CLIFFORD CHANCE
DEUTSCHLAND LLP

4 SEPTEMBER 2018

GERMAN LAW OPINION FOR THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC.

ENFORCEABILITY OF CERTAIN CLOSE-OUT, SET-OFF AND DEFAULT PROVISIONS WITH RESPECT TO THE ISDA/F~~O~~IA CLIENT CLEARED OTC DERIVATIVES ADDENDUM

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CLIENT RELIANCE OPINION

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International Swaps and
Derivatives Association, Inc.
~~360 Madison Avenue, 16th~~10 East 53rd Street,
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USA

~~17 November 2015~~4 September 2018

Dear Sirs,

You have instructed us to give a legal opinion under the laws of the Federal Republic of Germany ("**Germany**" or "**this jurisdiction**") to address certain issues with regard to the enforceability of the close-out, set-off and default provisions of the ISDA/F~~O~~IA Client Cleared OTC Derivatives Addendum (the "**Addendum**") when used in conjunction with any of the 1987, the 1992 or the 2002 ISDA Master Agreements (as defined in paragraph 1.3.2 below). We are not responsible for drafting the Industry Opinions (as defined in paragraphs 1.3.~~4~~5 and 1.3.~~5~~6 below) and you have not instructed us to review and update the Industry Opinions. As instructed, we have not discussed any statements made in this opinion letter (the "**Opinion Letter**") with German ISDA counsel responsible for the Industry Opinions.

1. INTRODUCTION

The opinions in this Opinion Letter are given by Clifford Chance Deutschland LLP in respect of an Addendum that has been entered into between two parties, one being a clearing member which is incorporated in this jurisdiction ("**Clearing Member**" or "**German Party**") of a central counterparty ("**CCP**") as further specified in paragraph 1.5 and the other being the Clearing Member's client ("**Client**").

The Addendum is entered into in conjunction with an existing Covered Base Agreement (as defined in paragraph 1.3.2) to facilitate the standardisation of documentation of

client clearing and to support the client protections used by a CCP on the default of a clearing member. The Addendum supplements and forms part of a Covered Base Agreement between the Client and the Clearing Member.

The opinions in this Opinion Letter are given in respect of Client Transactions (as defined in the Addendum) of the type as included in Appendix A to this Opinion (which corresponds to Appendix A to the Industry Netting Opinion~~,~~), subject to the assumptions and qualifications made in this Opinion Letter and to the assumptions and qualifications made in the Industry Opinions.

1.1 Formal statement

This Opinion Letter ~~is a~~contains formal statements of opinion as to German law as set out in paragraph 4 (*Opinion*) below. It is based on our understanding of the Addendum as described in paragraph 2 (*Background*) below, and is subject to the facts set out therein, the specific assumptions set out in paragraph 3 (*Assumptions*) and to the qualifications set out in paragraph 4 (*Opinion*) and paragraph 5 (*Qualifications*). The interpretation and validity of the Addendum are, however, matters of English or New York law, on which we do not opine. The opinions given in this Opinion Letter are strictly limited to the specific questions raised by you as set out in paragraph 4 (*Opinion*) and do not extend to any other matters.

1.2 No advice

We have not been responsible for advising any party to a Clearing Agreement ~~for~~in respect of the ~~purposes~~subject matter of this Opinion Letter and the delivery of this Opinion Letter to any other person to whom a copy of this Opinion Letter may be communicated does not evidence the existence of any relationship of client and lawyer between us and such person.

1.3 Documents reviewed

For the purposes of preparing our opinion we have reviewed pdf-copies of the following documents submitted to us in template format:

1.3.1 the Addendum (version dated 5 July 2013~~ and~~, 9 June 2015 and 9 February 2016);

1.3.2 each of the following:

(a) the Interest Rate and Currency Exchange Agreement (the "**Interest Rate and Currency Exchange Agreement**") and the Interest Rate Swap Agreement (the "**Interest Rate Swap Agreement**"), both published by

ISDA in 1987 (the "**1987 ISDA Master Agreements**" and each a "**1987 ISDA Master Agreement**"),

(b) the Multicurrency-Cross Border Master Agreement (the "**Cross Border Master Agreement**") and the Local Currency-Single Jurisdiction Master Agreement (the "**Single Jurisdiction Master Agreement**"), both published by ISDA in 1992 (the "**1992 ISDA Master Agreements**" and each a "**1992 ISDA Master Agreement**"), and

(c) the ISDA 2002 Master Agreement (the "**2002 ISDA Master Agreement**")

(each of the agreements listed under paragraph 1.3.2(a) to 1.3.2(c) in the form as published by ISDA and each, a "**Covered Base Agreement**" and together with the Addendum, the "**Clearing Agreement**");

1.3.3 the 1995 Credit Support Annex governed by English law (the "**Transfer Annex**") together with a ~~P~~paragraph 11 in the versions modified and published specifically for the purposes of the Addendum by ISDA on 8 July 2013, on 22 July 2014 and on 9 June 2015 (~~each a~~the "**Paragraph 11 ~~Document~~**");

1.3.4 the 1994 Credit Support Annex governed by the laws of the State of New York (the "**NY Annex**" and along with the Transfer Annex, the "**Credit Support Documents**") together with a paragraph 13 in the form published by ISDA on 9 June 2015 (the "**Paragraph 13**");

~~1.3.4~~1.3.5 the memorandum of law by the German law firm Hengeler Mueller Partnerschaft von Rechtsanwälten mbH, Berlin, as German counsel to ISDA as to "the enforceability of close-out netting under the 1987 ISDA Master Agreements, the 1992 ISDA Master Agreements and the 2002 ISDA Master Agreement in German law" dated ~~7 July 2014~~1 September 2017 (the "**Industry Netting Opinion**"); and

~~1.3.5~~1.3.6 the memorandum of law by the German law firm Hengeler Mueller Partnerschaft von Rechtsanwälten mbH, Berlin, as German counsel to ISDA as to "the validity and enforcement of collateral arrangements under the ISDA Credit Support Documents in German law" dated ~~30 December 2014~~1 September 2017 (the "**Industry Collateral Opinion**" and, together with the Industry Netting Opinion, the "**Industry Opinions**").

1.4 Scope of examination and investigation

1.4.1 We are not instructed to review and update the Industry Opinions. Hence, this Opinion Letter is not intended to, nor should it be construed to confirm, restate, approve or verify any statements made in the Industry Opinions and we do not assume any responsibility for any statements made (or any omissions) in the Industry Opinions. We therefore assume that the Industry Opinions are complete, correct, not misleading and discuss and present all relevant issues in answering the questions set out in the Industry Opinions. Accordingly, as instructed, this Opinion Letter is limited to an examination of whether, based on the analysis set out in the Industry Opinions as to the effectiveness of the close-out provisions of the Covered Base Agreements including ~~the Transfer Annex~~a Credit Support Agreement, the entering into the Addendum and the Paragraph 11 ~~Document~~or Paragraph 13, as applicable, to supplement the relevant Covered Base Agreement would adversely affect the analysis as set out in the Industry Opinions. We have not been asked for, and do not opine or advise on, necessary updates or inconsistencies in the Industry Opinions.

1.4.2 The opinions given in paragraph 4 are given in respect of the Addendum as at the date of this Opinion Letter. We express no opinion as to any provision of the Addendum other than those on which we expressly opine.

1.4.3 We do not express any opinions as to any matters of fact including, for the avoidance of doubt, factual matters of law (*Rechtstatsachen*) except to the extent that we expressly opine on such matters.

1.4.4 We do not opine on any regulatory, tax or accounting matters.

1.4.5 This Opinion Letter constitutes a legal opinion for regulatory capital purposes only. We do not opine on the suitability or appropriateness of the Addendum or any Client Transaction or related issues including any advisory obligations and related duties of care. Accordingly, this Opinion Letter shall not provide a basis on which any Addressee or any other person can rely with respect to, or in connection with, any transaction or act which any of them may undertake or omit to undertake and we assume no responsibility to any person in the context of this Opinion Letter.

1.5 Covered Clearing Members

This opinion is given in respect of Clearing Members as defined in chapter III.1~~.~~.(a) and (b) of the Industry Netting Opinion, to the extent incorporated in Germany~~,~~ and acting through their offices in Germany and holding the requisite licence to act as a credit institution (*Kreditinstitut*) within the meaning of section 1 para 1 KWG ("**Credit**

Institution") or as a financial services institution (*Finanzdienstleistungsinstitut*) within the meaning of section 1 para 1a KWG ("**Financial Services Institution**") subject to paragraph 5.2 below.

This Opinion Letter does not consider the validity and enforceability of Credit Support Documents if the validity and enforceability of such Credit Support Documents is outside the scope of the Industry Collateral Opinion and we refer in particular to chapter B.2 of the Industry Collateral Opinion.

1.6 Definitions

For purposes of this Opinion Letter,[1]

1.6.1 The main insolvency proceedings (*Hauptinsolvenzverfahren*) under the German Insolvency Code (*Insolvenzordnung*, "**InsO**") are referred to as "**Insolvency Proceedings**". A Party subject to Insolvency Proceedings is called an "**Insolvent Party**" and its counterparty is called the "**Solvent Party**". For the avoidance of doubt, the point in time of formal commencement of Insolvency Proceedings (i.e. the opening of Insolvency Proceedings) is in all likelihood not the point in time in which a party became insolvent.

1.6.2 "**System**" means a system within the meaning of section 1 para 16 KWG; and

1.6.3 "**Transactions**" refers to all Transactions under the Clearing Agreement, i.e. Client Transactions (as such term is defined in Section 20 of the Addendum) and uncleared Transactions under the Covered Base Agreement not covered by the Addendum ("**Uncleared Transactions**").

Capitalised terms used herein that are not defined in this Opinion Letter shall have the meanings ascribed to them in the Addendum, the relevant Covered Base Agreement or the relevant ~~Covered Base~~Credit Support Agreement, as applicable.

1.7 Enforceability

In this Opinion Letter, references to the word "enforceable" and cognate terms are used to refer to the ability of a party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy or on the factual or commercial success of any enforcement measures.

1.8 German law

This Opinion Letter is confined to matters of German law in force as at the date on which this Opinion Letter is given (including any European Union ~~law~~regulations

[1] We do not give an opinion on generally applicable regulatory restrictions, including investment guidelines, under regulatory laws or regulations regarding entities subject to further regulatory restrictions other than those generally applicable for all ~~credit institutions within the meaning of section 1 para 1 of the German Banking Act (*Kreditwesengesetz*, "**KWG**") ("~~Credit Institutions~~")~~ or ~~financial services institutions within the meaning of section 1 para 1a KWG ("~~Financial Services Institutions~~").~~.

(*Verordnungen*) directly applicable in Germany). We express no opinion on European Union law as it affects or would be applied in any jurisdiction other than Germany.

1.9 No updating

We assume no duty to update this Opinion Letter or inform ISDA or any other person to whom a copy of this Opinion Letter may be communicated of any change in German law (including, in particular, applicable court decisions), or the legal status of any party to the Addendum, or any other circumstance that occurs, or is disclosed to us, after the date on which this Opinion Letter is given, which might have an impact on the opinions given in this Opinion Letter. However, we are not aware of any pending developments which may have an effect on the contents of this opinion. We have assumed, for the purpose of the foregoing statement, that the reference to a "development" refers to a published proposal for actual legislation or binding regulatory policy that is reasonably likely to occur in a manner that would materially and adversely affect our conclusions. We do not purport to comment on more general discussions, proposals and consultations for changes to the legal and regulatory framework for the financial markets at national, European and international level with respect to the specific questions or generally.

1.10 Date

This Opinion Letter is given as of ~~17 November 2015~~4 September 2018.

1.11 Interpretation

The opinions given in this Opinion Letter express and describe German legal concepts in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying German law concepts. Any issues of interpretation arising in respect of the opinions given in this Opinion Letter will be determined by the German courts in accordance with German law and we express no opinion on the interpretation that the German courts may give to any such expressions or descriptions. Please note in the general context of the aforesaid that German courts have held that, under German law, documents which are governed by German law may, if they have been executed in the English language, be interpreted with a view to the meaning of such English terms in an English law environment.

Translations of German legal provisions into English are non-official translations and are provided by us for convenience only. The German version is the only binding version.

1.12 Reliance

1.12.1 This Opinion Letter speaks as of its date and is addressed to and solely for the benefit and use of ISDA and ~~Clients that are~~its members ~~of ISDA~~ (the "**Addressees**").

1.12.2 Clifford Chance Deutschland LLP hereby consents to the Addressees and their Affiliates relying on the Opinion. This Opinion may not, without our prior written consent, be relied upon by or be disclosed to any other person save that it may be disclosed without such consent to:

(a) the officers, employees, auditors and other professional advisers of any Addressee;

(b) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings; and

(c) any competent authority supervising an Addressee or its Affiliates,

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made and in preparing this Opinion we have not had regard to the interests of any such person.

1.12.3 This Opinion was prepared by Clifford Chance Deutschland LLP on the basis of instructions from ISDA in the context of the netting requirements of the Basel III capital rules in the EU and Clifford Chance Deutschland LLP has not taken instructions from, and this Opinion does not take account of the specific circumstances of, any Addressee. In preparing this Opinion Clifford Chance Deutschland LLP had no regard to any other purpose to which this Opinion may be put by any Addressee.

1.12.4 By permitting Addressees to rely on this Opinion as stated above, Clifford Chance Deutschland LLP accepts responsibility to such Addressees for the matters specifically opined upon in this Opinion in the context stated in paragraph 1.12.3, but Clifford Chance Deutschland LLP does not have or assume any client relationship in connection therewith or assume any wider duty to any Addressee or their Affiliates. This Opinion has not been prepared in connection with, and is not intended for use in, any specific transaction. Furthermore this opinion is given on the basis that any limitation on the liability

of any other adviser to ISDA or any Addressee, whether or not we are aware of that limitation, will not adversely affect our position in any circumstances.

2. BACKGROUND

2.1 Addendum

In the following we describe our understanding of the Addendum and how it modifies the Covered Base Agreements.

The Addendum is based on the principal-to-principal client clearing model[2] and is designed to operate on a cross CCP basis in conjunction with any non-US CCP that adopts a client clearing structure capable of being used with the Addendum. The Addendum applies from the point at which a Transaction between the Clearing Member and the relevant Agreed CCP is recorded in the relevant client account at the Agreed CCP for a particular client clearing service offered by such Agreed CCP, which includes all Transactions that are transferred to the Clearing Member as a result of a pre-default or post-default porting. The Clearing Agreement only governs Client Transactions, i.e. Transactions cleared via an Agreed CCP. In addition, the Covered Base Agreement continues to govern all Uncleared Transactions. The Addendum includes an Addendum Annex that enables the Clearing Member and the Client to specify which CCPs and which product types are covered by the Addendum and to make certain elections and otherwise customise their client clearing relationship.

The Addendum ~~may~~is intended to govern Client Transactions cleared by different CCPs. Consequently, the Client Transactions entered into under the Addendum may be subject to different legal requirements depending on whether or not they belong to the Transactions attributed to a specific Agreed CCP and form different groups for these purposes (such as, for example, collateralisation, timing of termination and valuation of Transactions) and each such group of Client Transactions cleared via one Agreed CCP forms a single Cleared Transaction Set.

2.1.1 Early Termination

[2] Under the principal-to-principal model clearing model two separate legal relationships are established: on the one hand (i) a principal-to-principal transaction between the Clearing Member and the CCP, which is governed by the rules of the CCP, and on the other hand (ii) a principal-to-principal transaction between the Clearing Member and the client with economically equal terms save for the fact that the Clearing Member takes the position opposite to the position it takes in the transaction with the CCP, which is governed by the terms of the client clearing agreement.

Upon an early termination pursuant to the Addendum due to a Client, Clearing Member or CCP default, in principle, the Addendum refers to the default related termination provisions of the relevant Covered Base Agreement. Section 8 of the Addendum modifies the early termination provisions (Sections 5 (a) and 6 of the Covered Base Agreement). These modifications apply to Client Transactions only and can be summarised as follows:

(a) Termination rights of a Clearing Member in case of Client Default

Pursuant to Section 8(a)(i) of the Addendum, the Clearing Member's termination rights under the Covered Base Agreement upon the occurrence of an Event of Default or of a Termination Event with respect to the Client also apply, if the Covered Base Agreement is used in connection with the Addendum, i.e. Section 5 and Section 6(a) to (c) of the Covered Base Agreement continue to apply for Client Transactions and Uncleared Transactions (except for Section 7 of the Addendum with respect to Illegality/Impossibility).

Consequently, upon the occurrence of an Event of Default, Termination Event or other similar event, howsoever described, in respect of the Client ("**Client Default**"), the Clearing Member is entitled to terminate all Client Transactions and Uncleared Transactions entered into with such Client under the relevant Covered Base Agreement. If applicable, the Covered Base Agreement as modified by the Addendum and all Transactions thereunder terminate automatically in accordance with the terms of the Covered Base Agreement upon the occurrence of an Automatic Early Termination under the Covered Base Agreement with respect to the Client as Defaulting Party.

(b) Termination of Client Transactions upon Clearing Member Default or CCP Default

As a principle, Client Transactions under the Addendum are grouped into Cleared Transaction Sets, each such Cleared Transaction Set comprising all Client Transactions cleared through the same Agreed CCP Service. The Cleared Transaction Sets may be subject to different termination events, each in line with the corresponding CM/CCP Transactions with respect to the relevant Agreed CCP Service.

Accordingly, the Covered Base Agreement may continue to exist with respect to Uncleared Transactions and the Covered Base Agreement together with the Addendum may continue to exist with respect to Client Transactions which are cleared through another Agreed CCP with respect to the relevant Cleared Transaction Sets where no default occurred:

(i) Termination of Client Transactions upon Clearing Member Default

Pursuant to Section 8(b)(i) of the Addendum, with respect to Client Transactions, all termination rights of a Client pursuant to Sections 5 and 6 of the Covered Base Agreement, or any automatic termination pursuant to Section 6(a) of the Covered Base Agreement with respect to a Clearing Member do not apply.

Pursuant to Section 8(b)(ii) of the Addendum, all Client Transactions of the relevant Cleared Transaction Set automatically terminate upon the occurrence of a CM Trigger Event (as defined in the Addendum) at the same time as the related CM/CCP Transactions terminate (except to the extent otherwise stated in the Core Provisions of the relevant Rule Set). Under the Addendum, the Client may not terminate Client Transactions upon the occurrence of an Event of Default, Termination Event or other similar event, howsoever described, with respect to the Clearing Member.

Section 8(b)(i) of the Addendum provides, however, that the Client may exercise any termination rights under Sections 5 and 6 of the relevant Covered Base Agreement with respect to Uncleared Transactions (see also Section 8(d) of the Addendum). We understand that if Automatic Early Termination has been selected in accordance with Section 6(a) of the Covered Base Agreement, all Uncleared Transactions are covered by an Automatic Early Termination under the Covered Base Agreement with respect to the Clearing Member (which is the counterparty under the Covered Base Agreement) as Defaulting Party.

(ii) CCP Default

Pursuant to Section 8(c) of the Addendum, upon the occurrence of a CCP Default with respect to an Agreed CCP, all relevant Client Transactions of the respective Cleared Transaction Set terminate automatically at the same time as the related CM/CCP Transactions (except to the extent otherwise stated in the Core Provisions of the relevant Rule Set).

2.1.2 Valuation and close-out netting

The valuation of terminated Transactions and the close-out netting with respect to a Covered Base Agreement and all Uncleared Transactions thereunder are governed by Sections 6(d) and (e) of the Covered Base Agreement as modified by the Addendum. The Addendum provides for different methods for valuation and close-out netting in case of termination upon a Client Default, a CM Trigger Event or a CCP Default:

(a) Valuation and close-out netting by Clearing Member in case of a Client Default

Upon termination of a Covered Base Agreement, one of the parties is obliged to pay to the other party a termination amount which is determined in accordance with the calculation methods of the Covered Base Agreement. These methods are in each case those set out in Sections 6(d) and (e) of the 1987 ISDA Master Agreements, the 1992 ISDA Master Agreement, or the 2002 ISDA Master Agreement (in the 2002 ISDA Master Agreement such amount is defined as the Early Termination Amount). Any amount payable upon termination of a Covered Base Agreement is hereinafter referred to as the "**Termination Amount**" for each relevant Covered Base Agreement.

(i) In case of a termination of the Clearing Agreement by a Clearing Member, the Addendum does not modify the calculation methods for determining the Termination Amount with respect to Uncleared Transactions covered by the Covered Base Agreement.

(ii) With respect to Client Transactions only, Section 8(a)(ii) to (vi) of the Addendum provides for a modification of Sections 6(d) and (e) of the Covered Base Agreement amending the valuation methods of the Covered Base Agreement when determining the Termination Amount under the 1992 or 2002 ISDA Master Agreement.

With respect to the 1992 ISDA Master Agreement, Section 8(a)(ii) and (iii) of the Addendum provides for changes and modifications to the terms and selection of "Loss" or "Market Quotation" the Parties have originally made under a Covered Base Agreement.

~~Furthermore, pursuant to Section 8(a)(iv) of the Addendum, when determining the Close-Out Amount under~~ With respect to the 2002 ISDA Master Agreement ~~or when valuing CM/CCP Transactions in order to determine the Termination Amount under~~and (as modified as set out above) the 1992 ISDA Master Agreement, pursuant to Section 8(a)(iv), the Clearing Member can take into account amounts attributable to the relevant Client Transactions under the Clearing Agreement or related Collateral Agreement which were payable but unpaid at the time of termination and the cost or gain of neutralising the corresponding CM/CCP Transaction at the relevant Agreed CCP when determining the value of each Client Transaction for the purposes of determining the Close-Out Amount.

(iii) The general principle that, upon the Clearing Member terminating all Transactions, a single net Termination Amount becomes due with respect to all Transactions covered by the Clearing Agreement as provided in Section 6(e) of the Covered Base Agreement continues to apply but is subject to Section 8(d)(iii) of the Addendum. Any Cleared Set Termination Amount that has been determined pursuant to Section 8(b) or Section 8(c) of the Addendum but not yet been paid at the time an event occurs which would entitle the Clearing Member to terminate all other outstanding Transactions pursuant to Section 5 and Section 6(a) to (c) of the Covered Base Agreement in connection with Section 8(a) of the Addendum may not be taken into account by the Clearing Member when determining the Termination Amount as a result of such termination of all other outstanding Transactions. Rather, such amount remains separately payable pursuant to Section 8(d)(iii) of the Addendum and only the Client is entitled to set-off such amounts (Section 8(e) of the Addendum).

(b) Valuation and close-out netting in case of a CM Trigger Event

Section 8(b)(ii)(2) to (7) of the Addendum providing for an automatic termination of Client Transactions upon the occurrence of a CM Trigger Event amends the effects of an early termination stipulated by Section 6 of the Covered Base Agreement. Pursuant to Section 8(b)(ii)(2) of the Addendum, the value of a Client Transaction is equal to the value of the

corresponding CM/CCP Transaction between the Clearing Member and the Agreed CCP under the relevant Rule Set. Upon the occurrence of a CM Trigger Event only those Client Transactions in respect of which the related CM/CCP Transactions are cleared through the same Agreed CCP Service which has declared a CM Trigger Event terminate automatically. As Client Transactions are grouped into Cleared Transaction Sets and each such Cleared Transaction Set terminates in line with the corresponding CM/CCP Transactions at the relevant Agreed CCP Service and a separate Termination Amount is determined for each Cleared Transaction Set.

(c) CCP Default

Pursuant to Section 8(c)(ii) of the Addendum, upon an automatic termination of Client Transactions following the occurrence of a CCP Default, the value of the terminated Client Transactions is equal to the value of the corresponding CM/CCP Transactions between the Clearing Member and the Agreed CCP under the relevant Rule Set.

Again, a separate Termination Amount is calculated for each Cleared Transaction Set so terminated.

2.1.3 Set-Off

Pursuant to Section 8(e) of the Addendum, upon termination following a CM Trigger Event in accordance with Section 8(b)(ii) of the Addendum, the Client is entitled to reduce an Available Termination Amount due by it to the Clearing Member by way of set-off against any other Termination Amount payable by the Clearing Member to the Client at that time. Upon termination following a CCP Default, each party is entitled to set-off whereby the relevant party or parties can elect to set off relevant Termination Amounts due in respect of the termination of Client Transactions in a Cleared Transaction Set and Uncleared Transactions. The Addendum does not include a similar set-off right in case of a Client default in such case because, as described above, the termination provisions of the Addendum result in a single net amount calculated in respect of all Transactions (Client Transactions and Uncleared Transactions).

2.1.4 Limited Recourse

Pursuant to Section 15(a) of the Addendum, the Client agrees that performance and payment obligations by the Clearing Member to the Client under or in

respect of Client Transactions and related Collateral Agreements are limited by and contingent on the actual performance or payment by the relevant Agreed CCP to the Clearing Member in relation to the related CM/CCP Transactions or any related collateral arrangements, provided that amounts that would have been paid by the Agreed CCP to the Clearing Member but for the application of (i) netting or set-off in accordance with the relevant Rule Set and/or applicable law or (ii) any provision of the relevant Rule Set and/or applicable law that allows the Agreed CCP to make payments directly to the Client or transfer related CM/CCP Transactions upon the occurrence of a CM Trigger Event will be considered to have been paid.

~~2.2 Transfer Annex~~

2.2 Credit Support Documents

Following your instructions, we assume that a ~~Transfer Annex~~Credit Support Document is entered into covering Client Transactions. Pursuant to Section 10(a)(ii)(1) of the Addendum, the ~~Transfer Annex~~relevant Credit Support Document is separate from any existing credit support document entered into between the Parties with respect to Uncleared Transactions. Furthermore, pursuant to Section 10(a)(ii)(2) of the Addendum, with respect to each Cleared Transaction Set a separate ~~Transfer Annex~~Credit Support Document is deemed to exist securing only obligations resulting from such Cleared Transaction Set.

The Paragraph 11 ~~Document~~ as set out in the English ~~L~~law CSA Collateral Terms of the Addendum substantially alters the Transfer Annex~~,~~ and the Paragraph 13 as set out in the New York law CSA Collateral Terms of the Addendum substantially alters the NY Annex for the purposes of the Addendum. The Transfer Annex is in particular altered by replacing Paragraph 6 (Default) of the Transfer Annex with sub-paragraph (g) of the Paragraph 11 ~~Document~~.

2.3 Scope of Industry Opinions

You have asked us to opine on the specific questions set out in paragraph 4.2 by referring to the conclusions reached in the Industry Opinions. The Industry Opinions relate to the enforceability of close-out netting under the Covered Base Agreements and the validity and enforcement of the ~~Transfer Annex.~~Credit Support Documents.

The Industry Netting Opinion addresses the following specific questions (see chapter IV. of the Industry Netting Opinion):

2.3.1 whether the provisions of the Covered Base Agreements permitting the non-defaulting party to terminate all Uncleared Transactions upon insolvency of the German Party are enforceable under German law;

2.3.2 whether, assuming the Parties have selected Automatic Early Termination upon certain insolvency-related events to apply to the insolvent German Party, the provisions of the Covered Base Agreements automatically terminating all Uncleared Transactions upon insolvency of the German Party are enforceable under German law;

2.3.3 whether the provisions of the Covered Base Agreements providing for the netting of termination values in determining a single "lump sum" termination amount upon insolvency of the German Party are enforceable under German law;

2.3.4 whether it is possible to "prove" (that is, file) a claim in ~~I~~insolvency proceedings under the laws of Germany in a foreign currency (i.e., a currency other than Euro); and

2.3.5 whether it is possible to obtain or execute a judgement in a foreign currency under German law.

2.4 Scope of the Industry Collateral Opinion with respect to the Transfer Annex

The conclusions reached in the Industry Collateral Opinion address the following specific questions (see chapter G.II. of the Industry Collateral Opinion):

2.4.1 whether German law characterises each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that any such transfer would be recharacterised as creating a security interest;

2.4.2 whether there is need to take any action after the Transferee has received an absolute ownership interest in the Eligible Credit Support to ensure that its title therein continues, in particular, whether there are any filing or perfection~~ary~~ requirements necessary or advisable, 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.

2.4.3 what the effect, if any, is under German law of the right of ~~Party A~~the Transferor to exchange Eligible Credit Support pursuant to Paragraph 3(c) of the Transfer

Annex, and whether the presence or absence of consent to exchange by the Transferee have any bearing on this question;

2.4.4 whether Paragraph 6 of the Transfer Annex is also valid to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of a net amount payable under Section 6(e) of the Covered Base Agreement;

2.4.5 whether the rights of the Transferee are enforceable in accordance with the terms of the Covered Base Agreement and the Transfer Annex, irrespective of the insolvency of the Transferor;

2.4.6 whether the Transferor (or its receiver or other similar official) will be able to recover any transfer of Eligible Credit Support made to the Transferee during a certain "suspect period" preceding the date of the insolvency and whether the substitution of Eligible Credit Support by a counterparty during this period invalidates an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing;

2.4.7 whether the parties' agreement on governing law of the Transfer Annex and submission to jurisdiction would be upheld in Germany, and

2.4.8 whether the Transfer Annex is in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee or whether there are any other requirements to be observed in Germany in order to ensure the validity of such transfer in each type of Eligible Credit Support created by ~~Party A~~the Transferor under the Transfer Annex.

