Shearn Delamore &co.

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MEMORANDUM OF LAW ON VALIDITY AND ENFORCEABILITY UNDER MALAYSIAN LAW OF COLLATERAL ARRANGEMENTS UNDER THE ISDA CREDIT SUPPORT DOCUMENTS

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INTRODUCTION

In this Memorandum, we set out our responses on the validity and enforcement under the laws of Malaysia of collateral arrangements entered into under:

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

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

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

published by the International Swaps and Derivatives Association, Inc ("**ISDA**") in each case, when entered into to provide credit support for transactions ("**Transactions**") entered into pursuant to an ISDA master agreement (the "**Master Agreement**").[1]

A capitalized term used herein shall have the meaning ascribed to such term in the Master Agreement or the relevant Credit Support Document, as applicable, unless otherwise stated.

In this Memorandum:

(a) in relation to the Security Documents, the term "**Security Collateral Provider**" shall refer to the Pledgor (under the NY Annex) or the Chargor (under the Deed), as the context requires; and

(b) "**Collateral Provider**" means the Security Collateral Provider under a Security Document or the Transferor under the Transfer Annex, according to the context, in relation to which "**Collateral Taker**" means the Secured Party or the Transferee, as the case may be.

The term "**Collateral**", when used in this Memorandum, is meant to refer, in the case of each Security Document, to any assets in which a security interest is created by the Security Collateral Provider in favour of the Secured Party and, in the case of the Transfer Annex, to any securities transferred as credit support or cash ~~transferred~~deposited, in either case, by the Transferor to or with the Transferee, as credit support for the obligations of the Collateral Provider under the relevant Master Agreement.

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

This Memorandum is limited to matters of Malaysian law (other than (i) the State laws applicable in Sarawak or Sabah; (ii) laws specifically relating to *Shariah* compliant entities; and (iii) laws applicable to

[1] Although the various master agreements published by ISDA include (i) the 1987 Interest Rate Swap Agreement, (ii) the 1987 Interest Rate and Currency Exchange Agreement, (iii) the 1992 ISDA Master Agreement (Multicurrency – Cross Border), (iv) the 1992 ISDA Master Agreement (Local Currency – Single Jurisdiction) and (v) the 2002 ISDA Master Agreement, the differences among the forms are not relevant to the matters covered in this Memorandum.

the Labuan International Business and Financial Centre[2]) of general application in force as at the date of this Memorandum and as currently applied by the Malaysian courts and does not consider the effect of any laws other than Malaysian law and we have assumed that no law of a jurisdiction other than Malaysia adversely affects the conclusions in this Memorandum. We do not specifically refer to any regulatory requirement issued by any Malaysian regulator that is not publicly available or applicable generally.

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

We refer to our Memorandum of Law dated ~~30 July 2015~~20 June 2018 to ISDA on the validity and enforceability under Malaysian law of close-out netting under the Master Agreement (the "**Netting Opinion"**).

Scope of Counterparty Types

Each of the "**Collateral Provider**" is a counterparty falling within the counterparty types set out in **Appendix B** (Certain Counterparty Types) dated September 2009, and marked as covered by this Memorandum, namely:

(a) a Bank/Credit Institution ~~("**Bank**")~~, if incorporated or deemed registered in Malaysia under the Companies Act ~~1965~~2016 ("**Companies Act**")[3], and is licensed under the Financial Services Act 2013 ("**FSA**") to carry on banking business ("**Bank**"), which excludes investment banks licensed under the FSA (each an "investment bank" covered under Investment Firm/Broker Dealer), development financial institutions and Islamic banks[4].

(b) a Corporation, if incorporated or deemed registered as a company ~~incorporated~~ under the Companies Act conducting general business ("~~Company~~**company**") excluding insurance ~~Companies, Companies~~companies, companies conducting regulated businesses other than a

[2] Malaysia has established the Labuan International Business and Financial Centre ("**Labuan IBFC**") in the Federal Territory of Labuan ("**Labuan**") pursuant to specific federal laws. The Labuan IBFC laws apply only to entities established under the specific laws applicable to the Labuan IBFC, carrying on business in or through Labuan or outside Malaysia. This Memorandum does not cover the laws applicable solely to the Labuan IBFC. We also do not discuss the requirements and regulations of the Labuan International Financial Exchange ("**LFX**"), the offshore financial exchange based in Labuan, hence we have not considered the situation where the debt securities are listed on the LFX.

[3] Labuan companies are incorporated under the Labuan Companies Act 1990, which is a law applicable to the Labuan IBFC. ~~Except in relation to question 6, we do not address the laws specifically applying to the Labuan IBFC.~~

[4] So we do not consider laws regulating *Shariah* compliant business in this Memorandum.

Bank or an Investment Firm, sovereign wealth funds and ~~Companies~~companies whose corporate powers or business are affected or regulated by statute (each a "**Company**").

(c) an Investment Firm/Broker Dealer, if incorporated or deemed registered in Malaysia under the Companies Act and holds a licence to carry on business in dealing in derivatives and dealing in securities, including investment banks (an "**Investment Firm**").

Each counterparty in the abovestated classes may be subject to restrictions in its constituent documents and to legal or regulatory requirements (for example, foreign exchange administration requirements) that may affect the legality or validity of any Credit Support Document it enters into. Such issues are not considered in this Memorandum.

In this Memorandum, we do not consider any other type of entity existing or incorporated under Malaysian law, whether or not falling within any description in Appendix B including, without limitation, general partnerships, limited partnerships, limited liability partnerships and natural persons.

Assumptions

We make the following assumptions throughout this Memorandum:

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

(2) Each of the parties to a Master Agreement and Credit Support Document who is carrying on, or purporting to carry on, any regulated activity in Malaysia is duly licensed under, or is an entity exempted from, the licensing requirements in Malaysia for such regulated activity.

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

(4) The terms of a Master Agreement, including each Transaction under the Master Agreement, and the Credit Support Document are agreed at arms' length by the parties so that no element of gift or undervalue from one party to the other party is involved.

(5) At the time of entry into a Master Agreement and the Credit Support Document, neither party is insolvent at the time of entering into the Master Agreement or the Credit Support Document or becomes insolvent as a result of entering into either document.

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

(7) All approvals required under the laws of Malaysia have been obtained by the Collateral Provider for the entry by the Collateral Provider into the Master Agreement, the Credit Support Document and for the performance of its obligations thereunder and such approvals remain in full force and effect.

(8) The parties do not intend, nor will they by their conduct show, that the transactions or their performance of their obligations under a Credit Support Document to be (a) otherwise than

as in accordance with the provisions of that Credit Support Document, (b) fraudulent or (c) a sham to avoid the restrictions or prohibitions of the laws of Malaysia.

FACT PATTERNS

As requested, we will distinguish between the following three fact patterns:

I The Location of the Collateral Provider is in Malaysia and the Location of the Collateral is outside Malaysia.

II The Location of the Collateral Provider is in Malaysia and the Location of the Collateral is in Malaysia.

III The Location of the Collateral Provider is outside Malaysia and the Location of the Collateral is in Malaysia.

For the foregoing purposes:

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

(b) the "**Location**" of Collateral is the place where an asset of that type is located under the private international law rules of Malaysia.

"**Located**" when used below in relation to a Collateral Provider or any Collateral should be construed accordingly.

We have considered the three fact patterns in our analysis below and, unless expressly stated otherwise, our responses would apply to all three fact patterns.

PART I

SECURITY INTEREST APPROACH PURSUANT TO THE SECURITY DOCUMENTS

Introduction

Our conclusions in this Part I in relation to a Company apply in relation to:

(a) a Bank, as modified and supplemented by Annex 1; and

(b) an ~~Investment Firm~~investment bank, as modified and supplemented by Annex 2.

Assumptions relating to the Security Documents

In addition to the above assumptions, as requested we make the following assumptions:

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

(b) Although each Security Document is a bilateral form in that it contemplates that either party may be required to post Collateral to the other depending on movements in Exposure under

the relevant Security Document, we assume, for the sake of simplicity, that the same party is the Security Collateral Provider at all relevant times under the applicable Security Document.

(c) The party or parties that is Located in Malaysia is one of those counterparty types set out in **Appendix B** (Certain Counterparty Types) dated September 2009, and marked as covered by this Memorandum.

(d) Each Master Agreement and each Security Document is enforceable under the laws of New York or England, as the case may be, and that each party has duly authorized, executed and delivered, and has the capacity to enter, into each document. We also assume that the choice of the State of New York or English law in a Master Agreement or a Security Document is made in good faith and will not contravene any applicable law or public policy in Malaysia.

(e) No provision of the Master Agreement and the relevant Security Document has been altered in any material respect. The selections contemplated by the Master Agreement or the relevant Security Document would not, in our view, constitute material alterations, except where expressly otherwise stated in this Memorandum.

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

(g) Any securities provided as Eligible Collateral are denominated in ringgit or any freely convertible currency and consist of (i) corporate debt securities, whether or not the issuer is organized or located in Malaysia; (ii) debt securities issued by the government of Malaysia; and (iii) debt securities issued by the government of a member of the "G-10" group of countries in one of the following forms[5]:

(i) directly held bearer debt securities: by this we mean debt securities issued in certificated form, in bearer form (meaning that ownership is transferable by delivery of possession of the certificate) and, when held by a Secured Party as Collateral under a Security Document, held directly in this form by the Secured Party (that is, not held by the Secured Party indirectly with an Intermediary (as defined below));

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

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

[5] No analysis of the legality or validity of security interest over securities issued by corporations that are traded and listed on the stock market of Bursa Malaysia Securities Bhd is included in this Memorandum. Such listed securities are traded on a scripless basis under specific laws and rules of the approved central depositary which also regulate the manner in which securities subject to security may be held.

(iv) intermediated debt securities: by this we mean a form of interest in debt securities recorded in fungible book-entry form in an account maintained by a financial intermediary (which could be a ~~Central Securities Depositary~~central securities depositary ("**CSD**") or a custodian, nominee or other form of financial intermediary, in each case an "**Intermediary**") in the name of the Secured Party where such interest has been credited to the account of the Secured Party in connection with a transfer of Collateral by the Security Collateral Provider to the Secured Party under a Security Document.

The Secured Party's Intermediary may itself hold its interest in the relevant debt securities indirectly with another Intermediary or directly in one of the three forms mentioned in (i), (ii) and (iii).

(h) Cash Collateral will be denominated in a freely convertible currency and is held in an account under the control of the Secured Party. As ringgit is not freely convertible outside Malaysia, cash Collateral denominated in ringgit may only be located in Malaysia under Malaysian law. Each of the Collateral Provider and the Collateral Taker has complied, and will comply, with the foreign exchange administration ("**FEA**") requirements in respect of its ringgit account held in Malaysia, or dealings in ringgit.

(i) Pursuant to the terms and conditions of the Master Agreement, the Security Collateral Provider enters into a number of Transactions with the Secured Party. Such Transactions include any or all of the Transactions described in **Appendix A**.

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

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

Questions relating to the Security Documents

Validity of Security Interests

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

Under Malaysian conflict of laws, the law governing the contractual aspects of a security interest in the various forms of Eligible Collateral is the governing law of the relevant Security Document.

A Malaysian court would recognize the validity of a security interest created in respect of the various forms of Eligible Collateral under each Security Document provided the Security Document does not contravene any law or public policy of Malaysia.

2. ***Under the laws of your jurisdiction, what law governs the proprietary aspects of a security interest (that is, the formalities required to protect a security interest in Collateral against competing claims) granted by the Security Collateral Provider under each Security Document (for example, the law of the jurisdiction of incorporation or organization of the Security Collateral Provider, the jurisdiction where the Collateral is located, or the jurisdiction of location of the Secured Party's Intermediary in relation to Collateral in the form of indirectly held securities)? What factors would be relevant to this question? Where the location (or deemed location) of the Collateral is the determining factor, please briefly describe the principles governing such determination under the laws of your jurisdiction with respect to the different types of Collateral. In particular, please describe how the laws of your jurisdiction apply to each form in which securities Collateral may be held as described in assumption (g) above.***

Under the conflict of law principles of Malaysia, the law governing the proprietary aspects of a security interest would be the law of the jurisdiction where the Collateral is situated (the *lex situs*). Hence, the security interest would have to be perfected in accordance with the *lex situs* of the Collateral.

As there has yet to be any judicial consideration in Malaysia of how the different forms of Collateral should be categorized and how their location is to be determined, we are of the view that the *lex situs* of the following forms of Collateral are as follows:

(i) directly held bearer debt securities: where the certificate of title to the bearer debt securities is located;

(ii) directly held registered debt securities: where the register is kept;

(iii) directly held dematerialised debt securities: where the depository is established and where it keeps the account in which the entitlements of the depositors are recorded;

(iv) intermediated debt securities: in respect of an Intermediary, where it keeps the account in which the entitlements of the depositors are recorded: this scenario is particularly uncertain; and

(v) cash Collateral: where the cash is held, that is, the location of the account in which the cash is deposited.

In addition to any perfection requirements in the jurisdiction of the *lex situs*, Malaysian law requirements relating to registration of charges may apply: please see our response to question 5 below.

3. ***Would the courts of your jurisdiction recognize a security interest in each type of Eligible Collateral created under each Security Document? In answering this question,***

please bear in mind the different forms in which securities Collateral may be held, as described in assumption (g) above. Please indicate in relation to cash Collateral if your answer depends on the location of the account in which the relevant deposit obligations are recorded and/or upon the currency of those obligations.

The courts of Malaysia would recognize a security interest given over each of the various forms of debt securities provided as Eligible Collateral, assuming that the security interest is valid under the governing law of the Security Document and has been properly perfected in accordance with the laws of the applicable jurisdictions where the choice of law of the Security Document is upheld by the court (as in the response to question 19 below) including, where located in Malaysia, under the laws of Malaysia (as set out in our response to question 5 below).

