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## PRAG

THOMAS MÜLLER

Frankfurt am Main, February 12, 2001

Dear Mr. Pickel,

### The ISDA Master Agreements Strategic Documentation Review Queries

We refer to your letter dated November 21, 2000 requesting our advice regarding certain aspects of ISDA's Strategic Documentation Review.

Our advice set forth below relates to our memorandum of law for the ISDA on the enforceability of close-out netting under the ISDA Master Agreements in German law dated November 12, 1999, as updated by our letter dated January 26, 2001 (the "ISDA Netting Memorandum"). This letter is subject to the same assumptions and limitations as the ISDA Netting Memorandum and may be relied upon only for the purposes expressly set forth therein. Terms defined in the ISDA Netting Memorandum bear the same meaning in this letter.

#### 1. Changes to Sections 5 and 6 of the ISDA Master Agreement

We confirm that the amendment of Sections 5 and 6 of the ISDA Master Agreements by the eight annexes attached as Appendix A to your letter would not affect the conclusions reached in our ISDA Netting Memorandum.

2. Force Majeure provisions

We confirm that the inclusion of the annex addressing the occurrence of force majeure and impossibility events, which is attached as Appendix B to your letter, in the ISDA Master Agreements would not affect the conclusions reached in our ISDA Netting Memorandum.

3. Use of the Cross-Product Master Agreement and ISDA's development of a Cross Product Bridging Annex

We confirm that the three amendments to the ISDA Master Agreements set forth in Appendix C attached to your letter which may be effected by the Cross-Product Master Agreement would not affect the conclusions reached in our ISDA Netting Memorandum.

We further confirm that the inclusion of any of the master agreements set forth in Appendix D-2 attached to your letter under the draft ISDA Cross-Product Bridging Annex, which is attached as Appendix D-1 to your letter, would not affect the conclusions reached in our ISDA Netting Memorandum.

4. Additional types of transactions under the ISDA Master Agreement

Where types of transactions described in Appendix E-2 (the "Transactions") to your letter were entered into under the ISDA Master Agreements, the conclusions reached in our ISDA Netting Memorandum would be affected as follows:

(A) In respect of the 1992 Agreements:

1. Assuming the parties to an Agreement have selected "Automatic Early Termination" upon the Events of Default specified in Section 6(a), second sentence, to apply to the German party, and assuming further that the Early Termination Date falls *before* the institution of the proceedings, then the inclusion of any of the Transactions in such Agreement would not affect the conclusions reached in our ISDA Netting Memorandum.
2. Assuming that the parties to an Agreement have not selected "Automatic Early Termination" upon the Events of Default specified in Section 6(a), second sentence, to apply to the German party, the legal position is as follows:
  - (i) If the Early Termination Date falls *before* the institution of Insolvency Proceedings over the assets of the German Party, then the inclusion of any of the Transactions in an 1992 Agreement would not affect the conclusions reached in our ISDA Netting Memorandum.
  - (ii) If the Early Termination Date falls *on or after* the date on which Insolvency Proceedings are instituted over the assets of the German Party, the legal regime applicable on the Transactions included in an Agreement depends on whether such Transactions qualify for master agreements under § 104(2) Insolvency Code.

Credit Spread Transactions do so qualify. They constitute "financial transactions" within the meaning of § 104(2), second sentence, no. 4 Insolvency Code, being transactions relating to "payments the amount of which is determined, directly or

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indirectly, by the price of any foreign currency or any currency unit or the rate of interest on money claims or the price of other goods or services." (emphasis supplied)

Repurchase Transactions also qualify, as a rule. They fall in our view under § 104(2), second sentence, no. 2 Insolvency Code. We note that this not free from doubt in respect of Repurchase Transactions which are driven by the Seller's need to borrow money ("general collateral" as opposed to "special" repo transactions).

However, Repurchase Transactions do not qualify as financial transactions within the meaning of § 104(2) Insolvency Code if they are not dated. Repurchase Transactions entered into for an undetermined period of time or transactions for which performance is due upon the giving of notice, are beyond the scope of application of § 104(2) Insolvency Code. Although the matter is not entirely free from doubt, Repurchase Transactions terminable on demand should in our opinion be viewed as dated transactions within the meaning of § 104(2) Insolvency Code to the extent that the master agreements provides for a definitive date on which the securities have to be returned if a demand notice has not been given.

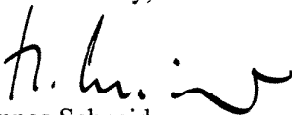
What has been said in respect of Repurchase Transactions applies to Buy/Sell-Back Transactions *mutatis mutandis*.

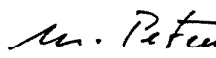
Securities Lending Transactions qualify likewise. They fall in our view under § 104(2), second sentence, no. 2 Insolvency Code.

Assuming that Physical Commodity Transactions do not comprise transactions in precious metals (gold, silver, platinum and palladium), Physical Commodity Transactions do not qualify for termination by operation of law under § 104(2) Insolvency Code.

- (iii) In respect of those Transactions that qualify for master agreements under § 104(2) Insolvency Code as discussed under (ii) above, close-out and liquidation of the Transactions will be governed by § 104(3) Insolvency Code. In respect of Transactions that do not so qualify, close-out and liquidation will be governed by the provisions of the Agreement.
- (B) In respect of the 1987 Agreements:
  - 3. The inclusion of any of the Transactions in an 1987 Agreement would not affect the conclusions reached in our ISDA Netting Memorandum.

Yours sincerely,

  
Hannes Schneider

  
Martin Peters