2.5 Scope of the Industry Collateral Opinion with respect to the NY Annex

The conclusions reached in the Industry Collateral Opinion address the following specific questions with respect to the NY Annex (see chapter F.II. (*Validity of Security Interests*) to (*Miscellaneous*) of the Industry Collateral Opinion):

2.5.1 under German law, what law governs the contractual aspects of a security interest in the various forms of Eligible Collateral deliverable under the NY Annex and whether the German courts recognize the validity of a security interest created under the NY Annex, assuming it is valid under the governing law of the NY Annex;

2.5.2 under German law, 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 the NY Annex, 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, including what factors are relevant to this question (together with a description of the principles governing such determination under German law with respect to the different types of Collateral);

2.5.3 whether the German courts would recognise a security interest in each type of Eligible Collateral created under the NY Annex, bearing in mind the different forms in which securities Collateral may be held and indicating, in relation to cash Collateral, if the answer depends on the location of the account in which the relevant deposit obligations are recorded and/or upon the currency of those obligations;

2.5.4 what the effect, if any, is under German law of the fact that the amount secured or the amount of Eligible Collateral subject to the security interest will fluctuate under the Covered Base Agreement and the NY Annex (including as a result of entering into additional Transactions under that Covered Base Agreement from time to time);

2.5.5 whether, assuming that the German courts would recognise the security interest in each type of Eligible Collateral created under NY Annex, 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) is required in Germany to perfect that security interest;

2.5.6 an indication of nature of such requirements described in question 5 in chapter F.II. (*Validity of Security Interests*) of the Industry Collateral Opinion, if any, including whether it is necessary as a matter of formal validity that the NY Annex be expressly governed by German law or translated into any other language or for the NY Annex to include any specific wording and whether there are any other documentary formalities that must be observed in order for a security interest created under the NY Annex to be recognized as valid and perfected under German law;

2.5.7 whether, assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under German law, to the extent German law applies, by complying with the requirements set forth in the responses to questions 1 to 6 in chapter F.II. (*Validity of Security Interests*) of the Industry Collateral Opinion, as applicable, the Secured Party or the Security

Collateral Provider will 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 (or the amount of Collateral required to be delivered under the NY Annex, as applicable) exceeds the Value of the Collateral held by the Secured Party;

2.5.8 whether, assuming that (a) pursuant to German law, 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 the NY Annex (for example, because such Collateral is located or deemed to be located outside of Germany) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, the Secured Party will have a valid security interest in the Collateral so far as German law is concerned and/or whether any action (filing, registration, notification, stamping or notarization or any other action or the obtaining or any governmental, judicial, regulatory or other order, consent or approval) required under German law to establish, perfect, continue or enforce this security interest;

2.5.9 whether there are any particular duties, obligation or limitations imposed on the Secured Party in relation to the case of the Eligible Collateral held by it pursuant to the NY Annex;

2.5.10 whether German law recognizes the right of the Secured Party to use Collateral pursuant to an agreement with the Pledgor as provided for in the NY Annex, which, unless otherwise agreed to by the parties, in Paragraph 6(c) 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 (which use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or simply selling the securities), how such use of the Collateral affects, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use and whether there are any other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under German law;

2.5.11 what the effect, if any, is under German law on the validity, continuity, perfection or priority of a security interest in Eligible Collateral under the NY Annex of the right of the Pledgor to substitute Collateral pursuant to Paragraph

4(d) of the NY Annex and how the presence or absence of consent to substitution by the Secured Party affects the response to this question (commenting specifically on whether the Pledgor and the Secured Party are able validly to agree in the NY Annex 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 the conclusions regarding the validity or enforceability of the security interest;

2.5.12 assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under German law, to the extent such law applies, by complying with the requirements set forth in the responses to questions 1 to 6 in chapter F.II. (*Validity of Security Interests*) of the Industry Collateral Opinion, as applicable, what 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, are that the Secured Party must observe or undertake in exercising its rights as a Secured Party under the NY Annex, such as the right to liquidate Collateral (and whether, for example, it is free to sell the Collateral (including to itself) and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the Covered Base Agreement and whether such formalities or procedures differ depending on the type of Collateral involved);

2.5.13 whether, assuming that (a) pursuant to German law, 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 the NY Annex (for example, because such Collateral is located or deemed located outside of Germany) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, there are any formalities, notification requirements or other procedures, if any, that the Secured Party must observe or undertake in Germany in exercising its rights as a Secured Party under the NY Annex;

2.5.14 whether there are any laws or regulations in Germany 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, whether there are any types of "statutory liens" that would be deemed to take precedence over a creditor's security interest in the Collateral;

2.5.15 whether the responses to questions 12 to 14 in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) of the Industry Collateral Opinion above would 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, whether this would affect this ability of the Secured Party to exercise its enforcement rights with respect to the Collateral;

2.5.16 how competing priorities between creditors are determined in Germany and 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;

2.5.17 whether the Secured Party's rights under the NY Annex, such as the right to liquidate the Collateral, would be subject to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how the institution of an insolvency proceeding changes the responses to questions 12 and 13 in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) of the Industry Collateral Opinion, if at all);

2.5.18 whether the Security Collateral Provider (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) will 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 favor of the Secured Party or on any other basis, whether, if such a period exists, the substitution of Collateral by a counterparty during this period would invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing and whether the posting of additional Collateral pursuant to the mark-to-market provisions of the NY Annex 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;

2.5.19 whether the parties' agreement on governing law of the NY Annex and submission to jurisdiction be upheld in Germany, and what the consequences would be if it they were not;

2.5.20 whether there are 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; and

2.5.21 whether there are any other foreseeable circumstances that might affect the Secured Party's ability to enforce its security interest in Germany.

3. ASSUMPTIONS

This Opinion Letter is given on the basis of the following assumptions:

3.1 The Addendum

3.1.1 Two ~~parties~~institutions (either two derivatives dealers or a derivatives dealer and a sophisticated end-user of derivatives and together, the "**Parties**"), each of which is an entity type falling within one of the categories covered by the Industry Opinions, have entered into the Addendum, one as the Clearing Member and one as the Client. The Clearing Member is incorporated in Germany.

3.1.2 The Addendum is supplemented by one or more collateral agreement(s) in the form of a Transfer Annex together with ~~a~~the Paragraph 11 ~~Document~~or in the form of a NY Annex together with the Paragraph 13.

3.1.3 The master agreement (i.e. the underlying agreement that is supplemented by the Addendum) is a Covered Base Agreement.

3.1.4 The Addendum is governed by English law or New York law, as applicable and is enforceable under the laws of England and Wales or the State of New York, as the case may be.

3.1.5 No provision of the Addendum ~~that is necessary for the giving of our advice in this Opinion Letter~~ has been altered in any material respect from the standard form which we have examined.

3.1.6 On the basis of the terms of the Clearing Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Clearing Agreement, the Parties over time enter into a number of Client Transactions, of a type covered by the Industry Opinions, that are intended to form part of and be subject to the Clearing Agreement.

3.1.7 The Client Transactions entered into result in at least one Cleared Transaction Set under the Clearing Agreement.

3.1.8 The Core Provisions of each Agreed CCP Service are legal, valid and binding under the relevant governing law and enforceable against the relevant Agreed CCP and the Clearing Member (including upon the insolvency of the relevant Agreed CCP and/or the Clearing Member).

3.2 Covered Base Agreement

In addition to the assumptions made in chapter III.2. to 6. of the Industry Netting Opinion which are incorporated by reference into this Opinion Letter, we assume the following:

3.2.1 Prior to, or at the same time as, entering into the Addendum, the Parties have entered into a Covered Base Agreement.

3.2.2 The Covered Base Agreement is governed by English law or New York law, as the case may be.

3.2.3 Other than pursuant to the Addendum, no provision of the Covered Base Agreement ~~that is necessary for the giving of the Industry Netting Opinion in respect of the Covered Base Agreement~~ has been altered in any material respect from the standard forms examined in the Industry Netting Opinion.

3.2.4 On the basis of the terms and conditions of the Covered Base Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Covered Base Agreement, the Parties may over time enter into a number of Uncleared Transactions that are governed by the Covered Base Agreement. The Uncleared Transactions are of a type covered by the Industry Opinions.

~~3.3 Transfer Annex~~

3.3 Credit Support Documents

In addition to the assumptions made in chapter B.1.(ix), and B.2., chapter C.III. and chapter G.I. of the Industry Collateral Opinion which are incorporated by reference into this Opinion Letter, we assume the following:

3.3.1 The Parties have entered into a ~~Transfer Annex~~Credit Support Document, either directly or by entering into the Addendum deeming that a ~~Transfer Annex~~Credit

Support Document is entered into supplementing and forming part of the Clearing Agreement.

3.3.2 The Transfer Annex is governed by English law~~.~~ and the NY Annex is governed by New York law.

3.3.3 Other than pursuant to the Addendum and the Paragraph 11 ~~Document~~or the Paragraph 13, as applicable, no provision of the ~~Transfer Annex that is necessary for the giving of the Industry Collateral Opinion in respect of the Transfer Annex~~relevant Credit Support Document has been altered in any material respect from the standards forms examined in the Industry Collateral Opinion.

3.3.4 The assets ~~transferred and~~ subject to ~~the Transfer Annex~~any Credit Support Document are the types of Eligible Credit Support covered by the Industry Collateral Opinion, i.e. within the categories outlined in chapter B.1.(a)(1) to (4) of the Industry Collateral Opinion, and the terms "**Eligible Credit Support**" and "**Eligible Collateral**" as used in this Opinion Letter shall only comprise assets belonging to one of these categories.[3]

3.4 Further assumptions

3.4.1 The Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document have been validly agreed between the Parties and are incorporated into the legal relationship between the Clearing Member and the Client.

3.4.2 The Transactions entered into under the Covered Base Agreement and Clearing Agreement are governed by English law or New York law, as applicable.

3.4.3 Under the laws of England or New York law, as applicable (including insolvency or resolution laws) and under all other applicable laws that have an effect on the Transactions or the Agreement (other than the laws of Germany) the Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document and all Transactions thereunder constitute and will at all times constitute valid and legally binding obligations of the Parties thereto, enforceable in accordance with their terms, and under all applicable laws (other

[3] For the avoidance of doubt, this Opinion Letter is only given with respect to units in investment funds issued in the form of transferable securities freely tradeable on a market.

than the laws of Germany) the choice of the laws of England as the governing law is a valid and binding selection.

3.4.4 Each Party has the capacity, power and authority under all applicable law(s) to enter into the Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document and all Transactions thereunder, to perform its obligations under the Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document and all Transactions thereunder and each party has taken all necessary steps to execute and deliver and perform the Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document and all Transactions thereunder.

3.4.5 Each party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document and all Transactions thereunder and to ensure the legality, validity, enforceability or admissibility in evidence of the Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document and all Transactions thereunder in Germany.

3.4.6 The Covered Base Agreement, the Addendum and the ~~Transfer Annex~~Credit Support Document have been entered into, and each of the Client Transactions entered into thereunder is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses and none of the Parties has entered into or will enter into the same if entering into the same would prejudice any of its creditors.

3.4.7 Each party is at all relevant times solvent and there is no current or pending stoppage of payment situation (including German law *Zahlungsunfähigkeit*), no status of over-indebtedness (including German law *Überschuldung*) and no reasons justifying a filing for the opening of insolvency proceedings (including on a voluntary basis) (drohende *Zahlungsunfähigkeit*) in respect of any party and that no party is subject to any regulatory pre-insolvency, recovery, resolution, reorganisation or insolvency proceedings under the laws of any jurisdiction as of the date of this opinion. Each of the Covered Base Agreement, the Addendum, any Credit Support Document or any Transactions is entered into by the parties prior to the opening of any insolvency or bankruptcy proceedings against either party.

~~3.4.7~~3.4.8 None of the parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process. To the extent a Client established under German public law enters into the Covered Base Agreement, the Addendum, the ~~Transfer Annex~~Credit Support Document or any Transactions, the execution of such agreement constitutes, and the exercise of that party's rights and performance of its obligations thereunder will constitute, private and commercial acts done and performed for private and commercial purposes.

~~3.4.8~~3.4.9 The obligations assumed under the Covered Base Agreement, the Addendum, the ~~Transfer Annex~~Credit Support Document and Transactions are mutual between the parties, in the sense that the parties are each individually and solely liable as regards obligations owing by each other and are solely entitled to the benefit of obligations owed to each other, respectively. "**Mutuality**" generally exists where each party is personally and solely liable as regards obligations owed by each other and is solely entitled to the benefit of obligations owed to each other, respectively. Circumstances in which the requisite mutuality is missing include, without limitation, where a party is acting as agent for another person, or is a trustee, or in respect of which a party has a joint interest (including partnership) or such in respect of which a party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law.

4. OPINION

On the basis of the foregoing terms of reference under paragraph 2 and assumptions under paragraph 3 and subject to the qualifications set out under paragraph 5 below, we are of the following opinion in response to your specific questions which are repeated in italics in paragraph 4.2. The opinion and specific qualifications given in paragraphs 4 and 5 are intended to address questions which are not addressed in the Industry Opinions as the Industry Opinions do not cover the Addendum and any modification made in the Addendum to the documents covered by the Industry Opinions. In the statements made in paragraph 4.2 we refer to the statements made in the Industry Opinions with respect to your questions and the modifications made by the Addendum. The statements made in paragraph 4.2 are therefore subject to the Industry Opinions.

4.1 Application of the InsO and other specific provisions on Systems

The statements made in the Industry Opinions are based on a conflict of laws analysis and an analysis of the InsO with respect to the Covered Base Agreement only (without any modifications by the Addendum). The Clearing Agreement is, however, ~~subject~~

~~to~~also governed by the rules of the System and may therefore also be subject to particular conflict of laws rules applicable to Systems. Furthermore, specific exemptions from the provisions of the InsO apply where German insolvency courts have jurisdiction for opening insolvency proceedings over the assets of a Client if the Clearing Agreement relates to clearing of OTC derivatives in the context of Regulation EU No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**"). Therefore, as this is not covered by the Industry Opinions, in the following we analyse the scope of application of the InsO and its exemptions that are specifically relevant with respect to the Clearing Agreement.

A general description of Insolvency Proceedings, provisional insolvency proceedings (*vorläufige Maßnahmen*) under sections 21 *et seqq*. InsO ("**Provisional Insolvency Proceedings**") and regulatory proceedings under the laws of Germany applicable to Credit Institutions and Financial Services Institutions (collectively "**Institutions**~~"), insurance companies within the meaning of section 1 para 1 no. 1 of the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*, "**VAG**") ("**Insurance Companies**") and capital management companies (*Kapitalverwaltungsgesellschaften*) as defined under section 17 para 1 of the German Capital Investment Code (*Kapitalanlagegesetzbuch*, "**KAGB**") ("**Capital Management Companies**")~~") and recovery and resolution proceedings applicable to certain Institutions pursuant to the provisions of the German Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz*, "**SAG**") or, as applicable, Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, as amended,[4] is provided in chapter VII.(B) of the Industry Netting Opinion and chapter E.III. of the Industry Collateral Opinion. Applicable insolvency conflict of laws provisions are described in chapter VI. of the Industry Netting Opinion and chapter E.III.(A)(1) of the Industry Collateral Opinion. As instructed, we have neither reviewed the Industry Opinions as to completeness in this respect nor whether their contents are up to date.

~~While we are not instructed to update the Industry Opinions, you should be aware that since 1 January 2015 a new recovery and resolution regime applies in Germany governed by the provisions of the German Recovery and Resolution Act (*Sanierungs-*~~

[4] OJ No. L 225 of 30 July 2014, p. 1.

~~*und Abwicklungsgesetz*, "**SAG**"), following the implementation of the Directive of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms ("**BRRD**").[5] Under the resolution powers set out in the SAG, the competent resolution authority may, *inter alia*, apply the bail-in resolution tool which results in the write-off of liabilities of an entity under resolution in whole or in part or in the conversion of liabilities into equity or apply one of the asset transfer tools. To protect resolution measures the exercise of certain rights may be suspended or otherwise restricted. From a German law perspective these resolution measures are mandatory subject to applicable conflict of laws rules.~~

4.1.1 Rules applicable to Systems

Specific conflict of laws provisions apply to Insolvency Proceedings with respect to rights and obligations of participants in "systems" (Article ~~9 Council~~12 of Regulation (~~EC) No. 1346/2000 of 29~~EU) 2015/848 of the European Parliament and of the Council of 20 May 20~~00~~15 on insolvency proceedings ~~("~~(recast)[6] ("**Recast EUIR**")[7] and section 340 para 3 InsO). In addition, within the scope of application of the InsO, exemptions for Systems apply with respect to insolvency-related set-off. Such exemptions apply by analogy to measures under section 46 para 1 sentence 2 no. 4 to 6 KWG (section 46 para 2 sentence 6 KWG) and to restructuring and reorganisation proceedings (section 23 German Bank Reorganisation Act (*Kreditinstitute-Reorganisationsgesetz*, "**KredReorgG**")). Further, exemptions for Systems apply in the context of certain resolution measures under the SAG (sections 79 para 7, 82 para 2, 83 para 2, 84 para 4 and 110 para 4 SAG).

(a) Definition of the term System

~~In an English translation, the definition of the term~~A "System" under section 1 para 16 KWG ~~reads as follows: "A system within the meaning of section 24b~~ is a written agreement within the meaning of Article 2 lit

~~[5] OJ No L 173 of 12 June 2014, 190, as amended.~~

[6] OJ No. L 141 of 5 June 2015, p. 19.

[7] The Recast EUIR entered into force on 26 June 2015 and replaces Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings ("**EUIR**"). Where relevant, the Recast EUIR applies to Insolvency Proceedings opened after 26 June 2017.

(a) of the Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on Settlement Finality in Payment and Securities Settlement Systems (~~OJ No L 166 of 11 June 1998, p. 45) as amended by Directive 2009/44/EC (OJ No L 146 of 10 June 2009, p. 37) [(~~Settlement Finality Directive, "**SFD**~~")],~~"),[8] including an agreement between a participant and an indirectly participating credit institution which has been notified by Deutsche Bundesbank or a competent authority of a ~~Member State~~member state of the European Economic Area ("**EEA**") to the European Securities and Markets Authority ~~[("~~("**ESMA**~~")].~~"). Systems from third countries are treated similar as the systems referred to in sentence 1 if they largely correspond with the requirements enumerated in Article 2 lit (a) ~~of the Directive 98/26/EC."~~SFD.

Article 2 lit (a) SFD (as amended) defines "system" as follows:

"'system' shall mean a formal arrangement

– between three or more participants, excluding the system operator of that system, a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the clearing, whether or not through a central counterparty, or execution of transfer orders between the participants,

– governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and

– designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to ESMA by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

[8] OJ No. L 166 of 11 June 1998, p. 45, as amended by Directive 2009/44/EC (OJ No. L 146 of 10 June 2009, p. 37).

Subject to the conditions in the first ~~sub-paragraph~~subparagraph, a Member State may designate as a system such a formal arrangement whose business consists of the implementation of transfer orders as defined in the second indent of (i)[9] and which to a limited extent executes orders relating to other financial instruments, when that Member State considers that such a designation is warranted on grounds of systemic risk.

A Member State may also on a case-by-case basis designate as a system such a formal arrangement between two participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, when that Member State considers that such a designation is warranted on grounds of systemic risk.

An arrangement entered into between interoperable systems shall not constitute a system."

If the Rule Set ~~does establish~~establishes a System, then the exemptions for Systems are applicable. ~~What constitutes a system within the meaning of section 1 para 16 KWG implementing Article 2 lit (a) SFD into German law is not entirely clear.~~

(i) List of ~~Security~~Designated Payment and Securities Settlement Systems maintained by ESMA

Pursuant to Article 2 lit (a) SFD Systems established within the EU have to be entered in the list of ~~Security~~Designated Payment and Securities Settlement Systems maintained by ESMA.[10] The European Commission and the European Central Bank take the view that the list of Designated Payment and Securities Settlement Systems provides legal certainty with respect to the

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[9] The second indent of (i) of the definition of transfer order under Article ~~1~~2 SFD reads as follows: "…an instruction by a participant to transfer the title to or interest in, a security or securities by means of a book entry on a register or otherwise;"

[10] Available at https://www.esma.europa.eu/sites/default/files/library/designated_payment_and_securities_settlement_systems.pdf.

qualification of Systems.[11] Such view appears to be based on the idea that an entry into the list has constitutive effect under the laws of the ~~Member States~~EU member states implementing the SFD. However, there is no statutory provision which expressly provides for a constitutive legal effect of the entry which would result in such legal certainty. Under Article 2 lit (a) SFD an entry into the list is not the only requirement, but one of several ~~requirements~~ that must be met for an arrangement to ~~qualify~~be treated as a System.

If the ESMA list ~~of Systems~~ had constitutive legal effect, a system entered into the list would in our view constitute a System for purposes of German law. If it had no constitutive effect, a System would have to meet the additional requirements of the definition under section 1 para 16 KWG.

(ii) ~~Additional requirements of a~~ System within the meaning of section 1 para 16 KWG

Under German law (section 1 para 16 KWG in connection with Article 2 lit (a) SFD), a System is a formal arrangement between three or more participants which consists of standardised terms, is intended to be used with various Clearing Members and, amongst other things, provides for the clearing through a central counterparty[12] ~~and~~ or for the execution of transfer orders of participating Clearing Members in the course of the settlement. ~~The~~Even if it could be argued that the wording "formal arrangement between three or more participants" on its face appears to require that all contractual relationships are multilateral agreements~~. However, the ECB Opinion which was published in 2008 criticised the definition of the term 'System' in the SFD for being unclear and concluded that "the current~~

[11] Opinion of the European Central Bank of 7 August 2008 on a proposal for a directive amending Directive 98/26/EC and Directive 2002/47/EC (CON/2008/37), OJ No. C 216 of 23 August 2008, p. 1 ("**ECB Opinion**"), item 4.2 at p. 3; Report from the European Commission – Evaluation report on the Settlement Finality Directive 98/26/EC (EU 25) of 27 March 2006 (COM(2005) 657 final/2) ("**European Commission Report**"), p. 5.

~~[12] We note however that the material provisions of the SFD such as Articles 3 and 5 SFD refer to transfer orders.~~

~~definition in the first and second indents of Article 2 (a) does not accurately reflect the way in which a majority of systems are established".~~[13] ~~Assuming that the European Parliament and the Council were aware of the concerns expressed in the ECB Opinion when making the amendments to the SFD under Directive 2009/44/EC (as quoted above) in 2009 but did not consider the proposed changes as necessary in order to ensure that existing systems were covered, a System within the meaning of the SFD does not necessarily require that all contractual relationships are multilateral agreements but rather that three or more participants are bound by the same formal arrangements.~~ , this interpretation is, in our view, not compelling. A formal arrangement between three or more participants also exists when a number of bilateral arrangements are concluded, with one party being a party to all of such arrangements, which are accordingly linked by all members submitting to the same rules.[14] In our view, in order to provide for legal certainty with respect to the applicable laws in the case of insolvency and in view of legislative history (including the implementation of EMIR[15]), the definition of System should be interpreted widely,[16] so that also

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[13] ~~Items 4.2 and 4.1 at p. 2 of the ECB Opinion which concludes that "the current definition in the first and second indents of Article 2 (a) does not accurately reflect the way in which a majority of systems are established".~~

[14] The reference to clearing in the definition of 'system' under the SFD was implemented through Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims.

[15] In relation to the authorisation of EU CCPs under EMIR, Article 17 para 4 EMIR requires that the competent authority shall grant authorisation only where it is fully satisfied that the CCP is notified as a system pursuant to the SFD. Given the role of a CCP under EMIR, we would construe the reference to such notification such that not only the payment and settlement function, but also the clearing function can be regarded as a System, and we would also construe such reference as a clarification of the scope of the SFD generally.

[16] We note that the definition of 'netting' in the SFD and Article 3 SFD only refer to the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders, but do not expressly refer to the clearing function referred to in the definition of 'system' under the SFD. While it is therefore not entirely clear whether this is intended to limit the application of this provision to transfer orders in respect of cash and securities, this would appear contrary to the introduction of the reference to clearing. Further, section 340 para 3 InsO in connection with section 1 para 16 KWG, which implements the SFD, refers to the SFD's

bilateral arrangements within the same comprehensive formal arrangement, such as an Agreed CCP having established the respective Rule Set, can form a System.[17]

~~The SFD generally covers systems providing for payment and securities settlement. These services are generally disctinct from clearing.[18] However, the wording of Article 2 lit (a) SFD and legislative documents[19] suggest that Article 2 lit (a) SFD is intended to comprise also clearing services. This view is supported by Article 17 para 4 EMIR as we would construe the reference to the notification of a CCP as a System pursuant to the SFD as a reference to the clearing function rather than to the settlement or payment function.~~

(iii) Third-country systems

~~The situation is less clear for systems governed by the law of a country outside the EU. Recital 7 SFD provides that Member States may apply the provisions of the SFD also "...to their domestic institutions which participate directly in third country systems and to collateral security provided in connection with participation in such systems". In defining insolvency proceedings for the purposes of the SFD, Article 2 lit (j) SFD refers to "...any collective measure provided for in the law of...a~~

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definition of 'system' (which includes the reference to clearing) as such without mentioning transfer orders and therefore appears to have been implemented to include the clearing function generally.

[17] See also *Brambring*, Zentrales Clearing von OTC-Derivaten unter EMIR, 2017, p. 348 *et seqq*., differing view *von Hall*, Insolvenzverrechnung in bilateralen Clearingsystemen, 2011, p. 170 *et seqq*.

~~[18] The term "clearing" as defined in Article 2 para 3 EMIR comprises the process of establishing positions, including the calculation of net obligations, and ensuring that financial instruments, cash, or both, are available to secure the exposures arising from those positions whereas, according to the ECB's description (https://www.ecb.europa.eu/home/glossary/html/glosss.en.html) the term "settlement" means the completion of a transaction or processing with the aim of discharging participants' obligations through the transfer of funds and/or securities. We are not aware of any legal definition of the term "settlement".~~

~~[19] The European Commission Report on the SFD states that "... in the area of payment and securities settlement systems, some important changes may be underway which could have an influence on the SFD. The European Commission may propose legal instruments to increase the efficiency, and safety of clearing and settlement services..."~~

~~third country,...".~~ Pursuant to section 1 para 16 sentence 2 KWG third country systems would also qualify as System if they "largely" correspond with the requirements mentioned in Article 2 lit (a) SFD. ~~We understand that~~Accordingly, despite the choice of the laws of any other jurisdiction outside the EU, a third country system may still qualify as a System if the other requirements of Article 2 lit (a) SFD are met. Otherwise, the reference to third country systems would not make much sense as it cannot be assumed that a third country system is governed by the laws of an EU ~~Member State~~member state.[20] While the effect of section 1 para 16 sentence 2 KWG is, in our view, that arrangements governed by the law of a country outside the EU may qualify as a System for purposes of German law, there is no public register of such third country systems.[21]

(iv) Indirect participants in a System

If the relevant Rule Set constitutes a System and the Client is a Credit Institution[22], then pursuant to section 1 para 16 sentence 1 KWG also the contractual relationship between the Clearing Member as direct participant in the System and the Client as indirectly participating Credit Institution would be considered part of the System.

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[20] Please also refer to BR-Drucksache 456/99, 21.

[21] ~~For the European Union a list of Designated Payment and Security Settlement Systems is maintained by ESMA pursuant to Article 10 para 1 SFD (available at http://www.esma.europa.eu/page/Post-tradingSettlement-SFD-CSDR-T2S).~~ With respect to the register maintained by ESMA pursuant to Article 10 para 1 SFD, see footnote 10 above. ESMA further maintains a list of third country CCPs having been recognised to offer services and activities in the EU, available under https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf., this recognition is however not based on the third country CCP complying with the EMIR requirements for CCPs but instead relies on the CCPs to be fully compliant with their local regime and be effectively supervised domestically when the applicable CCP regime has been deemed equivalent.

[22] Based on its wording, we believe that section 1 para 16 KWG applies to credit institutions generally. However, there are views in legal literature (*Ehricke*, WM 2006, 2109) that such term may have to be construed in the light of European Union law, and hence, only Credit Institutions as defined in section 1 para 3d sentence 1 KWG in conjunction with Article 4 para 1 no 1 CRR (*CRR Kreditinstitute*, "**CRR Credit Institutions**") would be covered.