With respect to cash Collateral deposited with the Secured Party, the position is the same as above. The location of the account in which cash Collateral is held and currency are relevant to public policy considerations in Malaysia. Bank Negara Malaysia ("**BNM**") prohibits under the FEA requirements persons from engaging in any dealing or transaction with specified persons (as defined in BNM's Direction on Dealings with Specified Persons and in Restricted Currencies), or using or involving the currency of Israel except with BNM's prior written approval.

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

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

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

   (c) is there any difficulty with the concept of creating a security interest over a fluctuating pool of assets, for example, by reason of the impossibility of identifying in the Security Documents the specific assets transferred by way of security?

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

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

   Malaysian law permits the amount secured or the amount of Eligible Collateral subject to the security interest to fluctuate under the Master Agreement and the relevant Security Document (including as a result of entering into additional Transactions under the Master Agreement from time to time) where such fluctuation is provided for in the terms of the relevant contract.

In response to the specific queries above-

(a) the security interest will be valid when perfected (please see our response to question 5 on perfection of security interest) in relation to the future obligations of the Security Collateral Provider when the obligations arise in the future provided that such obligations can be identified as they arise by reference to the provisions of the Security Document.

(b) the security interest would be valid in relation to future Collateral if the Security Document provides that the security interest would extend to any Eligible Collateral not yet delivered to the Secured Party at the time of entry into the relevant Security Document, provided the perfection requirements (as set out in question 5) are complied with.

(c) there is no difficulty under Malaysian law with the concept of creating a security interest over a fluctuating pool of assets provided that at any specific time the pool of Collateral could be clearly identified.

(d) the amount secured by each Security Document need not be a fixed amount or subject to a fixed maximum amount.

(e) it is permissible under the laws of Malaysia for the Secured Party to hold Collateral in excess of its actual exposure to the Security Collateral Provider under the related Master Agreement if so agreed between the parties.

5. ***Assuming that the courts of your jurisdiction would recognize the security interest in each type of Eligible Collateral created under each Security Document, is any action (filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required in your jurisdiction to perfect that security interest? If so, please indicate what actions must be taken and how such actions may differ depending on the type of Eligible Collateral in question.***

As there is no precise definition of perfection of a security interest, our response below sets out the requirements under Malaysian law to render the security interest over Eligible Collateral valid and effective as against third parties.

The requirements for perfection of a security interest depend on various factors, including the nature of the security interest (mortgage, charge, pledge, contractual lien), the nature and location of the Collateral, and nature and/or location of the Security Collateral Provider. On the assumptions made in this Memorandum, we only address perfection requirements in relation to Collateral located in Malaysia.

Registration under the Companies Act

In addition to the perfection requirements under the governing law of the Security Document and, where applicable, the *lex situs* of the Collateral, a Security Collateral Provider that is a Malaysian company, or a foreign entity providing security through its Malaysian branch over property in Malaysia, has to comply with the registration requirement under the Companies Act where the security interest is registrable under section ~~108~~353 of the Companies Act.

The security interest created under a Security Document (including an agreement to charge) would need to be registered within 30 days after creation if it is, among others:

(a) a charge to secure any issue of debentures;

(b) a charge on shares of a subsidiary owned by the Security Collateral Provider;

(b) a floating charge on the undertaking or property of the Security Collateral Provider that includes securities and cash;

(c) a charge on book debts of the Security Collateral Provider; or

(d) a charge on the credit balance in any deposit account (referring to cash Collateral).

Where the Security Document is executed outside Malaysia by the company, the period for registration is extended by seven days.

If not registered, a registrable charge over the Collateral shall be void as against the liquidator and creditors of the Security Collateral Provider. ~~Where the Security Document is executed outside Malaysia by the company, the period for registration is extended by seven days.~~However, subsection 352(5) of the Companies Act provides that a failure to register a charge created over a company's property or undertaking other than those relating to land, shall not affect the validity or limit the effect of the charge created under subsection 352(1) of the Companies Act. Subsection 352(5) was introduced in the Companies Act from 31 January 2017 and its inclusion gives rise to an inconsistency with subsection 352(2), which should be addressed by legislative amendment. Pending such legislative action, any registrable charge should be registered on the basis that the consequences set out in subsection 352(2) of the Companies Act will apply.

No charge or assignment which is registrable under ~~section 108 of~~ the Companies Act ~~(except those relating to land)~~in respect of securities or cash Collateral need to be filed (other than for assessment of stamp duty thereon) or registered under any other written law in Malaysia. A certificate is issued by the Registrar of Companies of every registration and is conclusive evidence that the requirements as to registration have been complied with.

FEA requirements

Where a Collateral Provider and/or the Collateral is located in Malaysia, the applicable FEA requirements as set out in section 214 read with Schedule 14 to, or 216 of, the FSA and directions and notices issued thereunder will have to be complied with by such Collateral Provider and/or in respect of any dealings with Collateral in Malaysia. All dealings and transactions falling within Schedule 14 to the FSA are prohibited unless the written approval of BNM is obtained. Subject to any direction issued by BNM under paragraph 214(6)(e) of the FSA (which ~~may~~are not ~~be~~ publicly available), a Bank is exempted from the prohibition in respect of transactions in paragraph 1 of Schedule 14 to the FSA. BNM has issued notices (each a "**Notice**") which set out what transactions are for the time being generally permitted which would constitute BNM's written approval thereto. *Ad hoc* BNM approval has to be applied for where no general approval has been given in the Notices. Pursuant to section 270 of the FSA no Security Document entered into in breach of the FEA requirements shall be void solely by reason of such breach, except as otherwise provided in the FSA or in pursuance of any provision of the FSA.

Collateral located in Malaysia

If the Collateral is located in Malaysia-

(a) written notice of assignment has to be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action (a) as one of the requirements in order to pass and transfer the legal right to the debt or the chose in action from the date of the notice pursuant to subsection 4(3) of the Civil Law Act 1956, and (b) to give notice of such assignment where notice affects the priority of such assignment.

(b) a pledge must be perfected by the delivery of the pledged asset to the Secured Party. A pledge arises when title to an asset, like bearer securities, is derived by way of possession.

Pursuant to the Stamp Act 1949 (the "**Stamp Act**"), the proper stamp duty has to be paid on a Security Document in order for such document to be admissible in evidence in Malaysia, unless an exemption applies. Stamping is not required in Malaysia as a condition to perfect the security interest except as stated in our response to question 6 below. If no exemption applies, the stamp duty payable on a Security Document would depend on the amount secured:

- where the amount is in foreign currency, stamp duty of RM5 is payable for every RM1,000 subject to a maximum of RM500;
- where the amount secured is in ringgit, RM5 is payable for every RM1,000 or part thereof.

All instruments chargeable with duty have to be submitted to the Collector of Stamp Duties for assessment of, or, if the amount of stamp duty is determinable, payment of the proper duty within one month of its execution or, if executed outside Malaysia, within one month of its first receipt in the country. The penalty for late stamping (which is payable in addition to the stamp duty) is as follows:

(i) RM25 or 5% of the stamp duty payable, whichever is the higher, if the instrument is stamped within three months after the time for stamping;

(ii) RM50 or 10% of the stamp duty payable, whichever is the higher, if the instrument is stamped later than three months but not later than six months after the time for stamping; or

(iii) RM100 or 20% of the stamp duty payable, whichever is the higher, in any other case.

Where Securities Collateral comprises debt securities listed on the stock exchange of Bursa Malaysia Securities Bhd, it would be advisable for them to be held in a pledged securities account maintained with Bursa Malaysia Depository Sdn Bhd, a CSD, in accordance with the Securities Industry (Central Depositories) Act 1991 for the benefit of the Secured Party.

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

Save as stated in the responses to question 5 above and question 20 below, there is no other requirement under Malaysia law to ensure the validity or perfection of a security interest in each type of Eligible Collateral under a Security Document. It is not necessary as a matter of formal validity under Malaysian law that a Security Document be expressed to be governed by Malaysian law or translated into any other language or, based on the assumptions above, for them to include any specific wording in order for the security interest created under such Security Document to be recognized as valid and perfected in Malaysia.

In relation to Collateral held in Malaysia, subsection 4A(2) of the Stamp Act provides that where an instrument executed outside Malaysia purporting to effect a transfer (by way of sale or legal mortgage) of debentures issued by, or shares in, a Malaysian company or a foreign company registered as a branch in Malaysia is produced to the company for registration, the company shall, unless the proper stamp duty has been paid thereon, refuse to register the transfer and the transfer shall not take effect.

7. ***Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements set forth in your responses to questions 1 to 6 above, as applicable, will the Secured Party or the Security Collateral Provider need to take any action thereafter to ensure that the security interest in the Eligible Collateral continues and/or remains perfected, particularly with respect to additional Collateral transferred by way of security from time to time whenever the Credit Support Amount exceeds the Value of the Collateral held by the Secured Party?***

A Secured Party need not take any regulatory action to maintain its security interest after the creation thereof, so long as the necessary regulatory approvals (see our response to questions 5 above and 20 below) have been obtained and the conditions therein are complied with and assuming that it does not otherwise act in any manner which could be construed as waiving or releasing its security interest in accordance with the nature of the security interest created. Please see our response to question 20 below.

Where additional Collateral is given under a security that is registrable under the Companies Act, and was so registered, the Secured Party should be satisfied that the description of the affected/charged property stated in ~~Form 34~~the prescribed form for registration of charge where the Collateral Provider is a company (see our response to question 5 above) is sufficiently wide to include additional Collateral pledged from time to time, in which case there would be no additional registration requirements under the Companies Act for the additional Collateral.

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

Our response to question 5 above applies and, where applicable to the Collateral, the requirements in our response to question 6 will also apply for a valid security interest to arise under Malaysian law, subject to the laws referred to in our response to question 14 below.

It should be noted that the registration requirements under section ~~108~~352 of the Companies Act apply to a Malaysian company, and the location of the Eligible Collateral or the governing law of the Security Document would not affect such requirements.

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

Under Malaysian law, where a bailment arises in respect of the Eligible Collateral in the form of goods (for example, scrip securities) the Secured Party is bound to take as much care of the goods bailed to it as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. In any other case, the Secured Party has to exercise reasonable care in relation to Eligible Collateral held by it pursuant to a Security Document.

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

[6] These concerns remain as a matter of English law unless the Deed falls within the scope of the Financial Collateral Arrangements (No. 2) Regulations 2003, which implement in the United Kingdom the Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements.

agreement with the Pledgor? In particular, how does such use of the Collateral affect, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under the laws of your jurisdiction?

There is no Malaysian case on this point, and we are of the view that a Malaysian court will be likely to follow the English common law (without application of any relevant statute effective after 1956) analysis of the issue. The use of the Collateral in the manner contemplated in the NY Annex (that is, to deal with the Collateral as though they belonged to the Secured Party) is, in our view, inconsistent with the nature of a fixed "security interest" and hence would destroy the security interest in the Collateral insofar that a fixed charge is intended to be created. The right to use the Collateral would also constitute a clog on the equity of redemption. Such a clause would, in our view, be unenforceable under Malaysian law or may be construed to affect the fixed security interest of the Secured Party, unless a Malaysian court upholds the choice of law of the NY Annex and such clause is valid and enforceable under such law and the law governing the proprietary aspects of the security interest, and evidence of the applicable foreign laws are adduced.

11. ***What is the effect, if any, under the laws of your jurisdiction on the validity, continuity, perfection or priority of a security interest in Eligible Collateral under each Security Document of the right of the Pledgor to substitute Collateral pursuant to Paragraph 4(d) of the NY Annex and the Deed? How does the presence or absence of consent to substitution by the Secured Party affect your response to this question? Please comment specifically on whether the Pledgor and the Secured Party are able validly to agree in the Security Document that the Pledgor may substitute Collateral without specific consent of the Secured Party and whether and, if so, how this may affect the nature of the security interest or otherwise affect your conclusions regarding the validity or enforceability of the security interest.***

Under Malaysian law, the absence of consent to substitution could mean that the Security Collateral Provider is at liberty to deal with the Collateral. This could result in the security interest ceasing to fasten upon the specific Collateral and having characteristics of a floating charge instead. Similarly, although the parties are able to validly agree in the Security Document that the Pledgor may substitute Collateral without the specific consent of the Secured Party, this could result in the security interest ceasing to fasten upon the specific Collateral and having characteristics of a floating charge instead. The requirement of consent should be a requirement which is, as between the parties, applied strictly, and that the parties should not behave or have any understanding to the contrary.

The consequences of the charge being recharacterized as a floating charge are, inter alia, the obligation to register it (please see our response to question 5) and that statutorily preferred claims rank in priority to creditors holding a floating charge.

A Security Collateral Provider that is a company ~~incorporated under the Companies Act~~ is subject to sections ~~191~~392 and ~~292~~527(4) of the Companies Act. Such a Security Collateral Provider that is not in the course of being wound up must still pay off debts which in every winding up are preferential debts and are due by way of wages and any amount which in a

winding up is payable in pursuance of subsections ~~292~~527(3) or (5) of the Companies Act in priority to claims of holders of debentures secured by a floating charge in the enforcement of such floating charge by or on behalf of debenture holders. Debts which, in a winding-up, are preferred debts and are due by way of wages, salary, vacation leave or superannuation or provident funds as well as amounts payable to a person who has advanced money for payment of wages, salary or vacation leave to an employee of the company and amounts payable to discharge any liability to third parties (which liability has been insured against and for which payment has been received from the insurer) shall be paid out of the assets coming into the hands of the receiver or person taking possession, in priority to any claim for principal or interest in respect of the debentures. A Secured Party may then recoup any payment under section ~~191~~392 of the Companies Act out of the assets of the Security Collateral Provider available for payment of general creditors.

If the nature of the security remains a fixed charge, the Collateral substituted will be released from the fixed charge or disposed subject to it. If legal title to the existing Collateral ("**Old Collateral**") is vested in the Secured Party, then provided that the replacing Collateral ("**New Collateral**") has been transferred upon an exercise of the right to substitute, the Secured Party will re-transfer the Old Collateral to the Security Collateral Provider, in which case, the security interest over the Old Collateral may be deemed released and discharged where it is essential to the nature of the security interest for the title to be vested in the Secured Party. The New Collateral will only take effect from the date of the substitution.

