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Dear Sirs/Mesdames

Opinion for International Swaps and Derivatives Association, Inc. on the enforceability under South African law of the ISDA collateral arrangements under the ISDA Credit Support Documents

A. In this opinion we consider the validity and enforceability under the laws of the Republic of South Africa ("**South Africa**") of margin or collateral arrangements entered into under one of the following standard form documents published by the International Swaps and Derivatives Association, Inc. ("**ISDA**"):

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

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

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

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in each case, when entered into to provide credit support for transactions ("**Transactions**") entered into pursuant to a master agreement published by ISDA ("**Master Agreement**")[1].

B. Capitalised terms used and not defined in this opinion have the meaning given to those terms in the Master Agreement or the relevant Credit Support Document, as applicable.

C. In this opinion:

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

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

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

E. Unless otherwise specified in this opinion, references to "**Master Agreement**" in this opinion include each Transaction entered into under the Master Agreement.

F. The issues you have asked us to address are set out in bold-face print below, followed in each case by our analysis and conclusions. We indicate, where relevant, any assumptions that you have asked us to make. In addition, for purposes of this opinion, we make the following assumptions:

a. To the extent that any obligation arising under the Master Agreement and/or the Credit Support Document falls to be performed in any jurisdiction outside South Africa, that obligation is legally valid, binding and enforceable under the laws of that jurisdiction and the performance of that obligation will not be illegal or ineffective by virtue of the laws of that jurisdiction.

b. Each party to the Master Agreement and the Credit Support Document (each, a "**Party**" and together, the "**Parties**") (a) is able lawfully to enter into the Master Agreement and the Credit Support Document under the laws of its jurisdiction of incorporation and under its relevant constitutional documents, (b) has taken all corporate action necessary to authorise its entry into the Master Agreement and the Credit Support Document, and (c) has duly executed and delivered the Master Agreement and the Credit Support Document.

c. If the Master Agreement and/or the Credit Support Document is governed by any law other than South African law (including, without limitation, English law and/or New York law), the Master Agreement and/or the Credit Support Document, when duly entered into by the Parties, constitutes legally binding, valid and enforceable obligations of each Party under that law.

d. All consents, licences, approvals and authorisations of any person in any jurisdiction (including South Africa) which must be obtained under any applicable law (including the laws of South Africa), and all regulatory requirements which must be complied with under any applicable law (including the laws of South Africa), in connection with the Master

[1] The various forms of master agreements published by ISDA include (a) the 1987 Interest Rate Swap Agreement, (b) the 1987 Interest Rate and Currency Exchange Agreement, (c) the 1992 Master Agreement (Multicurrency - Cross Border), (d) the 1992 Master Agreement (Local Currency - Single Jurisdiction) and (e) the 2002 Master Agreement.

Agreement and the Credit Support Document and/or the performance by each Party of its obligations under the Master Agreement and the Credit Support Document have been obtained and/or complied with (including, without limitation, the prior approval of the Financial Surveillance Department of the South African Reserve Bank to the entering into of the Master Agreement and the Credit Support Document in terms of the Exchange Control Regulations, 1961 promulgated under the Currency and Exchanges Act, 1933 (see paragraph 5(A) (*Exchange control requirements*) below).

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

f. The Master Agreement and the Credit Support Document have been entered into by each Party in good faith and not with the intention to defraud creditors and there are no facts or circumstances relating to any Party or any of the directors of that Party (including, without limitation, bad faith, fraud, coercion, duress, misrepresentation and mistake) that, under any applicable law (including the laws of South Africa), would render the Master Agreement and/or the Credit Support Document (or any of the provisions thereof) illegal and/or invalid and/or non-binding and/or non-enforceable and/or void and/or voidable and/or unenforceable and/or liable to be set aside or avoided or cancelled by any person under any applicable law (including the laws of South Africa).

g. At the time of entry into the Master Agreement and the Credit Support Document, no insolvency, judicial management, curatorship, or composition or similar proceedings have commenced in respect of any Party, and no Party is insolvent at the time of entering into the Master Agreement and/or the Credit Support Document or becomes insolvent as a result of entering into the Master Agreement and/or the Credit Support Document.

h. Each Collateral Provider, at the time of transferring and/or pledging Collateral comprising securities under the Credit Support Document, has full legal title to such securities, free and clear of any lien, claim, charge or encumbrance or any other interest of the Collateral Provider or of any third person (other than a lien routinely imposed on all securities in the relevant clearance or settlement system).

i. No foreign law to which any Party is subject affects this opinion.