(v) Summary

In ~~our view, a CCP's Rule Set would have to meet all requirements as described above to constitute a System within~~summary, on the ~~meaning~~basis of ~~section 1 para 16 KWG. However, given that~~ the ~~European Commission~~above, an Agreed CCP operating under a Rule Set which is authorised under EMIR and ~~the European Central Bank take the view that~~included in the list of Designated Payment and Settlement Systems ~~provides legal certainty, a CCP's Rule Set may~~should be considered as a System ~~by competent authorities if such Rule Set is designated as a System therein~~.

We are not aware of any court decisions on Systems and a court may not follow our analysis. If the Agreed CCP operating under its Rule Set does not establish a System, then the exemptions for Systems are not applicable.

(b) Conflict of laws provisions applicable to Systems

(i) To the extent the Recast EUIR [23] applies to Insolvency Proceedings pursuant to applicable conflict of laws provisions, pursuant to Article ~~9~~12 para 1 Recast EUIR ~~provides that~~ the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market are governed solely by the law~~s~~ of the ~~Member State~~EU member state applicable to that system or market.[24]

~~Whether the reference to payment or settlement systems would include CCP clearing is not entirely clear. Also, the Clearing Agreement between the Clearing Member and the Client may~~

[23] The Industry Netting Opinion describes the scope of application of the EUIR and the Recast EUIR and discusses specific conflict of laws provisions of the EUIR and the Recast EUIR in chapter VI.(B).

[24] Save for a cross reference to a restated provision in Recast EUIR the wording of Article 12 Recast EUIR is identical to the wording of the predecessor regulation under Article 9 EUIR and hence the relevant analysis relevant for Article 9 EUIR would also be relevant for Article 12 Recast EUIR; see *Jahn/Fried*, in: Münchener Kommentar InsO, 3rd ed. (2016). Art. 12 EuInsVO 2015, no. 1, arguing in favour of construing Article 12 Recast EUIR in light of Article 9 EUIR to which we agree. However, we are not aware of any official guidance under Article 9 EUIR either.

~~only be qualified as an agreement forming part of a System if the Client were a Credit Institution as only Credit Institutions may form part of a System as indirect participants. However, the EUIR as a whole is not applicable to Insolvency Proceedings over the assets of a Clearing Member which is a CRR Credit Institution (see Chapter VI. (B) (2) of the Industry Netting Opinion).~~

~~Also the conflicts of law provision on financial markets with the consequence that the laws of the Member State applicable to the~~ The term "financial market ~~applies would in our view not apply to the Clearing Agreement. In our understanding, an Agreed CCP does not constitute a "financial market".~~

~~What constitutes a financial market within the meaning of Article 9 EUIR~~" is not defined in the Recast EUIR but is understood to be a market in ~~a Member State~~an EU member state (other than Denmark) where financial instruments, other financial assets or commodity futures and options are traded ~~and which is subject to supervision by the Member State's~~ .[25] Whether the reference to payment or settlement systems would include central counterparty clearing is not entirely clear and we are not aware of any guidance by a competent ~~authorities.[26] Again, the Client would not directly participate in the financial market but only have a bilateral relationship with the Clearing Member being a market participant. In our view, the legal relationships between market participants and their clients are not covered by~~ authority or any relevant court decisions on the interpretation of Article 12 Recast EUIR. In our view, the definition of "system" as set out Article ~~9 EUIR (unlike an indirect participation in a System which is expressly mentioned). Furthermore,~~2 lit (a) SFD may generally be referred to when construing Article ~~9 para~~12 Recast EUIR.[27] When referring to

[25] Cf. *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings, paragraph 102. See also Recital 71 sentence 3 Recast EUIR referring to "regulated financial markets".

~~[26] *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings (1996), no. 120.~~

[27] *Dornblüth*, in: Heidelberger Kommentar InsO, 9th ed. (2018), Article 12 EuInsVO no. 4; *Huber*, in: Haß et al., EU-Insolvenzverordnung (2005), Article 9 EuInsVO no. 2 (both referring to Article 9 EUIR).

"payment systems" Recital 71 sentence 1 ~~EUIR requires the financial market as such~~ Recast EUIR also mentions "position-closing agreements and netting agreements to be ~~regulated (as regulated market under Article 4 para 1 point 14 of the~~found in such systems". Sentence 3 of Recital 71 refers to "the payment and settlement of transactions, and provided for in payment and set-offs systems". The reference to payment or settlement systems would appear to be a reference to systems,[28] i.e. the term is a reference to European ~~Parliament and Council Directive 2004/39/EC~~ Union law on ~~markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC~~payment and ~~Directive 2000/12/EC of the European Parliament~~settlement systems. As mentioned, the EU legislator does not strictly distinguish between payment, settlement and ~~the Council~~clearing systems and ~~repealing Council Directive 93/22/EEC as amended (OJ No L 145 of 30 April 2004, "**MiFID**").~~ [29] in light of subsequent developments clearing systems can also qualify as Systems (see paragraph 4.1.1(a) above).

While the reference in Recital 71 sentence 4 Recast EUIR to the SFD clarifies that the SFD contains special provisions which should take precedence over the general rules laid down in the Recast EUIR, no such reference is made in the wording of Article 12 Recast EUIR. The reference may be construed that the SFD is intended to prevail over the Recast EUIR and that even within the scope of application of the Recast EUIR the relevant conflicts of law provisions under the SFD, which with respect to this jurisdiction would result in the application of section 340 para 3 InsO, have to be applied. Recital 71 sentence 4 Recast EUIR may also be construed to provide further clarity on the

[28] *Wenner/Schuster*, in: Wimmer, Frankfurter Kommentar InsO, 9th ed. (2018), Article 12 EuInsVO no. 3; *Kemper*, in: Kübler/Prütting/Bork, InsO, Loseblatt (as of March 2018), Article 9 EuInsVO no. 5; *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings, paragraph 123, stating that "work in progress in the Community on those systems" should be taken into account to determine the applicable law.

~~[29] If Article 9 para 1 EUIR applies to Client Transactions by reason of the fact that Client Transactions are traded on exchanges or other financial markets, it will provide for a separate treatment of those Client Transactions which are traded on the financial market and those which are not.~~

interpretation of Article 12 Recast EUIR and thereby ensuring that such article applies to systems covered by the SFD. Under both interpretations, within the scope of application of the Recast EUIR, Article 12 Recast EUIR would apply and the position as regards Systems is in our view similar to the position under the InsO.

Where a CCP qualifies as a System and such definition is also relevant for construing Article 12 Recast EUIR, Article 12 Recast EUIR would refer to the governing law of the System.

(ii) If the conflict of laws provisions of the Recast EUIR do not apply to Insolvency Proceedings, section 340 para 3 InsO applies and provides that the effects of Insolvency Proceedings on the rights and obligations of participants in a System within the meaning of section 1 para 16 KWG are governed by the laws of the country which applies to that System. If the Clearing Agreement forms part of a System, section 340 para 3 InsO applies and the effects of a Client's insolvency would, under section 340 para 3 InsO, as we would construe such provision, be governed by the laws applicable to the System (section 340 para 3 InsO refers to section 340 para 1 which in turn refers to the laws of the country applicable to such market (*Recht des Staats, das für diesen Markt gilt*)). ~~With respect to the legal consequences, where section 340 para 3 InsO applies, it is not entirely clear to which set of rules the laws of the country applicable to the System refers. Basically, section 340 paras 3 and 1 InsO could refer to (i) the substantive insolvency laws of the jurisdiction that has been chosen by the parties to govern the relevant System,~~ [30] ~~(ii) the substantive contract law of the jurisdiction that has been chosen by the parties to govern the relevant System~~ [31] ~~or (iii) directly to the terms of the relevant System without any regard to the~~

[30] ~~See (in the context of section 340 para 2 InsO) *Liersch/Tashiro*, in: Braun, Insolvenzordnung, 6th ed. (2014) § 340 nos. 3 and 4; *Jahn/Fried*, in: Münchener Kommentar InsO, 3rd ed. (2014), § 340 no. 7.~~

[31] ~~See (in the context of section 340 para 2 InsO) *Kindler*, in: Münchener Kommentar BGB, 6th ed. (2015), § 340 no. 5 (*lex causae*); *Stephan*, in: Heidelberger Kommentar InsO, 7th ed. (2014), § 340 nos. 6, 7.~~

~~substantive insolvency or contract laws.[32] In our view, both the legal history and the context of this provision have to be taken into account. Section 340 para 3 InsO implements the SFD into German law. When implementing the SFD into German law, the German legislator emphasised the necessity to ensure predictability regarding the applicable law. It is, however, not possible in order to achieve this purpose to give effect to the parties agreement without having regard to the principles of insolvency law. Moreover, the wording of section 340 para 3 InsO refers to the laws of the country instead of merely referring to the terms of the System. According to our interpretation of section 340 para 3 InsO, the netting takes effect in accordance with the substantive insolvency laws of the country the laws of which have been chosen by the parties to govern the System. Therefore, the effectiveness of the contractual terms of a System would not only be a matter of the terms of the System (without any reference to substantive insolvency laws) pursuant to section 340 para 3 InsO but a matter of the laws of the country governing such System. An interpretation pursuant to which section 340 para 3 InsO would refer to the contract law of the country that has been chosen to govern the relevant System is not convincing as section 340 para 3 InsO is an insolvency conflict of laws provision. However, we note that, as far as we are aware, the interpretation of section 340 para 3 InsO has not been the subject of any court decision yet.~~We interpret "the laws applicable to the System" to refer to the substantive insolvency laws of the country the laws of which govern the relevant System. This view is based on the legislator's intention to provide clarity on the applicable insolvency laws[33] and a decision of the German Federal Court of Justice (*Bundesgerichtshof*, "**BGH**") of 9 June 2016 on netting agreements within the meaning of section 340

~~[32] See (in the context of section 340 para 2 InsO) *Schneider*, in: Kohler/Obermüller/Wittig, Kapitalmarkt – Recht und Praxis, Gedächtnisschrift für Ulrich Bosch (2006), 211. Generally, the Industry Netting Opinion construes section 340 para 2 InsO (which provides for a similar rule with respect to netting agreements) as most likely to be referring to the relevant contractual arrangement rather than substantive insolvency laws, see a detailed discussion in chapter VI.(C)(3) of the Industry Netting Opinion.~~

[33] See BT-Drucksache 15/16, p. 20.

para 2 InsO, which provision states that the effects of the insolvency proceedings on, inter alia, netting agreements are governed by the law of the country which governs such agreements. In that decision, the BGH concluded that "the law of the country which governs such agreement" refers to the relevant substantive insolvency laws of such country.[34]

Based on the definition of system in section 1 para 16 KWG, as set out above, the Clearing Agreement between the Clearing Member as direct participant in the System and the Client as indirect participant could only form part of a System if the Client were a Credit Institution.

~~Given their scope, neither the Industry Netting Opinion nor the Industry Collateral Opinion discuss the effects of section 340 para 3 InsO. The above analysis has therefore to be considered in addition to chapter VI., in particular chapter VI.(C)(3) of the Industry Netting Opinion with respect to the determination of the substantive insolvency law applicable to the enforceability of the close-out netting pursuant to section 340 para 2 InsO.~~[35]

(c) Exemptions under the InsO applicable to Systems

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[34] BGH WM 2016, 1168, 1172. In this decision relating to netting agreements, the BGH has referred to the substantive insolvency laws of the country the laws of which have been chosen by the parties to govern the relevant netting agreement. Before the 9 June 2016 decision of the BGH, it was not entirely clear to which set of rules the wording "law of the country which governs such agreements" refers. Basically, section 340 para 2 InsO could refer to (i) the substantive insolvency laws of the jurisdiction that has been chosen by the parties to govern the relevant agreement (*Tashiro*, in: Braun, InsO, 7th ed. (2017) § 340 InsO nos. 3 and 4; *Jahn/Fried*, in: Münchener Kommentar InsO, 3rd ed. (2014) § 340 InsO nos. 6 *et seq.*), (ii) the substantive contract law of the jurisdiction that has been chosen by the parties to govern the relevant agreement (*Kindler*, in: Münchener Kommentar BGB, 7th ed. (2018) § 340 InsO no. 5 (lex causae); *Swierczok*, in: Heidelberger Kommentar InsO, 9th ed. (2018), § 340 InsO nos. 7 *et seq.*) or (iii) directly to the terms of the relevant agreement without any regard to the substantive insolvency or contract laws (this interpretation is supported by *Schneider*, in: Kohler/Obermüller/Wittig, Kapitalmarkt – Recht und Praxis, Gedächtnisschrift für Ulrich Bosch (2006), p. 211). With respect to the interpretation of section 340 para 2 InsO, see also the Industry Netting Opinion in chapter VI.(C)(3).

~~[35] We note particularly, that the Industry Netting Opinion in chapter VI.(C)(3) comes to a different conclusion with respect to the interpretation of section 340 para 2 InsO (which contains a similar conflict of laws provision as regards netting agreements) supporting a view similar as described under paragraph 4.1.1(b)(ii) item (iii) above.~~

(i) If a set-off is effected at the latest on the day of opening of the Insolvency Proceedings (section 96 para 2 InsO) the prohibitions of set-off pursuant to section 95 para 1 sentence 3 InsO and section 96 para 1 InsO do not apply to the set-off of claims and benefits from transfer, payment or settlement agreements introduced into a System. The Industry Netting Opinion addresses set-off upon the opening of Insolvency Proceedings in the context of insolvency conflict of laws in chapter VI.(B)(3) as regards the Recast EUIR and the EUIR and chapter VI.(C)(2) and (3) as regards insolvency conflict of laws provisions under the InsO. ~~The Industry Collateral Opinion addresses the German rules on set-off in chapter G.II.25.(a) and discusses insolvency conflict of laws provisions as regards set-off in chapter G.II.25.(b).~~

(ii) Section 166 InsO provides for restrictions on the realisation of a security interest upon the opening of Insolvency Proceedings (see chapter E.III.(B)(1) of the Industry Collateral Opinion). Where the security interest grants the secured party a right to separate satisfaction rather than a right for segregation, a distinction has generally to be drawn between such security interests which may be enforced by the secured party and security interests which are enforced by the insolvency administrator (*Insolvenzverwalter*, "**Insolvency Administrator**"). However, in the case that a secured party has been granted a security interest entitling the secured party to separate satisfaction which collateralises claims under a System, section 166 para 3 no. 1 InsO provides for an exemption from this restriction and the secured party may enforce such security interest itself.

4.1.2 Exemptions for ~~necessary measures under Article 48 EMIR~~clearing

Article 102b of the German Introductory Act to the InsO (*Einführungsgesetz zur Insolvenzordnung*, "**EGInsO**") provides for an exemption from mandatory provisions under the InsO for Insolvency Proceedings and Provisional Insolvency Proceedings. Article 102b EGInsO was introduced into German law to ensure that the implementation of necessary measures under Article 48 EMIR are not impaired by the opening of Insolvency Proceedings.

~~Pursuant to~~In accordance with Article 102b section 1 para 1 EGInsO, the opening of Insolvency Proceedings must not impair (1) the performance of the necessary measures (*gebotene~~) measures~~ *Maßnahmen*)[36] to administer, close out or otherwise settle client positions and own account positions of a clearing member in accordance with Article 48 paras 2, ~~para~~ 3,~~ para~~ 5 sentence 3 and para 6 sentence 3 EMIR, (2) the necessary transfer of client positions in accordance with Article 48 paras 4 to 6 EMIR and (3) the necessary utilisation and disbursement of clients' collateral in accordance with Article 48 para 7 EMIR where such measures have been taken in accordance with Article 48 EMIR. Furthermore, Article 102b section 2 EGInsO provides that the measures referred to in section 1 of Article 102b EGInsO shall not be subject to ~~challenge in~~ insolvency challenge (please refer to chapter VII.(E) of the Industry Netting Opinion for a general description of challenge in insolvency). Article 102b EGInsO also applies to Provisional Insolvency Proceedings.

Based on its wording and on the legislative reasoning pursuant to which Article 102b EGInsO is intended to ensure the validity of certain measures a CCP takes upon the default of one of its clearing members in order to mitigate such default[37], we construe Article 102b EGInsO as a provision of substantive insolvency law rather than as an insolvency conflict of laws provision.[38] Therefore, in our view Article 102b EGInsO only applies if German insolvency law applies. Article 102b EGInsO is an insolvency law provision and ~~does~~ therefore does not address any property or contractual law aspects in connection with Article 48 EMIR and any necessary measures thereunder.

Article 48 EMIR largely addresses the relationship between a CCP and its clearing members. Systematically, Article 48 EMIR can be construed as a risk management provision and be understood to pursue for the main part regulatory goals. Some of the measures upon a default of a clearing member also serve the interests of clearing clients but this does not necessarily result in a legal

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[36] Whether the term "necessary" is intended to restrict the application of Article 102b EGInsO or whether it lacks substantial meaning is unclear. The legislative reasoning qualifies "necessary measures" by a reference to "regulatory necessary measures" which in our view should cover all measures which have been approved by the relevant competent authority when assessing compliance of the relevant clearing rules with Article 48 EMIR pursuant to Article 14 EMIR; see BR-Drucksache 606/12, p. 42. Please also see *Scholl*, in: Wilhelmi/Achtelik/Kunschke/Sigmundt, Handbuch EMIR, 2016, p. 378.

[37] BT-Drucksache 17/11289, p. 28.

[38] See also *Holzer*, DB 2013, 444, 445.

relationship between a CCP and a clearing client. Rather, the clearing client's interests are protected by Article 39 EMIR requiring the segregation of assets and positions. It is therefore not entirely clear whether Article 102b EGInsO was also intended to govern the relationship between a clearing member and its clearing clients and with a view to also protecting the positions of a clearing client from the application of mandatory insolvency laws, if such mandatory insolvency laws limit the enforceability of necessary measures instituted under the relevant clearing conditions or clearing rules. This question is a matter to be determined under German law, as the reference in Article 102b EGInsO to Article 48 EMIR does not result in Article 102b EGInsO becoming a provision of EU law and the question at hand is not a question of the interpretation of Article 48 EMIR.

The wording of Article 102b section 1 para 1 no. 1 EGInsO refers to the performance of the necessary ~~(*gebotene*)~~ measures to administer, close out or otherwise settle client positions and own account positions of a clearing member. In Article 102b section 1 para 1 nos. 2 and 3 EGInsO the necessary transfer of clients' positions and the necessary utilisation and disbursement of clients' collateral is addressed. In those cases where it is not entirely clear whether the relationship between clearing member and clearing client is also directly addressed or whether this is a mere function of the "clearing cascade", ~~in our view~~ the reference to "necessary measures to administer, close out or otherwise settle client positions and own account positions of a clearing member" is in our view intended to ensure that both relationships in the clearing cascade, CCP with clearing member and clearing member with clearing client, are covered. A different treatment of those relationships producing different results ~~is~~would in our view not be in line with the meaning and purpose of Article 102b EGInsO.

In the following, we therefore ~~assume and understand~~take the view that all necessary measures of a CCP within the meaning of Article 48 EMIR under Article 102b section 1 para 1 no. 1 and 2 EGInsO and the utilisation and disbursement of clients' collateral under Article 102b section 1 para 1 no. 3 EGInsO are not impaired by the opening of Insolvency Proceedings ~~and, as a consequence, some provisions under the InsO either do not apply at all or to a limited extent only.~~in respect of a Clearing Member. As a result, the provisions of the Rule Set of an Agreed CCP which is licensed as a CCP under EMIR would prevail over mandatory provisions under the InsO, however, only to the extent the measures under the Rule Set of an Agreed CCP correspond to the measures referred to under Article 48 EMIR and Article 102b EGInsO or

implement such measures provided that these measures are necessary ~~(*geboten*)~~ within the meaning of Article 102b section 1 para 1 EGInsO. In our view, the exemptions implemented by Article 102b EGInsO go beyond the generally applicable exemptions for Financial Collateral (as defined in paragraph 4.2.~~10~~11(c)(i) below) and Systems.[39] Where we discuss in the following the effects of Insolvency Proceedings we also refer to Article 102b EGInsO.

~~Please note that~~We are not aware of any court decisions on the ~~aforementioned~~ interpretation of Article 102b EGInsO ~~has not been confirmed in any court decisions~~ and ~~given that Article 102b EGInsO was only recently introduced into German law~~, accordingly, we cannot exclude that our understanding of Article 102b EGInsO ~~would~~may not be shared by ~~legal commentators or treated differently by any~~a competent court ~~decisions~~.

With respect to the effects of a Clearing Agreement covering more than one Cleared Transaction Set, please see paragraph 4.2.1 below.

4.2 Answers to specific questions

4.2.1 *Are the provisions covering the consequences of a CM Trigger Event in Section 8(b) of the Addendum enforceable under the laws of your jurisdiction, both in the absence of and in the event of insolvency proceedings in your jurisdiction in relation to the Clearing Member?*

Please explain whether:

a) your answer would be different if more than one CM Trigger Event occurred in respect of separate Agreed CCP Services;

b) your answer would be different if one or more CM Trigger Events occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions; and

c) your answer would be different depending on the Type of Client Account.

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[39] See further *Bornemann*, in: Graf -Schlicker, InsO, 4th ed. (2014), § 104 InsO no. 52.

(a) Enforceability of section 8(b) of the Addendum in the absence of Insolvency Proceedings

The choice of English law or New York law, as applicable, to govern the Addendum and the Covered Base Agreement would be recognised in court proceedings taken in Germany for the enforcement of obligations under the Addendum and the Covered Base Agreement. This would, however, be subject in each case to the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations ("**Rome I**")[40] and, where it concerns non-contractual obligations arising out of the Addendum or the Covered Base Agreement, subject in each case to the provisions of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("**Rome II**").[41] In particular, to the extent the Clearing Agreement refers to *in rem* or property rights (*dingliche Rechte*) the creation of the relevant rights and any enforcement of such rights are subject to different conflict of laws principles and may limit the ability of parties to freely select the applicable law.

On the assumption that a CM Trigger Event has occurred which is not "insolvency-related", the termination under Section 8(b) of the Addendum would be recognised by a German court in accordance with Rome I as a matter of contract law if such obligation is valid under English ~~law. Based on judgments of the German Federal Court of Justice (*Bundesgerichtshof*, "**BGH**")~~or New York law, as applicable. Pursuant to Article 12 para 1 lit (d) Rome I, the law applicable to a contract by virtue of Rome I shall govern, amongst other things, the various ways of extinguishing obligations. Agreements on termination rights are therefore covered by the parties' rights to choose the law governing the Covered Agreement and the Addendum, and accordingly, the

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[40] OJ No. L 177 of 4 July 2008. Rome I applies to contracts concluded on or after 17 December 2009 (Article 28 of Rome I as revised by the corrigendum published in OJ No. L 309 of 24 November 2009, p. 87). Agreements entered into prior to that date are subject to the Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, "**EGBGB**"). See paragraph 5.1.1 below on the general restrictions under Rome I.

[41] OJ No. L 199 of 31 July 2007, p. 40.

contractual validity of the termination rights under Section 8(b) of the Addendum upon the occurrence of a CM Trigger Event which is not "insolvency-related" would therefore be a matter of the laws of England.

Based on judgments of the BGH [42] the term "insolvency-related" termination clause refers to provisions under which a contract may be terminated or terminates automatically upon a stoppage of payment (*Zahlungseinstellung*), the filing for Insolvency Proceedings (*Insolvenzantrag*) or the opening of Insolvency Proceedings (*Insolvenzeröffnung*) but has to be construed broadly and pursuant to that court decision even applies to situations created prior to the opening of Insolvency Proceedings from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected (*mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*).

The restrictions for rights of the Client to terminate upon a Clearing Member's default under Section 8(b) of the Addendum would in our view not be considered as manifestly incompatible with German public policy[43] nor as breaching any provision to be considered as an overriding mandatory provision of German law within the meaning of Article 9 Rome I[44] so that in our view, a German court would not grant to the Client an extraordinary termination right based on mandatory principles of German law despite the valid choice of English ~~law. Section 8(b) of the Addendum excludes the Client's termination right for Client~~

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42 BGH WM 2013, 274~~,~~; BGH WM 2003, 1384, 1386.

43 Based on Article 21 Rome I, where the result of the application of a foreign law contradicts the fundamental idea of the corresponding German legal provisions and the understanding of righteousness of the German public in a way that the application of such foreign law is considered unbearable, a German court would not apply such results of the application of foreign law contravening German public policy (*ordre public*). However, whether or not *ordre public* is infringed depends on the circumstances of the specific case with a view to all aspects of the relevant foreign law, the application of which is to be considered, such as, for example, treatment of a Clearing Member's fraudulent behaviour or wilful misconduct.

44 Generally, civil law provisions which aim at protecting private interests of a person are regularly not considered overriding mandatory provisions within the meaning of Article 9 Rome I (*Martiny*, in: Münchener Kommentar BGB, ~~5~~7th ed. (201~~0~~8), Art. 9 ~~VO (EG) 593/2008~~ Rome I,no. 59~~,~~ and 60; *Staudinger*, in: Ferrari/Kleininger/Mankowski u.a., Internationales Vertragsrecht, ~~2nd~~3rd ed (201~~1~~8), Art. 9 ~~VO (EG) 593/2008~~Rome I, no. 9~~,~~; both providing as example that section 138 BGB does not constitute ~~a~~an overriding mandatory provision~~.~~).

~~Transactions except in the case of Illegality and Impossibility (section 7 of the Addendum) and provides that upon the occurrence of a CM Trigger Event, the Client Transactions in the relevant Cleared Transaction Set terminate automatically at the same time as the related CM/CCP Transactions terminate or are transferred (except if otherwise stated in the Core Provisions of the relevant Rule Set). While under German law, a full exclusion of a Party's termination right under a contract for the performance of a continuing obligation (*Dauerschuldverhältnis*) would be invalid on the basis of section 314 para 2 BGB providing a general termination right for material reason (*wichtiger Grund*), a termination right may be contractually restricted. We are not aware of court precedents that would consider a provision similar to section 8(b) in connection with section 7 of the Addendum (restricting a Party's termination right to Illegality and Impossibility) as manifestly incompatible with German public policy nor as breaching any provision to be considered as an overriding mandatory provision of German law~~or New York law, as applicable.

Furthermore, in our view the contractual validity of any set-off as a consequence of CM Trigger Event is recognised as a matter of contract law if it is valid under English ~~law~~or New York law, as applicable, provided that any early termination of Client Transactions and set-off occurs prior to the opening of Insolvency Proceedings.[45]

(b) Enforceability of section 8(b) of the Addendum upon the occurrence of Insolvency Proceedings

(i) Insolvency-related termination

In the following we analyse the enforceability of the termination right contained in Section 8(b) of the Addendum.

Section 8(b) of the Addendum excludes the Client's termination rights under the Covered Base Agreement with respect to Client Transactions. Instead, upon the occurrence of a CM Trigger Event Section 8(b) of the Addendum provides for an automatic termination of all Client Transactions of a relevant Cleared Transaction Set "at the same time as the related CM/CCP

[45] Regarding the enforceability of set-off in an insolvency, we refer to paragraph 5.1.~~4~~5 below.

Transaction is terminated or Transferred" except to the extent otherwise stated in the Core Provisions of the relevant Rule Set.

(A) Mandatory rules of the InsO

Upon the opening of Insolvency Proceedings (as defined in chapter VII.(B)(1) of the Industry Netting Opinion), within its scope of application (see chapters VI.(B)(3) and VI.(C)(3) of the Industry Netting Opinion), any mandatory procedural law under the InsO would prevail over the contractual provisions of the Clearing Agreement and the mandatory rules applicable to the termination and liquidation of financial transactions under section 104 para ~~2~~1 InsO apply (for a detailed analysis see chapters VII.(C)(2) and (3) of the Industry Netting Opinion). In particular, executory contracts which have not been effectively terminated prior to the opening of Insolvency Proceedings are, pursuant to section 103 InsO, subject to the Insolvency Administrator's right to decide whether to assume or reject such contracts;[46] i.e. to refuse performance of unprofitable contracts and to enforce profitable ones ("**Selection Right**" - such selection right by the Insolvency Administrator often being referred to as "cherry-picking" right). The Selection Right does, however, not apply where the statutory netting provision under section 104 InsO applies.

Section 119 InsO provides that agreements excluding or limiting the application of sections 103 to 118 InsO in advance are invalid and, therefore, protects the Insolvency Administrator's Selection Right ~~and, pursuant~~

[46] The opening of Insolvency Proceedings does not trigger the (automatic) termination of the contractual obligation to perform. Rather, the opening of Insolvency Proceedings only affects the enforceability of the respective claims since both parties to a contract may raise the objection of non-performance of a contract (BGH ZIP 2002, 1093, 1095). Therefore, pursuant to section 103 InsO neither the opening of Insolvency Proceedings nor the decision of the Insolvency Administrator results directly in a termination of the contractual agreement.