The Secured Party should be satisfied that the description of the affected/charged property in a registered charge (see our response to question 5 above) is sufficiently wide to include the substituted Collateral which is delivered from time to time, in which case there would be no additional registration requirements for the substituted Collateral.

Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding

Note the additional assumption in (j) above which applies to questions 12 to 15 below.

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

Where the Collateral is comprised of debt securities, and the Secured Party becomes entitled to enforce its security under a Security Document, the Secured Party would have the right to sell the Collateral as provided in the Security Document. Listed debt securities held in a

pledged securities account (as defined in the Securities Industry (Central Depositories) Act 1991) in the name of the Secured Party made be sold by the Secured Party. There is no requirement for a court order to be obtained in order for the Secured Party to sell the Collateral and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the Master Agreement.

The only limitation is that a legal mortgagee may not sell the property to itself as this would not be viewed as a sale. If the sale is made pursuant to an order of court, the mortgagee may, with the leave of the court, make a bid.

Where BNM approval was obtained for the granting of the security under a Security Document pursuant to section 214 of, and paragraph 5 of Schedule 14 to, the FSA, the conditions of such approval affecting enforcement of security (if any) must be complied with. For example, written notice may be required prior to the Secured Party's sale of Collateral.

A chargee or mortgagee owes a duty when exercising its power of sale. Although there has been substantial debate as to the nature of this duty (whether it is a duty imposed by equity or a legal duty based on the tort of negligence), there is a duty on the chargee to take reasonable care to obtain a proper price. There is no particular time in which the chargee must exercise its power of sale, where volatile securities are concerned.

In the case of cash Collateral deposited with the Secured Party, the Secured Party may exercise any contractual right of set-off in the relevant Security Document to set off such cash Collateral against amounts owing by the Security Collateral Provider under the Master Agreement, subject to the matters set out in the Netting Opinion which may affect such set-off and there not being any other claim to the cash Collateral.

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

No, where the Secured Party is not subject to Malaysian law, and the only Malaysian element is that Security Collateral Provider is incorporated in Malaysia.

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

14.1 Collateral that secures payment or performance of an obligation in respect of a "qualified financial transactions" or a "qualified financial agreements" in certain statutes will be treated in the same manner by the regulator as the Master Agreement which is a qualified financial agreement, when exercising their power whether to transfer qualified financial agreements. Collateral that is not given to secure or provide credit support to qualified financial agreements will not have the benefit of the provisions applicable to qualified financial agreements. A Security Document will secure obligations under different Transactions over time as new Transactions are entered into, and earlier Transactions terminate in accordance with their terms. So, the enforceability of a Security Document will, in respect of the relevant statute, depend on whether the then subsisting Transactions secured are qualified financial transactions or qualified financial agreements as defined in that statute.

14.2 It should be noted that definitions of "qualified financial transactions" in the following statutes do not include all types of Transactions or underlyings set out in Appendix A:

(a) the definition in the Central Bank of Malaysia Act 2009 ("**CBMA**") ~~definition does~~, the FSA and the Malaysia Deposit Insurance Corporation Act 2011 ("**MDICA**") which is substantially the same, do not include Securities Lending Transactions as described in Appendix A.

(b) the Netting of Financial Agreements Act 2015 ("**Netting Act**") definition includes only Securities Lending Transactions in respect of unlisted debt securities under the Real Time Electronic Transfer of Funds and Securities System ("**RENTAS**") established under paragraph 44(1)(a) of the CBMA.

Reference to the Transactions in Appendix A in this Memorandum does not imply that a Malaysian counterparty may enter into all or any such Transactions under the Master Agreement, or that the Master Agreement is a qualified financial agreement in all cases.

14.3 Thus, the enforcement of a Security Document in respect of the laws referred to below will depend on whether the Security Document itself is a qualified financial agreement. This is determined by whether the Security Document provides security for obligations under Transactions that are qualified financial transactions or qualified financial agreements as defined in the relevant law.

Qualified financial agreements in CBMA

14.4 The same definition of "qualified financial agreement" applies in the CBMA and the FSA. A "**qualified financial agreement**" refers to, among others-

(a) a master agreement in respect of one or more qualified financial transactions under which, if certain events specified by the parties to the agreement occur—

(i) the transactions referred to in the agreement terminate or may be terminated;

(ii) the termination values of the transactions under the master agreement are calculated or may be calculated; and

(iii) the termination values of the transactions under the master agreement are netted or may be netted, so that a net amount is payable; or

(b) an agreement relating to financial collateral, including a title transfer credit support agreement, with respect to one or more qualified financial transactions under a master agreement referred to in paragraph (a) above.

A "**qualified financial transaction**" means-

(a) a derivative, whether to be settled by payment or delivery. A "**derivative**" means any agreement, including an option, a swap, futures or forward contract, whose market price, value, delivery or payment obligations is derived from, referenced to or based on, but not limited to, securities, commodities, assets, rates (including interest rates, profit rates or exchange rates) or indices; or

(b) a repurchase, reverse repurchase or buy-sell back agreement with respect to securities.

The above definition does not include Securities Lending Transactions as described in Appendix A.

"**Financial collateral**" means any of the following that is subject to an interest or a right that secures payment or performance of an obligation in respect of a qualified financial agreement or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits;

(b) security, a securities account or a right to acquire securities; or

(c) futures agreement or futures account.

Thus a Security Document will be qualified financial agreement under the CBMA and FSA if it relates to "financial collateral" as defined in the CBMA and FSA.

14.5 The enforcement by parties of their rights under a Security Document which is a qualified financial agreement as defined in the CBMA is preserved by the following provisions-

(a) Subsection 31(8) of the CBMA which provides that the enforcement of parties' rights under a qualified financial agreement shall not be affected by any measure or order issued in the interest of financial stability under subsection 31(1) of the CBMA, which overrides the requirement that such person must comply with any statutory provision or any contractual obligation to the contrary in subsection 31(5) of the CBMA.

(b) Subsection 32(1A) of the CBMA which provides that the enforcement by the parties of their rights under a qualified financial agreement shall not be affected by the making of a vesting order under sub-paragraph 32(1)(c)(iii) of the CBMA. A transferee will assume all rights and obligations under any qualified financial agreement of the transferor from whom such agreement was transferred. The enforcement by the parties of their rights under such qualified financial agreement shall be in accordance with the terms of such agreement as if the transferee had always been a party to such agreement. In this case, the Secured Party may not enforce the Security Document against the Security Collateral Provider Bank transferor.

(c) The proviso in subsection 77(1) of the CBMA specifies that any direction given or requirement imposed under section 77 by the Board of BNM for the purpose of giving effect to the objects of BNM or safeguarding the balance of payments position under subsection 77(1) of the CBMA shall not affect the enforcement by the parties of their rights under a qualified financial agreement.

Danaharta Act

14.6 The Danaharta Corporation ("**Danaharta**") was established by the Government of Malaysia pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 (the "**Danaharta Act**") to purchase non-performing loans from commercial and merchant banks in 1990s. Danaharta has wound up its activities (outstanding assets have been transferred to a special vehicle to work out), but the Danaharta Act has yet to be repealed.

14.7 Following such purchase, (a) the persons who then owe a duty or liability to Danaharta or its subsidiary as primary obligors, (b) subsidiaries of primary obligors, (c) third parties who provided security for the obligations of primary obligors and (d) any company where at least two per cent. of its share capital has been charged, pledged or mortgaged by any person to secure the performance of or discharge of a duty or liability owed to Danaharta or its subsidiary, become "affected persons" under the Danaharta Act.

A Security Collateral Provider may become an affected person as defined in the Danaharta Act prior to, or after, its own insolvency.

14.8 Under section 23 or 24 of the Danaharta Act, a special administrator may be appointed with respect to an "affected person". Upon the appointment of a special administrator in respect of a Security Collateral Provider under the Danaharta Act-

(a) pursuant to section 29A of the Danaharta Act, a security or contract is not to be invalidated or discharged, and the Secured Party may not, among others,

enforce the performance of an obligation or require the performance of an obligation not otherwise arising for performance, by reason of such appointment.

(b) any transaction or dealing with any asset of an affected person by the affected person or its agent will be void unless it is entered into, or consented to, by the special administrator. This means that a Security Collateral Provider may not provide any additional Collateral after a special administrator has been appointed over it except with the consent of the special administrator.

(c) pursuant to section 41 of the Danaharta Act, a 12-month (which may be abridged or extended by Danaharta) moratorium will take effect during which no steps may be taken, among others, (i) to create, perfect or enforce any security over any asset of the affected person, (ii) to enforce a judgment over any asset of the affected person, (iii) to repossess any asset in the possession, custody or control of the affected person, (iv) to set off any debt owing to the affected person in respect of any claim against the affected person, (v) to commence or continue with any proceedings, except with the prior written consent of Danaharta. A Secured Party may not enforce its Collateral during the moratorium following appointment of a special administrator over the Security Collateral Provider, except with the prior consent of Danaharta.

Netting Act

14.9 The Netting Act came into force on 30 March 2015. The Netting Act applies to "qualified financial agreements" which means (a) a master agreement, with a netting provision (as defined therein), in respect of one or more qualified financial transactions, (b) any agreement or arrangement prescribed by the Minister of Finance as such, and (c) an agreement relating to financial collateral that secures payment or performance of an obligation, including any agreement under which title to property has been provided for the purpose of such security, with respect to one or more qualified financial transactions under a qualified financial agreement.

A Security Document that secures obligations under qualified financial transactions (as defined in section 5 of the Netting Act) would itself be a qualified financial agreement under the Netting Act.

14.10 Pursuant to section 4 of the Netting Act, the Netting Act only applies to financial collateral provided in the form of (a) cash or cash equivalents, (b) securities, a securities account or a right to acquire securities, or (c) futures agreement or futures account.

14.11 However, the Netting Act does not specifically refer to enforcement of Security Documents. Section 3 of the Netting Act only provides that notwithstanding sections 29A and 41 of the Danaharta Act and section 31ZG of the Securities Commission ~~of~~ Malaysia Act 1993 ("**SCMA**")[7] as specified in Part I of the Schedule thereto, the netting

[7] By virtue of section 39 of the Capital Markets and Services (Amendment) Act 2015 ("**CMSA Amendment Act**"), Part IXA of the Capital Markets and Services Act 2007 ("**CMSA**") which includes section 346C has been deleted with effect from 15 September 2015. By virtue of section 6 of the Securities Commission (Amendment)

provision (as defined therein) in a qualified financial agreement in respect of the qualified financial transactions shall be enforceable in accordance with the terms of the qualified financial agreement. Thus the requirement for the prior consent of Danaharta for the Secured Party to enforce its Security Document under section 41 of the Danaharta Act is not affected by the Netting Act.

SCMA[8]

14.12 Subsection 31ZG(1) of the SCMA confers power, where the Securities Commission Malaysia ("**SCM**") considers it necessary in the interest of monitoring, mitigating or managing "systemic risk in the capital market" (as defined in the SCMA), to issue a directive in writing requiring any person to take such measures as the SCM may consider necessary. As the ambit of 'measures' is potentially wide and the language is cast in broad terms, it is possible that the SCM could issue a directive pursuant to section 31ZG of the CMSA which may affect or restrict the rights of the Secured Party under a Security Document. Although section 3 of the Netting Act refers to section 31ZG of the SCMA, its substance is to render the netting provision (as defined therein) in qualified financial agreements enforceable, and does not preserve enforcement of Security Documents (see also paragraph ~~14.30~~14.28 below on section 57C of the CMSA).

Malaysia Deposit Insurance Corporation Act 2011 ("**MDICA"**)

14.13 The Malaysia Deposit Insurance Corporation (the "**Corporation"**) may acquire assets from member institutions (which include Banks and investment banks). The obligors, both primary and secondary, under assets acquired by the Corporation from member institutions then become obligated to the Corporation in place of the selling member institution, thereby becoming "**affected persons**" under the MDICA. A Security Collateral Provider other than a member institution may become an "***affected person***" under the MDICA where-

(a) it is a debtor under any facility to the Corporation or any subsidiary of the Corporation (the "**primary affected person**"),

(b) it is a subsidiary of a primary affected person,

(c) it has provided security or guaranteed a facility to the Corporation or any subsidiary of the Corporation~~,~~; or

(d) at least five per cent. of its share capital has been charged, pledged or mortgaged by any person to secure a duty or liability owed by any primary affected person to the Corporation or any subsidiary of the Corporation.

Act 2015 (which also came into force on 15 September 2015), where in any written law, any reference is made to any specific provision of the repealed Part IXA of the CMSA (which includes section 346C), it shall be construed as a reference to a provision of the SCMA as amended by Securities Commission (Amendment) Act 2015 which corresponds as nearly as may be to such specific provision. In this case, section 31ZG of the SCMA is the corresponding provision of the repealed section 346C of the CMSA.

[8] As amended by section 51 of the Securities Commission (Amendment) Act 2015.

The Corporation may appoint a conservator in respect of an affected person to achieve certain outcomes.

14.14 Pursuant to section 166 of the MDICA, the appointment of a conservator will not, among others, (~~i~~a) give rise to a right for the Secured Party to terminate, cancel or modify the Security Document, enforce or accelerate the performance of an obligation or require the performance of an obligation not otherwise arising for performance, (~~ii~~b) invalidate or discharge a contract or security, (~~iii~~c) be regarded as terminating, cancelling or varying any right, privilege, or priorities in relation to an asset, or (~~iv~~d) be regarded as placing the affected person in breach of any agreement prohibiting, restricting or regulating the assignment, sale, disposal or transfer of any asset.

14.15 Upon the appointment of a conservator to administer a Security Collateral Provider that is not a member institution-

(a) any transaction or dealing with any asset of an affected person by the affected person or its agent will be void unless it is entered into by the Corporation or the conservator or the prior written consent of the conservator was obtained. This means that a Security Collateral Provider may not provide any additional Collateral after a conservator has been appointed to administer it except with the consent of the conservator.