G. This opinion is subject to the following qualifications:

a. This opinion relates only to South African law as at the date of this opinion. To the best of our knowledge, and save for the legal developments referred to in this opinion, there are no pending developments relating to South African law which will negatively impact the findings expressed in this opinion.

b. In this opinion we consider the enforceability of the Credit Support Documents in respect of those entities listed in Appendix B hereto and to the extent set out therein.

c. As used in this opinion, the terms "**enforceable**" and "**enforced**" mean that the obligations assumed by a Party under the Master Agreement and the Credit Support Document are of a type which the South African courts generally enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms, enforcement being subject to, among other things, laws of general application affecting the rights of creditors, the laws of prescription (claims may become time-barred) and the nature of the remedies available in the South African courts. The power of a South African court to grant an equitable remedy such as an interdict or specific performance is discretionary, and accordingly a South African court might make an award of damages where an equitable remedy is sought. Enforcement is also subject to the discretion of the courts in

the acceptance of jurisdiction, the power of such courts to stay proceedings, and other principles of law and equity of general application.

d. The Transactions entered into between the Parties pursuant to the Master Agreement comprise one or more of the transactions set out in Appendix A attached hereto and constitute valid, binding and enforceable obligations of the Parties.

e. Where the Collateral Provider is a company, the terms of the Companies Act, 2008 ("**Companies Act**"), provide that a company may only give financial assistance to a related or inter-related[2] company in limited circumstances, the relevant circumstances for the current purposes being where the terms on which the assistance to be given are sanctioned by a special resolution of the members of the company and the board of directors of the company is satisfied that certain solvency and liquidity tests have been met and that the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

f. The Conventional Penalties Act, 1962 provides, *inter alia*:

1) that a creditor will not be entitled to recover, in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty; and

2) if upon the hearing of a claim for a penalty it appears to the court that the penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such an extent as it considers equitable in the circumstances; provided that in determining the extent of that prejudice the court must take into consideration not only the creditors' proprietary interest but every other rightful interest which may be affected by the act or omission in question.

g. Subject to the permission of the Minister of Economic Affairs in terms of the Protection of Businesses Act, 1978 ("**PB Act**"), any judgment obtained under the Credit Support Documents in a court of competent jurisdiction outside South Africa will be recognised and enforced in accordance with ordinary procedure applicable under South African law for the enforcement of foreign judgments, provided that:

1) the judgment was final and conclusive, was not obtained by fraud or in any manner opposed to natural justice, that the enforcement of the judgment is not contrary to public policy and that the foreign court in question had jurisdiction and competence according to applicable principles of South African law;

2) a foreign judgment will probably not be recognised in South Africa if the foreign court exercised jurisdiction over the defendant solely by virtue of an attachment to found jurisdiction or on the basis of domicile alone; and

3) the South African courts will not enforce foreign revenue or penal laws.

h. The PB Act requires that the consent of the Minister of Economic Affairs be obtained before certain foreign judgments can be enforced. The ambit of the PB Act would appear not to include loans from, or guarantees in favour of, foreign lenders, and the only two judgments

[2] The Companies Act provides that, when used in respect of three or more persons, "inter-related" means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in section 2(1), and one of them is related to the third in any such manner, and so forth in an unbroken series. "Persons" include juristic persons for the purposes of the Companies Act. Section 2(1)(c) of the Companies Act further provides that a juristic person is related to another juristic person if-
'(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
(ii) either is a subsidiary of the other; or
(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2)'.

to date which deal with the PB Act support that analysis, although only by statements which were not essential to the reasoning on which the rulings depended.

i. A South African court may determine, in its discretion, that the parties to the Credit Support Documents are able to amend it by oral agreement despite any provisions to the contrary.

j. The effectiveness of any provision of the Credit Support Documents which allows an invalid provision to be severed in order to save the remainder of the Credit Support Documents will be determined by the South African courts in their discretion.

k. Provisions analogous to those in the Credit Support Documents which render the records of one party, or a certificate issued by one party, conclusive proof of the matters stated therein, have been found to be against public policy by South African courts.

l. Where a party to the Credit Support Documents is vested with discretion, or may determine a matter in its opinion and if such intention appears from the Credit Support Documents, South African law may require that such discretion is exercised in a justifiable manner or that such opinion is based upon justifiable grounds. Furthermore, the laws of South Africa may require that the parties act reasonably and in good faith in their dealings with each other.

m. The Uniform Rules of the High Court of South Africa provide that documents executed outside South Africa must be sufficiently authenticated for the purpose of use in South Africa. In terms of Rule 63(4) of the Uniform Rules of the High Court of South Africa, "*… any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed each document.*" Nominal court fees and stamp duty may be payable on documents and process served in court proceedings commenced in South Africa.

H. Fact patterns

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

1) The Location of the Collateral Provider is <u>in</u> South Africa and the Location of the Collateral is <u>outside</u> South Africa.

2) The Location of the Collateral Provider is <u>in</u> South Africa and the Location of the Collateral is <u>in</u> South Africa.

