and relying on a specific representation to the contrary would still be qualified as administrative assets with the result of disallowing the security interest or transfer of title for security purposes granted by ZKB therein seems largely academic and remote and can, therefore, in our view be ruled out as a practical matter. There are, however, to our knowledge neither precedents nor doctrine available to the very issue. 19

4. Conclusions

Based on the above our conclusions can be summarized as follows: 20

Subject to the particular status as described above (n. 1-12), which may limit the insolvency procedures available against ZKB and may not give rise to an insolvency event under Section 5a (vii) of the Master Agreement as referred to under n. 12 and the more detailed discussion in the opinion and the recommendation therein to elect Automatic Early Termination, the conclusions reached in this opinion as to the enforceability under Swiss law of the close-out netting and set-off provisions apply to ZKB as such conclusions in the opinion apply to a Bank. 21