~~to a judgment~~. Based on the purpose of section 119 InsO, the BGH held in its judgement of 15 November 2012~~,~~[47][48] that section 119 InsO applies from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected (*mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*).[49] ~~The BGH held that an insolvency-related termination provision[50] in a contract is invalid, because it would exclude the Selection Right of the Insolvency Administrator under section 103 InsO and, therefore, violate section 119 InsO. Therefore, the early termination under Section 8(b) of the Addendum may be invalid if it violates sections 103, 119 InsO.~~[51] Any contractual early termination right based on insolvency-related events is therefore void if the termination is triggered resulting from the occurrence of such event.

~~Pursuant to the BGH's judgement of 15 November 2012 insolvency-related termination provisions are upheld if the contractual insolvency-related termination right corresponds to a statutory termination right. To the extent that section 104 InsO applies, it overrides the Insolvency Administrator's Selection Right under section 103 InsO and, therefore, there is no need to protect the Selection Right under section 119 InsO, even in cases where an insolvency-related termination right has been exercised. While the BGH does not refer to section 104 InsO, in our~~

~~47 BGH WM 2013, 274~~

48 BGH WM 2013, 274.

49 We refer to chapter VII.(C)(2)(b)(ii) of the Industry Netting Opinion.

~~50 We refer to chapter VII.(C)(2)(a) and (b) of the Industry Netting Opinion for a detailed analysis of the mandatory nature of the statutory termination and liquidation provisions of the InsO and the general effects of the BGH's judgement of 15 November 2012.~~

~~51 While the BGH's judgment related to a contract for the supply of energy we understand that the BGH intends to apply its reasoning to any other agreements as long as an early termination under such agreements will result in the exclusion of an Insolvency Administrator's Selection Right.~~

~~view, section 104 InsO should qualify as a "corresponding" statutory termination as section 104 InsO operates as a statutory termination and close-out netting provision which under all circumstances already excludes the Selection Right of the Insolvency Administrator under section 103 InsO.~~ [52] ~~Accordingly, section 104 InsO provides for an automatic termination of the contracts falling within its scope of application. Consequently, in our view, where the relevant agreement or any transactions thereunder fall within the scope of section 104 InsO, an insolvency-related contractual termination right should not be regarded as a circumvention of section 103 InsO.~~

In its decision of 9 June 2016, the BGH held that, if parties to a transaction governed by German law entered into a netting arrangement (*Abrechnungsvereinbarung*) for the event of an insolvency which is contradictory to section 104 InsO, the netting arrangement is void in this respect and the provisions of section 104 InsO are directly applicable. The BGH has explicitly ruled that section 104 InsO prevails over contractual arrangements such as a master agreement, irrespective of the fact that section 104 InsO expressly refers to master agreements. The BGH has also ruled that the valuation must not deviate from section 104 InsO. [53]

The decision of the BGH of 9 June 2016 was based on a version of section 104 InsO which is no longer in force and as the version of section 104 InsO currently in force was enacted as a direct response to the BGH decision [54] we hold the view that such strict interpretation of sections 104, 119 InsO would no longer be upheld. However, in its decisions of 15 November 2012 and 9 June 2016 the

~~[52] *Obermüller*, ZInsO 2013, 476.~~

[53] BGH WM 2016, 1168, 1173, 1174.

[54] Please refer to chapter VII.(C)(2)(b) of the Industry Netting Opinion with respect to further details on the legislative history of section 104 InsO.

BGH did not refer to the reasoning given in the legislative procedure but rather formed its view on the interpretation of the wording and the purpose of these sections.

The currently applicable version of section 104 InsO, which entered into force on 29 December 2016, provides that fixed date transactions and financial transactions falling within the scope of section 104 para 1 InsO[55] are automatically terminated upon the opening of Insolvency Proceedings and the parties may no longer demand performance of the relevant obligations but a claim for non-performance is calculated on the basis of the method stipulated in section 104 para 2 InsO. The other party may assert the claim for non-performance as an insolvency creditor, ranking *pari passu* with any other unsecured creditors (section 104 para 5 InsO). Within the scope set out therein, section 104 para 4 InsO generally recognises contractual close-out netting (*vertragliches Liquidationsnetting*) and within such scope parties may agree on a valuation which differs from section 104 para 2 InsO.[56]

However, if pursuant to the contractual termination provision a transaction is not terminated prior to the opening of Insolvency Proceedings, section 104 InsO overrides any contractual termination provision. Accordingly, fixed date transactions and financial transactions falling within the scope of section 104 InsO terminate automatically upon the opening of Insolvency Proceedings, unless such transactions have been terminated before.

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[55] Please refer to chapter VII.(C)(2)(c) of the Industry Netting Opinion for further details as to which transactions constitute "financial transactions" within the meaning of section 104 para 1 InsO.

[56] Please refer to chapter VII.(C)(2)(b)(iii) of the Industry Netting Opinion for further details on deviations permitted by section 104 para 4 InsO.

In our view, Transactions falling within the scope of section 104 InsO would terminate upon the opening of Insolvency Proceedings even if the corresponding CM/CCP Transactions within the meaning of Section 8(b)(ii)(1) of the Addendum have not yet terminated or have not yet been transferred and even if the Core Provisions of a Rule Set would state otherwise, i.e. contractually exclude a termination of those Transactions at that time.

Article 102b section 1 para 1 no. 1 and 2 EGInsO provides that necessary measures of a CCP under Article 48 EMIR and the utilisation and disbursement of clients' collateral are not impaired by the opening of Insolvency Proceedings. However, given that the scope of Article 102b section 1 para 1 no. 1 and 2 EGInsO is unclear (see above paragraph ~~4.1.2~~4.1.2) and in the absence of any specific guidance in this respect, it is not entirely clear whether a court would construe Article 102b EGInsO in a way to even prevent a mandatory statutory termination of Client Transactions between the Clearing Member and its Client pursuant to section 104 para ~~2~~1 InsO in order to avoid that such a statutory termination potentially impairs measures of a CCP necessary for the purposes of Article 48 EMIR which may be taken later, i.e. after the opening of Insolvency Proceedings~~.~~ in respect of the Clearing Member.

The broad and general wording of the Article could be construed to limit all effects of Insolvency Proceedings including a statutory termination under section 104 para ~~2~~1 InsO under two preconditions: (1) if Article 102b EGInsO also governs the relationship between Clearing Member and Client (see above paragraph 4.1.2) and (2) if it is applied retroactively, i.e. if under Article 102b section 1 para 1 no. 1 and 2 EGInsO any effects which have automatically occurred under the InsO could be declared null and void at a later point in time if these effects impair necessary measures of a CCP under Article 48 EMIR taken after such effects.

While we hold the view that ~~the~~ Article 102b EGInsO also generally governs the relationship between clearing member and clearing client with a view to also protecting the positions of a clearing client from the application of mandatory insolvency laws, there are a number of reasons against the application of Article 102b section 1 para 1 no. 1 and 2 EGInsO from an "*ex post*" perspective to the statutory termination under section 104 InsO. In particular, the retroactive application and, hence, the retroactive invalidity of a statutory termination between the Clearing Member and the Client may lead to considerable legal and commercial uncertainties for the Client because obligations of the Client against the Clearing Member would revive under the re-established Transactions notwithstanding any measures taken by the Client in the meantime to protect its positions in consideration of the statutory termination.

Furthermore, in our view such a broad effect of Article 102b section 1 para 1 no. 1 and 2 EGInsO may not have been intended by the German legislator which did not question the statutory termination upon opening of Insolvency Proceedings as such. Rather, the ~~legal~~legislative reasoning to Article 102b section 1 para 1 no. 1 and 2 EGInsO only mentions that the calculation method of section 104 para 3 InsO (in the version applicable prior to 29 December 2016, which is now covered by section 104 para 2 InsO) may be potentially detrimental for measures of a CCP.[57]

If Article 102b section 1 para 1 no. 1 and 2 EGInsO were construed to have the broadest effect to ensure that no provision of the InsO impairs measures of a CCP necessary for the purposes of Article 48 EMIR, then one could argue that even the statutory termination pursuant to section 104 para ~~2~~1 InsO would have no effect on a

[57] BT-Drucksache 17/11289, p. 27. Also the legislative reasoning in respect of the amendment to section 104 InsO does not provide any further clarity on this point.

Transaction to the extent such measures of a CCP require that such a Transaction continues to exist without termination.

~~There are no court decisions on the~~ Please note that our interpretation of Article 102b EGInsO ~~and given that Article 102b EGInsO was only recently introduced into German law,~~has not been confirmed in any court decisions and we cannot exclude that our understanding of Article 102b EGInsO ~~would not be shared by legal commentators or~~may be treated differently by any court decisions.

(B) Section 104 InsO and master agreements

In the following we analyse whether the Clearing Agreement can be considered one or more master agreements within the meaning of section 104 para ~~2~~3 sentence ~~3~~1 InsO even though different Cleared Transaction Sets are established ~~and~~ and are terminated separately upon the occurrence of an insolvency-related event with respect to the Clearing Member. Under section 104 para ~~2 sentence~~ 3 sentence 1 InsO all contracts relating to financial transactions which are combined in a master agreement ~~for~~(*Rahmenvertrag*) or the rules of a central counterparty within the meaning of section 1 paragraph 31 KWG, which ~~it has been agreed~~provides that~~, when reasons for the opening of Insolvency Proceedings exist, it can~~ the covered transactions may, upon the occurrence of certain events, only be terminated in ~~its~~their entirety, ~~are~~then the whole of such covered transactions shall be deemed to ~~form one~~be a single ~~mutual agreement~~transaction within the meaning ~~of sections 103, 104 InsO. The purpose of sentence 3 is to extend the scope~~ of section 104 para ~~2 sentence 1 and 2 InsO also to such financial transactions which would normally not fall within the scope of sections 103 and 104 InsO, as they have been fully~~

~~performed by one party before the opening of Insolvency Proceedings~~1 InsO. [58]

In either case, if the Clearing Agreement were to be construed as one single master agreement but also if it were construed to constitute more than one and separate master agreements for the purposes of section 104 para ~~2~~3 sentence ~~3~~1 InsO, [59] ~~-~~each Transaction falling within the scope of section 104 para ~~2~~1 InsO[60] would benefit from section 104 para ~~2~~3 sentence ~~3~~1 InsO.

In case of a CM Trigger Event (including an insolvency-related event with respect to the Clearing Member), the Clearing Agreement provides for a different treatment of various groups of Transactions/Client Transactions. Whereas within a group of Transactions/Client Transactions all such Transactions/Client Transactions terminate at the same time upon the same termination trigger, the Clearing Agreement does not provide that all Transactions under the Clearing Agreement, (which may be allocated to different Cleared Transactions Sets) and all Uncleared Transactions~~,~~ terminate at the same point in time where reasons for the opening of Insolvency Proceedings exist with respect to the Clearing Member.

(C) Scope of section 104 para ~~2~~3 sentence ~~3~~1 InsO

Whether and to what extent section 104 para ~~2~~3 sentence ~~3~~1 InsO applies to the Clearing Agreement as a whole or to each different Cleared Transaction Set and the Covered Base Agreement separately, depends on the question whether also for Cleared Transactions the

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[58] Please see chapter VII.(C)(2)(c) of the Industry Netting Opinion with respect to ~~sections 103,~~section 104 InsO and ~~their~~its application on the Covered Base Agreement.

~~[59] Please see chapter VII.(C)(2)(a) of the Industry Netting Opinion with respect to the effects of section 104 InsO.~~

[60] Please ~~see~~refer to chapter VII.(C)(2)(c) of the Industry Netting Opinion ~~with respect to the Transactions falling~~for further details as to which transactions constitute "financial transactions" within the ~~scope~~meaning of section 104 para ~~2~~1 InsO.

Covered Base Agreement as amended by the Addendum qualifies as one single "master agreement" within the meaning of section 104 para ~~2~~3 sentence ~~3~~1 InsO. While the Industry Netting Opinion confirms that the Covered Base Agreement qualifies as a master agreement in its chapter VII.(C)(2)(c), the amendments made by the Addendum resulting in the termination of some but not all Transactions at the same time upon the occurrence of an insolvency-related termination event with respect to the Clearing Member may affect the analysis.

The ~~wording of section 104 para 2 sentence 3~~ InsO ~~refers to contracts involving financial transactions which are combined in a~~ does not provide for a more detailed definition of the term "master agreement ~~for which it has been agreed that, where reasons for the opening of insolvency proceedings exist, it can~~". Express precondition is only ~~be terminated in its entirety but does not further describe~~that the ~~concept of a "~~master agreement~~". In particular, section 104 para 2 sentence 3 InsO does not require a specific form of an agreement. Section 104 para 2 sentence 3 InsO only requires that the master agreement~~ [61] must ~~result in the~~ provide for a termination of the entire agreement (including all transactions ~~which are intended to be combined in the master agreement.~~ [62] ~~By referring to "financial~~

[61] The same applies with regard to the rules of a central counterparty within the meaning of section 1 para 31 KWG (i.e. the clearing rules of a CCP).

~~[62] We believe that a German court should when construing the term "master agreement" for the purposes of section 104 para 2 InsO also refer to other legal provisions taking into account netting agreements, such as Article 296 para 2 lit (a) CRR or section 2 para 3 no. 43 lit. (a) SAG, respectively. The aforementioned provisions are using different terms but we believe that they substantially address netting agreements; see Article 296 CRR on "a contractual netting agreement […] which creates a single legal obligation, covering all included transactions" (*vertragliche Nettingvereinbarung […], die für alle erfassten Geschäfte eine einzige rechtliche Verpflichtung begründet*) or section 2 para 3 no. 43 SAG pursuant to which a 'netting arrangement' means an arrangement under which a number of claims or obligations can be converted into a single net claim (*Saldierungsvereinbarung ist eine Vereinbarung, der zufolge eine Reihe von im Vorhinein festgelegten oder bestimmbaren Forderungen oder Verpflichtungen in eine einzige Nettoforderung umgewandelt werden kann*).~~

~~transactions … combined in a master agreement" ("*in einem Rahmenvertrag zusammenge-fasst*") section 104 para 2 sentence 3 InsO implies in our view that it is not intended to restrict the contractual freedom of parties to decide whether or not a master agreement is entered into and also whether a transaction shall be covered by, and form part of, a master agreement. Furthermore, no restriction can in our view be drawn from section 104 para 2 sentence 3 InsO which would prevent parties from entering into more than one master agreement.~~

under the master agreement) where specified reasons allow for such termination. Under section 104 para ~~2~~3 sentence ~~3~~1 InsO parties are ~~fur~~ther~~m~~efore not restricted to agree on different termination rights with respect to specific transactions (or specified groups thereof) subject to the terms of an agreement.~~-~~[63]

Section 104 para 3 sentence 1 InsO generally replicates and substantiates section 104 para 2 sentence 3 InsO as in force prior to 10 June 2016[64], which was intended to specifically cover master agreements for financial forward transactions (*Finanztermingeschäfte*) and was drafted with a view to the then existing market

[63] We believe that a German court should, when construing the term "master agreement" for the purposes of section 104 para 3 InsO, also take into account other legal provisions dealing with netting agreements, such as Article 296 para 2 lit (a) CRR or section 2 para 3 no. 43 lit. (a) SAG, respectively. The aforementioned provisions are using different terms but we believe that they substantially address netting agreements; see Article 296 CRR on "a contractual netting agreement […] which creates a single legal obligation, covering all included transactions" (*vertragliche Nettingvereinbarung […], die für alle erfassten Geschäfte eine einzige rechtliche Verpflichtung begründet*) or section 2 para 3 no. 43 SAG pursuant to which a 'netting arrangement' means an arrangement under which a number of claims or obligations can be converted into a single net claim (*Saldierungsvereinbarung ist eine Vereinbarung, der zufolge eine Reihe von im Vorhinein festgelegten oder bestimmbaren Forderungen oder Verpflichtungen in eine einzige Nettoforderung umgewandelt werden kann*).

[64] BT-Drucksache 18/9983, p. 19. With respect to the amendments made to section 104 InsO by the Third Law Amending the Insolvency Code and the Introductory Act to the Code of Civil Procedure (*Drittes Gesetz zur Änderung der Insolvenzordnung und zur Änderung des Gesetzes betreffend die Einführung der Zivilprozessordnung*) (BGBl. 2016 I, p. 3147) generally, see chapter VII.(C)(2)(b) of the Industry Netting Opinion.

documentation,[65] which at that time generally provided for identical termination rights for both parties in case of an insolvency.[66] Therefore, in our view neither the wording of section 104 para ~~2~~3 sentence ~~3~~1 InsO nor legislative procedure indicate that an agreement is excluded from the scope of section 104 para ~~2 sentence 3 InsO which does not provide for identical termination rights for both parties.~~ 3 sentence 1 InsO which does not provide for identical termination rights for both parties. Rather, only those transactions which are terminated when "specified reasons exist" qualify as "contracts combined in a master agreement" and are thus subject to section 104 para 3 sentence 1 InsO. We are not aware of any court precedents on this question.[67] As far as we are aware, this specific question has neither been discussed in legal literature, and instead, when describing the features of a master agreement, reference is made to the general characteristics of a master agreement as a single agreement (*einheitliches Vertragsverhältnis*).[68]

It should be noted that the above also applies if transactions are covered by such agreement, which neither qualify as fixed date transactions nor as financial transactions within the meaning of section 104 para 1 InsO, however, such transactions would be subject to the general provisions (section 104 para 3 sentence 2 InsO)

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65 BT-Drucksache 15/1853, p. 15. The legislator explicitly intended to give effect to contractual close-out netting agreements, see BT-Drucksache 12/7302, p. 168. For a summary of the legislative process see *Jahn/Fried*, in: Münchener Kommentar InsO, 3rd ed. (2013), § 104 nos. 10 *et seqq*., 24 *et seqq.; Piepenbrock/Ludwig*, WM 2014, 2197, 2200.

66 BT-Drucksache 15/1853, p. 15.

67 BGH judgment of 28 April 2015 (XI ZR 378/13) refers to the single agreement concept but not in connection with the interpretation of section 104 InsO.

68 For a summary of the requirements for a single agreement see *Jahn/Fried*, in: Münchener Kommentar InsO, 3rd ed. (2013), § 104 no. 143 and with respect to OTC derivatives clearing: § 104 no. 180g. *Lüer*, in: Uhlenbruck, Insolvenzordnung, 14th ed. (2015), § 104 no. 36.

(which include the Insolvency Administrator's Selection Right).[69]

(D) Clearing Agreement as one or more master agreements

As the Clearing Agreement does not provide for a termination of all Transactions in a Clearing Member's insolvency, in our view, the Clearing Agreement cannot be considered as one single master agreement within the meaning of section 104 para ~~2~~3 sentence ~~3~~1 InsO. However, section 104 para ~~2~~3 sentence ~~3~~1 InsO may still apply to ~~those~~ Transactions under the Clearing Agreement generally falling within the scope of 104 para ~~2~~1 InsO (i.e. financial transactions within the meaning of such provision). We are of the view that, within the contractual relationship established by the Clearing Agreement, those transactions which are determined as belonging to one and the same Cleared Transaction Set, and which are consequently terminated together when "specified reasons ~~for the opening of insolvency proceedings~~ exist", may qualify as "contracts combined in a master agreement~~".~~ or the rules of a central counterparty" (*durch einen Rahmenvertrag oder das Regelwerk einer zentralen Gegenpartei [...] zusammengefasst*).[70] While we are not aware of any court decision on the interpretation of section 104 para 3 InsO we would not construe the reference to "one single transaction" in sentence 1 of such section as prohibiting the parties to designate in the relevant master agreement which transactions are being netted against each other by allocating the relevant transactions to different "netting

[69] Please refer to the statements in respect of "Non-qualifying Transactions" in the Industry Netting Opinion, e.g. in chapter VII.(C)(2)(c)(ii) thereof.

[70] See also Article 296 CRR covering all included transactions (*alle erfassten Geschäfte*).

sets".[71] Thus, from the perspective of German insolvency law the Clearing Agreement may qualify as master agreement within the meaning of section 104 para ~~2~~3 sentence ~~3~~1 InsO ~~separately~~ for each ~~such~~separate group of Transactions (i.e. Uncleared Transactions and each Cleared Transaction Set) provided that the Clearing Agreement can be construed in such way ~~(which is a matter of English law on which we do not opine).~~[72].

While the interpretation of the Clearing Agreement is a matter of English law or New York law, as applicable, on which we do not opine, a corresponding intention of the parties may be evidenced by the third paragraph of the Addendum's recitals which reads: "Notwithstanding that the Clearing Agreement constitutes a single agreement, each Cleared Transaction Set will be treated separately for certain purposes, including, without limitation, termination of transactions in certain circumstances, as further described in this Addendum."

~~As a result, for the purposes of the InsO, in our view, the Clearing Agreement may be treated as forming a number of master agreements each within the meaning of section 104 para 2 sentence 3 InsO irrespective of the fact that the Clearing Agreement constitutes a single agreement pursuant to the Addendum's recitals. The Clearing Agreement would still be subject to section 104 para 2 sentence 3 InsO with each separate group of Transactions (i.e. Uncleared Transactions and each Cleared Transaction Set) to be treated as a separate master agreement provided that the Clearing Agreement can be construed in such way under its governing law (which is a matter of English law on which we do not opine).~~

[71] Rather, the purpose of section 104 para 3 InsO is to address master agreements or rules of a central counterparty which include transactions falling within and transactions falling outside the scope of section 104 para 1 InsO; see also BT-Drucksache 18/9983, p. 11.

[72] ~~Please see our further reasoning in this paragraph whether or not parties can enter into more than one master agreement and whether separate copies of such master agreement need actually to be signed.~~

~~Assuming that under English law~~Assuming therefore that under English law or New York law, as applicable, the distinction between Uncleared Transactions and Client Transactions and the contractual allocation of Client Transactions to various Cleared Transaction Sets is recognised, we believe that where several "master agreement relationships" are combined in the Clearing Agreement, the Industry Netting Opinion's analysis of the termination provision (Section 6 of the Covered Base Agreement) as provided in Chapter VII.(C)(1) to (3) of the Industry Netting Opinion ~~-~~would apply to each such master agreement relationship~~. This also means that section 104 InsO should qualify as a "corresponding" statutory termination provision to an insolvency-related termination as provided in Section 8(b) of the Addendum with respect to each Cleared Transaction Set~~.

~~We are not aware of any court precedents on the interpretation of section 104 para 2 sentence 3 InsO and on the question whether more than one master agreement could be evidenced by one written contract (such as the Clearing Agreement).~~ [73] ~~As far as we are aware, this specific question has neither been discussed in legal literature but our view is supported by the fact that when describing the features of a master agreement, reference is made to the general characteristics of a master agreement as a single contractual relationship (*einheitliches Vertragsverhältnis*)~~ [74] ~~but not as one document signed by the parties.~~

A further argument supporting the application of section 104 para ~~2~~3 sentence ~~3~~1 InsO on each Cleared

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[73] ~~BGH judgment of 28 April 2015 (XI ZR 378/13) refers to the single agreement concept but not in connection with the interpretation of section 104 InsO.~~

[74] ~~For a summary of the requirements for a single agreement see *Jahn/Fried* in: Münchener Kommentar zur InsO, 3rd ed. (2013), § 104 no. 143 and with respect to OTC derivatives clearing: § 104 no. 180g; *Lüer* in: Uhlenbruck, Insolvenzordnung, 14th ed. (2015), § 104 no. 36. The BGH has developed specific criteria to be met for a contractual relationship to form a single inseparable agreement. To constitute a "single inseparable~~

Transaction Set is that with respect to the Clearing Agreement and the Cleared Transaction Sets established ~~both, the effects of section 104 InsO and of section 119 InsO (and consequently also the BGH's decision of 15 November 2012[75])~~, sections 104 and 119 InsO must be construed in the light of Article 102b EGInsO which provides that the implementation of necessary measures under Article 48 EMIR must not be impaired by the opening of Insolvency Proceedings. ~~In our view, this general intention of Article 102b EGInsO must be taken into account when construing section 104 para 2 InsO.~~ While it is not entirely clear whether Article 102b EGInsO applies to the legal relationship between the Clearing Member and the Client (see paragraph 4.1.2 above), in our view, the provisions of the Rule Set of an Agreed CCP which is licensed as a CCP under EMIR would prevail over mandatory provisions under the InsO, however, only to the extent the measures under the Rule Set of an Agreed CCP correspond to the measures referred to under Article 48 EMIR and Article 102b EGInsO or implement such measures and provided that these measures are necessary (*geboten*) within the meaning of Article 102b section 1 para 1 EGInsO. As a result, the Client's termination right under Section 8(b) of the Addendum should be treated in the same way as the termination right under Section 6 of the Covered Base Agreement if an insolvency of a German Clearing Member occurs and the Clearing Agreement was not already terminated before.

~~contractual relationship", a mere commercial connection would not be sufficient (BGH 1987, 2004, 2007). Rather, it must be the intention of the parties that the different parts of such relationship shall "stand or fall" ("*stehen und fallen*") together (BGH, NJW 1976, 1931; BGH NJW 1986, 1988, 1990). According to some legal commentators, an "objective connection" in the purposes of the contractual arrangements (*objektiver Sinnzusammenhang*) is required (see *Busche*, in: Münchener Kommentar zum BGB, 6th ed. (2012), § 139 no. 16).~~

~~[75] BGH WM 2013, 274~~

If Article 102b EGInsO does not apply ~~such as~~, i.e. where the early termination does not relate to "necessary measures" under Article 48 EMIR (including cases where the relevant CCP is not subject to Article 48 EMIR as it is located in a third country as such term is used in EMIR) or in case our interpretation as to the scope of Article 102b EGInsO is not correct, the question is whether parties can enter into more than one master agreement and, if so, whether each of such master agreement would be subject to section 104 para ~~2~~3 sentence ~~3~~1 InsO separately as discussed above.

(ii) Insolvency-related set-off

Section 8(b)(ii)(3) of the Addendum, which provides for the calculation of the Cleared Set Termination Amount by aggregating and netting the Aggregate Transaction Value, unpaid amounts and the Relevant Collateral Value, involves elements of set-off and would, thus, also be subject to the mandatory restrictions on set-off under the InsO [76] upon the opening of Insolvency Proceedings ~~(as defined in chapter VII.(B)(1) of the Netting Opinion),~~, within its scope of application (see chapters VI.(B)(3) and VI.(C)(3) of the Industry Netting Opinion).

Section 104 InsO provides for the termination of Transactions to form a basis for set-off and provides for the calculation of compensation claims which may serve as a basis for set-off but in our view does not effect the aggregation of compensation

[76] ~~We note that the Industry Netting Opinion considers the relevant provisions not to apply on the basis that section 104 para 2 sentence 3 and para 3 InsO and the concept of close-out netting constitute a *lex specialis* to the rules of the InsO governing set-off; see chapter VI.(B)(3) and VI.(C)(2) of the Industry Netting Opinion as regards conflict of laws and chapter VII. (C)(3) of the Industry Netting Opinion as regards the scope of section 104 paar 3 InsO which is considered to provide for an aggregation of all amounts to a single lump-sum amount. A more detailed analysis regarding set-off in contained in chapter G.II.25.(b) of the Industry Collateral Opinion.~~ We note that the Industry Netting Opinion does not refer to restrictions on set-off under the InsO.

claims by set-off.[77] If substantive German insolvency law applies, insolvency-related restrictions on set-off have to be taken into account which apply generally to any set-off effected upon the opening of Insolvency Proceedings, see paragraph ~~5.1.5~~5.1.8 below.

(c) Enforceability of Section 8(b) of the Addendum upon the occurrence of more than one CM Trigger Event in respect of separate Agreed CCP Services

The analysis under paragraphs 4.2.1(a) and 4.2.1(b) above would also apply if of more than one CM Trigger Event in respect of separate Agreed CCP Services occurred. In such case, each Cleared Transaction Set would terminate in accordance with Section 8(b) of the Addendum, subject to the statutory termination of Transactions upon the opening of Insolvency Proceedings pursuant to section 104 para ~~2~~1 InsO and each Cleared Transaction Set could be treated as a separate master agreement provided that the Clearing Agreement can be construed in such way under its governing law.

[77] It could be argued it is not required to assess whether a contractual netting arrangement falling within the scope of section 104 InsO meets the requirements of sections 94 et. seqq. InsO where the netting (*Verrechnung*) of claims is made through the calculation of the relevant claim for non-performance within the meaning of section 104 InsO. Section 104 paras 1 and 2 InsO refer to the relevant single transaction, however pursuant to section 104 para 3 InsO the entirety of the transactions combined in a master agreement or the rules of a central counterparty are deemed to be a single transaction within the meaning of section 104 para 1 InsO. Accordingly, if this deeming provision results in a single transaction, set-off would not be required, as all respective amounts would simply be items to be included in the single payment claim resulting in a single settlement amount. However, we interpret section 104 InsO such that it does not include any set-off but, by transforming the former payment and delivery claims into a Euro denominated payment claim, provides a basis for set-off. Since pursuant to the legal reasoning the amendments to section 104 InsO was made for clarification purposes (see BT-Drucksache 18/9983, p. 9), we refer to the statements by legal commentators made prior to the new provision entering into force: *Lüer*, in: Uhlenbruck, Insolvenzordnung, 14th ed. (2015), § 104 no. 44; *Fuchs*, Close-out Netting, Collateral und systemisches Risiko, 2013, p. 106; *Ehricke*, ZIP 2003, 273 *et seqq*., 277; *Bosch*, WM 1995, 413 *et seqq*., 419 (differing view *von Hall*, Insolvenzverrechnung in bilateralen Clearingsystemen, 2011, p. 152, p. 156 *et seqq*.). Section 104 Abs. 4 InsO allows, within the limits of the provision, contractual arrangements, which, however, have the characteristics of a contractual set-off agreement and must therefore comply with section 94 *et seqq*. InsO. The statement in BT-Drucksache 18/9983, p. 21 in our view refers to other circumstances.