3) The Location of the Collateral Provider is <u>outside</u> South Africa and the Location of the Collateral is <u>in</u> South Africa.

b. For the foregoing purposes:

1) the "**Location**" of the Collateral Provider is in South Africa if it is incorporated or otherwise organised in South Africa and/or if it has a branch or other place of business in South Africa; and

2) the "**Location**" of Collateral is the place where the asset of the type of which the Collateral is comprised is located under the private international law rules of South Africa,

and "**Located**" when used in this opinion in relation to a Collateral Provider or any Collateral will be construed accordingly.

c. Although we do not expressly refer to each fact pattern in our answer to each question, we have taken the fact patterns into consideration in developing our analysis. It should generally be clear from the context which of the fact patterns is being discussed in each case.

PART 1

SECURITY INTEREST APPROACH PURSUANT TO THE SECURITY DOCUMENTS

Assumptions relating to the Security Documents

For purposes of this PART 1 we make the following assumptions:

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

b. Although each Security Document is a bilateral form in that it contemplates that either Party may be required to post Collateral to the other depending on movements in Exposure under the relevant Security Document, we assume, for the sake of simplicity, that the same Party is the Security Collateral Provider at all relevant times under the applicable Security Document.

c. Unless otherwise specified in this opinion (or Appendix B), the Party that is Located in South Africa is of the type covered by this opinion (as set out in Appendix B).

d. The Master Agreement and each Security Document is enforceable under the laws of New York or England, as the case may be, and each Party has duly authorized, executed and delivered, and has the capacity to enter into the Master Agreement and the Security Document.

e. No provision of the Master Agreement or the relevant Security Document has been altered in any material respect. In this regard, the making of standard elections in Paragraph 13 of either Security Document and the specification of standard variables (consistently with the other assumptions in this opinion) or the changes made by the Close-out Amount Protocol published by ISDA on 27 February 2009 (see PART 5 below) would not in our view constitute material alterations, except where expressly indicated in this opinion below.

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

g. Any securities provided as Collateral are denominated in either the currency of South Africa ("**Rand**" or "**ZAR**") or any freely convertible currency and consist of (i) corporate debt securities whether or not the issuer is organized or located in South Africa, (ii) debt securities issued by the government of South Africa, and (iii) debt securities issued by the government of a member of the "G-10" group of countries, in one of the following forms:

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

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

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

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

The precise nature of the rights of the Secured Party in relation to its interest in intermediated debt securities and as against its Intermediary will be determined, among other things, by the law of the agreement between the Secured Party and its Intermediary relating to its account with the Intermediary, as well as the law generally applicable to the Intermediary, and possibly by other considerations arising under the general law or the rules of private international law of South Africa. The Secured Party's Intermediary may itself hold its interest in the relevant debt securities indirectly with another Intermediary or directly in one of the three forms mentioned in (1), (2) and (3) above. In practice, there is likely to be a number of tiers of Intermediaries between the Secured Party and the issuer of such securities, at least one of which will be an Intermediary that is a national or international CSD.

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

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

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

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

QUESTIONS RELATING TO THE SECURITY DOCUMENTS

Section 1: Validity of Security Interests

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

1.1 The contractual aspects of a security interest in Collateral are governed by the legal system chosen contractually by the parties. In the absence of any such choice of law provisions in the relevant agreement, whether express or implied, the courts will assign a governing law to the contract.

1.2 Subject to the qualifications and requirements outlined in this PART 1, we are of the opinion that:

1.2.1 the South African courts would recognise a security interest in each type of Collateral (excluding Collateral comprising cash ("**Cash Collateral**")) created under the Deed, including Collateral comprised of debt securities subject, in the case of debt securities which are held in the Central Depository, to paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) below;

1.2.2 subject to paragraphs 3.2 and 3.3 below, the South African courts would recognise a security interest in each type of Collateral (excluding Cash Collateral) created under the NY Annex, including Collateral comprised of debt securities subject, in the case debt securities which are held in the Central Depository, to paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) below.

1.3 In relation to Cash Collateral, South African law does not allow a security interest to be created in cash itself but does allow the creation of a security interest in the claim to such cash, as more fully set out in paragraph 3 below.

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

(A) General

2.1 The proprietary aspects of a security interest in Collateral (including the validity and enforceability of the security interest upon insolvency) are governed by the law of the place where the Collateral is situated.

2.2 Under South African law, the formalities for establishing a valid security interest in any property are the formalities of the law of the place where the property is situated (that is, the *lex situs*). For example, if the property is situated in New York, the formalities of New York law for establishing a security interest in the asset must be fulfilled. Similarly, if the property is

situated in South Africa, the formalities of South African law for establishing a security interest in the property must be fulfilled.

2.3 The principle that the *lex situs* is the proper law of a security interest in Collateral applies both to Collateral which comprises tangible property and Collateral which comprises intangible property.

2.4 The place where Collateral which comprises tangible property is situated is self-evident. In the case of Collateral which comprises intangible property (such as contractual and other personal rights), the general rule is that it is situated in the place where the corresponding obligation must be performed.