(b) a 12-month (which may be abridged or extended by the Corporation) moratorium will take effect during which no steps may be taken, among others, (i) to create, perfect or enforce any security over any asset of the affected person, (ii) to enforce any judgment or order over any asset of the affected person, (iii) to repossess any asset in the possession, custody or control of the affected person, (iv) to set off any debt owing to the affected person in respect of any claim against the affected person, (v) to commence or continue with any proceedings, except with the prior written consent of the Corporation.

(c) the conservator may require any person who has in his possession or control asset, books, records, accounts or other documents to which the affected person appears to be entitled to deliver, convey, surrender or transfer the asset to the conservator immediately, and such person shall deliver it[9]. However, this will not apply to any book, record, account or other document to which a secured creditor is entitled to possession otherwise than because of a lien, but the conservator shall be entitled to inspect and make copies of such account or document.

~~14.16~~ A Secured Party may not enforce its Collateral by reason of section 166 of the MDICA and during the moratorium following the appointment of a conservator to administer the Security Collateral Provider that is not a member institution unless the Security Document is a "qualified financial agreement" as defined in the MDICA (a "**MDICA Qualified Financial Agreement**") and the Secured Party is permitted under section 180 of the MDICA to do so.

[9] Subsection 176(1) of the MDICA.

~~14.17 Subsection 115(1) of the MDICA sets out the types of agreements that are MDICA Qualified Financial Agreements. They include, in relation to over-the-counter derivatives-~~

~~(a) a derivative, whether to be settled by payment or delivery, that is the subject of recurrent dealings in the over-the-counter derivatives, securities or commodities markets (an "**MDICA derivative**").~~

~~(b) an agreement to borrow or lend securities including an agreement to transfer securities under which the borrower may repay the loan with other securities, cash or cash equivalent;~~

~~(c) a master agreement in so far as it is in respect of MDICA derivatives.~~

14.16 ~~(d)~~ The definition of "qualified financial agreement" in the MDICA includes that in the CBMA and FSA.[10] A Security Document that is "an agreement relating to financial collateral, including ~~any form of security or security interest in collateral and~~ a title transfer credit support agreement, with respect to ~~any other~~one or more qualified financial transactions under a master agreement" that is a MDICA Qualified Financial Agreement would itself be a MDICA Qualified Financial Agreement.

14.17 ~~14.18~~ "**Financial collateral**" means any of the following that is subject to an interest or a right that secures payment or performance of an obligation in respect of a MDICA Qualified Financial Agreement or that is subject to a title transfer credit support agreement:

(i) cash or cash equivalents, including negotiable instruments and demand deposits;

(ii) security, a securities account, or a right to acquire securities; or

(iii) a futures agreement or a futures account.

Whether a Security Document would be a MDICA Qualified Financial Agreement will depend on whether the relevant Master Agreement or Transactions thereunder secured by it are MDICA Qualified Financial Agreements.

14.18 ~~14.19~~ Where a Security Document would be a MDICA Qualified Financial Agreement, pursuant to subsection 180 of the MDICA (which modifies the consequences of the appointment of a conservator)-

(a) a Secured Party may not, among others, exercise any right or remedy against the affected person or its assets within the applicable stay period (presently, two business days) following the appointment of a conservator, unless the Corporation otherwise specifies in writing.

(b) the Corporation may consent to transfer such Security Document to a qualified third party (as defined in the MDICA) within the applicable stay period. Where the Corporation consents to the transfer of the Security Document and that Security Document applies to the property of the Security

[10] Inserted as subsection 2(1A) of the MDICA pursuant to paragraph 3(b) of the Malaysia Deposit Insurance Corporation (Amendment) Act 2016 which came into force on 8 March 2016.

Collateral Party affected person, that property shall also be transferred to the qualified third party[10][11].

(c) Where the Corporation does not transfer the Security Document, then after the stay period, the Secured Party may exercise any right or remedy against the affected person or its assets under the Security Document. Where the Secured Party may terminate the Security Document but has not done so, the Corporation may declare by notice in writing that such agreement is terminated, in which case, and despite any term of such agreement to the contrary, such agreement shall be deemed to have been terminated by the Secured Party.

MAS Act

14.19 ~~14.20~~ Certain Companies are subject to the Malaysian Airline System Bhd (Administration) Act 2015 ("**MAS Act**"). The MAS Act came into force on 20 February 2015 and will apply up to the earlier of 20 February 2020 and the listing of the shares of Malaysia Airlines Bhd ("**MAB**"), a Company incorporated pursuant to section 23 of the MAS Act as successor national carrier, on the official list of Bursa Malaysia Securities Bhd unless the Minister orders its cessation earlier.

14.20 ~~14.21~~ The Companies that may be placed under administration under the MAS Act are (a) Malaysian Airline System Bhd ("**MAS**"), (b) its wholly owned subsidiary Companies, (c) Abacus Distribution Systems (Malaysia) Sdn Bhd. (Company No. 180535-T), (d) Aerokleen Services Sdn Bhd (Company No. 277266-X) and (e) MAS Awana Services Sdn. Bhd. (Company No. 372384-D). An Administrator (as defined in the MAS Act) has been appointed for MAS and MASKargo Sdn Bhd. (collectively, the "**Administered Companies**"). The administration of the Administered Companies will terminate when terminated by the appointer.

14.21 ~~14.22~~ Under subsection 11(3) of the MAS Act, the appointment of the Administrator cannot be regarded as, among others, giving rise to a right or duty for any person to enforce the performance of an obligation of the Administered Companies, although it would not invalidate or discharge a security. The Secured Party may not enforce its rights under a Security Document except with the consent of the Administrator.

14.22 ~~14.23~~ The MAS Act provides that the Administrator may transfer assets and liabilities of MAS to MAB. Pursuant to a restructuring process, selected assets and liabilities of MAS ~~will be~~were transferred to MAB on ~~or around~~ 1 September ~~2015 (or such other date as may be determined). MAB will operate~~2015. MAB operated the Malaysia Airlines business on and from that date. In connection with the MAS Business Migration to MAB, MAS has informed local and foreign banks that are parties to then subsisting derivatives Transactions with MAS that it intends to novate them, subject to the agreement of the counterparties concerned. Following the novation from MAS to MAB, the counterparties will be able to enforce the Security Documents against MAB as of the date those Transactions are novated as part of the business migration to MAB.

[10][11] Subsection 180(3) of the MDICA.

In this context, any unenforceability of the Security Documents vis-à-vis MAS as an Administered Company is temporary.

FSA

~~14.24 Where the Security Document is not a qualified financial agreement as defined in the FSA, the Secured Party's right to enforce the Security Document may be affected by-~~

~~(a) the assumption of control of a licensed person (includes Banks) pursuant to section 167 of the FSA;~~

~~(b) the appointment of a receiver and manager of the business, affairs or property of, among others, Banks pursuant to section 172 of the FSA; and/or~~

~~(c) the making of an order for the compulsory transfer of the business, assets or liabilities of a Bank pursuant to section 176 of the FSA, where the terms of any vesting order made by BNM of the whole or part of the business of that Bank may restrict or prevent enforcement of the Security Document.~~

14.23 ~~14.25~~ Section 216 of the FSA states broadly that BNM may, in the national interest, issue directions to any person in Malaysia, to prohibit, restrict, or require the doing of any act in relation to dealings or transactions with any person resident in a country or territory, or in any currency as may be specified by BNM. Although the scope of BNM's power under section 216 of the FSA is wide, it has to be exercised in the national interest in the context of foreign exchange administration in Malaysia. We are of the view that the possibility of subsection 216(1) of the FSA applying as to preclude enforcement of Security Documents generally is unlikely as BNM's objective has to be to safeguard the balance of payments position of Malaysia, although specific Secured Parties may be affected.

14.24 ~~14.26~~ In isolated instances, Malaysian law may expressly save contracts that would otherwise have been void for illegality by reason of any breach of statutory provisions.

14.25 ~~14.27~~ The creditor's enforcement rights could depend on the type of Collateral: see our response to question 20 below. In circumstances where a Malaysian statute prescribes how dealings in Collateral should be effected, the applicable provisions of the relevant statute should be complied with to enable a creditor to properly enforce its rights over the Collateral (for example, where Collateral comprises securities listed on Bursa Securities).

14.26 ~~14.28~~ FEA requirements may apply depending on the type of Collateral and the Location of a Secured Party.

14.27 ~~14.29~~ A statutory lien is imposed by section 31 of the Employment Act 1955 when a secured creditor enforces its security by sale of a place of employment in respect of which wages are due to employees of the person liable working there, in which case the wages of employees are paid out of the proceeds of sale before their release to the secured creditor but this should not apply, given the types of Eligible Collateral. Subject to the foregoing, there is no other statutory lien or preferred claims under Malaysian law that would take precedence over a creditor's security interest in the relevant types of Collateral.

CMSA

14.28 ~~14.30~~ The CMSA Amendment Act 2015 introduces a new Subdivision 7 of Division 2 of Part II in the CMSA on 'Enforceability of netting provisions under qualified capital market agreement' (the "**New Division**") which applies the following definitions unless the context otherwise requires-

A "**netting provision**" means a contractual provision which provides that when the events specified by the parties under a qualified capital market agreement occur, two or more debts, claims or obligations can be set-off against each other or be converted into a net debt, claim or obligation and includes close-out netting arrangement.

A "**qualified capital market agreement**" means (a) an agreement with a netting provision, in respect of one or more securities borrowing and lending transactions; or (b) an agreement specified by the SCM to be a qualified capital market agreement for the purposes of that Part.

A "**securities borrowing and lending**" means an arrangement where any securities borrowing and lending transaction is entered into, other than-

(a) transactions entered into between the approved clearing house and participants that is done in accordance with the rules of the approved clearing house; and

(b) transactions in respect of unlisted debt securities effected under the Real Time Electronic Transfer of Funds and Securities (RENTAS) system.

We are of the view that the definition of 'securities borrowing and lending' would include OTC Securities Lending Transaction as described in Appendix A, except in respect of transactions of unlisted debt securities effected under the RENTAS system.

Section 57B of the CMSA provides that *"(1) the rights of the parties under a netting provision shall not be stayed, avoided or otherwise limited by the commencement of any other proceeding which has the effect of assuming control or managing the business, affairs and properties to which a party may be subject; and (2) the netting provision of a qualified capital market agreement under subsection (1) shall be enforceable in accordance with its terms."*

Further section 57C of the CMSA provides that *"[n]o provision in securities law or in any other written law, including any written law relating to the management of systemic risk or promoting financial stability, whether enacted before or after the commencement of this Act, shall limit, restrict or otherwise affect the operations of Subdivisions 6 and 7 of this Part."*

However, nothing in the New Division refers to the enforcement of Security Documents so the provisions of the New Division do not apply to the enforcement of Security Documents.

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

We are of the view that if an Event of Default, Relevant Event or Specified Condition, as the case may be, occurs with respect to the Secured Party, our responses to questions 12 to 14 would not change if there is also an Event of Default, Relevant Event or Specified Condition subsisting in relation to the Security Collateral Provider.

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

Note the additional assumptions in (k) above which applies to questions 16-18 below.

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

The Malaysian law rules determining priority among creditors having security over the same Eligible Collateral are largely based on the common law of England and the rules of equity as administered in England on the 7 day of April, 1956 for West Malaysia subject to such qualifications as local circumstances render necessary. Such rules are complex, and depend on the nature of the security interest, but a general rule of thumb is-

(a) subject to (b) below, that priority is determined by the order in which secured claims are created and registration under section ~~108~~352 of the Companies Act where applicable. It should be noted that order of registration under section ~~108~~352 of the Companies Act does not by itself determine priority, but registration gives notice of the charge.

(b) as between a first equitable interest and a subsequent legal interest created without notice of the prior interest, the subsequent legal interest has priority, provided that all registrations required have been effected.

(c) the priority of competing assignments of a debt is regulated by the order in which an assignee gives notice of assignment to the relevant debtor under the rule in the English case of *Dearle v Hall*~~1~~12 and whether it had notice of an earlier assignment. Priority goes to the first assignee to give notice of assignment provided that it does not have notice of any earlier assignment when it takes its assignment.

For the Secured Party's security interest to have priority over all other claims in Eligible Collateral, the Secured Party should have a first legal interest in the relevant Collateral and have no notice of any other earlier interest. To obtain a first ranking legal interest-

(a) in securities, the Security Document should state that the interest is a first ranking one. A search on the Security Collateral Provider at the Companies Commission of Malaysia ("**CCM**") will indicate the register of charges of that Security Collateral Provider based on its filings to the CCM. The relevant charge instrument may have to be reviewed where the description of the charged properties is too general. As not all charges over securities are registrable under the Companies Act, the latest Annual Return should also be reviewed as particulars of charges not required to be registered under the Companies Act (if any) are required to be set out therein. Where the Collateral is securities in Malaysia listed on Bursa Securities, a Security Collateral Provider should require a transfer of the affected listed securities into its pledged securities account in accordance with section 40 of the Securities Industry (Central Depositories) Act 1991. As unlisted transferable debt securities in Malaysia are held in a ~~central depositary~~CSD, and dealings thereof effected by book entries only, a Security Collateral Provider should ensure that the relevant debt securities are transferred into its local custodian's clients' account and credited to it in its account with its local custodian.

~~1~~12 (1828) 3 Russ 1; 38 ER 475 LC; [1824-34] All ER Rep 28.

(b) in cash deposited with a Bank in Malaysia, the Security Collateral Provider may create (i) a legal assignment of its rights, title and interest to the cash by an absolute assignment in writing and giving written notice of the assignment to the account Bank and (ii) a charge over its account. The Security Collateral Provider enforces the security by notice to the account Bank and requiring cash to be paid to it.