(d) Enforceability of Section 8(b) of the Addendum upon the occurrence of an event of default in respect of the Clearing Member under the Covered Base Agreement

The analysis under paragraphs 4.2.1(a) and 4.2.1(b) above would also apply if one or more CM Trigger Events occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling the Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions.

In such case, each Cleared Transaction Set would terminate in accordance with Section 8(b) of the Addendum and Uncleared Transactions under the Covered Base Agreement would terminate in accordance with Sections 5 and 6 of the Covered Base Agreement as described in chapter VII.(C)(2)(c) of the Industry Netting Opinion, subject to the statutory termination of Transactions upon the opening of Insolvency Proceedings pursuant to section 104 para ~~2~~1 InsO.

(e) Enforceability of Section 8(b) of the Addendum in relation to different types of Client Account

The analysis under paragraphs 4.2.1(a) and 4.2.1(b) above on the termination of Cleared Transactions would apply to the Clearing Agreement irrespective of the type of Client Account maintained by the CCP chosen with respect to the relevant CM/CCP Transactions.

4.2.2 *Would the conclusions reached in the Industry Netting Opinion, other than any conclusions relating to the matters discussed in paragraph 4.2.1, in relation to a Covered Base Agreement apply equally where a Covered Base Agreement is used in conjunction with the Addendum*?

(a) Based on the specific instructions given to ISDA's German counsel by ISDA as set out in the Industry Opinions ("**Specific Instructions**"), the Industry Netting Opinion contains an answer to the question whether the provisions of the Covered Base Agreement pursuant to which the Non-defaulting Party is entitled to terminate all Uncleared Transactions upon

insolvency of the German Party are enforceable under German law (see chapter IV. (A) 1. of the Industry Netting Opinion).[78]

(i) Scope of Industry Netting Opinion

The provisions applicable upon the occurrence of an Event of Default or Termination Event are addressed in chapter II.(A), (B) and (C) of the Industry Netting Opinion (Sections 5(a) and 6 of the Covered Base Agreement). Chapter VII.(C) (1) to (3) of the Industry Netting Opinion addresses the enforceability of a termination pursuant to these provisions under German law. With respect to the treatment of master agreements which include Transactions falling within the scope of 104 para ~~2 sentence 2~~1 InsO but at the same time also Transactions not falling within the scope of 104 para ~~2 sentence 2~~1 InsO, see chapter VII.(C)(2)(c) ~~and (d)~~ of the Industry Netting Opinion.

Chapter III.2. of the Industry Netting Opinion contains an assumption that Sections 1(c), 2(a)(iii)(1) and (2), 5 and 6 of a Covered Base Agreement are not altered in any material respect. Based on its specific fact pattern, the Industry Netting Opinion does not address whether its conclusions are affected by the combination of Uncleared Transactions and Client Transactions in a single agreement.

(ii) Application of Industry Netting Opinion's statements to the Clearing Agreement

With respect to Client Transactions, the Addendum does not in any material respect alter Sections 5(a) and 6 of the Covered Base Agreement, which provide for the termination rights of a Clearing Member upon insolvency of the German Party ~~in any material respect.~~. In case the Clearing Member is the Non-defaulting Party, the termination under Sections 5(a) and 6 of the

[78] For these purposes the Industry Netting Opinion contains an assumption that with respect to the 1987 ISDA Master Agreement the parties have amended Section 6(a) to the effect that an Early Termination Date will not be deemed to have occurred automatically upon the occurrence of an insolvency-related Event of Default under Section 5(a)(vii) (see in chapter IV.(B)(1) of the Industry Netting Opinion).

Covered Base Agreement applies to the Clearing Agreement in its entirety, i.e. to all Uncleared Transactions and all Client Transactions (Section 8(a) of the Addendum[79]). However, if the Client is the Non-defaulting Party, Section 8(b) of the Addendum[80] provides that the Clearing Agreement does not terminate in its entirety upon an insolvency-related event with respect to the Clearing Member. Rather, upon the occurrence of an Event of Default with respect to a CCP or Clearing Member a distinction is made between the various groups of Transactions (i.e. Uncleared Transactions and each Cleared Transaction Set) and each group of Transactions may terminate separately.

Even though the Industry Netting Opinion does not cover Sections 8(a) and (b) of the Addendum, there is in our view no statement in the Industry Netting Opinion which would prevent the application of the conclusions reached in the Industry Netting Opinion on insolvency-related termination rights under Sections 5(a) and 6 of the Covered Base Agreement with respect to Uncleared Transactions. Furthermore, there is in our view no statement in the Industry Netting Opinion which would prevent

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79 Section 8(a) of the Addendum provides that the termination of all Client Transactions upon the occurrence of an Event of Default, Termination Event or other similar event in respect of the Client is not restricted and will be effected in accordance with Sections 5 and 6 of the Covered Base Agreement (see Section 8(a)(i) of the Addendum). As a consequence, all Uncleared Transactions and all Client Transactions would be subject to a contractual early termination right under Section 6 of the Covered Base Agreement. Upon the occurrence of a CCP Default, an additional automatic termination event applies with respect to the affected Client Transactions. However, the Clearing Member's right to terminate Client Transactions is not affected by the additional automatic termination (see Section 8(d) (i) of the Addendum).

80 The termination right of a Client under Sections 5 and 6 of the Covered Base Agreement is, with respect to Client Transactions only, replaced by Section 8(b) of the Addendum providing for a termination of all Client Transactions of a relevant Cleared Transaction Set "at the same time as the related CM/CCP Transaction is terminated or Transferred" except to the extent otherwise stated in the Core Provisions of the relevant Rule Set. This means, upon the occurrence of an insolvency-related termination event in respect of the Clearing Member all Transactions under the Covered Base Agreement which are not subject to the Addendum terminate in accordance with Sections 5 and 6 of the Covered Base Agreement while the Client Transactions are subject to Section 8(b) of the Addendum triggering the termination of all Client Transactions of a relevant Cleared Transaction Set at the same time as the related CM/CCP Transactions terminate if such termination is not excluded by the Core Provisions of the relevant Rule Set.

its application to the termination of Uncleared Transactions[81] by a Client pursuant to Sections 5(a) and 6 of the Covered Base Agreement. This is, however, subject to our analysis in paragraph 4.2.1 above.

(b) Chapter IV.(A)2. of the Industry Netting Opinion ~~addresses~~raises the question whether the "Automatic Early Termination" provisions of the Covered Base Agreement upon insolvency of the German Party are enforceable under German law.[82]

[81] We note in particular, that the Industry Netting Opinion does not specifically exclude Transactions entered into between a Clearing Member and its Client for the purposes of OTC derivatives clearing (see chapter III. 1 last sentence of the Industry Netting Opinion).

[82] For these purposes the Industry Netting Opinion contains an assumption that either (i) the Parties to a 1992 or 2002 ISDA Master Agreement have selected automatic early termination upon certain insolvency-related events to apply to the insolvent German Party or (ii) the Parties to a 1987 ISDA Master Agreement have amended Section 6(e) of the Agreements to provide for full two-way payments in respect of all Events of Default and Termination Events.

(i) Scope of Industry Netting Opinion

Chapter IX.2 and chapter VII.(A) and (C) of the Industry Netting Opinion cover the "Automatic Early Termination" provision of the Covered Base Agreement.

(ii) Application of Industry Netting Opinion's statements to the Clearing Agreement

(A) The use of the Addendum does not affect the "Automatic Early Termination" of Uncleared Transactions under Section 6(a) of the Covered Base Agreement upon an insolvency of the Clearing Member. Pursuant to the introductory part of the Addendum, second sub-paragraph, the provisions of the Covered Base Agreement remain unchanged as regards Uncleared Transactions. Therefore, while the Industry Netting Opinion does not address the Addendum, in our view there is no explicit statement in the Industry Netting Opinion which would prevent the application of the conclusions reached in chapter IX.2 of the Industry Netting Opinion based on chapter VII.(A) and (C) of the Industry Netting Opinion on the "Automatic Early Termination" provision of the Covered Base Agreement with respect to Uncleared Transactions.

(B) With respect to Client Transaction~~s~~, the "Automatic Early Termination" provision of the Covered Base Agreement is disapplied and replaced by Section 8(b) of the Addendum providing for a termination of all Client Transactions of a relevant Cleared Transaction Set "at the same time as the related CM/CCP Transaction is terminated or Transferred" except to the extent otherwise stated in the Core Provisions of the relevant Rule Set. Based on its specific fact pattern, the Industry Netting Opinion does not address Section 8(b) of the Addendum.

(C) Consequently, the Industry Netting Opinion does not address whether its conclusions are affected by the combination of Uncleared Transactions and Client Transactions in the Clearing Agreement and by the fact

that the Addendum creates Cleared Transactions Sets which do not terminate at the same time.

(iii) Supplemental analysis

We believe that the changes to the Client's termination rights under the Covered Base Agreement in case of a default of the Clearing Member (which, among others, lead to an exclusion of the automatic termination pursuant to Section 6(a) of the relevant Covered Base Agreement upon an insolvency-related default of the Clearing Member) or upon an insolvency-related default of a CCP do not affect the analysis of the Industry Netting Opinion with respect to the Client's termination rights including an "Automatic Early Termination" for Uncleared Transactions upon an Event of Default by the Clearing Member (for more details, please refer to our supplemental opinion in paragraph 4.2.1(b)).

(c) Based on the Specific Instructions, the Industry Netting Opinion contains an answer to the question whether the provisions of the Covered Base Agreement providing for the netting of termination values to determine a single "lump-sum" termination amount upon insolvency of the German Party are enforceable under German law (see chapter IV.(A)3. and chapter IX.3. of the Industry Netting Opinion).

(i) Scope of Industry Netting Opinion

In answering this question, chapter VII.(C)(2)(b) and (c) of the Industry Netting Opinion provides for an analysis whether the Parties may validly agree on a method for determining a single "lump-sum" termination amount upon termination by a Clearing Member following an insolvency-related Event of Default with respect to a Client. Chapter VII.(C)(2)(c)(iv) of the Industry Netting Opinion addresses the calculation method of Section 6(e) of the Covered Base Agreement which provides for the netting of termination values in determining the Termination Amount as a single lump-sum amount.

(ii) Application of Industry Netting Opinion's statements to the Clearing Agreement

(A) With respect to Uncleared Transactions, the Addendum does not modify the calculation method under Section 6(e) of the Covered Base Agreement on which the Industry Netting Opinion gives an opinion. Therefore, while the statements made in the Industry Netting Opinion do not consider the Addendum, there is no statement in the Industry Netting Opinion which in our view prevents the application of the conclusions on such calculation method used under the Clearing Agreement.

(B) With respect to Client Transactions, the valuation method under Section 6(e) of the Covered Base Agreement is replaced by Section 8(b)(ii)(3) of the Addendum providing for a calculation of termination values of Client Transactions based, among others, on the relevant Rule Set of the CCP by stipulating that the value of a Client Transaction is equal to the value of the corresponding CM/CCP Transaction between the Clearing Member and the Agreed CCP under the relevant Rule Set.

To the extent the conclusions in the Industry Netting Opinion in chapter VII.(C)(2)(c)(iv) generally address whether section 104 para ~~3~~2 InsO overrides a calculation method contractually agreed in a master agreement which deviates from statutory requirements and in ~~our view~~which circumstances contractual deviations are permitted in accordance with section 104 para 4 InsO, the general considerations of the Industry Netting Opinion set out in such chapter can also be applied to Section 8(b)(ii)(3) of the Addendum. However, to the extent chapter VII.(C)(2)(c)(iv) of the Industry Netting Opinion contains statements on the precise valuation method of Section 6(e) of the Covered Base Agreement, the calculation method set out in Section 8(b)(ii)(3) of the Addendum is not covered by the Industry Netting Opinion's analysis.

(iii) Supplemental analysis

~~In our view,~~ If the chosen contractual calculation method~~s~~ for calculating a close-out amount upon a valid insolvency-related early termination [83] ~~should generally be upheld even if the methods deviate~~deviates from the calculation method provided by section 104 para ~~3 InsO~~ 2 InsO, in accordance with section 104 para 4 InsO, such calculation method will generally be upheld if such deviations are compatible with the fundamental principles applicable to the statutory provisions of section 104 para 2 InsO. For examples of permitted deviations as provided in section 104 para 4 InsO, please refer to chapter VII.(C)(2)(b)(iii) of the Industry Netting Opinion.

The reference to "in particular" in section 104 para 4 InsO ("The parties may, in particular, agree that...") indicates, as also stated in the legislative reasoning, that the enumerated deviations are mere examples which are all guided by the principle that such deviations are permissible as long as these are compatible with the fundamental principles applicable to the relevant statutory requirement which is to be amended.[84] Hence, section 104 para 4 InsO limits contractual close-out netting provisions and prohibits that they ~~are essentially comparable to the results~~ contradict the purpose of the statutory close-out netting.[85] The legislative reasoning also mentions the valuation on the basis of an actual or hypothetical replacement transaction and that the relevant extended periods for valuations may only be used if and to the extent such time is necessary due to the complexity of the relevant portfolio.

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[83] According to the BGH (BGH WM 2013, 274), the term "insolvency-related" refers to termination provisions under which a contract may be terminated or terminates automatically upon a stoppage of payment (*Zahlungseinstellung*), the filing for Insolvency Proceedings (*Insolvenzantrag*) or the opening of Insolvency Proceedings (*Insolvenzeröffnung*). In this judgment the BGH has also decided that section 119 InsO applies from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected (*mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist).*

[84] BT-Drucksache 18/9983, p. 14.

[85] BT-Drucksache 18/9983, p. 1, 14.

While we are not aware of any court decision or any further guidance in the legislative reasoning we hold the view that there is no need to explicitly refer to section 104 para 4 InsO when agreeing on any deviations from the statutory netting requirements, in particular from the timing and method of valuation set out under section 104 para ~~3 InsO.~~ 2 InsO. As already mentioned above, while single agreement clauses are generally permissible in accordance with section 104 para 3 InsO, based on our understanding of section 104 para 4 InsO parties may not agree to extend section 104 InsO to such transactions which are not covered by section 104 para 1 InsO (however bearing in mind that, with respect to financial transactions, section 104 para 1 sentence 3 InsO is not conclusive but is intended to provide for examples of potentially covered transactions).

~~Section 104 para 3 InsO provides for a method for calculating damages by determining the amount of any claim for non performance on the basis of the difference between the agreed price and the market or exchange prices, applicable at the place of performance to an agreement with the agreed time for performance on the date agreed between the parties, but no later than the fifth working day after the opening of Insolvency Proceedings.~~

~~If Client Transactions fall within the scope of section 104 InsO but the insolvency-related reason for termination has occurred prior to the opening of Insolvency Proceedings, it is not entirely clear whether the interpretation of section 119 InsO in the judgment of the BGH of 15 November 2012[86] may also affect the results of such early termination and, accordingly, the determination of any close-out or the calculation of any termination amounts under Section 8(b)(ii)(3) of the Addendum. We believe that section 104 para 3 InsO which provides for a calculation method following the early termination of transactions by section 104 InsO is also protected by section 119~~

~~[86] BGH WM 2013, 274.~~

InsO. Accordingly, section 104 para 3 InsO could be considered a mandatory provision which must not be modified by contractual agreement at all.[87] If such interpretation holds true, the results of a contractual automatic early termination would have to be equal to the results after the application of section 104 InsO in order to be valid. However, there is no explicit statement in the BGH's judgment supporting such a strict interpretation of section 119 InsO. In particular as section 104 InsO has been designed as a statutory "close-out netting" rule, which in para 2 sentence 3 explicitly refers to contractual close-out netting in master agreements upon an insolvency related trigger event ("*bei Vorliegen eines Insolvenzgrundes*"), the German legislator has accepted the concept of insolvency related contractual close-out netting generally. Furthermore, while the BGH held that section 119 InsO also applies to early termination rights exercised prior to the opening of Insolvency Proceedings, we are of the view that the BGH will likely uphold the results of the operation of contractual netting provisions (i) if the calculation methods are essentially comparable to those generally described under section 104 para 3 InsO (which, as we note, itself does not provide for comprehensive methods of determining the required calculation method)[88] and (ii) to the extent the results of such calculation are not obviously detrimental to the Insolvent Party compared to a calculation pursuant to section 104 para 3 InsO.[89]

However, evenIn our view, the calculation method under Section 8(b)(ii)(3) of the Addendum should be compatible with the fundamental principles of section 104 para 2 InsO, however, we are not aware of any court decision on this question and a relevant court may not follow our view.

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[87] Chapter VII.(C)(2)(c)(iv) of the Industry Netting Opinion construes section 104 para 3 InsO as mandatory only if and to the extent a master agreement and any transactions entered into thereunder have been terminated by operation of law under section 104 para 2 InsO.

[88] *Jahn/Fried*, in: Münchener Kommentar InsO, 3rd ed. 2013, § 104 no. 182b *et seq*.

[89] With respect to section 104 para 3 InsO, please see chapter VII.(C)(2) in particular, chapter VII.(C)(2)(c)(iv) of the Industry Netting Opinion.

Even if the calculation methods of a CCP authorised under EMIR for determining the values of CM/CCP Transactions or their results did not meet the above requirements, the results of such operation of contractual netting provisions may still be upheld if the operation of contractual netting fell within the scope of application of Article 102b section 1 para 1 no. 2 EGInsO. Article 102b section 1 para 1 no. 2 EGInsO provides that the provisions applicable upon the opening of Insolvency Proceedings must not impair the performance of the necessary (*gebotene*) measures to administer, close out or otherwise settle client positions and own account positions of a clearing member in accordance with Article 48 para 2, para 3, para 5 sentence 3 and para 6 sentence 3 EMIR.

As described above in paragraph 4.1.2, the scope of this provision is unclear and it is not beyond doubt whether it may be applied to the contractual relationship between the Clearing Member and its Client. However, in our view Article 102b EGInsO covers both relationships in the clearing cascade, CCP with clearing member and clearing member with clearing client. If the valuation of a CCP deviated from the concepts of section 104 para ~~3~~2 InsO in a manner that would not be in line with the deviations permitted by section 104 para 4 InsO, such deviating calculation method would therefore in our view have to be upheld if it were part of a necessary measure pursuant to Article 48 EMIR.[90]

(d) Based on the Specific Instructions, the Industry Netting Opinion contains an answer to the question whether it is possible to "prove" (that is, file) a claim in Insolvency Proceedings under the laws of Germany in a foreign currency (i.e. a currency other than Euro) (see chapter VII.(D) and VIII. of the Industry Netting Opinion).

(i) Scope of Industry Netting Opinion

[90] BT-Drucksache 17/11289, p. 27 explicitly mentions section 104 para 3 InsO (in the version applicable prior to 29 December 2016, which has, according to the legislative reasoning, been replicated and further substantiated (*konkretisiert*) in section 104 para 2 InsO, see BT-Drucksache 18/9983, p. 19) as a provision potentially subject to Article 102b section 1 para 1 no. 2 EGInsO.

When answering this question, the Industry Netting Opinion does not refer to any provision of the Covered Base Agreement which is amended or supplemented by the Addendum.

(ii) Application of Industry Netting Opinion's statements to the Clearing Agreement

Therefore, in our view the fact pattern on the basis of which the conclusions in chapter VII.(D) of the Industry Netting Opinion are reached is not amended by the Addendum and consequently, these conclusions and the answer given in chapter IX.4 of the Industry Netting Opinion should equally apply if the Covered Base Agreement is used in conjunction with the Addendum.

(e) Based on the Specific Instructions, the Industry Netting Opinion contains an answer to the question whether it is possible to obtain or execute a judgement in a foreign currency under German law.

(i) Scope of Industry Netting Opinion

When dealing with this question, the Industry Netting Opinion does not refer to any provision of the Covered Base Agreement which is amended or supplemented by the Addendum.

(ii) Application of Industry Netting Opinion's statements to the Clearing Agreement

Therefore, in our view the fact pattern on the basis of which the answer in chapter IX.5 of the Industry Netting Opinion is given is not amended by the Addendum and consequently, the answer given in chapter IX.5 of the Industry Netting Opinion should equally apply if the Covered Base Agreement is used in conjunction with the Addendum.

4.2.3 *Are the provisions covering the consequences of a CCP Default in Section 8(c) of the Addendum enforceable under the laws of your jurisdiction in the absence of insolvency proceedings in relation to the Clearing Member*?

The choice of English law or New York law, as applicable, to govern the Addendum and the Covered Base Agreement would be recognised in court proceedings taken in Germany for the enforcement of obligations under the Addendum and the Covered Base Agreement as described in paragraph 4.2.1(a)

and our above analysis on the enforceability of the (restricted) termination provisions applies similarly to section 8(c) of the Addendum.

4.2.4 *Are the hierarchy of applicable events provisions contained in Section 8(d) of the Addendum enforceable under the laws of your jurisdiction in circumstances where a CM Trigger Event and a CCP Default occur in proximity to each other, both in the absence of and in the event of insolvency proceedings in relation to the Clearing Member*?

Section 8(d)(i) of the Addendum provides that if Client Transactions are capable of being terminated pursuant to more than one of the termination rights under the Clearing Agreement, then the consequences of termination for the relevant Client Transactions follow that provision of the Addendum in respect of which termination is effected first. However, pursuant to Section 8(d)(ii) of the Addendum, upon the occurrence of a CM Trigger Event and a CCP Default, if the relevant Rule Set of a CCP provides for a different order of priority, the provisions of the Rule Set prevail.

Section 8(d)(~~i~~iii) of the Addendum provides that any termination amount payable upon a termination pursuant to Sections 8(b) or 8(c) of the Addendum shall not be ~~be~~ taken into account in the determination of a termination amount as a result of a termination of further Transactions for other reasons, therefore restricting the full netting under the Clearing Agreement to preserve termination amounts per Cleared Transaction Sets.

(a) Enforceability of section 8(d) of the Addendum in the absence of Insolvency Proceedings

In the absence of Insolvency Proceedings and on the assumption that the applicable termination event in accordance with the hierarchy of applicable events provisions contained in Section 8(d)(i) and (ii) of the Addendum is not "insolvency-related",[91] the choice of English law or New York law, as applicable, to govern the Addendum would be recognised in court proceedings taken in Germany for the enforcement of obligations under the Addendum and the Covered Base Agreement as, pursuant to Article 12 para 1 lit (b) and (d) Rome I, the choice of law also applies to the performance and the various ways of extinguishing obligations, including the exercise of any contractual early termination

[91] With respect to the term "insolvency-related termination clause" see above paragraph 4.2.1(b)(i)(A).

and each of the applicable termination events is in our view enforceable under German law in the absence of insolvency proceedings in relation to the Clearing Member (see paragraphs 4.2.1(a) and 4.2.3 above).

(b) Enforceability of section 8(d) of the Addendum in an insolvency of the Clearing Member

Upon the opening of Insolvency Proceedings the Clearing Agreement is subject to the rules on insolvency-related early termination and insolvency-related set-off. To the extent applicable any mandatory procedural law of the InsO would prevail over the contractual provisions of the Clearing Agreement.

According to the BGH, [92] restrictions on insolvency-related early termination to protect, *inter alia*, the Insolvency Administrator's Selection Right would already apply to situations created prior to the opening of Insolvency Proceedings from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected (*mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*). Any contractual early termination right based on insolvency related events is therefore void if the termination is triggered resulting from the occurrence of such event.[93]

Whereas, according to the BGH, "non-insolvency related" termination provisions are not intended to "undermine" the Selection Right and therefore non-insolvency related termination provisions would generally not be covered by section 119 InsO, the validity of contractually stipulated termination rights that are based on insolvency related events depends on whether or not the respective agreement is deemed as an exclusion or limitation of the application of the Selection Right. However, a Selection Right of the Insolvency Administrator

[92] BGH WM 2013, 274.

[93] BGH WM 2013, 274, 275 *et seq.* (relating to a contract for the supply of energy), confirmed by BGH WM 2016, 1168, 1173 also in respect of other contracts; see also *Obermüller*, ZInsO 2013, 476, 480 *et seq.*

cannot be "undermined" where such a Selection Right does not exist in the first place, which is the case where section 104 InsO applies.[94]

(i) Enforceability of section 8(d) of the Addendum upon the opening of Insolvency Proceedings

Where, pursuant to the terms of an applicable Rule Set and Sections 8(b) or 8(c) and the applicable hierarchy of events pursuant to Section 8(d)(ii) of the Addendum Client Transactions would only terminate after the opening of Insolvency Proceedings, we refer to the effects of ~~sections 103 *et seq.* in particular,~~ section 104 para ~~2~~1 InsO (as described in chapter VII.(C).(2)(a) of the Industry Netting Opinion). In our view, upon the opening of Insolvency Proceedings the statutory termination of Transactions falling within the scope of section 104 para ~~2~~1 InsO would prevail over the contractual hierarchy of applicable events.

(ii) Enforceability of section 8(d) of the Addendum upon the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected

Prior to the opening of Insolvency Proceedings with respect to a Clearing Member but ~~after the filing of a valid application for their opening if such~~in a situation where the opening of Insolvency Proceedings is to be seriously expected, the BGH's decision on the invalidity of insolvency-related termination rights must be taken into account when considering the enforceability of Section 8(d) of the Addendum providing for a hierarchy of applicable events. In our view, only if both~~,~~ the termination pursuant to Section 8(c) and the termination pursuant to Section 8(b)~~[95]~~ of the Addendum were generally enforceable, then the hierarchy of events as stipulated by Section 8(d)(ii) of the Addendum would have to be recognised by a

[94] See BGH WM 2016, 1168, 1173; BT-Drucksache 18/9983, p 9, pursuant to which a selection right of the Insolvency Administrator under section 103 InsO is excluded by section 104 InsO.

~~[95] See paragraph 4.2.1(b) with respect to the enforceability of Section 8(b) of the Addendum.~~

German court as described in paragraph 4.2.4(a) above as a matter of applicable contract law.

~~Pursuant to the BGH's decision~~With respect to the enforceability of Section 8(b) of the Addendum in the context of contractual close-out netting within the scope of section 104 InsO, we refer to paragraph 4.2.1(b) above.

Applying the reasoning of the BGH's decisions, Section 8(c) of the Addendum is not an insolvency-related termination clause. Insolvency-related termination clauses are termination rights based on a stoppage of payments (*Zahlungseinstellung*), the filing of an application for the opening of insolvency proceedings or the opening of insolvency proceedings.[96] The trigger of a termination pursuant to Section 8(c) of the Addendum is a CCP Default, i.e. a default, termination event or other similar event in respect of an Agreed CCP that, under the relevant Rule Set, entitles Clearing Member to terminate, or results in automatic termination of, CM/CCP Transactions which does not relate to insolvency (not ~~even~~event to any other non-performance) of the Clearing Member. Thus, Section 8(c) of the Addendum is a non-insolvency-related termination provision. In the view of the BGH, "non-insolvency-related" termination provisions are not intended to "~~erode~~undermine" the Selection Right and, therefore, non-insolvency-related termination provisions are generally not covered by section 119 InsO. Section 8(c) of the Addendum is therefore enforceable even if the opening of Insolvency Proceedings with respect to a Clearing Member is to be seriously expected.

As both~~,~~ Section 8(c) and Section 8(b) of the Addendum are enforceable prior to the opening of Insolvency Proceedings, in our view also the respective hierarchy of events provision Section 8(d)(ii) of the Addendum would have to be recognised by a German court.

[96] BGH WM 2013, 274 referring to BGH WM 2003, 1384, 1386.

4.2.5 *Are the set-off provisions contained in Section 8(e) of the Addendum enforceable under the laws of your jurisdiction in the absence of insolvency proceedings in relation to the Clearing Member*?

The choice of English law or New York law, as applicable, to govern the Clearing Agreement does, in particular, also apply to the performance and the various ways of extinguishing obligations (Article 12 para 1 lit (b) and (d) Rome I), including the exercise of any contractual early termination and set-off rights. Article 17 Rome I provides that where the right to set off is not agreed between the parties, set-off is governed by the law applicable to the claim against which the right to set-off is asserted. Given the clear wording of such provision, any contractual agreements relating to set-off or netting of obligations are outside the scope of Article 17 Rome I and the parties may therefore agree on set-off or netting arrangements in accordance with Article 3 para 1 Rome I.