2.5 The place where Collateral which comprises a claim for the payment of money is situated is the place of the debtor's domicile. Debt securities are situated at the place of the issuer's domicile, irrespective of whether such securities are certificated, immobilised, uncertificated or held with an Intermediary. However, due to practical considerations involved in transferring debt securities, the law of the place where the principal register is situated is deemed to be the place at which the debt securities are situated.

2.6 The forms of South African security interests in Collateral that are comparable to those contemplated in the Security Documents are (i) a pledge of the Collateral and (ii) a pledge and cession *in securitatem debiti* of the Collateral (akin to the English law concept of assignment). The terms cession *in securitatem debiti* and cession in security are used interchangeably in this opinion.

2.7 Under South African law there is no distinction between the formalities for establishing valid security interests of the type referred to in paragraph 2.6 above and the formalities for "perfecting" such security interests.

2.8 A pledge is an appropriate form for establishing a security interest in Collateral which comprises tangible movable property. A pledge and cession in security is an appropriate form for establishing a security interest in Collateral which comprises intangible movable property. The two forms of security interests (pledge and pledge and cession in security) are similar in a number of respects and the South African courts have held that where parties "pledge" intangible movable property, the pledge will be construed as a pledge and cession in security.

2.9 Under South African common law there are two formalities for establishing a "perfected" security interest in Collateral:

2.9.1 there must be an agreement between the Secured Party and Security Collateral Provider to establish a security interest in the Collateral (that is, an agreement to pledge or an agreement to pledge and cede in security); and

2.9.2 there must be delivery of the Collateral to the Secured Party.

2.10 Under South African common law it is not possible for a Secured Party to obtain a security interest in Collateral before the Collateral is delivered to the Secured Party:

2.10.1 In the case of Collateral which comprises tangible movable property, the Collateral must be physically delivered (or deemed to have been physically delivered) to the Secured Party. Delivery of the Collateral serves to vest possession, but not ownership, of the Collateral with the Secured Party. It is necessary for the Secured Party to retain physical possession of the Collateral as this fulfils the requirement that third parties be aware of the security interest in the Collateral – the so-called "*publicity principle*".

2.10.2 In the case of Collateral which comprises intangible movable property, delivery of the Collateral is effected by way of cession of the Collateral to the Secured Party pursuant to an agreement of cession (physical delivery of the Collateral not, of course, being possible). At common law, the "*publicity principle*" referred to in sub-paragraph (1) above is relaxed in the context of Collateral which comprises intangible movable property as physical delivery of the Collateral to the Secured Party (and possession of the Collateral by the Secured Party) is not possible. The agreement of cession of the Collateral itself effects delivery (cession) of the Collateral to the Secured Party. Except in the case of Collateral which comprises negotiable instruments (see paragraph 2(B)(b) (*Debt securities which qualify as "negotiable instruments"*) below), it is not necessary to physically deliver the document/s (if any) evidencing the Collateral (such as a share certificate or a note/debenture certificate) to the Secured Party in order to "perfect" such delivery (or to "perfect" the security interest in the Collateral). Please note the legislative formality (described in paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) below) for a pledge and cession in security of Collateral which comprises debt securities which are held in the Central Depository.

(B) Collateral which comprises debt securities

(a) Debt securities which are held in the Central Depository

2.11 Until November 2013, the securities services industry in South Africa was regulated under the Securities Services Act, 2002 ("**SSA**"). In June 2013, the SSA was repealed and replaced in its entirety by the Financial Markets Act, 2012 ("**FMA**"). The scope of the FMA is similar to the SSA in that the FMA governs the regulation of securities services in South Africa and primarily focuses on the regulation of exchanges, central securities depositories, clearing houses and their members. The FMA does however additionally seek to align South African legislation with international standards issued by, among others, the G20, Financial Stability Board, International Organisation of Securities Commissions and the Unidroit Convention. The key difference between the FMA and the SSA is that the FMA makes provision for the electronic trading and central clearing of over-the-counter derivative contracts, as well as capital requirements for non-centrally cleared derivatives contracts. While the FMA creates a framework for the aforementioned requirements, the South African legislature has yet to publish the final regulations to the FMA[3] and no formal indication has been given by the National Treasury as to when the regulations will be published. The regulations, once published, will provide the substantive detail regarding the regulation of over-the-counter derivative contracts outlined in the FMA.

2.12 In keeping with the above, the definition of "*securities*" in the FMA includes debt securities of the type described in PART 1 assumption (*g)* under "*Assumptions relating to the Security Documents*" above. Debt securities that are listed on the securities exchange operated by the JSE Limited (the "**JSE**") must be held in a Central Depository in terms of the FMA such as Strate Limited[4] ("**Central Depository**"). In addition, unlisted debt securities may also be held in the Central Depository.