In the winding up of an insolvent Company, ~~subject to section 292 of the Companies Act, the same rules prevail with regard to the respective rights of secured and unsecured creditors as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons.~~ a Secured Party may realise its security and/or value the Collateral and claim in the winding up as an unsecured creditor for the balance due, if any, or surrender the Collateral to the liquidator for the general benefit of creditors and claim in the winding up as an unsecured creditor for the whole debt. The liquidator may give notice requiring a Secured Party to elect which of the preceding powers the Secured Party wishes to exercise, and to exercise the power (other than realisation) within 21days from receipt of the liquidator's notice. A Secured Party on whom a notice has been served who fail to comply with the notice is to be taken as having surrendered the charge to the liquidator for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for the whole debt. A Secured Party who has or is deemed to have surrendered a charge may, with the leave of Court or liquidator and subject to such terms and conditions as the Court or liquidator thinks fit, before the liquidator has realised the Collateral (a) withdraw the surrender and rely on the charge, or (b) submit a new claim under section 524 of the Companies Act.

~~Section 8 of the Bankruptcy Act 1967 ("**Bankruptcy Act**") provides that the Director General of Insolvency becomes the receiver of the property of the debtor without affecting secured creditors, who may realize or otherwise deal with his security as if Section 8 of the Bankruptcy Act had not been passed.~~

A Secured Party who realises the Collateral must account to the liquidator any surplus from the net realised proceeds of the Collateral after satisfaction of its claim, including interest payable up to six months from the date of realisation of the Collateral, after making proper payments to any holder of other charges over the Collateral.

The liquidator may, after accepting a valuation and claim of a secured creditor, before realisation of the Collateral redeem the Collateral on payment of the assessed value.

~~Once the secured creditors[12] have been paid out of the assets that comprise their security, the remainder of the assets will be distributed among the preferred creditors in the order as set out in subsection 292(1) of the Companies Act as follows:~~Subject to the Companies Act, in a winding up the following shall be paid in the following priority and in priority to all other unsecured debts[13]:

(a) the costs and expenses of the winding-up~~, subject to the Court's discretion to determine order of priority where the assets are insufficient to satisfy the liabilities~~.

~~[12] "**Secured creditor**" refers to a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.~~

[13] Subsection 527(1) of the Companies Act.

(b) all wages or salary of any employee not exceeding RM~~1,500~~15,000 or such other amount as may be prescribed from time to time in respect of services rendered by him to the company within a period of four months before the commencement of the winding-up.

(c) all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding-up.

(d) all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding-up.

(e) all amounts due in respect of contributions payable during the twelve months[14] before the commencement of the winding-up by the company as the employer of any person under any written law relating to employees, superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under federal income tax law.

(f) the amount of all federal tax assessed under any written law before the date of the commencement of the winding-up or assessed at any time before the time fixed for the proving of debts has expired.

Further, any net amount under insurance to insure against a specific liability to a third party has to be paid to that third party. All debts due to the Government shall be entitled from the date of the accrual thereof to a preference of payment over all debts thereafter contracted to any other person under section 10 of the Government Proceedings Act 1956: this would rank such debts ahead of other unsecured debts contracted thereafter. ~~A liquidator of a foreign company appointed for Malaysia may only pay the net proceeds of his realization of the assets of the foreign company in Malaysia after paying the preferential debts in section 292 of the Companies Act and satisfying any liability incurred in Malaysia by the foreign company pursuant to paragraph 340(3)(c) of the Companies Act.~~

One exception to the general rule that secured creditors under a floating charge get paid first is where the assets of a Company available for payment of general creditors are insufficient to meet preferential debts specified in paragraphs ~~292~~527(1)(b), (d) and (e) of the Companies Act, in which case such debts shall have priority over the claims of the holders of debentures under any floating charge created by the Company, and shall be paid accordingly out of any property comprised in or subject to the floating charge.

17. ***Would the Secured Party's rights under each Security Document, such as the right to liquidate the Collateral, be subject to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how does the institution of an insolvency proceeding change your responses to questions 12 and 13 above, if at all)?***

Companies Act

17.1 Any disposition of the property of the company made after the ~~commencement~~presentation of the winding up ~~by the Court~~petition shall, unless the

[14] Paragraph 527(1)(e) has "next" immediately after months, but this appears to be a typographical error.

Court otherwise orders, be void under ~~section 223~~subsection 472(1) of the Companies Act. The Federal Court has held that "the realisation by a secured creditor of assets of a company charged as security does not fall within ~~section 223~~subsection 472(1) of the Companies Act~~"~~. Where the Secured Party obtains a security of such a nature that confers on the Secured Party a beneficial interest in the assets subject to the security~~, then section 223~~ prior to the presentation of a winding up petition against the Security Collateral Provider, then subsection 472(1) of the Companies Act will not apply to prevent the Secured Party from retrieving property under the security when the Secured Party is entitled to have it on the basis that such retrieval does not amount to a disposition of the property of the Security Collateral Provider. In other words, the assets subject to security are not free assets which the Security Collateral Provider is beneficially entitled to that can be realised for the benefit of the creditors of the Security Collateral Provider generally. However, the Federal Court did not set out its analysis of whether the security granted did in fact confer upon the Security Collateral Provider a beneficial interest in the charged asset.

17.2 A stay of proceedings comes into effect when a winding-up order is made, or a ~~provisional~~interim liquidator is appointed, under subsection ~~226~~471(~~3~~1) of the Companies Act. Any action or proceedings against the insolvent company would require the leave of the Court and be on such terms as the Court may impose. This restriction, however, would not affect the right of a Secured Party who can liquidate its Collateral without any court action or proceeding.

17.3 A Security Collateral Provider that is insolvent may propose a scheme of arrangement with its creditors (or any class of them) which, if agreed by the requisite majority, will bind all the affected creditors. The rights of a Secured Party to enforce its security may be affected by the terms of the scheme. However, as the approval process requires Court orders, a Secured Party may enforce its security before the scheme becomes binding on it. The Security Collateral Provider may obtain a Court order restraining further proceedings against it except with leave of the Court. The Secured Party will not be prevented by a restraining order if it may enforce the Collateral without the assistance of the Court.

MDICA

17.4 Where the Security Document is a not MDICA Qualified Financial Agreement (as set out in paragraph 14.17 above)-

(a) the Security Collateral Provider is a member institution (as defined in the MDICA) and control has been assumed by the Corporation or its appointee, or a receiver has been appointed in respect of the Security Collateral Provider on the application of the Corporation, the restrictions in section 109 of the MDICA will apply and prevent the Secured Party from enforcing any remedy against the Security Collateral Provider or its assets except with the consent of the Corporation during the assumption of control or appointment of the receiver, as applicable.

(ii) the Security Collateral Provider is not a member institution and a conservator has been appointed over it, section 179 of the MDICA will prevent the

Secured Party from enforcing the Security Document during the moratorium commencing on the appointment of the conservator, except with the prior written consent of the Corporation.

17.5 Where the Security Document is a MDICA Qualified Financial Agreement, and-

(a) where the Security Collateral Provider is a member institution (as defined in the MDICA) and control has been assumed by the Corporation or its appointee, or a receiver has been appointed in respect of the Security Collateral Provider on the application of the Corporation, the Corporation may transfer or declare it will transfer the Security Document to a qualified third party or bridge institution (each as defined in the MDICA) within the applicable stay period (presently, two business days) after the assumption of control or appointment of a receiver.

(i) Where the Corporation transfers the Security Document to a qualified third party or bridge institution, the Secured Party may not enforce the Security Document against the original Security Collateral Provider. ~~and the~~The Security Document may be terminated against the transferee as if it had always been with the transferee and not the original Security Collateral Provider.

(ii) Where the Corporation does not transfer the Security Document, the Secured Party has to wait out the stay period before enforcing its rights under the Security Document.

(b) where the Security Collateral Provider is not a member institution and a conservator has been appointed over it, the Corporation may consent to transfer the Security Document to a qualified third party (as defined in the MDICA) within the stay period of two business days after the appointment of the conservator. The Secured Party may not enforce the Security Document during the applicable stay period.

Danaharta Act

17.6 Paragraph 14.9 above applies: the Secured Party may not enforce the Security Document during the moratorium commencing upon the appointment of a special administrator by Danaharta in respect of the Collateral Provider.

~~FSA~~

~~17.7 Where the Security Document is not a qualified financial agreement as defined in the FSA, the Secured Party may be restricted from enforcing its rights under the Security Document by-~~

~~(i) the assumption of control of a licensed person (includes Banks) pursuant to section 167 of the FSA;~~

~~(ii) the appointment of a receiver and manager of the business, affairs or property of, among others, Banks pursuant to section 172 of the FSA; and/or~~

~~(iii) the making of an order for the compulsory transfer of the business, assets or liabilities of a Bank pursuant to section 176 of the FSA, as the terms of any vesting~~

~~order made by BNM of the whole or part of the business of that Bank may restrict or prevent enforcement of the Security Document.~~

CBMA

17.8 BNM or, in the case of section 77 of the CBMA, the Board of BNM, has been granted wide powers under the following provisions of the CBMA:

(a) section 31 to specify measures or issue orders to avert or reduce risk to financial stability;

(b) subparagraph 32(1)(c)(iii) read with sections 36 and 38 and the Third Schedule to vest in a person the whole or part of the business, assets or liabilities of, or capital instruments issued by, a financial institution (as defined in subsection 32(2) of the CBMA); and

(c) section 77 to give directions to any person for giving effect to the objects of BNM or safeguarding the balance of payments position,

that may potentially impact collateral rights depending on the manner in which the power is exercised and the type of measure that BNM deploys pursuant to the widely drafted provisions.

However, express provision has been made to the effect that any exercise of power under the abovementioned provisions would not affect the enforcement by parties of their rights under "qualified financial agreements" as defined in the CBMA. Derivatives are a qualified financial transaction as defined in the CBMA (but not Securities Lending Transactions as described in Appendix A). An agreement relating to financial collateral, including a title transfer credit support agreement, with respect to one or more qualified financial transactions under a master agreement is a qualified financial agreement under the CBMA. Where a Security Document would be a qualified financial agreement under the CBMA, any enforcement by the Secured Party of its rights under a Security Document would not to be affected by an exercise of power under the abovementioned provisions.

18. ***Will the Security Collateral Provider (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Collateral made to the Secured Party during a certain "suspect period" preceding the date of the insolvency as a result of such a transfer constituting a "preference" (however called and whether or not fraudulent) in favour of the Secured Party or on any other basis? If so, how long before the insolvency does this suspect period begins? If such a period exists, would the substitution of Collateral by a counterparty during this period invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing? Would the posting of additional Collateral pursuant to the mark-to-market provisions of the Security Documents during the suspect period be subject to avoidance, either because the Collateral was considered to relate to an antecedent or pre-existing obligation or for some other reason?***

The insolvency of the Security Collateral Provider may affect a transfer of Collateral made to a Secured Party under the following undue preference provisions under Malaysian law that could apply to a Security Collateral Provider as follows:

- subsection ~~293~~528(1) of the Companies Act;
- section 42 of the Danaharta Act where the Security Collateral Provider has a special administrator appointed over it (see response to question 20); and
- section 182 of the MDICA where a conservator has been appointed in respect of the Security Collateral Provider that is not a member institution,
- subsection 13(1) of the MAS Act, in relation to the Administered Companies,

(the "**Undue Preference Provisions**"). ~~All of them~~

Subsection 528(1) of the Companies Act provides that any transfer, mortgage, delivery of goods, payment or other act relating to property done by or against a company which is unable to pay its debts as the debts become due from its own money in favour of any creditor shall be deemed to have given such creditor a preference over other creditors in the event of the company's being wound up on a winding up petition presented within six months from the date of making or doing the same and every such act shall be deemed fraudulent and void. In the case of winding up by court, where prior to the date of presentation of a winding up petition a resolution had been passed by the company for voluntary winding up, then the date for the ascertainment of the applicable six month period is that of the resolution to voluntarily wind up the company.

However, any such transfer, mortgage, delivery of goods, payment or other act relating to property is not rendered void under subsection 528(1) of the Companies Act if it "was in favour of any person dealing with the company for valuable consideration and without any actual notice of the contravention." Thus, although subsection 528(1) of the Companies Act deems all payments, deliveries of goods and the other specified acts by a company to its creditor a fraudulent preference and void where the company was insolvent, subsection 528(4) will preserve such payment or delivery of goods under the CSA where the Secured Party can establish that it-

(a) gave valuable consideration; and

(b) did not have notice of "the contravention". Subsection 528(1) does not actually prohibit any act, rather it specifies the legal consequences of the specified acts. In our view, the reference to contravention would, in the context, mean the application of subsection 528(1) of the Companies Act in the relevant circumstances.

In any case, where the statutory insolvency set-off under section 526 of the Companies Act applies, payments which would otherwise be set aside under section 528 of the Companies Act may be retained by the Collateral Taker. In other words, where any transfer or disposition would be taken into account under the insolvency set-off under section 526 of the Companies Act, that transfer or disposition cannot be construed as a void preference under section 528 of the Companies Act.

The other Undue Preference Provisions refer to subsection 53(1) of the ~~Bankruptcy~~Insolvency Act ~~1967~~[15] which provides that every transfer of property, creation of security or payment made by a bankrupt in favour of any creditor shall be deemed to have given such creditor a preference over other creditors if the person is adjudged bankrupt on a bankruptcy petition presented within six months after the date of such transfer and every such act shall be deemed fraudulent and void as against the Director General of Insolvency.

In ***Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)***~~[13]~~[16], the Federal Court held that "It is clear law that the Court has no power to make an order setting aside payments and transfers made in the run-up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following conditions are satisfied:

(i) that the transaction in question took place within six months prior to the commencement of the winding-up;

(ii) that it was a conveyance or transfer of property, or charge thereon, the making of a payment or incurring of an obligation, out of the company's funds or the taking of judicial proceeding;

(iii) that it took place at the time when the company was insolvent;

(iv) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and

(v) that the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding-up."