~~To the extent the Clearing Agreement refers to *in rem* or property rights (*dingliche Rechte*) the creation of the relevant rights and any enforcement of such rights are subject to different conflict of laws principles and may limit the ability of parties to freely select the applicable law.~~

4.2.6 *Are the limited recourse provisions contained in Section 15 of the Addendum enforceable under the laws of your jurisdiction in the absence of insolvency proceedings in relation to the Clearing Member*?

In summary, the limited recourse provision in Section 15 of the Addendum ("**Limited Recourse Provision**") provides that performance and payment obligations by Clearing Member to Client under or in respect of Client Transactions (including, without limitation, any related obligations under the Collateral Agreement) is dependent on the Agreed CCP meeting its performance or payment obligations under the corresponding CCP/CM Transactions. This does, however, not apply, if the CCP's non-performance arises as a result of the fraud, wilful default or gross negligence of the Clearing Member or as a result of a breach by Clearing Member of any provision of the Rule Set of that Agreed CCP (other than as a result of any action or inaction on the part of Client) or as a result of a tax deduction in respect of which the Clearing Member is entitled to make a corresponding deduction. Under Section 15(b) of the Addendum, the Clearing Member is obliged to take all reasonable steps to obtain payment or performance by the Agreed CCP and, if it receives any amounts from the CCP under a CM/CCP Transaction, to pass the corresponding amounts owing under the Client Transaction on to the Client.

It is our understanding that the Limited Recourse Provisions is a matter of contractual law, i.e. affecting the existence and scope of a contractual right rather than a matter of procedural law, as it does not limit the Client's rights to take action before court or initiate other proceedings to enforce an existing right.

(a) Recognition of English law or New York law, as applicable, to govern the Limited Recourse Provision

The Limited Recourse Provision is governed by English law or New York law, as applicable, and applies to contractual rights of a Client against the Clearing Member by reducing such rights to the extent an Agreed CCP does not meet its performance or payment obligations under the corresponding CCP/CM Transactions under certain circumstances.

Based on Rome I in court proceedings taken in Germany for the enforcement of obligations under the Clearing Agreement, the choice of English law or New York law, as applicable, to govern the Clearing Agreement would be recognised as already explained in paragraph 4.2.1(a) above.

Pursuant to Article 12 para 1 Rome I, the law applicable to a contract is generally decisive for its interpretation, the performance of the obligations created by it, within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law, the various kinds of extinguishing obligations, and prescription and limitation of actions and the consequences of the nullity of the contract. Article 12 para 1 lit (b) Rome I covers contractual limitations of liability[97] and waivers and would, in our view also apply to the Limited Recourse Provision.

We are not aware of any court decisions that would either consider a provision limiting a counterparty's liability, such as the Limited Recourse Provision as manifestly incompatible with German public

[97] *Spellenberg* in: Münchener Kommentar BGB, ~~5~~7th ed. ~~(2010), VO (EG) 593/2008~~(2018), Art. 12 Rome I, no. ~~57~~51.

policy nor as breaching any provision to be considered as an overriding mandatory provision of German law.[98]

(b) Enforceability of Limited Recourse Provision in the event of Insolvency Proceedings

Upon the opening of Insolvency Proceedings, the Limited Recourse Provision would have to be considered in the light of mandatory provisions of the InsO. The Limited Recourse Provision would in our view not conflict with the calculation of the termination amounts for Client Transactions under section 104 ~~para 3 InsO. While section 104 para 3~~paras 2, 4 InsO as further described in chapter VII.(C)(2)(b)(iii) of the Industry Netting Opinion and paragraph 4.2.2(c)(iii) above. While section 104 para 2 InsO provides for mandatory rules on the calculation of the value of a Client Transaction it does not provide for mandatory rules on the scope or content of such Transaction, in particular not on scope of the performance or payment obligations thereunder. We therefore do not believe that the Limited Recourse Provision would be incompatible with the fundamental principles applicable to the statutory provisions of section 104 para 2 InsO and would therefore be permitted under section 104 para 4 InsO. We also refer to the generally applicable provisions on challenge in insolvency.

4.2.7 *Would the Addendum materially impact on or prejudice the operation of any terms of a Rule Set in respect of an Agreed CCP Service providing for the transfer of CM/CCP Transactions from the Clearing Member to another*

[98] In our view, the provision cannot be construed as leading to an apparent disproportion (*auffälliges Mißverhältnis*) between the Client's obligations under the Clearing Agreement and the consideration due by the Clearing Member which could render the respective provision invalid on the basis of section 138 BGB regarding usury (*Wucher*), if and to the extent section 138 BGB qualifies as part of the German ordre public or as an overriding mandatory provision of German law (see *Martiny*, in: Münchener Kommentar BGB, ~~6~~7th ed. ~~(2015), Rom I VO~~(2018), Art. 21 Rome I ~~VO~~, no. 3; *Staudinger*, in: Ferrari/Kieninger/Mankowski/Staudinger, Internationales Vertragsrecht, ~~2nd~~3rd ed. (201~~4~~8), Art. 9 ~~VO (EG) 593/2008~~Rome I, no. 9). Section 138 BGB renders a contractual arrangement invalid under certain circumstances if pecuniary advantages granted to a party are clearly disproportionate to the objective value of its performance. However, section 138 BGB does in our view not apply where a party (such as the Client) contractually assumes to take a certain additional credit risk (of the CCP) which then realises (see also generally *Armbrüster*, in: Münchener Kommentar BGB, ~~6~~7th ed. (201~~2~~5), section 138 BGB no. 112 *et seq.*).

clearing member of the relevant Agreed CCP on the default of the Clearing Member or otherwise?

We are not aware of any such impacts. In particular, we note that Section 8(b)(ii)(1) of the Addendum expressly contemplates that the transfer of CM/CCCP Transactions ~~providing that~~results in the corresponding Client Transaction terminating at the same time as the relevant transfer.

Please note that the creation or transfer of *in rem* or property rights would be subject to mandatory conflict of laws provisions.

4.2.8 *Would the use of the Addendum in conjunction with a Covered Base Agreement affect the conclusions reached in the Industry Netting Opinion in relation to Transactions other than Client Transactions*?

No, we refer to paragraph 4.2.2.

4.2.9 *Would the conclusions reached in the Industry Collateral Opinion, other than any conclusions relating to the matters discussed in the questions of paragraphs 4.2.1 and 4.2.3, in relation to the use of the Transfer Annex apply equally where the Transfer Annex is used in conjunction with the Paragraph 11 ~~Document~~*?

(a) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether German law characterises each transfer of Eligible Credit Support as effecting an unconditional transfer of ownership in the assets transferred and whether there is any risk that any such transfer would be recharacterised as creating a security interest (see chapter G.II.22. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The Industry Collateral Opinion deals with this question on the basis of the fact pattern and the assumptions set out in chapter F.I. in connection with, and as modified by, chapter G.I. thereof. In particular chapter F.I.(e) in connection with chapter G.I. of the Industry Collateral Opinion assumes that neither any provisions of the Covered Base Agreement nor any provisions of the Transfer Annex have been altered in any material respect.

The opinions given in the Industry Collateral Opinion with respect to the Transfer Annex are further based on the assumption that the transfer of Eligible Credit Support involves

an outright transfer of title, free and clear of any liens, 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) (chapter G.I.(a) sentence 2 of the Industry Collateral Opinion).

In answering the question, the Industry Collateral Opinion contains a discussion in chapter E.II.(A)(2) whether under German conflict of laws rules the law governing the Transfer Annex would be a valid choice of law to govern the obligation to transfer ownership. Furthermore, chapters E.II.(B)(4) and E.II.(B)(5) address that an outright transfer of ownership as provided by the Transfer Annex is recognised as a collateral arrangement under German law and describe the legal steps required under German law to effect such outright transfer or assignment.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

The fact pattern on the basis of which the analysis in chapter G.II.22. of the Industry Collateral Opinion is made does in our view not materially change, if the Covered Base Agreement is used in conjunction with the Addendum and the Paragraph 11 ~~Document~~ to the Transfer Annex. In particular, neither the Addendum nor the Paragraph 11 ~~Document~~ to the Transfer Annex modifies or limits Paragraph 5(a) of the Transfer Annex which provides for an obligation of the Transferor to deliver Eligible Credit Support by way of outright title transfer.

The Industry Collateral Opinion is based on the assumption that no provision of the Covered Base Agreement has been altered in any material respect (chapter F.I.(e) in connection with chapter G.I. of the Industry Collateral Opinion). The term "altered in any material respect" is not defined in the Industry Collateral Opinion. While we consider the amendments made by the Addendum to Section 6(d) and (e) of the Covered Base Agreement not as material, in particular for the purposes of answering the question under this paragraph ~~4.2.9(a)~~4.2.9(a), we cannot exclude that the law firm Hengeler Mueller Partnerschaft

von Rechtsanwälten mbH, Berlin, as German counsel to ISDA responsible for the Industry Collateral Opinion would have taken a different view. In such case, the authors of the Industry Collateral Opinion might consider the Paragraph 11 ~~Document~~ not being covered by the analysis of the Industry Collateral Opinion.

(iii) Supplemental analysis

In our view, even if the Transfer Annex is used in conjunction with the Paragraph 11 ~~Document~~, the considerations of Chapter E of the Industry Collateral Opinion with respect to the Transfer Annex continue to apply, subject to our additional analysis of the applicable conflict of laws following the application of provisions of the InsO on Systems in paragraph 4.1 above.

Please refer to chapter E.II.(B)(4) of the Industry Collateral Opinion for a more detailed analysis of the Transfer Annex with respect to the general enforceability of an "outright transfer" under German law and chapter E.II.(D)(2) of the Industry Collateral Opinion with respect to a potential re-characterisation risk under German law.

(b) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether there is a need to take any action after the Transferee has received an absolute ownership interest in the Eligible Credit Support to ensure that its title therein continues, in particular, whether there are any filing or perfection~~ary~~ requirements necessary or advisable, 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 (see chapter G.II.23. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

When answering this question, the Industry Collateral Opinion does not refer to any provisions of the Covered Base Agreement or the Transfer Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, in our view the fact pattern on the basis of which the answer in chapter G.II.23. of the Industry Collateral Opinion is given is neither amended by the Addendum nor by the Paragraph 11 ~~Document~~ and consequently, the answer given in chapter G.II.23. of the Industry Collateral Opinion applies equally if the Clearing Agreement and the Transfer Annex in conjunction with the Paragraph 11 ~~Document~~ are used.

(c) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question on the effect, if any, under German law of the right of ~~Party A~~the Transferor to exchange Eligible Credit Support pursuant to Paragraph 3(c) of the Transfer Annex and whether the presence or absence of any consent to exchange by the Transferee has any bearing on this question (see chapter G.II.24. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter G.II.24. of the Industry Collateral Opinion are based on Paragraph 3(c) of the Transfer Annex and not affected by any other provision of the Transfer Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

As neither the Addendum nor the Paragraph 11 ~~Document~~ to the Transfer Annex changes or restricts Paragraph 3(c) of the Transfer Annex the answer given in chapter G.II.24. of the Industry Collateral Opinion in our view applies equally if the Clearing Agreement and the Transfer Annex in conjunction with the Paragraph 11 ~~Document~~ are used.

(d) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether Paragraph 6 of the Transfer Annex is also valid to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of a net amount payable under Section 6(e) of the Covered Base Agreement assuming the general validity and enforceability of Section 6 of the Covered Base Agreement under German law (see chapter G.II.25. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

Chapter G.II.25.(a) of the Industry Collateral Opinion contains an analysis whether the contractual netting arrangements contemplated in Paragraph 6 of the Transfer Annex and Section 6(e) of the Covered Base Agreement are recognised by a German court in case ~~an early termination occurred prior to the opening of Insolvency Proceedings~~of a non-insolvency-related Event of Default under the Covered Base Agreement.

Chapter G.II.25.(b) of the Industry Collateral Opinion contains an analysis ~~on the effects on~~with respect to the contractual netting arrangements contained in Paragraph 6 of the Transfer Annex and Section 6(e) of the Covered Base Agreement with respect to collateral provided under a financial collateral arrangement in case ~~no early termination has occurred prior to the opening of Insolvency Proceedings. In particular, the Industry Collateral Opinion contains an analysis under which circumstances claims~~insolvency-related Event of ~~the Transferor for the return of Equivalent Credit Support under the Transfer Annex constitute "financial transactions" (*Finanzleistungen*) within the meaning of section 104 para 2 and 3 InsO~~Default.

Chapter G.II.25.(c) of the Industry Collateral Opinion contains an analysis whether an assignment, pledge or attachment of claims would affect the inclusion of claims into the balance due on the close-out if German law applied.

These answers have to be read in conjunction with chapter E.III of the Industry Collateral Opinion which contains a general description of applicable insolvency conflict of laws provisions referring to chapters VI.(B)(3) and VI.(C)(3) of the Industry Netting Opinion.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Pursuant to Paragraph (g) of the Paragraph 11 ~~Document~~, Paragraph 6 of the Transfer Annex is deleted in its entirety and replaced by the wording of Paragraph (g) of the Paragraph 11 ~~Document~~. The analysis in chapter G.II.25. of the Industry

Collateral Opinion is not based on the wording of Paragraph (g) of the Paragraph 11 ~~Document~~ that is applicable following a CM Trigger Event or CCP Default. Therefore, the fact pattern on the basis of which the Industry Collateral Opinion has been given has changed in relation to a CM Trigger Event or CCP Default and the replacement of Paragraph 6 of the Transfer Annex with Paragraph (g) of the Paragraph 11 ~~Document~~ is in our view a material alteration within the meaning of the assumption under chapter F.I.(e) in connection with chapter G.I. of the Industry Collateral Opinion. Consequently, with respect to a termination of Client Transactions following a CM Trigger Event or CCP Default Paragraph (g) of the Paragraph 11 ~~Document~~ is not covered by the Industry Collateral Opinion's analysis any more.

Paragraph (g) of the Paragraph 11 ~~Document~~ revises Paragraph 6 of the Transfer Annex to cover specific cases of termination. If the Client is the Defaulting Party, the consequences of such termination have not been substantially amended. Rather, Paragraph (g) of the Paragraph 11 ~~Document~~ still provides that when determining the Termination Amount the value of any Collateral is included into the close-out netting as an Unpaid Amount (as does Paragraph 6 of the Transfer Annex in its original version). However, upon the occurrence of a CM Trigger Default or CCP Default, the revised Paragraph 6 of the Transfer Annex refers to Section 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum for determining the (Cleared Set) Termination Amount and, in particular, including the value of the relevant Collateral when calculating such Termination Amount (by way of close-out netting). Therefore, we refer to our supplemental analysis below.

Furthermore, the general conflict of laws analysis of the Industry Collateral Opinion (and the Industry Netting Opinion) relates to the Covered Base Agreement and the Transfer Annex only, and does not consider additional insolvency conflict of laws provisions applicable to the Addendum and the Paragraph 11 ~~Document~~. Where the Covered Base Agreement is used together with the Addendum, additional insolvency conflict of laws provisions have to be considered with respect to rights and obligations of participants in "Systems" (Article ~~9~~12 Recast

EUIR and section 340 para 3 InsO). We refer to paragraph 4.1.1 above which should be read as supplementing the general conflict of laws analysis of the Industry Collateral Opinion (and the Industry Netting Opinion).

(iii) Supplemental analysis

(A) In order to assess whether Paragraph 6 of the Transfer Annex is also valid to the extent that it provides for a valuation method referring to the Relevant Collateral Value, the law resulting from application of insolvency conflict of laws rules must be considered (and for the purpose of the following analysis the general validity and enforceability of Section 6 of the Covered Base Agreement under German law, to the extent applicable, is assumed).

With respect to insolvency conflict of laws provisions applicable to netting and set-off in connection with the Covered Base Agreement, we refer to chapter VI.(B) and (C) of the Industry Netting Opinion.

Where insolvency conflict of laws (i.e either sections 335 *et seqq*. InsO or the provisions of the Recast EUIR) refer to the conflict of laws provisions under the InsO, the Industry Netting Opinion contains a detailed analysis in chapter VII.(C), as summarised in chapter E.III.(A) of the Industry Collateral Opinion. Chapter G.II.25.(~~a~~b) of the Industry Collateral Opinion refers to the Industry Netting Opinion with respect to enforceability of close-out netting under the Covered Base Agreement. In addition to the opinions given in the Industry Netting Opinion, please see paragraph 4.2.1(b) above with respect to enforceability of close-out netting under the Clearing Agreement. Please also refer to our additional opinion on the scope of application of the InsO under paragraph 4.1 above.

(B) ~~The last paragraph of~~ However, the statements in chapter G.II.25.(~~a~~b) of the Industry Collateral Opinion ~~describes~~

~~the agreement under~~are based on Paragraph 6 of the Transfer Annex and Section 6(e) of the Covered Base Agreement ~~as a set-off agreement (*Aufrechnungsvereinbarung*) under German law because "upon~~which have not been amended, and express the ~~occurrence of an Early Termination Date, by virtue of~~ view that the contractual ~~agreement, any conditional claim for redelivery or repayment of the~~ netting arrangement with respect to collateral ~~becomes unconditional,~~provided under an arrangement for the provision of Financial Collateral (as defined below) is valid and enforceable irrespective of whether the ~~claim for redelivery of securities is converted into a claim for payment of cash in an amount equal to~~ Transactions under the relevant Covered Base Agreement fall within the scope of application of the statutory netting provisions.

~~(B)~~ Under section 104 para 1 sentence 3 no. 6 InsO, financial collateral ~~furnished, the so converted claim for redelivery as well as the claim for repayment of~~ within the meaning of section 1 para 17 KWG ("**Financial Collateral**") also qualifies as a financial transaction. According to the legislative reasoning this provision is intended to implement Article 7 of Directive 2002/47/EC of 6 June 2002 [99] on financial collateral ~~originally furnished~~arrangements as amended by Directive 2009/44/EC [100] ("**Financial Collateral Directive**" or "**FCD**") by ensuring that Financial Collateral can also be enforced by set-off under a close-out netting agreement.[101] The wording of section 104 para 1 sentence

[99] OJ No. L 168 of 27 June 2002, p. 43.

[100] OJ No. L 146 of 10 June 2009, p. 37.

[101] Under Article 2 para 1 lit (n) FCD "close-out netting provision" means a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise: (i) the obligations of the parties are accelerated so as

3 no. 6 InsO only refers to Financial Collateral, i.e. the asset constituting the Financial Collateral, but it does not state that transactions which are secured by Financial Collateral are within the scope of this provision. The legislative reasoning is not clear either as reference is made to the creation of Financial Collateral and that Financial Collateral, other than transactions covered by section 104 para 1 sentence 3 nos. 1 to 5 InsO, are not regarded as the "main obligation" forming part of a mutual contract. [102] This appears to protect Financial Collateral as such from the Selection Right but it does not create an exemption for the transactions secured by Financial Collateral which themselves do not constitute financial transactions within the meaning of section 104 para 1 sentences 2,3 InsO. Article 7 FCD provides that EU member states shall ensure that a close-out netting provision can take effect in ~~cash, become due for payment and are the~~ accordance with its terms. To achieve the purpose of Article 7 FCD there are good arguments to construe section 104 para 1 sentence 3 no. 6 InsO broadly. However, the definition of "close-out netting" under the FCD refers to financial collateral arrangements and such term again refers in our view to the collateral asset as such but not to the secured obligation or any transaction to be secured. We would therefore construe section 104 para 1 sentence 3 no. 6 InsO such that Financial Collateral may be included in the close-out netting ~~balance […]".~~ (and, accordingly, would not be subject to any Selection Right), but the mere collateralisation of a transaction normally not covered by section 104 para 1 sentence 3 InsO does not result in the application of section 104 para 1 sentence 3 InsO. As far as we are aware, no court decisions exist in

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to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or (ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

[102] BT-Drucksache 15/1853, p. 15.

respect of the interpretation of section 104 para 1 sentence 3 no. 6 InsO.

(C) ~~In our view the same applies in case of a CM Trigger Event or CCP Default. Section 8(b)(ii) or 8(c)(iii) of the Addendum also~~However, in our view, the agreement under Paragraph (g) of the Paragraph 11 and Section 6(e) of the Covered Base Agreement could be considered a set-off agreement which, also if governed by foreign law, is generally recognised as a matter of German law. In this respect, to the extent that the Client Transactions under a Covered Base Agreement fall within the scope of section 104 para 1 InsO (please see chapter VII.(C)(2)(c) of the Industry Netting Opinion with respect to the Transactions falling within the scope of section 104 para 1 sentence 2 InsO), any claim for the return of Eligible Credit Support may be included in the calculation of the close-out amount pursuant to Section 8 of the Addendum.

In the case of a CM Trigger Event or CCP Default, Section 8(b)(ii) or 8(c)(iii) of the Addendum provide that any redelivery or repayment claims with respect to collateral shall be converted into a cash amount to be valued in accordance with Paragraph (g) of the Paragraph 11 ~~Document~~ and the Addendum. Such cash amount (the Relevant Collateral Value) becomes due and is included into the Cleared Set Termination Amount. Such inclusion of the Relevant Collateral Value pursuant to Section 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum is performed by adding any positive amount of a Relevant Collateral Value or deducting any negative amount of a Relevant Collateral Value which would result in an aggregate net amount. The agreement on such calculation would, from a German law perspective, constitute a set-off agreement (*~~Aufrechnungsvereinbarung~~Aufrechnungsvereinbarung*) as the provisions

also meet the contractual requirements to qualify as a set-off agreement under German law.[103]

~~If substantive German insolvency law applies, mandatory restrictions on set-off under sections 94 *et seqq.* InsO have to be taken into account which apply generally to any set-off effected upon the opening of Insolvency Proceedings, see paragraph 5.1.5 below.~~

~~(C) In our view the conclusions reached in chapter G.II.25.(b) of the Industry Collateral Opinion on the term "financial transactions", the general scope of application of section 104 para 2 and 3 InsO and the restrictions on set-off upon opening of Insolvency Proceedings are based on a general fact pattern.~~

~~However~~As set out above in paragraph 4.2.1(b)(ii), in our view, section 104 InsO provides for the termination of Transactions to form a basis for set-off and provides for the calculation of compensation claims which may serve as a basis for set-off but does not effect the aggregation of compensation claims by set-off. With respect to the question whether any restrictions on set-off pursuant to sections 94 through 96 InsO may be relevant in respect of any set-off agreements upon insolvency, please see paragraph 5.1.8 below.

(D) With respect to the inclusion of the Value of the Credit Support Balance in the inclusion of the net amount payable under Section 6(e) of the Covered Base Agreement, the Industry Collateral Opinion is based on the fact that the Covered Base Agreement constitutes a master agreement within the meaning of section 104 para ~~2 sent. 3 InsO.~~3 sent. 1 InsO (referring to chapter VII(C) of the Industry Collateral Opinion). The Industry Collateral Opinion does not deal with the effects of a

[103] Under German statutory law, set-off (*Aufrechnung*) is understood as the mutual discharge of two corresponding obligations of the same nature, see sections 387 *et seqq.* BGB.

contractual termination being exercised with respect to some but not all Transactions under the Covered Base Agreement in case of a CCP Default or Clearing Member Default as this is not originally agreed in the Covered Base Agreement. As we believe that due to the separate termination of Client Transactions of each Cleared Transaction Set under the Clearing Agreement pursuant to section 8(b)(ii) and section 8(c)(i) of the Addendum with respect to Insolvency Proceedings opened with respect to a Clearing Member each Cleared Transaction Set could be seen as covered by a master agreement in our view the analysis in chapter G.II.25.(c) of the Industry Collateral Opinion should remain unaffected and apply to each such master agreement within the meaning of section 104 para ~~2 sentence 3 InsO.~~3 sentence 1 InsO, but please see also above paragraph 4.2.1(b)(i)(B)).

In our view, Paragraph 6 of the Transfer Annex is valid as described in the Industry Netting Opinion to the extent that it provides for the Value of the Credit Support Balance to be included in the calculation of a net amount payable under Section 6(e) of the Covered Base Agreement, assuming the general validity and enforceability of Section 6 of the Covered Base Agreement under German law (see chapter G.II.25. of the Industry Collateral Opinion).

~~(D)~~(E) The analysis in chapter G.II.25.(c) of the Industry Collateral Opinion should in our view equally apply where the Covered Base Agreement is used in conjunction with the Addendum and the Paragraph 11 ~~Document~~.

(e) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the rights of the Transferee in relation to the transferred Eligible Credit Support are enforceable in accordance with the terms of the Covered Base Agreement and the Transfer Annex, irrespective of the insolvency of the Transferor (see chapter G.II.26. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The Industry Collateral Opinion states that the rights in relation to the transferred Eligible Credit Support are enforceable in accordance with their respective terms, irrespective of the insolvency of the Transferor.

Chapter G.II.26. of the Industry Collateral Opinion gives a general opinion on the German conflict of laws rules applicable to a contract governed by a foreign law.

In this context, chapter G.II.26. of the Industry Collateral Opinion explicitly opines on Paragraphs 3(a) and 5(a) of the Transfer Annex which have not been amended since the Paragraph 11 ~~Document~~ does neither change Paragraph 3(a) nor Paragraph 5(a) of the Transfer Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

(A) When confirming enforceability of the rights of the Transferee and validity of choice of law, the Industry Collateral Opinion refers to the Covered Base Agreement and the Transfer Annex and, therefore, does not consider the changes to the Transfer Annex made by the Paragraph 11 ~~Document~~. Consequently it does not consider whether the terms of the Paragraph 11 ~~Document~~ are enforceable under German law, including insolvency laws.

(B) To the extent~~,~~ chapter G.II.26. of the Industry Collateral Opinion contains an opinion on Paragraphs 3(a) and 5(a) of the Transfer Annex, the fact pattern on the basis of which the opinion is based remains the same since Paragraph 11 ~~Document~~ does not change Paragraphs 3(a) and 5(a) of the Transfer Annex. Therefore, while the Industry Collateral Opinion does not include an analysis of the Paragraph 11 ~~Document~~, we are not aware of any statement in the Industry Collateral Opinion which in our view would prevent the application of the conclusions on Paragraphs 3(a) and 5(a) of the Transfer Annex reached

in chapter G.II.26. of the Industry Collateral Opinion to the Clearing Agreement.

(iii) Supplemental analysis

In court proceedings taken in Germany for the enforcement of obligations under the Clearing Agreement, the choice of English law to govern the Clearing Agreement and the Transfer Annex would be recognised, subject in each case to the provisions of Rome I and, where it concerns non-contractual obligations arising out of such Clearing Agreement, subject in each case to the provisions of Rome II as referred to in paragraph 4.2.1(a) above and we are not aware of any court precedents that would either consider the rules of the Transfer Annex and the Paragraph 11 ~~Document~~ as incompatible with German public policy nor as breaching any provision considered as an overriding mandatory provision of German law.[104] As the restrictions under the InsO constitute mandatory provisions of German law, the application of these rules may affect the validity and enforceability of the Clearing Agreement and the Transfer Annex as further described in the Industry Opinions.

(f) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the Transferor (or its ~~receiver~~administrator, provisional liquidator, conservator, receiver,

[104] Generally, civil law provisions which aim at protecting private interests of a person are regularly not considered overriding mandatory provisions within the meaning of Article 9 Rome I. Occasionally sections 242 and 138 para 1 ~~BGB~~of the German Civil Code (*Bürgerliches Gesetzbuch*, "**BGB**") have been regarded to constitute overriding mandatory provisions under German law within the meaning of Article 9 para 2 Rome I (see *Thorn*, in: *Rauscher*, Europäisches Zivilprozess-und Kollisionsrecht EuZPR/EuIPR ~~(2011~~4th ed. (2016), Article 9 Rome I, no. 59). This view is rejected by the majority of German legal commentators which advocate that mandatory rules restricting contractual autonomy should be considered as part of the public policy of the relevant jurisdiction rather than mandatory overriding provisions as defined in Article 9 para 2 Rome I, mainly because mandatory overriding provisions govern only those provisions which are regarded as essential by a country for safeguarding its public interests, *Thorn*, in: *Rauscher*, Europäisches Zivilprozess-und Kollisionsrecht EuZPR/EuIPR ~~(2011~~4th ed. (2016), Article 9 Rome I, no. 59; *Martiny*, in: Münchener Kommentar BGB, ~~6~~7th ed. (201~~5~~8), Article 9 Rome I, no. 60; *Thorn*, in: Palandt 7~~4~~7th. ed. (201~~5~~8), Article 9 Rome I, no. 5; generally with respect to section 138 para 1 BGB: BGH NJW 1997, 1697, 1700. ~~But~~However, also the standards for assessing any infringement of German (domestic) public policy under section 138 para 1 BGB are not the same as under Article 21 Rome I.

trustee, custodian or other similar official) will be able to recover any transfer of Eligible Credit Support made to the Transferee during a certain "suspect period" preceding the date of the insolvency and whether the substitution of Eligible Credit Support by a counterparty during this period invalidates an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing (see chapter G.II.27. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter G.II.27. and chapter E.III.(B)(3) of the Industry Collateral Opinion are based on a general fact pattern rather than on the terms of the Covered Base Agreement and the Transfer Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

As the Industry Collateral Opinion does not refer to specific provisions of the Covered Base Agreement, its opinions are in our view not affected by the Covered Base Agreement being used in conjunction with the Addendum and the Paragraph 11 ~~Document~~.