2.13 Debt securities which are held in the Central Depository may be issued in registered certificated form or in registered uncertificated (dematerialised) form, although new issuers of such debt securities are now required by the Central Depository to issue such debt securities in registered uncertificated (dematerialised) form. Debt securities issued in registered uncertificated (dematerialised) form are not represented by any certificate or written instrument.

[3] The second draft of the regulations to the FMA were circulated for comments in June 2015 and the period for submissions is now closed.
[4] Historically Strate Limited was the only central securities depository operating in South Africa, although another licensed depository (Granite Central Securities Depository (Proprietary) Limited) has recently been approved in terms of the FMA.

2.14 The Central Depository acts as the JSE-approved electronic clearing house, and carries on the role of matching, clearing and facilitating settlement of all transactions carried out on the JSE.

2.15 Certain of the major South African banks, branches of foreign banks, as well as the South African Reserve Bank (the "**Reserve Bank**"), have been accepted by the Central Depository as "*participants*" in terms of the FMA ("**Central Depository Participants**"). Central Depository Participants are responsible for the settlement of scrip and payment transfers through the Central Depository, the JSE and the Reserve Bank.

2.16 The Central Depository maintains central securities accounts only for Central Depository Participants. The Central Depository Participants are in turn required to maintain securities accounts for their clients. The clients of Central Depository Participants may include the holders of debt securities (or the holders of Beneficial Interests in the debt securities – see paragraph 2.17 below) or their custodians. Euroclear Bank S.A./N.V. as operator of the Euroclear System and Clearstream Banking, *societe anonyme*, may hold debt securities (or Beneficial Interests – see paragraph 2.17 below) through their Central Depository Participant.

2.17 In the case of a "pool" of fungible debt securities (that is, debt securities having the same issuer and *identical* terms and conditions), the relevant holders do not hold separately identifiable debt securities in that "pool" but a beneficial interest ("**Beneficial Interest**") as co-owner of an undivided share of all of the debt securities in that "pool", as contemplated in section 37(1) of the FMA.

2.18 A written statement issued by or on behalf of a Central Depository Participant in respect of an owner of debt securities or of a client, or by or on behalf of the Central Depository in respect of a Central Depository Participant, as the case may be, and specifying the Beneficial Interest of that owner, client or Central Depository Participant, is *prima facie* evidence of the title or interest of that person in such debt securities.

2.19 Beneficial Interests which are held by Central Depository Participants are held directly through the Central Depository, and the Central Depository holds such Beneficial Interests, on behalf of such Central Depository Participants, through the central securities accounts maintained by the Central Depository for such Central Depository Participants. Beneficial Interests which are held by clients of Central Depository Participants are held indirectly through such Central Depository Participants, and such Central Depository Participants hold such Beneficial Interests, on behalf of such clients, through the securities accounts maintained by such Central Depository Participants for such clients.

2.20 In terms of section 38 of the FMA, transfer of a Beneficial Interest in debt securities held by a Central Depository Participant "*must be effected*" in the manner provided for in Section 53 of the Companies Act, i.e. by electronic book entry in the central securities account of the transferor and the transferee maintained by the Central Depository. Transfer of a Beneficial Interest held by clients of a Central Depository Participant "*must be effected*" by electronic book entry in the securities account of the transferor and the transferee maintained by the Central Depository Participant. Accordingly, title to Beneficial Interests passes by electronic book entry in the relevant central securities accounts maintained by the Central Depository or the relevant securities accounts maintained by the relevant Central Depository Participant.

2.21 In terms of section 39 of the FMA, a pledge and cession in security of a Beneficial Interest in debt securities held by the Central Depository or a Central Depository Participant, as the case may be, "*must be effected*" by entry in the central securities account or the securities account, as the case may be, of the Security Collateral Provider (as pledgor) in favour of the Secured Party (as pledgee) specifying the name of the Parties, the Beneficial Interest pledged and the date**.**

2.22 The electronic book entry in the accounts referred to in paragraph 2.20 above (Section 39 Electronic Flagging) is a legislative formality, which is required to effect a pledge and cession in security of a Beneficial Interest in debt securities which are held in the Central Depository. Once Section 39 Electronic Flagging in respect of a Beneficial Interest in debt securities has occurred, the securities account of the pledgor is "frozen" in that no dealings in the Beneficial Interest may occur without the prior consent of the pledgee. The consequent prohibition on dealing in the relevant debt securities is of particular concern to participants in the South African securities lending market who would prefer to retain liquidity and an unrestricted ability to trade in securities which are pledged to secure obligations under a securities lending transaction. In these circumstances, we understand that a pledge and cession in security of a Beneficial Interest in such debt securities is effected by the relevant Central Depository Participant, without Section 39 Electronic Flagging, on the basis only of the common law requirements for pledging debt securities which are held in the Central Depository (see paragraphs 2.9 and 2.10 above). We further understand that, in these circumstances, participants in the South African securities lending and derivatives markets accept the risk of effecting a pledge of a Beneficial Interest in debt securities held by Central Depository Participants without Section 39 Electronic Flagging on the basis that, if a South African court were to regard such a pledge as invalid, the entire South African securities lending and derivatives markets would collapse.