If all five elements are satisfied, subject to the mandatory insolvency set-off and/or application of section 54 of the ~~Bankruptcy~~Insolvency Act referred to below, our view on the statutory construction of section 53 of the ~~Bankruptcy~~Insolvency Act is that transfers, mortgages, deliveries or any other act relating to property made or done by a Company within the six month period preceding the commencement of its winding-up are deemed fraudulent and void if the elements of undue preference set out above can be established, regardless of intent and the actual circumstances. That is, the deeming provision is not one that is rebuttable.

However, Mohamad Ariff J has stated that *"…any proscribed act under section 53 is merely "deemed" to be fraudulent and void as against the official assignee. The effect is to create a rebuttable presumption"* in ***Tee Siew Kai v Affin Bank***~~[14]~~[17]. In ***Tee Siew Kai's*** case, debentures dated a few days into the 6-month period to secure bank facilities were challenged as undue preferences, but the High Court held that the "*legal and policy arguments must be strong and compelling to allow such an inroad into banking security documents*" and that the liquidator had failed to establish all five elements of a fraudulent preference.

[15] The Bankruptcy Act 1967 was renamed the Insolvency Act 1967 on 6 October 2017.

~~[13]~~[16] [1998] 4 MLJ 569, at 579.

~~[14]~~[17] [2011] 1 LNS 18.

Without referring to the issue of whether "deemed" in section 53 of the ~~Bankruptcy~~Insolvency Act should be construed as a rebuttable presumption, the following statements of Mohamad Ariff J in ***Tee Siew Kai's*** case have been cited by the High Court~~15~~[18] and by the Court of Appeal~~16~~[19]:

"Section 293 of the Companies Act [1965] read in conjunction with section 53 of the Bankruptcy Act … cannot be construed in a mechanistic manner, but must be read in its proper context, which is to invalidate attempts at "fraudulent preference". It should not be a mere matter of counting the dates and determiniing the "twilight period", and indulge in mere legal semantics with an indifferent regard to commercial reality and banking practices. … It is therefore neccesary to consider the broader basis, as cases such as ***Air Services Australia***~~17~~[20]*,* ***Orient Apparel***~~18~~[21] *and* ***Bensa***~~19~~[22] *has done, and consider the purpose of the security documents. The answer must surely lie with the question whether these have been created or made in the course of a normal, genuine commercial transaction. If so, there cannot be any issue of a* fraudulent *preference."*

Presently, the position based on the cases adopting Mohamad Ariff J's view is that no fraudulent preference under section 53 of the ~~Bankruptcy~~Insolvency Act arises where the relevant transaction was made in the course of a normal, genuine commercial transaction as all five ingredients established in ***Sime Diamond*** have to be satisfied. It remains to be seen whether the Federal Court will endorse the rebuttable construction of "deemed" in section 53 of the ~~Bankruptcy Act. In any case, where the statutory insolvency set-off under section 41 of the Bankruptcy Act applies, payments which would otherwise be set aside under section 293 of the Companies Act may be retained by the Collateral Taker. In other words, where any transfer or disposition would be taken into account under the insolvency set-off under section 41 of the Bankruptcy Act, that transfer or disposition cannot be construed as a void preference under the Undue Preference Provisions.~~ Insolvency Act and subsection 528(1) of the Companies Act.

The dates corresponding with the date of presentation of the bankruptcy petition (each a "**Relevant Date**") are:

~~(1) in the case of a winding-up by the Court, the date of presentation of the petition.~~

~~(2) in the case of a voluntary winding-up, where a provisional liquidator has been appointed before the resolution for voluntary winding-up was passed, on the date on which the directors' declaration of the company's inability to continue its business is lodged in accordance with subsection 255(1) of the Companies Act, and in any other case, on the date of the passing of the resolution for winding-up.~~

(1) ~~(3)~~ the date of appointment of a special administrator under the Danaharta Act in respect of the Security Collateral Provider.

(2) ~~(4)~~ the date of appointment of a conservator under the MDICA in respect of the Security Collateral Provider.

(3) ~~(5)~~ 20 February, 2015 in respect of an Administered Company.

~~15~~[18] ***KWH Technologies Sdn Bhd v Warga Hikmat Kejuruteraan Sdn Bhd (In liquidation) & 2 others*** [2013] 1 LNS 1131.

~~16~~[19] ***Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Kepong Development Sdn Bhd*** [2015] 1 LNS 709.

~~17~~[20] ***Air Services Australia v. Ferrier and Another*** 137 ALR 609.

~~18~~[21] ***Arab Malaysian Merchant Bank Berhad v Orient Apparel Berhad & Ors*** [2002] 1 MLJ 89.

~~19~~[22] ***Bensa Sdn Bhd (in liquidation) v. Malayan Banking Berhad & anor*** [1993] 1 MLJ 119.

Section 54 of the ~~Bankruptcy~~Insolvency Act provides that a transfer that would otherwise be struck down under section 53 of the ~~Bankruptcy~~Insolvency Act would not be invalidated if given for valuable consideration, provided-

- the transaction took place before the applicable Relevant Date; AND
- the Secured Party had:

  (1~~)~~ ~~no notice of the existence of any of the grounds for compulsory winding up listed as (a) to (k) in subsection 218(1) of the Companies Act that would justify the presentation of petition under section 218 of the Companies Act for the compulsory winding up of the company; or~~

  ~~(2) In the case of a voluntary liquidation, no notice of the convening of a meeting of the members of the company or of the summoning of the creditors of the company to a meeting, in either case to consider placing the company in liquidation.(3~~) in the case of the appointment of the conservator, in our view, no notice that the Security Collateral Provider had become an affected person as defined in the MDICA.

  (42) where a special administrator is appointed over the Security Collateral Provider, in our view, no notice that the Security Collateral Provider had become an affected person as defined in the Danaharta Act.

  In the case of an Administrator appointed in respect of the Administered Companies under the MAS Act, we are of the view that the event would be the enactment of the MAS Act. The MAS Act is a public Act under Malaysian law, which means that persons are deemed to have notice of such Act upon its enactment.

"**Valuable consideration**" ~~here means~~ is defined in subsection 528(5) of the Companies Act and in subsection 54(2) of the Bankruptcy Act to mean "a consideration of fair and reasonable money value" in relation to the value of the Collateral transferred; or the known or reasonably anticipated benefits of the contract, dealing or transaction.

~~The High Court in ***Tee Siew Kai's*** case found it difficult to regard it as incorporated by virtue of section 293 of the Companies Act, on the basis that section 54 of the Bankruptcy Act speaks of *bona fide* transaction without notice of an "act of bankruptcy", and there is no equivalent of an "act of bankruptcy" in winding-up proceedings, and excluded the application of section 54 of the Bankruptcy Act in its decision. We think the better view is that section 54 of the Bankruptcy Act would be applicable to Companies, as the circumstances in which a Company may be wound up by Court may be deemed the equivalent to "act of bankruptcy" as it is a substantive exception to section 53 of the Bankruptcy Act, which has been held to apply to Companies.~~

There is no reported decision directly on the issue of whether or not the substitution of Collateral would be void if it takes place within the suspect period. If the substituted Collateral is of no greater value than the assets it is replacing, we are of the opinion that based on the fifth element, the substitution would not confer on the Secured Party a preference, priority or advantage.

The posting of additional Collateral pursuant to mark-to-market provisions is less clear. There is no provision in the Companies Act similar to that which protects margin and certain other

securities given to secure obligations under market contracts in connection with various recognized investment exchanges and clearing houses. The judicial approach in ***Tee Siew Kai*** lowers the risk that posting additional Collateral under a Security Document entered into prior to the clawback period will likely be considered a fraudulent preference, but whether the execution of a Security Document would be a fraudulent preference will depend on the applicable facts.

In addition, a floating charge created by a Company within six months of the ~~commencement~~presentation of ~~its winding up~~a winding up petition or, if earlier, the passing of the resolution to wind up voluntarily shall, unless it is proved that the Company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the Company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of five per centum per annum.

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

The parties' agreement on the governing law of each Security Document would be recognized by the courts of Malaysia unless the choice of law (a) was shown not to be a *bona fide* choice, (b) was made to avoid the operation of Malaysian law or statute which would otherwise apply, (c) is contrary to public policy in Malaysia or, where under the applicable conflicts of laws principles, Malaysian courts would apply mandatory provisions of Malaysian law as part of the law of the place of performance of the transactions or other provisions of Malaysian law that apply under exceptions that are commonly recognised under applicable conflicts of laws principles (for example, in matters of procedure or where the applicable English law is of the character of revenue or penal law). Where the Malaysian court decides not to recognize and enforce the choice of law clause, it would decide on the proper law of the contract under the applicable Malaysian conflict of laws principles. The most likely approach is for the Malaysian court to apply the law of the country with the closest and most real connection to the Security Document and transaction(s) thereunder.

Where the parties have contractually agreed a choice of a foreign court for resolution of any dispute between them, a Malaysian court will normally give effect to the contractual selection of the forum by requiring a Plaintiff that has initiated a claim in a Malaysian court to demonstrate why the action brought in breach of an agreed jurisdiction clause should not be stayed or dismissed. The Malaysian court does however have the discretion to allow an action to continue in Malaysia notwithstanding the non-exclusive jurisdiction clause if the Plaintiff can demonstrate a compelling case as to why the action can and ought to be allowed to continue in Malaysia and that it is just and proper to do so. The court, in considering the question of which is the proper forum, will take into account the nature of the dispute, the legal and practical issues involved and such questions as local knowledge, availability of witnesses and their evidence and expense. These factors are not exhaustive and would depend on the grounds invoked by the Plaintiff in asking the court to exercise its discretion in granting leave. If a Malaysian court were to find that it is the appropriate forum, the submission to the jurisdiction (if it is a jurisdiction other than Malaysia) will not be upheld.

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

FEA requirements

Payments in, into or from Malaysia is subject to the FEA requirements, which are subject to change administratively.

A resident Security Collateral Provider must obtain the prior approval of BNM before-

(a) accepting Eligible Collateral from a Specified Person or denominated in a ~~Specified~~Restricted Currency or not permitted in the Notices; or

(b) entering into a Security Document with a Secured Party who is a Specified Person or holds the Collateral on behalf of Specified Persons,

to comply with the FEA requirements.

"**Specified Persons**" means:

- Israel or her residents;
- the authorities of Israel;
- the agencies and instrumentalities of Israel or her residents;
- any entity owned or controlled, directly, or indirectly, by Israel or her residents.

The approval of BNM is also required before a resident may make or receive payments or deal in Restricted Currencies (presently only the currency of Israel).

Presently, section 270 of the FSA would preserve the Security Document entered into in breach of any provision of the FSA from illegality solely by reason of such breach as section 270 has not been disapplied in relation to breach of the FEA requirements.

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

None other than as set out above.

PART 2

TITLE TRANSFER APPROACH PURSUANT TO THE TRANSFER ANNEX

Introduction

Our conclusions in this Part 2 in relation to a Company apply in relation to:

(a) a Bank, as modified and supplemented by Annex 1; and

(b) an ~~Investment Firm~~investment bank, as modified and supplemented by Annex 2.

Assumptions relating to the Transfer Annex

We assume the same facts as set forth in Part 1, but on the assumption that the parties have entered into a Transfer Annex in connection with a Master Agreement rather than a Security Document. For this purpose, assumptions (a) to (k) should be read as modified by the following: references to the "Security Document(s)" shall be deemed to be references to the "Transfer Annex"; references to the "Security Collateral Provider" and "Secured Party" shall be deemed to be references to the "Transferor" and "Transferee", respectively; and references to "Eligible Collateral" should be deemed to be references to "Eligible Credit Support".

We make the following additional assumptions:

(1) The Transferor has entered into a Master Agreement (either the 1992 or the 2002 versions of the Master Agreement) governed by English law and a Transfer Annex with the Transferee. Pursuant to the terms of the Transfer Annex, and as a matter of English law, transfers of Eligible Credit Support involve an outright transfer of title, free and clear of any liens, claims, charges or encumbrances or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance system). If an Event of Default exists with respect to either party, an amount equal to the Value of the Credit Support Balance is deemed to be an Unpaid Amount under the Master Agreement and therefore is taken into account for purposes of determining the amount due upon close-out of the Transaction pursuant to Section 6(e) of the Master Agreement. Although such arrangement has an economic effect similar to the Collateral arrangements evidenced by the Security Documents, the Transfer Annex is not intended to create any form of security interest.

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

The Transfer Annex

22. ***Would the laws of your jurisdiction characterize each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be recharacterized as creating a security interest? If so, is there any way to minimize such risk? What would be the specific consequences of such a recharacterization (referring back to issues related to perfection, priority and formal requirements for establishing both as discussed with regard to the Security Documents in Part 1 above).***

We note that the footnote to the Transfer Annex clearly states that the document is not intended to create a charge or other security interest over the Eligible Credit Support transferred. Paragraph 5(a) provides for a transfer of assets (payment of cash and delivery of assets) which shall vest in the recipient free and clear of any liens, claims, charges or encumbrances or other interest while Paragraph 5(b) provides that nothing in the Transfer Annex is intended to create or does create in favour of either party any mortgage, charge, lien, pledge, encumbrance or any security interest in any cash or any property. We also note that throughout the Transfer Annex, the terms "transfer" is used (e.g., Paragraphs 2(a) and 3(a)).

The Transfer Annex has not as yet been litigated in the Malaysian courts. We are of the view that, to the extent that a Malaysian court upholds English law as the governing law thereof, the Malaysian courts will give effect to the express contractual provisions of the Transfer Annex as construed under English law. We also wish to add that it is unclear as to whether the courts of Malaysia will look to the *lex situs* as to the proprietary aspects of a transfer of assets located in that jurisdiction in determining whether or not to recharacterize the transaction. If the *lex situs* is Malaysia, it is likely that the Malaysian courts will be more inclined to apply Malaysian law in determining whether or not to recharacterize the transaction. We are of the view that, as there are statutory references to "title transfer credit support agreement", it is not likely that the title transfer provisions in the Transfer Annex would be recharacterised.