(iii) Supplemental analysis

Please refer to chapter VII.(E) of the Industry Netting Opinion with respect to challenge in insolvency and to chapter E.III.(b)(B)(3) of the Industry Collateral Opinion with respect to challenge in insolvency including specific aspects as regards collateral, in particular margin collateral. Please also refer - in this context - to paragraph 4.2.~~10~~11(c) below.

In addition, we ~~also~~ refer to the restrictions on challenge in insolvency under section 1 of Article 102b EGInsO as described in paragraph 4.1.2 above if the Transactions are cleared with a CCP for the purposes of EMIR. Where German insolvency laws apply and clearing of the relevant Transactions with the CCP is subject to EMIR, Article 102b EGInsO provides for an exemption from mandatory provisions under the InsO for Insolvency Proceedings and Provisional Insolvency Proceedings to ensure that the implementation of necessary measures under Article 48 EMIR is not impaired by the opening of Insolvency Proceedings. Article 102b section 2 EGInsO provides that the measures referred to in section 1 of Article 102b EGInsO are not subject to challenge in insolvency. The exemption, thus, covers all necessary measures taken by a CCP which are permissible in accordance with Article 102b section 1 para 1 EGInsO and should in our view also cover the corresponding consequences for the Transactions between the Clearing Member and the Client.

(g) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the parties' agreement on the governing law of the Transfer Annex and submission to jurisdiction would be upheld in Germany (see chapter G.II.28. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

Chapter G.II.28. of the Industry Collateral Opinion analyses mandatory German conflict of laws rules applicable to the transfer of ownership under the Transfer Annex on the basis of a general fact pattern.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

The conclusions reached in chapter G.II.28. of the Industry Collateral Opinion on the agreement on the law governing the obligation to transfer ownership under the Transfer Annex are based on Paragraph 2 of the Transfer Annex in connection with Section 13(a) of the Covered Base Agreement. Neither the Addendum nor the Paragraph 11 ~~Document~~ change or restrict Section 13(a) of the Covered Base Agreement. Rather, its application is expressly confirmed by Section 19 of the Addendum. Thus, in our view the answer given in chapter G.II.28. of the Industry Collateral Opinion on the recognition of the governing law applies equally if the Clearing Agreement and the Transfer Annex in conjunction with the Paragraph 11 ~~Document~~ are used.

The conclusions reached in chapter G.II.28. of the Industry Collateral Opinion on the law governing the transfer of legal title are made on a fact pattern that is not amended when using the Covered Base Agreement together with the Addendum. In our view, the conclusions apply equally if the Clearing Agreement and the Transfer Annex in conjunction with the Paragraph 11 ~~Document~~ are used.

The conclusions reached in chapter G.II.28. of the Industry Collateral Opinion on the submission to the jurisdiction of the English courts are based on Section 13(b) of the Covered Base Agreement. Neither the Addendum nor the Paragraph 11 ~~Document~~ amends this provision. Rather, its application is expressly confirmed by Section 19 of the Addendum. Thus, in our view the answer given in chapter G.II.28. of the Industry Collateral Opinion on the submission to the jurisdiction of English courts applies equally if the Clearing Agreement and the Transfer Annex in conjunction with the Paragraph 11 ~~Document~~ are used.

Please also refer to chapter E.I.(A) and (B) of the Industry Collateral Opinion on mandatory conflict of laws provisions applicable on transfer of specific collateral assets.

(h) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the Transfer Annex is in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee or whether there are any other requirements to be observed in Germany in order to ensure the validity of such transfer in each type of Eligible Credit Support created by ~~Party A~~the Transferor under the Transfer Annex (see chapter G.II.29. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

When answering this question, the Industry Collateral Opinion does not refer to any specific provision of the Transfer Annex but to the standard form of the documents to be reviewed for the purposes of the Industry Collateral Opinion.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

~~As the~~ Paragraph 11 ~~Document~~ does not only contain the "Elections and Variables" provided for in Paragraph 11 to the pre-printed 1995 Credit Support Annex but also amends the terms of the Transfer Annex. The fact pattern on the basis of which the Industry Collateral Opinion has been given has changed and we cannot exclude that such change is seen as material alteration within the meaning of the assumption under chapter F.I.(e) in connection with G.I. of the Industry Collateral Opinion, and as a consequence, such change would not be covered by the Industry Collateral Opinion.

(iii) Supplemental analysis

We are of the view that the Addendum and the Paragraph 11 ~~Document~~ meet the required form for creating an obligation to provide for an outright transfer of ownership[105] and are therefore

[105] The Paragraph 11 ~~Document~~ provides for the obligation to transfer security only but not for the transfer and creation of the security interest as such. The law applicable to the creation of the security interest as such and, consequently, any additional (factual) requirements and activities, need to be determined on the basis of applicable conflict of laws principles.

in an "appropriate form" for the purposes of German law. Consequently, in our view the conclusions and the answer given in chapter G.II.29. of the Industry Collateral Opinion ~~F.II.(A)6.~~ would apply equally if the Covered Base Agreement is used in conjunction with the Addendum.

Where the entering into a Transfer Annex is only deemed between the parties, this would not affect our view expressed in paragraph 4.2.9(h)(ii). Under German law the transfer of Eligible Credit Support of the types covered by the Industry Collateral Opinion does not require the form of a written agreement.

4.2.10 *Would the conclusions reached in the Industry Collateral Opinion in relation to the use of the ~~Paragraph 11 Document~~NY Annex apply equally where the NY Annex is used in conjunction with the Paragraph 13?*

(a) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question as to (as a matter of German law) what law governs the contractual aspects of a security interest in the various forms of Eligible Collateral deliverable under the NY Annex and whether the German courts recognise the validity of a security interest created under the NY Annex, assuming it is valid under the governing law of the NY Annex (see chapter F.II. (*Validity of Security Interests*) no. 1. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

When answering this question, the Industry Collateral Opinion refers to such provisions of the NY Annex which purport to create the security interest in favour of the Secured Party, namely Paragraph 2, and such provisions of the NY Annex which would contravene German law if German law applied to the Collateral, namely Paragraphs 6(c) and 8(a).

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

In our view, Paragraph 13 does not amend the above provisions in a manner that would change the analysis in chapter F.II. (*Validity of Security Interests*) no. 1. (a) and (b) of the Industry Collateral Opinion, as Paragraph 13 only specifies the events

which would constitute a Specified Condition for the purposes of the NY Annex, but does not otherwise change the fact pattern.

(b) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question as to (as a matter of under German law) 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 the NY Annex, 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, including what factors are relevant to this question (together with a description of the principles governing such determination under German law with respect to the different types of Collateral) (see chapter F.II. (*Validity of Security Interests*) no. 2. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 2 of the Industry Collateral Opinion are based on general principles of German law applicable for determining which law governs the proprietary aspects of a security interest and are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Validity of Security Interests*) no. 2 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(c) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the German courts would recognise a security interest in each type of Eligible Collateral created under the NY Annex, bearing in mind the different forms in which securities Collateral may be held and indicating, in relation to cash Collateral, if the answer depends on the location of the account in which the relevant deposit obligations are recorded and/or upon the currency of those obligations (see chapter F.II. (*Validity of Security Interests*) no. 3 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 3 of the Industry Collateral Opinion are based on an analysis of the provisions pursuant to which a security interest is purported to be created under the NY Annex, namely Paragraph 2 in connection with the definitions of Posted Collateral and Transfer.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

In our view, none of the amendments made to the NY Annex, in particular the amendments made in (r) of the Paragraph 13, result in a different conclusion than that stated in chapter F.II. (*Validity of Security Interests*) no. 3 of the Industry Collateral Opinion, as they do not alter the mechanics of a Transfer as set out on the NY Annex as such.

(d) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question as to what the effect, if any, is under German law of the fact that the amount secured or the amount of Eligible Collateral subject to the security interest will fluctuate under the Covered Base Agreement and the NY Annex (including as a result of entering into additional Transactions under that Covered Base Agreement from time to time) (see chapter F.II. (*Validity of Security Interests*) no. 4 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 4 of the Industry Collateral Opinion distinguish between a situation where the creation of the security interest would, pursuant to German conflict of laws rules, mandatorily be governed by German law (in which case a security interest would likely not validly created as stated in the Industry Collateral Opinion, so that the above questions are not relevant) and a situation where the creation of the security interest would, pursuant to German conflict of laws rules, be governed by foreign law (in which case, where such foreign law were to validate the security interest under the NY Annex, German law

would also validate the security interest, subject to the statements in the Industry Collateral Opinion), whereby the answers are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Validity of Security Interests*) no. 4 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(e) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether, assuming that the German courts would recognise the security interest in each type of Eligible Collateral created under NY Annex, 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) is required in Germany to perfect that security interest (see chapter F.II. (*Validity of Security Interests*) no. 5 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 5 of the Industry Collateral Opinion are based on general principles of German law in respect of security perfection requirements in respect of security governed by foreign law and do not refer to any specific provisions of the NY Annex.[106]

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, in our view, none of the amendments made to the NY Annex used in conjunction with the Paragraph 13 results in a

[106] We have assumed that this question relates to foreign security interests only. A German law pledge over cash in a bank account in Germany would require the notification of the account holding bank as set out in chapter E.II.(C)(1) of the Industry Collateral Opinion.

different conclusion than that stated in chapter F.II. (*Validity of Security Interests*) no. 5 of the Industry Collateral Opinion.

(f) Based on the Specific Instructions, the Industry Collateral Opinion contains an indication of the nature of such requirements described in question 6 in chapter F.II. (*Validity of Security Interests*) of the Industry Collateral Opinion, if any, including whether it is necessary as a matter of formal validity that the NY Annex be expressly governed by German law or translated into any other language or for the NY Annex to include any specific wording and whether there are any other documentary formalities that must be observed in order for a security interest created under the NY Annex to be recognized as valid and perfected under German law (see chapter F.II. (*Validity of Security Interests*) no. 6 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 6 of the Industry Collateral Opinion are based on general principles of German law in respect of security perfection requirements and do not refer to any specific provisions of the NY Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, in our view, none of the amendments made to the NY Annex used in conjunction with the Paragraph 13 results in a different conclusion than that stated in chapter F.II. (*Validity of Security Interests*) no. 6 of the Industry Collateral Opinion.

(g) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether, assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under German law, to the extent German law applies, by complying with the requirements set forth in the responses to questions 1 to 6 in chapter F.II. (*Validity of Security Interests*) of the Industry Collateral Opinion, as applicable, the Secured Party or the Security Collateral Provider will 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 (or the amount of Collateral required to be delivered under the NY Annex, as applicable) exceeds the Value of the Collateral held by the Secured Party (see chapter F.II. (*Validity of Security Interests*) no. 7 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 7 of the Industry Collateral Opinion are based on general principles of German law in respect of security perfection requirements and do not refer to any specific provisions of the NY Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, in our view, none of the amendments made to the NY Annex used in conjunction with the Paragraph 13 results in a different conclusion than that stated in chapter F.II. (*Validity of Security Interests*) no. 7 of the Industry Collateral Opinion.

(h) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether, assuming that (a) pursuant to German law, 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 the NY Annex (for example, because such Collateral is located or deemed to be located outside of Germany) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, the Secured Party will have a valid security interest in the Collateral so far as German law is concerned and/or whether any action (filing, registration, notification, stamping or notarization or any other action or the obtaining or any governmental, judicial, regulatory or other order, consent or approval) required under German law to establish, perfect, continue or enforce this security interest (see chapter F.II. (*Validity of Security Interests*) no. 8 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 8 of the Industry Collateral Opinion are based on general principles of German law in respect of security perfection requirements and do not refer to any specific provisions of the NY Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, in our view, none of the amendments made to the NY Annex used in conjunction with the Paragraph 13 results in a different conclusion than that stated in chapter F.II. (*Validity of Security Interests*) no. 8 of the Industry Collateral Opinion.

(i) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether there are any particular duties, obligation or limitations imposed on the Secured Party in relation to the case of the Eligible Collateral held by it pursuant to the NY Annex (see chapter F.II. (*Validity of Security Interests*) no. 9. of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 9. of the Industry Collateral Opinion distinguish between a situation where the creation of the security interest would, pursuant to German conflict of laws rules, mandatorily be governed by German law (in which case a security interest would likely not validly created as stated in the Industry Collateral Opinion, so that the above questions are not relevant) and a situation where the creation of the security interest would, pursuant to German conflict of laws rules, be governed by foreign law (in which case this would be a matter of such foreign law), whereby the answers are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Validity of Security Interests*) no. 9 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(j) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether German law recognizes the right of the Secured Party to use Collateral pursuant to an agreement with the Pledgor as provided for in the NY Annex, which, unless otherwise agreed to by the parties, in Paragraph 6(c) 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 (which use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or simply selling the securities), how such use of the Collateral affects, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use and whether there are any other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under German law (see chapter F.II. (*Validity of Security Interests*) no. 10 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 10. of the Industry Collateral Opinion are based on an analysis of the provisions of Paragraph 6(c) and their incompatibility with German law applicable to pledges.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Paragraph 13 does not amend the above provision and therefore, in our view, the analysis in chapter F.II. (*Validity of Security Interests*) no. 10 of the Industry Collateral Opinion is not affected by the NY Annex used in conjunction with Paragraph 13.

(k) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question what the effect, if any, is under German law on the validity, continuity, perfection or priority of a

security interest in Eligible Collateral under the NY Annex of the right of the Pledgor to substitute Collateral pursuant to Paragraph 4(d) of the NY Annex and how the presence or absence of consent to substitution by the Secured Party affects the response to this question (commenting specifically on whether the Pledgor and the Secured Party are able validly to agree in the NY Annex 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 the conclusions regarding the validity or enforceability of the security interest (see chapter F.II. (*Validity of Security Interests*) no. 11 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Validity of Security Interests*) no. 11 of the Industry Collateral Opinion distinguish between a situation where the creation of the security interest would, pursuant to German conflict of laws rules, mandatorily be governed by German law (in which case a security interest would likely not validly created as stated in the Industry Collateral Opinion, so that the above questions are not relevant) and a situation where the creation of the security interest would, pursuant to German conflict of laws rules, be governed by foreign law (in which case this would be a matter of such foreign law), whereby the answers are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Validity of Security Interests*) no. 11 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(l) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question as to what (assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under German law, to the extent such law applies, by complying with the requirements set forth in the responses to questions 1 to 6 in chapter F.II. (*Validity of Security Interests*) of the Industry

Collateral Opinion, as applicable), 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, are that the Secured Party must observe or undertake in exercising its rights as a Secured Party under the NY Annex, such as the right to liquidate Collateral (and whether, for example, it is free to sell the Collateral (including to itself) and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the Covered Base Agreement and whether such formalities or procedures differ depending on the type of Collateral involved) (see chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 12 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 12 of the Industry Collateral Opinion are based on the analysis of a situation where the creation of the security interest would, pursuant to German conflict of laws rules, mandatorily be governed by German law (in which case a security interest would likely not validly created as stated in the Industry Collateral Opinion, so that the above questions are not relevant).

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 12 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(m) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether, assuming that (a) pursuant to German law, 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 the NY Annex (for example, because such Collateral is located or deemed located outside of

Germany) and (b) the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of such other jurisdiction, there are any formalities, notification requirements or other procedures, if any, that the Secured Party must observe or undertake in Germany in exercising its rights as a Secured Party under the NY Annex (see chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 13 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 13 of the Industry Collateral Opinion is based on general principles of German conflict of laws, pursuant to which, where creation of the security interest would, pursuant to such rules, be governed by foreign law, would refer to such foreign law in respect ofay n formalities, notification requirements or other procedures, whereby the answers are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. *(Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 13 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(n) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether there are any laws or regulations in Germany 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, whether there are any types of "statutory liens" that would be deemed to take precedence over a creditor's security interest in the Collateral (see chapter F.II. *(Enforcement of Rights under the Security Documents by*

the Secured Party in the Absence of an Insolvency Proceeding) no. 14 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 14 of the Industry Collateral Opinion distinguish between a situation where the creation of the security interest would, pursuant to German conflict of laws rules, mandatorily be governed by German law (in which case a security interest would likely not validly created as stated in the Industry Collateral Opinion, so that the above questions are not relevant) and a situation where the creation of the security interest would, pursuant to German conflict of laws rules, be governed by foreign law (in which case this would be a matter of such foreign law), whereby the answers are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 14 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(o) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the responses to questions 12 to 14 in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) of the Industry Collateral Opinion would 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, whether this would affect this ability of the Secured Party to exercise its enforcement rights with respect to the Collateral (see chapter F.II. (*Enforcement of Rights under the Security Documents by the*

Secured Party in the Absence of an Insolvency Proceeding) no. 15 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 15 of the Industry Collateral Opinion are based on an analysis of general principles of German law, including conflict of laws provisions, applicable in relation to the NY Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) no. 15 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13

(p) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question how competing priorities between creditors are determined in Germany and 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 (see chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 16 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 16 of the Industry Collateral Opinion are based on generally applicable principles under German insolvency law on the ranking of secured creditors in insolvency and do not refer to any specific provision of the NY Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 16 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(q) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the Secured Party's rights under the NY Annex, such as the right to liquidate the Collateral, would be subject to any stay or freeze or otherwise be affected by commencement of the insolvency (that is, how the institution of an insolvency proceeding changes the responses to questions 12 and 13 in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding*) of the Industry Collateral Opinion, if at all) (see chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 17 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 17 of the Industry Collateral Opinion are based on generally applicable principles under German insolvency law on stays in insolvency and do not refer to any specific provision of the NY Annex.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 17 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(r) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the Security Collateral Provider (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) will 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 favor of the Secured Party or on any other basis, whether, if such a period exists, the substitution of Collateral by a counterparty during this period would invalidate an otherwise valid security interest if the substitute Collateral is of no greater value than the assets it is replacing and whether the posting of additional Collateral pursuant to the mark-to-market provisions of the NY Annex 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 (see chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 18 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 18 of the Industry Collateral Opinion distinguish between a situation where the creation of the security interest would, pursuant to German conflict of laws rules, mandatorily be governed by German law (in which case a security interest would likely not validly created as stated in the Industry Collateral Opinion, so that the above questions are not relevant) and a situation where the creation of the security interest would, pursuant to German conflict of laws rules, be governed by foreign law (in which case this would be a matter of such foreign law), and how preference rules under German insolvency laws would apply to such security interests, whereby the answers are not affected by any particular provision of the NY Annex or the Paragraph 13.

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Enforcement of Rights under the Security Documents by the Secured Party After the Commencement of an Insolvency Proceeding*) no. 18 of the

Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13.

(s) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether the parties' agreement on governing law of the NY Annex and submission to jurisdiction be upheld in Germany, and what the consequences would be if it they were not (see chapter F.II. (*Miscellaneous*) no. 19 of the Industry Collateral Opinion).

(i) Scope of Industry Collateral Opinion

The conclusions reached in chapter F.II. (*Miscellaneous*) no. 19 of the Industry Collateral Opinion are based on generally applicable principles under German law on recognition of choice of law and submission to jurisdiction clauses, which are not affected by any specific provision of the NY Annex

(ii) Application of Industry Collateral Opinion's statements to the Clearing Agreement

Therefore, the answer given in chapter F.II. (*Miscellaneous*) no. 19 of the Industry Collateral Opinion applies equally if the NY Annex is used in conjunction with the Paragraph 13

(t) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether there are any other local law considerations that are recommendable for the Secured Party to consider in connection with taking and realising upon the Eligible Collateral from the Security Collateral Provider (see chapter F.II. (*Miscellaneous*) no. 20 of the Industry Collateral Opinion).

The conclusion reached in the Industry Collateral Opinion that there are no other German law considerations that are recommendable for the Secured Party to consider in connection with the taking and realising upon the Eligible Collateral from the Security Collateral Provider except for those expressed in the Industry Collateral Opinion would, in our view, also apply where the NY Annex is used in conjunction with the Paragraph 13.

(u) Based on the Specific Instructions, the Industry Collateral Opinion contains an answer to the question whether there are any other

foreseeable circumstances that might affect the Secured Party's ability to enforce its security interest in Germany (see chapter F.II. (*Miscellaneous*) no. 21 of the Industry Collateral Opinion).

The conclusion reached in the Industry Collateral Opinion that there are no other circumstances that might affect the Secured Party's ability to enforce its security interest validly created under applicable foreign law in Germany except for those expressed in the Industry Collateral Opinion would, in our view, also apply where the NY Annex is used in conjunction with the Paragraph 13.

4.2.104.2.11 *Would the use of the Paragraph 11 in conjunction with the Transfer Annex or the use of Paragraph 13 in conjunction with the NY Annex affect the conclusions reached in the Industry Collateral Opinion to the extent that those conclusions relate to any Existing Collateral Agreement*?

(a) Scope of Industry Collateral Opinion

The Industry Collateral Opinion analyses the validity and enforcement of collateral arrangements under the 1994 Credit Support Annex governed by the lawsdocuments listed in chapter A (i) to (xiii) of the State of New York (the "**NY Annex**"), the 1995 Credit Support Deed governed by English law (the "**Deed**") and the Industry Collateral Opinion (including the Transfer Annex. and the NY Annex). For the purposes of this opinion these three documents shall together be referred to as "**Existing Collateral Agreements**" and each an "**Existing Collateral Agreement**".

(b) Application of Industry Collateral Opinion's conclusions to the Clearing Agreement

TheNeither the Paragraph 11 Document in conjunction with the Transfer Annex does not amendnor the Paragraph 13 in conjunction with the NY Annex amends the Existing Collateral Agreements. Accordingly, the terms of the Existing Collateral Agreements are not affected by the Paragraph 11 Documentor the Paragraph 13, as applicable, in conjunction with the Transfer Annexrelevant Credit Support Document.

(c) Supplemental analysis

Section 10(a) and Section 10(b) of the Addendum, however, have a direct impact on Existing Collateral Agreements.

(i) If Section 10(a) of the Addendum is selected to apply, Client Transactions would not be subject to an Existing Collateral Agreement. We understand that Uncleared Transactions remain unaffected. The Paragraph 11 ~~Document in conjunction with~~or the ~~Transfer Annex~~Paragraph 13, as applicable, in conjunction with the relevant Credit Support Document applies separately and only to Client Transactions subject to a single Cleared Transaction Set, i.e. for each Cleared Transaction Set a separate the Paragraph 11 or the Paragraph 13, as applicable, in conjunction with the relevant Credit Support Document ~~in conjunction with the Transfer Annex~~ is deemed to have been entered into. Under the Existing Collateral Agreement credit support is granted in relation to Uncleared Transactions only and under each relevant ~~Transfer Annex~~Credit Support Document credit support is granted in relation to each Cleared Transaction Set separately.

In our view the application of Section 10(a) of the Addendum together with the use of the Paragraph 11 ~~Document~~or the Paragraph 13, as applicable, in conjunction with the ~~Transfer Annex~~relevant Credit Support Document would not affect the conclusions reached in the Industry Collateral Opinion which relate to an Existing Collateral Agreement to the extent the Uncleared Transactions and each Cleared Transaction Set ~~a~~were considered as separate master agreements.

(ii) ~~We are~~To the extent the Clearing Agreement, and thus, all Cleared Transaction Sets together were considered as one single master agreement (see paragraph 4.2.1(b)(i)(B) above), we are still of the view that the use of the Existing Collateral Agreement for Uncleared Transactions and the use of one or more additional ~~Transfer Annexes~~Credit Support Documents for separate Cleared Transaction Sets under one and the same Clearing Agreement should not affect the qualification of collateral granted under the Existing Collateral Agreement or a Transfer Annex as financial collateral within the meaning of section 1 para 17 KWG as described in chapter E.II.(D)(2) and (3) of the Industry Collateral Opinion subject to the following analysis. The effect of using an Existing Collateral Agreement and one or more Transfer Annexes under one and the same master

agreement can be described as follows: During the term of the master agreement a Credit Support Amount is calculated for each group of Transactions separately and the parties need to provide credit support under each Transfer Annex and the Existing Collateral Agreement separately. This means that for the purposes of calculating the Credit Support Amount, only the values of those Transactions belonging to the specific group of Transactions (i.e. either a Cleared Transaction Set or the Uncleared Transactions) are netted and there is no further set-off between the Credit Support Amounts calculated for the different groups of Transactions.

However, in case of an early termination of the Clearing Agreement pursuant to Section 8(a) of the Addendum,[107] the Termination Amount is determined for the Clearing Agreement as a whole, covering all groups of Transactions including any credit support granted under each of the Existing Collateral Agreement and under one or more Transfer Annexes. If the purpose of the Existing Collateral Agreement and the Transfer Annexes were to secure the Termination Amount resulting from a termination pursuant to Section 8(a) of the Addendum, then during the term of the Clearing Agreement credit support may in aggregate exceed the value of such Termination Amount. This is because even if a party ~~would~~does not need to provide credit support on a net basis under the Clearing Agreement when such party is entitled to an overall Termination Amount with respect to the Clearing Agreement, such party may need to transfer credit support with respect to a specific group of Transactions (while at the same time it may have received credit support with respect to another group of Transactions).

In our view, this should, however, not affect the treatment of the credit support which constitutes ~~financial collateral~~Financial Collateral within the meaning of section 1 para 17 sentence 1 KWG ~~("**Financial Collateral**").~~ Section 1 para 17 sentence 1

[107] Section 8(a) of the Addendum provides that the termination of all Client Transactions upon the occurrence of an Event of Default, a Termination Event or other similar event in respect of the Client is not restricted and will be effected in accordance with Sections 5 and 6 of the Covered Base Agreement.

KWG is a regulatory law provision which ~~provides for~~stipulates a preferential treatment of certain collateral arrangements primarily under insolvency law rather than creating a specific type of collateral arrangement under contract or property law. As such it does not explicitly provide that the asset delivered as collateral must be provided [108] "to secure" a specific claim. Rather, in our view it is sufficient, if the relevant collateral asset is transferred "for collateral purposes" with respect to a specific Transaction. Only section 1 para 17 sentence 2 KWG which applies to security providers within the meaning of Article 1 para 2 lit (e) ~~of the Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements ("**Financial Collateral Directive**")~~FCD (largely unregulated corporate entities) requires that the collateral must serve one of the enumerated purposes to protect such security providers. Accordingly, we are of the view that a collateral arrangement, in particular a collateral arrangement based on a transfer of title subject to a broad security purpose agreed between the parties which takes into account any exposure to the other party, should not lose its character as financial collateral arrangement.

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[108] The FCD provides in Article 2 para 2 that "References in this Directive to financial collateral being "provided", or to the "provision" of financial collateral, are to the financial collateral being delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf. Any right of substitution or to withdraw excess financial collateral in favour of the collateral provider or, in the case of credit claims, right to collect the proceeds thereof until further notice, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in this Directive." In a recent decision (C-156/15 of 10 November 2016), the ECJ, dealing with the question what "control" means with respect to collateral in respect of monies deposited in a bank account, has ruled that "the taker of collateral… in the form of monies lodged in an ordinary bank account may be regarded as having acquired 'possession or control' of the monies only if the collateral provider is prevented from disposing of them." There is no express reference in section 1 para 17 KWG to "control", but we are of the view that the term "provide" in that section would need to be interpreted in conformity with European Union law. To the extent that the security provider is entitled to dispose over collateral (at least in cases which do not relate to a right to substitution or withdrawal of excess collateral), there would be a risk that a court could take the view that the qualification as Financial Collateral is endangered. Where the collateral is provided to the collateral taker by way of title transfer, the collateral provider typically does not have any possession or control over the collateral as this is vested in the collateral taker upon transfer, so that the above would only be relevant where collateral is provided by way of an in rem security arrangement (such as a German law pledge).

Furthermore, the use of an Existing Collateral Agreement and, in addition, one or more Transfer Annexes with respect to Cleared Transaction Sets serves the purpose to secure not only a single Termination Amount that would become due upon termination under the Covered Base Agreement but a number of claims resulting from a termination pursuant to Section 8(b) of the Addendum. If Section 8(b) of the Addendum applies there is no single Termination Amount calculated for the Clearing Agreement as a whole. Rather, a Termination Amount is calculated separately for each group of Transactions and each separate Termination Amount is secured by a separate credit support document (i.e. the Existing Collateral Agreement and each Transfer Annex). Accordingly, due to the effects of Section 8(b) of the Addendum in case of a Clearing Member default resulting in a separate treatment of the different groups of Transactions, the statements made in the Industry Collateral Opinion as regards "financial collateral" would in our view apply even if credit support is delivered by each of the parties under an Existing Collateral Agreement and further Transfer Annexes with respect to Cleared Transaction Sets separately.