2.23 In addition, the South African Securities Lending Association ("**SASLA**") obtained advice of an alternative method of creating a security interest in a Beneficial Interest in debt securities which are held in the Central Depository, without Section 39 Electronic Flagging, based on a supposed split between "beneficial" and "registered" ownership of the relevant debt securities. In our view, the split ownership method is not competent under South African law: debt securities (and an "interest" in debt securities) are either owned by an entity (and thus are an asset of that entity which will fall within the insolvent estate of that entity) or they are not. Ownership confers a real right in the relevant asset, this real right is indivisible and cannot be "split" into different components each of which are transferred to different entities. The only way of transferring ownership of a movable (tangible or intangible) asset is by way of (i) an agreement between the owner of that asset (the transferor) and the transferee and (ii) delivery of the asset to the transferee. We are of the view that the split ownership method is based on an erroneous "distinction" between so-called "registered" and "true" ownership of equity securities.

2.24 We are further of the view that the new provisions of the FMA confirm our view and make it clear that no distinction can be drawn between registered and beneficial ownership of debt securities and that the correct method of creating a security interest in debt securities which are held in the Central Depository is by means of Section 39 Electronic Flagging. Confirmation that the South African Securities Lending Association ("**SASLA**") and SASLA advisors have changed their view would have to come from SASLA itself.

(b) Debt securities which qualify as "negotiable instruments"

2.25 In the case of debt securities which qualify as "*negotiable instruments*" (either at common law or in terms of the Bills of Exchange Act, 1964 (the "**Bills of Exchange Act**")), the debt securities (and related rights) are embodied in (and not only represented by) a physical certificate or other instrument. In principle, debt securities which qualify as "*negotiable instruments*" are indistinguishable from (and cannot be separated or "abstracted" from) the relevant physical certificate or other instrument. Bearer debt securities are payable to the bearer (possessor) of the relevant physical certificate ("**Bearer Debt Securities**"). Order debt securities are payable to the order of the person reflected as the payee on the relevant physical certificate or other instrument (or the person to whom such physical certificate or other instrument has been negotiated) ("**Order Debt Securities**").

2.26 Bearer Debt Securities and Order Debt Securities may be transferred only by negotiation. In the case of Bearer Debt Securities, negotiation occurs by physical delivery of the relevant physical certificate or other instrument to the transferee. In the case of Order Debt Securities, negotiation occurs by "*indorsement*" (as contemplated in the Bills of Exchange Act) of the relevant physical certificate or other instrument and physical delivery of the relevant physical certificate or other instrument to the transferee.

(c) Debt securities issued in registered certificated form

2.27 In order for any transfer of debt securities which are issued in registered certificated form to be recorded in the issuer's register of debt securities (the "**Register**"), and for such transfer to be recognised by the issuer, (a) the transfer of such debt securities must be embodied in the usual written form of transfer (the "**Transfer Form**"), (b) the Transfer Form must be signed by the registered holder of such debt securities and the transferee (or their duly authorised representatives) and (c) the Transfer Form, together with the certificate representing such debt securities (the "**Certificate**") must be delivered to the issuer (or the issuer's transfer agent).

2.28 If the Collateral comprises debt securities that are issued in registered certificated form, it is desirable for the registered owner of such debt securities to deliver to the Secured Party the relevant Certificate and a Transfer Form duly signed by such registered owner. Note that the registered owner of debt securities which are held in the Central Depository (whether certificated or uncertificated) is usually a wholly owned subsidiary of the Central Depository.

2.29 The procedure described in paragraph 2.20 above is not a requirement to pledge (or transfer title to) the relevant debt securities (see paragraph 2(A) (*General*) - paragraphs 2.9 and 2.10 above) but will enable the Secured Party, upon becoming entitled to enforce the Collateral, to procure registration of transfer of the relevant debt securities into its name and thereby enhance the Secured Party's position. In other words, it is possible to transfer ownership of debt securities which are issued in registered certificated form without following the procedure described in paragraph 2.27 above – namely transferring "beneficial" ownership of the relevant debt security. However, in order to reflect the transfer of "beneficial" ownership in the relevant debt security in the Register, and for the transferee to be accorded the rights of the registered holder of the relevant debt security *vis-a-vis* the issuer, the procedure described in paragraph 2.21 above must be followed.

2.30 If the relevant debt securities are registered in the name of a custodian (or a custodian's nominee), the Security Collateral Provider may, in terms of general principles of South African law and by agreement between the Security Collateral Provider and the custodian (or custodian's nominee), procure that the custodian (or custodian's nominee) will hold the relevant debt securities for the benefit of the Secured Party instead of for the benefit of the Security Collateral Provider.