If the Transfer Annex is recharacterized by a Malaysian court to create security over the Eligible Credit Support, depending on the nature of the Eligible Collateral Support, such charge may be required to be registered under the Companies Act for it to be effective against the liquidator and other creditors of the Transferor in the event of its insolvency. Registration of the charge may be required, if, for example, the charge is a charge over a credit balance of the company in a deposit account or if the charge is determined to be a floating charge (see our response to question 5).

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

Where the Transferee received absolute ownership interest in the Eligible Credit Support, there is no action under Malaysian law that it will need to take thereafter to ensure that its title therein continues.

24. ***What is the effect, if any, under the laws of your jurisdiction of the right of the Transferor to exchange Eligible Credit Support pursuant to Paragraph 3(c) of the Transfer Annex? Does the presence or absence of consent to exchange by the Transferee have any bearing on this question? Please comment specifically on whether the Transferor and the Transferee are able validly to agree in the Transfer Annex that the Transferor may exchange Collateral without specific consent of the Transferee and whether and, if so, how this may affect your conclusions regarding the validity or enforceability of the Transfer Annex.***

The Malaysian courts have not considered the Transfer Annex yet. In our opinion, the provisions of Paragraph 3(c) of the Transfer Annex relating to exchange of delivered Eligible Credit Support would not change the characterisation of the transfers effected under the Transfer Annex as Paragraph 3(c) requires the return of equivalent securities and not the original securities. The parties are able to validly agree in the Transfer Annex that the Transferor may exchange Eligible Credit Support without specific consent of the Transferee.

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

We are of the view that Paragraph 6 of the Transfer Annex would be valid to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of the net amount payable under Section 6(e) of the Master Agreement, where the Transfer Annex is enforceable as a contract.

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

Subject to the response to question 27 below, the Master Agreement and the Transfer Annex will remain binding on the Transferor irrespective of the insolvency of the Transferor so the Transferee would be entitled to enforce its rights thereunder, except-

(a) ~~(a)~~ if the Master Agreement and Transfer Annex are MDICA Qualified Financial Agreements, during two business days following the appointment of a conservator in respect of the Transferor by the Corporation referred to in the response to question 14 above and the Netting Opinion. ~~Paragraph 115~~Subparagraph 2(1A)(~~i~~e)(ii) of the MDICA provides that a "title transfer credit support agreement" with respect to ~~an agreement in any of paragraphs 115(1)(a) to 115(1)(h~~one or more qualified financial transactions (as defined therein) under a master agreement referred to in subparagraph 2(1A)(e)(i) is also a MDICA Qualified Financial Agreement. Under the MDICA, a "**title transfer credit support agreement**" means an agreement under which title to property has been provided for the purpose of securing the payment or performance of an obligation in respect of a MDICA Qualified Financial Agreement. The Transfer Annex would be an MDICA Qualified Financial Agreement, where the Transactions it relates to fall within ~~subsection 115~~subparagraph 2(1A)(e)(i) of the MDICA.

(b) if the Master Agreement or Transfer Annex is not a MDICA Qualified Financial Agreement, during the moratorium following the appointment of a conservator in respect of the Transferor by the Corporation referred to in the response to question 14 above and in the Netting Opinion.

(c) where the Transfer Annex is a qualified financial agreement as defined in the Netting Act, during the stay period of two business days following the appointment of a special administrator in respect of the Transferor by Danaharta referred to in our response to question 14 above and in the Netting Opinion. The definition of "qualified financial agreement" in the Netting Act includes any agreement under which title to property has been provided for the purpose of securing payment or performance of an obligation, with respect to one or more qualified financial transactions under a Master Agreement that is a qualified financial agreement as defined therein.

(d) where the Transfer Annex is not a qualified financial agreement as defined in the Netting Act, during the moratorium following the appointment of a special administrator in respect of the Transferor by Danaharta referred to in our response to question 14 above and in the Netting Opinion.

(e) where the Transfer Annex is a qualified financial agreement as defined in the FSA, during the stay period of two business days as prescribed in the Netting of Financial Agreements (Period of Stay) Order 2015 following an event below under the FSA-

(i) the assumption of control of a licensed person (includes investment banks but excludes Banks) pursuant to section 167 of the FSA;

(ii) the appointment of a receiver and manager of the business, affairs or property of, among others, ~~Banks~~investment banks pursuant to section 172 of the FSA; or

(iii) the making of an order for the compulsory transfer of the business, assets or liabilities of ~~a Bank~~, among others, an investment bank pursuant to section 176 of the FSA,

referred to in our response to question 14 above and in the Netting Opinion.

A "qualified financial agreement" includes a "title transfer credit support agreement" in the FSA and CBMA respectively, where such title transfer credit support agreement relates to one or more qualified financial transactions (as defined therein) under a master agreement, and a "title transfer credit support agreement" is defined as an agreement under which title to property has been provided for the purpose of securing the payment or performance of an obligation in respect of a qualified financial agreement (as defined in the FSA and CBMA). The Transfer Annex would be a qualified financial agreement under the FSA and CBMA where the Master Agreement is a qualified financial agreement under the FSA and CBMA.

(f) where the Transfer Annex is a not qualified financial agreement as defined in the FSA, and restrictions on netting are imposed following an event below under the FSA-

(i) the assumption of control of a licensed person (includes Banks) pursuant to section 167 of the FSA;

(ii) the appointment of a receiver and manager of the business, affairs or property of, among others, Banks pursuant to section 172 of the FSA; or

(iii) the making of an order for the compulsory transfer of the business, assets or liabilities of a Bank pursuant to section 176 of the FSA,

referred to in our response to question 14 above and in the Netting Opinion.

(g) where the Transfer Annex is not a qualified financial agreement as defined in the CBMA (as set out in paragraph 17.8 above), subject to-

(i) any order issued or measure specified by BNM in the interest of financial stability under subsection 31(1) of the CBMA which a person affected must comply with notwithstanding any statutory provision or any contractual obligation to the contrary;

(ii) the terms of any vesting order (including any conditions as may be imposed in the vesting order) of a Bank made by BNM of the whole or part of the business of that Bank under subparagraph 32(1)(c)(iii) of the CBMA, which may restrict or prevent termination of agreements or transactions in accordance with their terms ; and

(iii) any directions given by the Board of BNM for the purpose of giving effect to the objects of BNM, or safeguarding the balance of payments position under subsection 77(1) of the CBMA, which restricts enforcement of the Transfer Annex.

(h) when an order of Court restraining proceedings against the Transferor after an arrangement with all or any class of its creditors has been proposed as referred to in response to question 17 above. It should be noted that if the Company disposes or acquires property other than in the ordinary course of its business without leave of Court, the Company and every officer commits an offence so following an order of Court, it will have to be determined whether transfers of Collateral are dispositions and acquisitions in the ordinary course of the Company's business and if not, an order of Court sought for such transfers.

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

Our response to question 18 above applies also to transfers of Eligible Credit Support to the Transferee. To the extent that transfers under the Transfer Annex would be taken into account under the statutory insolvency set-off under section ~~41~~526 of the ~~Bankruptcy~~Companies Act, transfers made under the Transfer Annex would not be construed as a void preference under the Undue Preference Provisions.

28. ***Would the parties' agreement on governing law of the Transfer Annex and submission to jurisdiction be upheld in Malaysia, and what would be the consequences if it were not?***

Our response to question 19 above applies to the Transfer Annex.

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

Under Malaysian conflict of laws rules, a Malaysian court will apply the law of the jurisdiction where the Eligible Credit Support is situated on the requirements to effect a valid transfer thereof. Therefore, the requirements under such law to effect a valid transfer of the Eligible Credit Support will have to be satisfied.

Transfers of Malaysian debt securities comprising Eligible Credit Support must be transferred in accordance with the laws governing, and rules of, the relevant CSD.

Close-out Amount Protocol

As requested, we have reviewed the ISDA Close-out Amount Protocol (the "**2009 Protocol**") published on 27 February 2009 on the assumption that the changes intended by the 2009 Protocol are effective as a matter of governing law of the Covered Master Agreement (as defined in the 2009 Protocol) and the relevant Credit Support Document. Our conclusions in this memorandum are not materially affected by the changes made by the 2009 Protocol to a 1992 Master Agreement.

Collateral Agreement Negative Interest Protocol

As requested, we have reviewed the Collateral Agreement Negative Interest Protocol published by ISDA on 12 May 2014 (the "**Protocol**"). On the assumption that the changes intended by the Protocol are effective as a matter of the governing law of the Protocol and each Protocol Covered Collateral Agreement (as defined in the Protocol), the changes made by the Protocol do not affect the conclusions in this Memorandum.

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

Yours faithfully,

Shearn Delamore &co.
WRITTEN BY Christina Kow
DIRECT TEL 2027 2786
DIRECT FAX ~~2078 0620~~2070 4445
EMAIL christina@shearndelamore.com

APPENDIX A
~~SEPTEMBER 2012~~
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 ~~fixed or floating~~ price, and the other party agrees to ~~deliver such~~pay a price for the same quantity ~~in exchange for payment at such price~~to be set on a specified date in the future. A Commodity Forward may be settled by the physical delivery of the commodity in exchange for the specified price or may be cash settled based on the difference between the agreed forward price and the prevailing market price at the time of settlement.

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

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

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

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

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

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

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

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

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

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

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

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical

data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B
SEPTEMBER 2009

CERTAIN COUNTERPARTY TYPES~~20~~23

Description	Covered by opinion	Legal form(s)~~21~~24
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 No	A public company limited by shares incorporated or deemed registered under the Companies Act ~~1965~~2016 with "Berhad" or "Bhd" in its name and licensed under the FSA to carry on banking business. Only a bank licensed under the FSA may use: • the word "bank"; • any derivative of the word "bank" in any language; or • any other words in any language capable of being construed as indicating the carrying on a banking business. We do not discuss: (a) Islamic banks licensed under the Islamic Financial Services Act 2013; (b) Development financial institutions regulated under the Development Financial Institutions Act 2002; (c) Labuan banks licensed under the Labuan Financial Services and Securities Act 2010;

~~20~~23 In these definitions, the term "legal entity" means an entity with legal personality other than a private individual.

~~21~~24 If appropriate, please indicate, as discussed in the instruction letter, any naming convention or rule that would help a reader of the opinion to identify and classify the entity.

		(d) Labuan Islamic banks licensed under the Labuan Islamic Financial Services and Securities Act 2010; or (e) any bank constituted under statute. Investment banks are considered under Investment firm/Broker dealer.
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	
Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix B.	Yes No	A Malaysian company may be: (a) a public limited company (i.e. with "Berhad" or "Bhd" as part of its name); or (b) a private limited company (i.e. with "Sendirian Berhad" or "Sdn. Bhd" as part of its name), each incorporated or deemed registered under the Companies Act ~~1965~~ 2016. A Labuan company.
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	
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	No	

order to protect the interests of policyholders.		
International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and similar organizations established by treaty.	No	

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Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.	Yes No	(a) A public company limited by shares incorporated or deemed registered under the Companies Act ~~1965~~2016 with "Berhad" or "Bhd" in its name and licensed under the FSA to carry on investment banking business. Only an investment bank licensed under the FSA may use: • the word "bank"; • any derivative of the word "bank" in any language; or • any other words in any language capable of being construed as indicating the carrying on ~~an~~ investment banking business. (b) A Malaysian company holding a Capital Markets Services Licence for dealing in derivatives and dealing in securities. Only holders of a Capital Markets Services Licence may use any name, title or description implying or tending to create the belief that such person is licensed to carry on the regulated activity of dealing in derivatives and dealing in securities. We do not discuss: (a) Labuan investment banks licensed under the Labuan Financial Services and Securities Act 2010; ~~and~~

		(b) Labuan Islamic investment banks licensed under the Labuan Islamic Financial Services and Securities Act 2010; (c) development financial institutions regulated under the Development Financial Institutions Act 2002; or (d) any bank constituted under statute.
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.	No	
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	
Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this	No	

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.	No	
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	

Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "Sovereign Wealth Fund" excludes a Central Bank.	No	
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	
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	

ANNEX 1

BANK

In this Annex 1, we only consider commercial banks licensed under the FSA to conduct banking business (each a **Bank**).

Subject to the detailed discussion below, the types of insolvency proceedings that may be commenced in Malaysia in respect of a Bank are:

(a) compulsory winding up under the Companies Act;

(b) voluntary winding up with the consent of BNM;

(c) private or Court appointed receivership, subject to prior notice to BNM;

(d) special administration under the Danaharta Act as set out in paragraph 14 above; and

(e) any exercise of the powers of the Corporation under section 99 of the MDICA[~~22~~25] after BNM has notified the Corporation, in writing, under subsection 98(1) of the MDICA that a Bank has ceased, or is likely to cease, to be viable, which include (without limitation):

(i) a power to assume control of the whole or part of the assets, liabilities, business and affairs of the Bank, or appoint any person to do so on behalf of the Corporation;

(ii) a power to apply to the High Court to appoint a receiver, manager or receiver and manager to manage the whole or part of the assets, liabilities, businesses and affairs of the Bank;

(iii) subject to Ministerial approval, to petition for the winding up of the Bank; and/or

(iv) a power to transfer such assets, business and affairs of the Bank as the Corporation determines to a bridge institution (as defined in the MDICA)~~; and~~

~~(f) any exercise of the following powers of BNM under Part XIII of the FSA, where any of the circumstances set out in section 165 of the FSA occurs in respect of a Bank:~~

~~(i) with the prior approval of the Minister of Finance by an order in writing under section 167 of the FSA to assume control or appoint a person to assume control, and to sell~~

[~~22~~25] A Bank will not be an "affected person" under the MDICA, and so no conservator may be appointed in respect of a Bank.

~~or otherwise dispose, of the whole or part of the business or property of the Bank, on terms and conditions determined by BNM;~~

~~(ii) under section 172 of the FSA to apply to the High Court for an order to appoint a receiver and manager to manage the whole or part of the business, affairs or property of the Bank;~~

~~(iii) to vest by order in writing in a third party the whole or part of the business, assets of liabilities of the Bank; or~~

~~(iv) with the authorisation of the Minister of Finance, BNM may file an application to the High Court for the winding up of the Bank; the High Court may order the winding up of the Bank pursuant to the application filed by BNM~~.