(iii) With respect to the use of an Existing Collateral Agreement in the form of a NY Annex as used together with the Paragraph 13 in conjunction with the NY Annex, the conclusion set out above under paragraph (ii) applies subject to however, the observations in chapter F.II (*Validity of Security Interests*) 1. of the Industry Collateral Opinion as to the invalidity of any security purported to be created under such agreement where German conflict of laws provision, substantive German law is to be applied and subject to the observations in chapter F.II (*Validity of Security Interests*) 3, pursuant to which the NY Annex will likely not be given effect under German law where the relevant account is located in Germany.

~~(ii)~~(iv) If Section 10(b) of the Addendum is selected as applicable, any collateral granted under an Existing Collateral Agreement is subject to a further and separate right for use ("**Rehypothecation Right**") in accordance with the Addendum.

The Industry Collateral Opinion analyses the legal issues regarding a right of use, such as the Rehypothecation Right in general in its Chapter E.II.(B)(1)(c) and analyses the legal consequences of the invalidity and ineffectiveness of provisions of the NY Annex in its ~~C~~chapter F.II~~(A)~~ *(Validity of Security Interests)* 1.(b)(3) and the legal consequences of the invalidity and ineffectiveness of provisions of the ~~Deed~~1995 Credit Support Deed (English law) in its ~~C~~chapter F.II~~(A)~~ *(Validity of Security Interests)* 1.(c)(3) in those cases where pursuant to German conflict of laws rules, German substantive law is to be applied~~.~~, which analysis also applies in respect of the other Security Documents (as such term is defined in the Industry Collateral Opinion).

Such analysis remains in our view unaffected by Section 10(b) of the Addendum.

~~4.2.11~~4.2.12 *Assuming that the Addendum was amended to incorporate the CM Default Amendments as attached as Appendix B hereto, would such amendments be enforceable under the laws of your jurisdiction, both in the absence of and in the event of insolvency proceedings in your jurisdiction in relation to the Clearing Member? Please explain whether*:

a) *your answer would be different if more than one Relevant CM Default (as defined in the CM Default Amendments) occurred in respect of separate Agreed CCP Services;*

b) *your answer would be different if one or more Relevant CM Defaults occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions; and*

c) *your answer would be different depending on the Type of Client Account.*

~~*In respect of this paragraph 4.2.10(a), as the CM Default Amendments have not been published on the ISDA website, for clarity of reference, please could you annex the CM Default Amendments to the Client Reliance Opinion.*~~

We understand that by agreeing on further events as "Relevant CM Default", additional rights to terminate the Clearing Agreement and all Client Transactions (or one or more Cleared Transaction Sets only) would be granted to the Client.

(a) Where a Relevant CM Default is agreed which is not "insolvency-related" (as such term is defined by the BGH)[109], the consequences thereof would be recognised by a German court as a matter of contract law if such termination right upon the occurrence of a Relevant CM Default is valid under English laws and subject to the provisions of Rome I (please refer to paragraph 4.2.1(a)).

(b) Enforceability of termination of Clearing Agreement based on Relevant CM Default upon the occurrence of Insolvency Proceedings

Upon the opening of Insolvency Proceedings the Clearing Agreement is subject to the rules on insolvency-related early termination and insolvency-related set-off. To the extent applicable (please see paragraph 4.2.1(b)) any mandatory procedural law of the InsO would prevail over the contractual provisions of the Clearing Agreement.

In particular, executory contracts which have not been effectively terminated prior to such opening of Insolvency Proceedings are, pursuant to section 103 InsO, subject to the Insolvency Administrator's Selection Right pursuant to section 103 InsO which is protected by section 119 InsO ~~and pursuant to~~ (and pursuant to a judgment of the BGH of 15 November 2012[110] applies from the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected (*mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*~~).~~), unless they fall within the scope of section 104 InsO, in which case they

[109] See paragraph 4.2.1(a) above.

[110] BGH WM 2013, 274.

are automatically terminated upon the opening of Insolvency Proceedings.

(c) Occurrence of more than one Relevant CM Defaults

Upon the occurrence of more than one Relevant CM Default in respect of separate Agreed CCP Services or upon the occurrence of a parallel termination right of the Client under the Covered Base Agreement (for Uncleared Transactions), the Client may be able to terminate the different Cleared Transaction Sets of the Clearing Agreement at different conditions. Prior to the opening of Insolvency Proceedings or, in case of an insolvency-related termination event, according to the BGH's judgment of 15 November 2012 the point in time in which, based on a valid application for the opening of Insolvency Proceedings, such opening of Insolvency Proceedings is to be seriously expected (*mit der Eröffnung eines Insolvenzverfahrens ernsthaft zu rechnen ist*), the validity of such termination is a matter of English law.

We refer, however, to our conclusions on insolvency-related early termination under paragraph 4.2.1(b) above.

5. QUALIFICATIONS

5.1 General qualifications

5.1.1 Choice of law

(a) The relevant German court may give effect to mandatory provisions (i.e. provisions regarded as crucial for a country's safeguarding of its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the Clearing Agreement (Article 9 para 1 Rome I) of the law of the country where the obligations arising out of the Clearing Agreement or Transfer Annex have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful (Article 9 para 3 Rome I).

(b) The relevant German court may apply the overriding mandatory provisions of German law (Article 9 para 2 Rome I) irrespective of the choice of foreign law in the Clearing Agreement or Transfer Annex.

(c) The relevant German court may refuse to apply the choice of law in the Clearing Agreement or Transfer Annex if such application is manifestly incompatible with the public policy of Germany (Article 21 Rome I).

(d) The relevant German court is obliged to have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (Article 12 para 2 Rome I).

(e) Where all other elements relevant to the situation at the time that the Clearing Agreement was entered into are located either in another state or in one or more ~~Member States~~member states of the European Union, the relevant German court may apply the provision of such state's law or the law of the European Union (as the case may be), which cannot be derogated from by agreement (Article 3 para 3 and 4 Rome I).

5.1.2 Exchange controls

~~On the basis~~By virtue of article VIII section 2(b) of ~~Article VIII~~ the Articles of Agreement of the International Monetary Fund ~~Agreement,~~(in connection with the German IMF Accession Act (*IWF-Beitrittsgesetz*) and the IMF Act (*IWF-Gesetz*)), as interpreted and applied by German courts, any obligation which involves the currency of any member of the International Monetary Fund and which is contrary to the exchange control regulations of ~~another~~that member ~~state of the International Monetary Fund~~ may not be enforceable ~~in Germany~~(*unklagbar*) in the German courts.

5.1.3 Financial sanctions

Any transfer of rights or payment in respect, or other performance, of an obligation under the Covered Agreement or Covered Transactions involving the government of any country which is currently or in the future the subject of United Nations or European Union sanctions, any person or body resident in, incorporated in or constituted under the laws of any such country or exercising public functions in any such country or any person or body controlled by any foregoing or by any person acting on behalf of any of the foregoing may be subject to restrictions pursuant to such sanctions as implemented in German law.

5.1.4 Mandatory clearing of OTC derivatives

We express no opinion as to whether any Party has complied with EMIR; any delegated or implementing acts adopted under EMIR, the provisions Banking Act, the German Securities Trading Act (*Wertpapierhandelsgesetz*) or the German Exchange Act (*Börsengesetz*) which were amended or enacted to implement EMIR, or any Regulations adopted thereunder in respect of anything done by it in relation to or in connection with any of the Covered Agreements and Covered Transactions. If EMIR is applicable, Article 12 para 3 EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the Clearing Agreements and Transactions covered invalid or unenforceable.

5.1.5 Cross-border payments

In respect of cross-border cash payments the notification requirements under the German Foreign Trade Act (*Außenwirtschaftsgesetz*) and the German Foreign Trade Regulation (*Außenwirtschaftsverordnung*) need to be observed. The reports have to be submitted to the Deutsche Bundesbank using the applicable notification forms. A failure to do so would, however, not affect the validity of the respective transaction.

5.1.6 SFTR

We express no opinions as to whether any party has complied with any applicable provision of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 ("**SFTR**").[111] Article 15 SFTR imposes obligations relating to rights of reuse where these are exercised. The SFTR has entered into force on 12 January 2016. Article 15 SFTR has taken effect from 13 July 2016 onwards.

5.1.7 Benchmark Regulation

We express no opinions on Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June November 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the

[111] OJ No. L 337 of 23 December 2015, p. 1.

performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.[112]

5.1.8 Over-collateralisation

If a party is substantially over-collateralised, a security interest governed by German law can be void in case of an initial over-collateralisation for being contrary to public policy (section 138 para 1 BGB).[113] If a subsequent over-collateralisation occurs, the secured party is required to release part of the security it has provided. Whether or not a party is substantially over-collateralised generally depends on the relation of the value of the secured obligation towards the realisable value of the collateral.[114]

However, if a security interest was governed by non-German law, German courts would only in exceptional cases not recognise the security interest on grounds of over-collateralisation. Even if the granting of collateral should result in a substantial over-collateralisation of the secured party by German standards, this would not necessarily lead a German court to conclude that the security interest is in breach of German public policy and therefore not recognise such security interest under Article 21 Rome I or Article 6 EGBGB, as the case may be (i.e. the standards for assessing any infringement of German public policy are not the same under section 138 para 1 BGB as under Article 21 Rome I or

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[112] OJ No. L 171 of 29 June 2016, p. 1.

[113] BGH NJW 1998, 2047. The BGH has not yet given any guidance as to when initial over-collateralisation would be considered as "substantial" and therefore void under section 138 para 1 BGB.

[114] The BGH (NJW 1998, 671, 674) provided the following guidance in respect of subsequent over-collateralisation: the claim for release of security is triggered once the realisable value of the collateral not only temporarily exceeds the value of the secured obligation by 10 per cent. The BGH further stated that even if an agreement whereby a security transfer is effected does not provide for provisions on the release of the collateral, the debtor has an inherent claim for release if a (subsequent) over-collateralisation has occurred. Therefore, such security interest should not be void due to a substantial over-collateralisation (however, this does not apply in case of an initial over-collateralisation); the secured party would only be obliged to return the excess collateral. The same applies to the release of a pledge. We are not aware of any judgment according to which this also applies in case collateral is provided by way of an outright title transfer. In case of a pledge under German law, an over-collateralisation should not occur because due to the accessory nature of a pledge, the pledge only exists in the amount of the secured obligation (including any future obligation). However, in case pledge assets have been transferred to the pledgee or a third party (for example, a depository), the pledgor may request the return of such assets which are not subject to the pledge anymore.

Article 6 EGBGB[115]). We are not aware of any court decisions supporting the application of the ordre public in such case.

~~5.1.5~~5.1.9 Insolvency-related set-off

(a) Set-off after the opening of Insolvency Proceedings

The right of a solvent Party to effect set-off after the opening of Insolvency Proceedings over the other Party is governed by sections 94 through 96 InsO. The extent to which a set-off after the opening of Insolvency Proceedings is permissible mainly depends on the point in time when the situation giving one party the right to set off comes into existence *(Entstehung der Aufrechnungslage*). This is in our view to be determined in accordance with the applicable contract law as determined in accordance with applicable conflict of laws provisions.

Pursuant to section 94 InsO and subject to the restrictions and prohibitions of set-off pursuant to sections 95 and 96 InsO, a right to set off a claim is preserved after the opening of Insolvency Proceedings if by force of law or on the basis of an agreement the solvent Party was already entitled to set off the claim at the time the Insolvency Proceedings were opened irrespective of whether or not the declaration to set off the claim was made before or after the opening of such Insolvency Proceedings.

~~In contrast to the former Bankruptcy Code (*Konkursordnung*, the predecessor of the InsO), the~~The InsO explicitly preserves rights to set off a claim under valid contractual agreements.[116] With respect to the overall intention of the InsO in general and the purpose of section 94 InsO in particular, i.e. the aim to protect the legitimate expectations of the creditors of the insolvent Party, the preservation of contractual rights to set off has been criticised since it enables the parties to extend the rights to set off to the detriment of creditors of the insolvent Party as

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[115] *Mülbert/Bruinier*, WM 2005, 105, 110.

[116] *Lüke*, in: Kübler/Prütting/Bork, InsO, 75th ed. (March 2018), § 94 no. 6 et. seqq.; *Kroth*, in: Braun, Insolvenzordnung, 7th ed. (2017), § 94 no. 1; *Brandes/Lohmann*, in: Münchener Kommentar InsO, 3rd ed. (2013), § 94 no. 44.

such agreements might reduce the assets involved in insolvency.[117] The validity of contractual agreements concerning set-off is therefore called into question ~~in German~~by some legal ~~literature and~~authors[118] that advocate a restrictive interpretation of section 94 InsO pursuant to which agreements concerning set-off may not override prohibitions of set-off that aim at protecting third parties' rights is proposed.[119] According to this view, such agreements also have to comply with sections 95 and 96 InsO.

However, this restrictive approach particularly applies to agreements deviating from the requirement of mutuality of the claims[120] under German statutory law and should not affect the validity of the contractual provision of automatic aggregation and set-off of all existing mutual payment obligations of the parties under the transactions where the relevant contractual provisions do not contain a contractual deviation from the requirement of mutuality of the claims.

~~(a) "Tri-party"-set-off~~

~~Pursuant to the BGH section 96 para 1 no. 2 InsO applies to agreements which provide for the right to set-off claims of an affiliated company by another company against the claims of a third party (*Konzernverrechnungsklausel*).[121] After the opening of Insolvency Proceedings, a set-off with claims not owned by the offsetting party but by its affiliate is ineffective, even if such "tri-party" set-off had been~~

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[117] *Lüke*, in: Kübler/Prütting/Bork, InsO, 75~~5~~th ed. (~~October 2013~~March 2018), § 94 no. ~~7~~8.

[118] *Kroth*, in: Braun, Insolvenzordnung, 7th ed. (2017), § 95 no. 23; *Sinz*, in: Uhlenbruck, Insolvenzordnung, 14th ed. (2015), § 94 nos. 8 *et seq.*

[119] *Kroth*, in: Braun, Insolvenzordnung, ~~5~~7th ed. (201~~2~~7), § 95 no. 20; *K. Schmidt*, NZI 2005, 138, 140 *et seq.*; see also *Brandes/Lohmann*, in: Münchener Kommentar ~~BGB~~InsO, 3rd ed. (2013), § 94 nos. 44 *et seq*.

[120] *Schwahn*, NJW 2005, 473, 475.

~~[121] BGH NJW 2004, 3185.~~

~~agreed upon by the three parties involved before the opening of Insolvency Proceedings.~~

(b) Restrictions under section 95 InsO

Where the right to set off emerges after the opening of Insolvency Proceedings, set-off is only permissible if the mutual claims originated before the opening of Insolvency Proceedings. If on the date when Insolvency Proceedings are opened one or more of the claims to be set off against each other are conditional, not yet due or do not cover similar types of obligations, such set-off will not be effected before such conditions are met (section 95 para 1 sentence 1 InsO). Pursuant to section 95 para 1 sentence 2 InsO, section 41 InsO concerning claims not yet due at the date when Insolvency Proceedings are opened and section 45 InsO concerning the conversion of certain claims do not apply.

Set-off is excluded if the claim against which a set-off is to be effected becomes unconditional and mature before it can be set off (section 95 para 1 sentence 3 InsO). Set-off is permissible if the Solvent Party's claim is unconditional and matures prior to the Insolvent Party's claim or at the same time at the latest.[122]

Pursuant to section 95 para 2 InsO, the fact that claims are expressed in different currencies or mathematical units would not exclude set-off, if these currencies or mathematical units are freely exchangeable at the place of payment of the claim against which the set-off is to be effected.[123] The claims have to be converted at the exchange value applicable to this place at the time of receipt of the declaration to set-off.

(c) Further restrictions under section 96 InsO

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[122] Moreover, section 95 para 1 sentence 3 InsO has been construed restrictively by the BGH in NJW 2005, 3574, 3575 *et seq*~~.)~~.. According to the BGH, section 95 para 1 sentence 3 InsO does not apply if the Insolvent Party's claim, against which set-off is declared, has become mature and unconditional before the Solvent Party's claim but at the same time was not enforceable due to a right to refuse performance by the Solvent Party against such claim.

[123] This is considered as a general principle of German law which also applies under section 94 InsO even though it is not mentioned therein (*Höhn/Kaufmann*, JuS 2003, 751, 753).

Set-off is prohibited if (i) a creditor in the Insolvency Proceedings has become a debtor of the insolvency estate only after the opening of Insolvency Proceedings, (ii) a creditor in the Insolvency Proceedings acquired its claim from another creditor only after the opening of Insolvency Proceedings, (iii) a creditor in the Insolvency Proceedings acquired the opportunity to set off its claim by a legal act subject to challenge in insolvency (for details see below under (d)) or (iv) a creditor with a claim to be satisfied from the debtor's free property is a debtor of the insolvency estate (section 96 para 1 InsO).

~~(c)~~(d) Set-off and challenge in insolvency

In the event an insolvency creditor acquired the right to set off ~~hi~~ts claim by a transaction which may be challenged, set-off is prohibited pursuant to section 96 para 1 no 3 InsO. This prohibition applies irrespective of whether or not the Insolvency Administrator has actually challenged the transaction. The BGH has decided that a legal act is not prevented from becoming subject to challenge in insolvency and, consequently, the prohibition on set-off under section 96 para 1 no 3 InsO is not excluded if the legal act at hand caused the claim against which set-off is declared to come into existence.[124] In particular, the BGH rejected the argument that the fact that such a legal act does not only create the right to set-off but also the claim against which set-off is declared and which becomes part of the insolvent Party's assets should be taken into account in determining whether the legal act is detrimental to creditors (as required by section 129 para 1 InsO).

~~(d)(a) Further restrictions under section 96 InsO~~

~~Set-off is prohibited if (i) a creditor in the Insolvency Proceedings has become a debtor of the insolvency estate only after the opening of Insolvency Proceedings, (ii) a creditor in the Insolvency Proceedings acquired his claim from another creditor only after the opening of Insolvency Proceedings, (iii) a creditor in the Insolvency Proceedings acquired the opportunity to set off his claim by a legal act subject to challenge in insolvency or (iv) a creditor with a claim to be satisfied~~

[124] BGH WM 2013, 1132, 1133.

~~from the debtor's free property is a debtor of the insolvency estate (section 96 para 1 InsO).~~

5.2 Specific counterparty qualifications

5.2.1 We do not give an opinion on German corporate law where, in specific cases, statutory restrictions on set-off apply (section 66 AktG and sections 19 GmbHG) which restrict the right of a shareholder to set off against its obligation to provide equity contributions. Pursuant to sections 392 *et seqq*. ~~of the German Civil Code (*Bürgerliches Gesetzbuch*, "**BGB**"),~~BGB, set-off is generally subject to restrictions in specific circumstances, i.e. in case of confiscated claims, claims which arise due to an intentionally committed tort and claims which are not subject to attachment.

~~5.2.2 Insurance Companies which are supervised in accordance the laws of a Federal State are not subject to the VAG and, therefore, outside the scope of section 1 para 1 no. 1 VAG. We do neither express any opinions on re-insurance undertakings (*Rückversicherungsunternehmen*) as defined in section 119 para 1 VAG.~~

~~5.2.3 Open-ended or closed-ended limited investment partnerships (*offene or geschlossene Investmentkommanditgesellschaften*) within the meaning of sections 124 and 149 KAGB are excluded.~~

~~5.2.4~~5.2.2 Credit Institutions established under public law

(a) Any set-off against a claim of a Credit Institution which is established as a public law entity is only permissible if payment is to be attributed to the same fund (*Kasse*) (i.e. where the entity has an administrative sub-division administering its own budget) of such German public law entity from which the claim of the party intending to effect the set-off is to be paid (section 395 BGB).

~~(a)~~(b) Credit Institutions which are established as public law entities may enter into contracts under private law where this is not expressly prohibited. However, where they engage in commercial acts under private law they are bound by the general restrictions applicable to German public law entities. In particular, they are bound by the fundamental rights (*Grundrechte*) of the German Constitution and the rule of law (*Rechtsstaatsprinzip*). On the facts of each individual case, the German courts may therefore reach the conclusion that general restrictions of

Credit Institutions under public law prevent them from entering into certain types of transactions or oblige to refrain from exercising certain rights or to exercise their rights in a certain manner.

~~(b)~~(c) Under the German public law doctrine of *ultra vires*, the power and capacity of a legal entity established under public law to validly enter into a legally binding agreement under private law is limited. Public law entities may principally only enter into transactions that fall within their scope of competence (*Verbandskompetenz*) and functions (*Wirkungskreis*) as defined by the laws establishing or applicable laws conferring its powers and capacities upon such public law entity.[125] If a public law entity purports to enter into a contract under private law that is beyond or exceeding its functions, such a contract might be considered *ultra vires* and, therefore, void.[126] Provided that the *ultra vires* doctrine is applicable, it applies regardless of the good faith of the counterparty or any representation by the public law entity to the contrary. As a rule, *ultra vires* measures are unenforceable. They may not be ratified.

~~(c)~~(d) It is often argued that public sector entities are subject to a prohibition on speculation even though the legal basis of such prohibition is very unclear.[127] The prohibition on speculation would prevent public sector entities from entering into transactions for speculative purposes. In the absence of a clear legal basis or this principle the position of German courts is that the prohibition on speculation – irrespective of the question whether and to what extent it constitutes a rule of law – does not lead to the voidness of contracts under section 134 BGB.[128]

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[125] BGH NJW 1956, 746, 747; BGH NJW 1969, 2198, 2199; Higher Administrative Court (*Oberverwaltungs-gericht*) Lüneburg NVwZ-RR 2010, 639, 641.

[126] BGH NJW 1956, 746, 747 *et seq.*; *Gurlit*, in: Erichsen/Ehlers, Allgemeines Verwaltungsrecht, 14th ed. (2010), § 31 no. 5. Pursuant to a judgement of the BGH of 28 April 2015 (XI ZR 378/13), the doctrine of *ultra vires* is, however, not applicable if a municipality enters into a derivatives agreement in breach of its own budgetary restrictions.

[127] Higher Regional Court (*Oberlandesgericht*) Bamberg BKR 2009, 288, 292.

[128] BGH judgment of 28 April 2015 (XI ZR 378/13) stating that section 134 BGB only applies if the prohibition on speculation is explicitly stipulated in a law that also applies directly to the counterparty of the relevant transaction rather than only binding the municipality.

(e) Budgetary provisions are under German law considered to constitute internal law of the relevant public sector entity meaning that the violation of the budgetary laws does not affect the dealings with third parties.[129] In particular, it would not make contracts void under section 134 BGB which provides for the voidness of contracts violating a legal prohibition (*Verbotsgesetz*). However, under extraordinary circumstances the violation of budgetary provisions may make agreements entered into by a public sector entity void.

(f) There is also considerable uncertainty as to whether a principle of connectivity (*Konnexität*) applies in respect of derivatives entered into by public sector entities.[130] The principle of connectivity would require such entities to only enter into transactions to hedge against certain risks from underlying contracts which the transaction matches.

[129] German Federal Constitutional Court (*Bundesverfassungsgericht*, "**BVerfG**"), BVerfGE 20, 56, 89 *et seq.*; Kirchhof, NVwZ 1983, 505, 506.

[130] *Endler*, in: Zerey, Finanzderivate, 4th ed. (2016), § 30 nos. 22 *et seqq.*

(g) In one case, a German court has argued that Credit Institutions may be under an obligation to inform a public sector entity of its restrictions under public law prior to the entry into a derivative and, failing to do so, that it may be liable to pay damages for wrongful investment advice.[131]

Yours sincerely,

Marc Benzler

CLIFFORD CHANCE DEUTSCHLAND LLP

[131] OLG Naumburg NJOZ 2005, 3420, 3427 *et seq.*

APPENDIX A
CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

AUGUST 2015

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

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

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

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

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

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

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

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which

an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

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

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

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

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

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

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

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

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

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference

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

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

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

APPENDIX B
PRUDENTIALLY REGULATED CLIENTS:
POTENTIAL STANDARD CM DEFAULT AMENDMENTS[1]

1.1 Additional Definitions[2]

"**Relevant CM Default**" means a failure to pay or deliver event of default or a bankruptcy event of default, in each case, if any and howsoever described in the Agreement, in respect of Clearing Member, provided that, for the purposes of a failure to pay or deliver event of default only and notwithstanding anything to the contrary in the Agreement, if the applicable grace period is shorter than three Business Days, such grace period shall instead be deemed to be three Business Days.

1.2 Other Provisions[3]

([•][4]) ***Relevant CM Default.***

(i) Notwithstanding Section 8(b)(i) of this Addendum, any provisions of the Agreement that without prejudice to Client's right to terminate Client Transactions pursuant to Section 7, (A) would entitle Client to terminate transactions early upon the occurrence of a Relevant CM Default or would automatically terminate transactions early upon the occurrence of a Relevant CM Default or (B) provide for the consequences of, and rights arising as a result of or pursuant to, an early termination of transactions upon the occurrence of any Relevant CM Default (including, without limitation, the provisions relating to the calculation of, and obligation to pay, any amount payable by either party following such early termination),] will continue to apply in respect of Client Transactions subject to the provisions of this Part [•][4].

(ii) If at any time a Relevant CM Default has occurred and is continuing and Client provides notice to Clearing Member designating an early termination date in accordance with the Agreement, all Client Transactions will terminate on such early termination date and, subject to Part [•][4] (iii) below, the provisions of Section 9 will apply in respect of such Client Transactions. For the avoidance of doubt, the early termination of any Client Transaction for the purposes of Section 9 is not a termination pursuant to Section 8.

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[1] The provisions set out herein are suggested as potential amendments to the Addendum only in circumstances where the Client is prudentially regulated such that it is required, by law or regulation applicable to it, to have certain termination rights against the Clearing Member. Such amendments may result in loss of client protections and other risks to the Client and should be assessed by the parties based on their own circumstances.

[2] To be included in Part 1 of the Addendum Annex.

[3] To be included in Part 5 of the Addendum Annex.

[4] Number of this Relevant CM Default provision as it appears in the Addendum Annex.

(iii) If Clearing Member fails to notify Client of its valuation of all Client Transactions in accordance with Section 9 within 30 calendar days of the early termination date, Client may notify [in writing] Clearing Member (the **"Calculation Notice")** that it intends to value the Residual Portfolio, in which case (A) Client shall value such Residual Portfolio in accordance with the terms of the Agreement and (B) all values determined by the Clearing Member and notified to the Client prior to the effective date of the Calculation Notice shall be included in the Client's calculation of the amount payable by either party to the other in accordance with the Agreement.

For purposes of this Part [•][4] (iii), **"Residual Portfolio"** means, in relation to any Client Transaction in any Cleared Transaction Set, such Client Transactions that relate to CM/CCP Transactions for which there remains an outstanding, unhedged economic exposure of the Clearing Member, determined by reference to Close-Out Transactions, Risk Hedging Transactions and any other actions in accordance with any other method permitted by the Agreement that (i) hedge, reduce or offset such CM/CCP Transactions or were entered into or carried out for purposes of determining the termination amount payable in respect of such Cleared Transaction Set and (ii) the value and nature of which have been notified by the Clearing Member to the Client prior to the effective date of the Calculation Notice. Such outstanding, unhedged economic exposure of the Clearing Member under such CM/CCP Transactions shall be determined as if such Cleared Transaction Set comprised such CM/CCP Transactions, Close-Out Transactions, Risk Hedging Transactions and any such other arrangements actually or notionally entered into under such permitted actions, so that any such components that offset each other on a portfolio basis shall be disregarded for purposes of valuation. If Clearing Member does not notify Client of any values prior to the effective date of the Calculation Notice, the Residual Portfolio will be all Client Transactions in the relevant Cleared Transaction Set (iv) Section 7 of this Addendum is amended by inserting the words "or Client's right to terminate transactions pursuant to Part [•][4](i) of the Addendum Annex" after the words "Section 8(a)" on the second line of Section 7(b).

(v) Section 8 of this Addendum is amended as follows:

(1) by inserting the words ", Relevant CM Default" after "CM Trigger Event" on the fourth line of Section 8(a)(ii);

(2) by inserting the words ", Relevant CM Default" after "CM Trigger Event" on the sixth line of Section 8(a)(iii);

(3) by inserting the words "Part [•][4] (i) of the Addendum Annex," before "Section 8(a)" on the second line of Section 8(d)(i); and

(2) by inserting the words "or Part [•][4](i) of the Addendum Annex after the words "Section 8(a)" on the third line of Section 8(d)(iii).

(vi) The CSA Elections table in Part 3(c) of the Addendum Annex is amended by inserting the words "or Relevant CM Default" after each occurrence of the words "CM Trigger Event" therein.