(d) *Debt securities comprising South African government treasury bills*

2.31 In terms of section 66(2)(a) of the Public Finance Management Act, 1999 ("**PFMA**"), the Minister of Finance may borrow money for the purposes set out in section 71 of the PFMA. Pursuant to the PFMA, treasury bills are issued by the National Treasury on behalf of the Minister of Finance as a representative of the Government of the Republic of South Africa ("**Treasury Bills**").

2.32 In terms of section 10(c)(i) of the South African Reserve Bank Act, 1989 the Reserve Bank is empowered, amongst other things, to "*perform such functions, implement such rules and procedures and, in general, take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems*". The Reserve Bank acts as an issuing agent of the National Treasury and is authorised to receive and deal with applications for the issuing of Treasury Bills. The Reserve Bank is also the registrar and

settlement agent of the National Treasury and is authorised to receive and make payments of moneys due in respect of Treasury Bills.

2.33 Treasury Bills are no longer issued in certificated form. With the immobilisation of Treasury Bills, the Reserve Bank has developed and implemented the Financial Instrument Register ("**FIR**") which is a register used by the Reserve Bank to account for ownership of, among other instruments,[5] Treasury Bills. Once settlement takes place, ownership of Treasury Bills is registered in the FIR.

2.34 FIR account holders are South African banks, branches/subsidiaries of foreign banks and mutual banks, and are allocated two accounts in the FIR: one for their own holdings and one for their clients' holdings. Non-FIR account holders (who tender on their own behalf or on behalf of their clients) are required to nominate an FIR account holder as their custodian.

2.35 FIR account holders must use the Money Market Internet System ("**MMIS**") to transfer ownership of Treasury Bills between themselves. Non-FIR account holders must transfer ownership of Treasury Bills via the respective FIR account holders nominated as their custodians.

2.36 The relevant FIR account will be allocated the nominal value of the Treasury Bills allotted. Transfer of ownership in Treasury Bills takes place by book entry in the FIR. FIR account holders must submit a Treasury Bill Transfer Instruction form to the Money Market Settlements Division, Johannesburg ("**MMJ**") when Treasury Bills are to be transferred between FIR accounts.

2.37 The FIR only facilitates the transfer of Treasury Bills between FIR accounts, but is not responsible for the transfer of funds associated with the relevant transaction.[6] Parties who take part in, among other things, pledges and secured lending or deposits can, on a deal-by-deal basis or for the net position at the end of the day, forward transfer instructions to the FIR.[7]

(e) Debt securities which are issued by companies

The principles set out in paragraph 2(B) (*Collateral which comprises debt securities*) - paragraphs (a) (*Debt securities which are held in the Central Depository*), (b) (*Debt securities which qualify as "negotiable instruments"*) and (c) (*Debt securities issued in registered certificated form*) above apply equally to Collateral comprising debt securities which are issued by companies and *mutatis mutandis* to Collateral comprising debt securities which are issued by the Government of South Africa.

(C) Collateral which comprises cash

The following considerations apply to Collateral which comprises cash ("**Cash Collateral**"):

2.38 It is a general principle of South African law that (subject to paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above) the transfer of fungible property (that is, movable tangible or intangible property such as cash that has not been individually identified but which is described only with reference to its weight, number or dimensions) to a person who mixes such fungible property with similar fungible property of his own results in the ownership of such fungible property transferring to that person. Accordingly, a security interest cannot be established in cash itself (except in circumstances where physical notes or coins are pledged and held on a non-fungible basis), but can be established in respect of the rights to claim such cash from a third party (for example a banking institution). If money is, for

[5] Reserve Bank debentures and Land Bank bills.

[6] Treasury Bill Information Memorandum of the Republic of South Africa (issued by National Treasury, dated October 2008).

[7] South African Reserve Bank's Procedure Manual on the Immobilisation of Treasury Bills (dated 18 April 2000).

example, received on deposit, the depositor may have a claim for repayment of an equivalent amount, but will have no right in or claim to the money itself.

2.39 A claim for the payment of any amount (such as a deposit) comprises intangible movable property, and a security interest in Collateral which comprises any such claim may be established by an agreement to establish a security interest in that claim between the Security Collateral Provider (generally, the holder of such claim) and the Secured Party and delivery (by way of a cession) of such claim to the Secured Party (such agreement and cession being effected by way of an agreement of pledge and cession in security – see paragraph 2(A) (*General*) - paragraphs 2.9 and 2.10 above). Subject to any contrary terms and conditions in the relevant contract which gives rise to a claim for payment of any amount, such claim may be pledged and ceded in security to a Secured Party without the consent of the relevant debtor. It is, nonetheless, desirable for the relevant debtor to be notified of the security interest of a Secured Party in the relevant claim. Where the debtor is so notified, the debtor cannot legally discharge the debt in respect of such claim by payment to the Security Collateral Provider, and the Secured Party will be in a stronger position if the debtor acknowledges the security interest of the Secured Party as cessionary of the relevant claim. A debtor must, however, agree to (i) a pledge and cession in security of part only of a claim and (ii) a pledge and cession in security of a claim which would result in the splitting of claims against the debtor. In the absence of such agreement by the debtor, such a pledge and cession in security would not be binding on the debtor.