Analysis

On the basis of the assumptions and subject to the qualifications in this Memorandum as modified and supplemented by this Annex 1, we are of the view that our conclusions in this Memorandum in relation to a Malaysian company would also apply to a Bank, including in the event of its becoming subject to one of the types of insolvency proceedings set out above.

A. Compulsory winding up under the Companies Act

The provisions of the Companies Act in relation to the winding up of companies shall apply to the winding up of a Bank, but any application for the winding up of a Bank may be only be presented to the High Court with the prior written approval of BNM, and BNM appoints the liquidator who must act under the direction and supervision of BNM.

B. Assumption of Control or the Appointment of a Receiver and Manager under the MDICA

B1. A Bank is deemed a member institution of the Corporation until its membership is cancelled or terminated, and would not be subject to the provisions of the MDICA relating to affected persons or the appointment of a conservator. Instead, where the Corporation has received a notification from BNM that a Bank has ceased to be viable or is likely to cease to be viable, the Corporation may, among other powers, assume control[~~23~~26] of the Bank directly or appoint a person to do so, or apply to the High Court to appoint a receiver, manager or receiver and manager (any thereof, a "receiver") to manage the Bank.

B2. Notwithstanding any other law, where the Corporation or the appointed person has assumed control, or a receiver has been appointed in respect, of a Bank, the restrictions in section 109 of the MDICA apply. Among others, paragraphs 109(1)(b) and (d) of the MDICA restrict the Secured Party from commencing or continuing any legal proceeding against the Bank or in respect of its assets, or having any remedy against the Bank or assets of the Bank as a creditor of the Bank, during the assumption of control by the Corporation or appointed person, or the appointment of a receiver as applicable.

[~~23~~26] Paragraph 99(1)(c) of MDICA.

B3. Where the Credit Support Document is a MDICA Qualified Financial Agreement[24][27], section 109 of the MDICA shall only prevent the enforcement of the Credit Support Document during a stay period (presently two business days) following-

- the commencement of the assumption of control where the Corporation or the appointed person assumes control of that Bank, or
- the appointment of the receiver where a receiver is appointed in respect of that Bank,

pursuant to subsection 115(3) of the MDICA.

B4. If, during the stay period following the commencement of the assumption of control or the appointment of the receiver of the Bank, the Corporation transfers, or declares by notice that it will transfer, the Credit Support Document as a MDICA Qualified Financial Agreement that applies to any property of the Bank to a bridge institution or a qualified third party (each as defined in the MDICA), the Corporation must also transfer that property to the relevant transferee[25][28]. Thereafter the Credit Support Document may only be enforced against the transferee in accordance with its terms, as if the Credit Support Document had always been with the transferee and not the Bank. Where a person is a counterparty to two or more MDICA Qualified Financial Agreement to which the Bank is also a party, then where the Corporation decides to transfer, it must transfer all such agreements or none at all.

B5. Where the Corporation does not transfer, and does not declare that it will transfer, the Credit Support Document within the applicable stay period, then the ~~Secured Party~~Collateral Taker may enforce the Credit Support Document against the Bank any time after the stay period. If the ~~Secured Party~~Collateral Taker, though able to terminate, does not terminate the agreement(s) in question, the Corporation may by notice in writing, declare such agreement(s) terminated, and in that case, the termination by the Corporation is effective notwithstanding any term to the contrary in the agreement(s) concerned and the agreement shall be deemed to have been terminated by the ~~Secured Party~~Collateral Taker.

B6. Where the Credit Support Document is not a MDICA Qualified Financial Agreement, paragraphs 109(1)(b) and (d) of the MDICA restrict the ~~Secured Party~~Collateral Taker from commencing or continuing any legal proceeding against the Bank or in respect of its assets, or having any remedy against the Bank or assets of the Bank as a creditor of the Bank, during the assumption of control by the Corporation or appointed person, or the appointment of a receiver as applicable.

~~C. Assumption of control or Appointment of Receiver and Manager by BNM~~

~~C1. Where the Credit Support Document is a qualified financial agreement as defined in the FSA, subsection 209(2) of the FSA provides that the parties under a qualified financial agreement (as defined in the FSA) may continue to enforce their rights under the qualified financial agreement and shall not be affected by-~~

[24][27] The types of agreements relating to derivatives that may be MDICA Qualified Financial Agreements are set out in paragraph 14.17 above.

[25][28] Subsection 115(5) of the MDICA.

(a) the assumption of control of a licensed person (includes Banks) pursuant to section 167 of the FSA;

(b) the appointment of a receiver and manager of the business, affairs or property of, among others, Banks pursuant to section 172 of the FSA; or

(c) the making of an order for the compulsory transfer of the business, assets or liabilities of a Bank pursuant to section 176 of the FSA,

except during such period as may be prescribed upon the commencement of the assumption of control or the appointment of a receiver and manager. The applicable period of stay is two business days from the commencement of the assumption of control or the appointment of a receiver and manager pursuant to the Netting of Financial Agreements (Period of Stay) Order 2015. Hence a Secured Party may not enforce the Credit Support Document as a qualified financial agreement under the FSA only during the two business day stay period from the commencement of the assumption of control or the appointment of a receiver and manager in respect of the Bank.

C2. Where BNM transfers a Credit Support Document to any person pursuant to the exercise of the powers under subsection 168(6) or section 174 of the FSA or to a bridge institution or any other person under section 176 of the FSA:

(a) the acquiring person or bridge institution shall assume all the rights and obligations under such Credit Support Document of the Bank from which such agreement was transferred.

(b) the enforcement by the parties of their rights under such Credit Support Document shall be in accordance with the terms of such agreement as if the acquiring person or bridge institution had always been a party to such agreement. This means that the Secured Party may not enforce the Credit Support Document against the Bank transferee.

(c) where a person is a counterparty to two or more qualified financial transactions (as defined in the FSA) under the Credit Support Document with the Bank, all or none of such qualified financial transactions shall be transferred to the acquiring person or bridge institution.

(d) where a Credit Support Document is transferred, any property of the Bank to which that agreement applies must likewise be transferred to the acquiring person or bridge institution.

C3. However, where BNM does not transfer a Credit Support Document within two business days from the commencement of the assumption of control or appointment of a receiver or manager in respect of the Bank, then the parties to the Credit Support Document shall be entitled to enforce their rights under such agreement at the expiry of the stay period of two business days.

C4. Where the Credit Support Document is not a qualified financial agreement as defined in the FSA, the enforceability of the Credit Support Document may be affected by-

~~(a) the assumption of control of a licensed person (includes Banks) pursuant to section 167 of the FSA following which, among others, BNM may sell or dispose of the Credit Support Document on terms determined by BNM;~~

~~(b) the appointment of a receiver and manager of the business, affairs or property of, among others, Banks pursuant to section 172 of the FSA; or~~

~~(c) the making of an order for the compulsory transfer of the business, assets or liabilities of a Bank pursuant to section 176 of the FSA, in which case the the terms of any vesting order made by BNM of the whole or part of the business of that Bank may restrict or prevent termination of agreements or transactions in accordance with their terms, subject to such conditions as may be imposed in the vesting order.~~

Priority of payments

Upon the winding up of a Bank, the priority of unsecured claims will be-

(i) costs and expenses of liquidator.

(ii) the preferential debts in paragraphs ~~292~~527(1)(b) to (f) of the Companies Act and debts due to the Government under section 10 of the Government Proceedings Act 1956.

(iii) liabilities in respect of all deposits in Malaysia.

Any remainder thereafter is to be distributed amongst the unsecured creditors.

Security Documents

On the basis of the assumptions and subject to the qualifications in this Memorandum as modified and supplemented by this Annex 1, we are of the view that the analysis in Part 1 of the Memorandum of issues relating to the enforceability of the Security Documents against a Security Collateral Provider would apply in circumstances where the Security Collateral Provider is a Bank.

Transfer Annex

On the basis of the assumptions and subject to the qualifications in this Memorandum as modified and supplemented by this Annex 1, we are of the view that the analysis in Part 2 of the Memorandum of issues relating to the enforceability of the Transfer Annex would apply to a Bank in the event that insolvency proceedings referred to above are commenced in Malaysia in respect of the Bank.

ANNEX 2

INVESTMENT BANK

In this Annex 2, we only consider investment banks licensed under the FSA to conduct investment banking business (each an **Investment Bank**).

A. The types of insolvency proceedings that may be commenced in Malaysia in respect of an Investment Bank are:

(a) compulsory winding up under the Companies Act;

(b) voluntary winding up with the consent of BNM;

(c) private or Court appointed receivership, subject to prior notice to BNM;

(d) special administration under the Danaharta Act as set out in paragraph 14 above~~;~~

~~(e) any exercise of the powers of the Corporation over affected persons under the MDICA as Investment Banks are not member institutions under the MDICA~~; and

(e) ~~(f)~~ any exercise of the following powers of BNM under Part XIII of the FSA, where any of the circumstances set out in section 165 of the FSA occurs in respect of an Investment Bank:

(i) with the prior approval of the Minister of Finance by an order in writing under section 167 of the FSA to assume control or appoint a person to assume control, and to sell or otherwise dispose, of the whole or part of the business or property of the Investment Bank, on terms and conditions determined by BNM;

(ii) under section 172 of the FSA to apply to the High Court for an order to appoint a receiver and manager to manage the whole or part of the business, affairs or property of the Investment Bank;

(iii) to vest by order in writing in a third party the whole or part of the business, assets of liabilities of the Investment Bank; or

(iv) with the authorisation of the Minister of Finance, BNM may file an application to the High Court for the winding up of the Investment Bank; the High Court may order the winding up of the Investment Bank pursuant to the application filed by BNM.

B. FSA

B1. Where the Collateral Provider is an Investment Bank and the Credit Support Document is not a qualified financial agreement as defined in the FSA, the Collateral Taker's right to enforce the Credit Support Document may be affected by-

(a) the assumption of control of that Investment Bank pursuant to section 167 of the FSA following which, among others, BNM may sell or dispose of the Credit Support Document on terms determined by BNM;

(b) the appointment of a receiver and manager of the business, affairs or property of that Investment Bank pursuant to section 172 of the FSA; and/or

(c) the making of an order for the compulsory transfer of the business, assets or liabilities of that Investment Bank pursuant to section 176 of the FSA, in which case the the terms of any vesting order made by BNM of the whole or part of the business of that Investment Bank may restrict or prevent enforcement of the Credit Support Document.

C. Qualified financial agreement

C1. Where the Credit Support Document is a qualified financial agreement as defined in the FSA, subsection 209(2) of the FSA provides that the parties under a qualified financial agreement (as defined in the FSA) may continue to enforce their rights under the qualified financial agreement and shall not be affected by-

(a) the assumption of control of the Investment Bank pursuant to section 167 of the FSA;

(b) the appointment of a receiver and manager of the business, affairs or property of the Investment Bank pursuant to section 172 of the FSA; or

(c) the making of an order for the compulsory transfer of the business, assets or liabilities of that Investment Bank pursuant to section 176 of the FSA,

except during such period as may be prescribed upon the commencement of the assumption of control or the appointment of a receiver and manager. The applicable period of stay is two business days from the commencement of the assumption of control or the appointment of a receiver and manager pursuant to the Netting of Financial Agreements (Period of Stay) Order 2015. Hence a Collateral Taker may not enforce the Credit Support Document as a qualified financial agreement under the FSA only during the two business day stay period from the commencement of the assumption of control or the appointment of a receiver and manager in respect of the Investment Bank.

C2. Where BNM transfers a Credit Support Document to any person pursuant to the exercise of the powers under subsection 168(6) or section 174 of the FSA or to a bridge institution or any other person under section 176 of the FSA:

(a) the acquiring person or bridge institution shall assume all the rights and obligations under such Credit Support Document of the Investment Bank from which such agreement was transferred.

(b) the enforcement by the parties of their rights under such Credit Support Document shall be in accordance with the terms of such agreement as if the acquiring person or

bridge institution had always been a party to such agreement. This means that the Collateral Taker may not enforce the Credit Support Document against the transferee by reason of the default of the Investment Bank transferor.

(c) where a person is a counterparty to two or more qualified financial transactions (as defined in the FSA) under the Credit Support Document, all or none of such qualified financial transactions shall be transferred to the acquiring person or bridge institution.

(d) where a Credit Support Document is transferred, any property of the Investment Bank to which that agreement applies must likewise be transferred to the acquiring person or bridge institution.

C3. However, where BNM does not transfer a Credit Support Document within two business days from the commencement of the assumption of control or appointment of a receiver or manager in respect of the Investment Bank, then the parties to the Credit Support Document shall be entitled to enforce their rights under such agreement at the expiry of the stay period of two business days.

Priority of payments

Upon a winding up of an Investment Bank, the assets of the Investment Bank shall firstly be applied towards all liabilities of the Investment Bank in relation to deposits in Malaysia which shall have priority over all other unsecured liabilities of that Investment Bank in Malaysia other than the preferential debts under subsection ~~292~~527(1) of the Companies Act in the order set out therein and debts due to the Government of Malaysia under section 10 of the Government Proceedings Act 1956.

Security Documents

On the basis of the assumptions and subject to the qualifications in this Memorandum as modified and supplemented by this Annex 2, we are of the view that the analysis in Part 1 of the Memorandum of issues relating to the enforceability of the Security Documents against a Security Collateral Provider would apply in circumstances where the Security Collateral Provider is an Investment Bank.

Transfer Annex

On the basis of the assumptions and subject to the qualifications in this Memorandum as modified and supplemented by this Annex 2, we are of the view that the analysis in Part 2 of the Memorandum of issues relating to the enforceability of the Transfer Annex would apply to an Investment Bank in the event that insolvency proceedings referred to above are commenced in Malaysia in respect of the Investment Bank.

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