2.40 A commercial practice has developed in South Africa in terms of which a Security Collateral Provider wishing to provide a Secured Party with Cash Collateral effects an outright transfer of such Cash Collateral to the Secured Party. See our discussion under PART 2 – paragraph 22(C) (*Cash*) below regarding the enforceability of an outright transfer of Cash Collateral as a form of security.

3 *Would the courts of your jurisdiction recognise a security interest in each type of Eligible Collateral created under each Security Document? In answering this question, please bear in mind the different forms in which securities Collateral may be held, as described in assumption (g) above. Please indicate, in relation to cash Collateral, if your answer depends on the location of the account in which the relevant deposit obligations are recorded and/or upon the currency of those obligations.*

3.1 Subject to the qualifications and requirements outlined in this PART 1, we are of the opinion that:

3.1.1 the South African courts would recognise a security interest in each type of Collateral (excluding Cash Collateral) created under the Deed, including Collateral comprised of debt securities subject, in the case of debt securities which are held in the Central Depository, to paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above;

3.1.2 subject to the exceptions referred to in paragraphs 3.2 and 3.3 below, the South African courts would recognise a security interest in each type of Collateral (excluding Cash Collateral) created under the NY Annex, including Collateral comprised of debt securities subject, in the case of debt securities which are held in the Central Depository, to paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above.

3.2 In relation to Cash Collateral, South African law does not allow a security interest to be created in cash itself but does allow the creation of a security interest in the claim to such cash (see paragraph 2(C) (*Collateral which comprises cash*) above). A security interest can be established, for example, in a claim to Cash Collateral (which comprises the rights to the separate bank account in which the Cash Collateral is deposited), by way of an agreement of pledge and cession in security of such claim between the Security Collateral Provider and the Secured Party and delivery (by way of a cession) of such claim to the Secured Party. The location or currency of the relevant bank account would not impact upon a Security Collateral

Provider's ability to establish a security interest in the claim to Cash Collateral, which security interest would be recognised by the South African courts.

3.3 The NY Annex does not provide for the establishment of a security interest in a claim to Cash Collateral by way of an agreement to pledge and cede in security such claim (such claim being the rights to the separate bank account in which the Cash Collateral is deposited), as contemplated in paragraph 3.2 above. Instead, the NY Annex provides that the Secured Party may set-off its obligation to repay or return Cash Collateral against its claims against the Security Collateral Provider. It is not clear whether, in the absence of a right of set-off by the Secured Party and in the absence of an agreement to pledge and cede in security the claim to Cash Collateral as discussed above, the NY Annex will afford the Secured Party any security interest in claims by the Security Collateral Provider for repayment or return of the Cash Collateral. Insofar as the NY Annex contemplates the creation of a security interest in Cash Collateral simply by the delivery of the Cash Collateral to an account held by the Secured Party, no security interest will be created in the Cash Collateral which will render the Secured Party a secured creditor for purposes of the Insolvency Act, 1936 (the "**Insolvency Act**"). See PART 2 - paragraph 22(C) (*Cash*) below as to the status of an outright transfer of Cash Collateral.

3.4 In instances where Cash Collateral is transferred to an account located (or deemed to be located) in South Africa in the name of the Secured Party, the title to such Cash Collateral will transfer to the Secured Party, and no security interest can be created in such Cash Collateral. Under South African law the transfer of Cash Collateral into an account in the name of the Secured Party is similar to the transfer of Cash Collateral under the Transfer Annex, and the issues under PART 2 - paragraph 22(C) (*Cash*) below of this opinion will similarly apply. We are of the view that the NY Annex can be amended to provide for a valid security interest in the claims to Cash Collateral (see paragraph 3.2 above). However, the required amendments would be substantial and may result in changing the nature of the NY Annex. Should the NY Annex be amended to provide for a valid security interest in the claims to Cash Collateral in the manner described in paragraph 3.3 above, a Secured Party should always bear in mind that the security interest in such claims will be subject to the continued existence of such claims and will also be subject to any previous security interests established in respect of such claims. Because claims to Cash Collateral comprise the rights to the relevant bank account in which the Cash Collateral is deposited, if the Cash Collateral is withdrawn from the relevant bank account, the security interest in the claims to the Cash Collateral will be extinguished. Further, should such claims be subject to any prior pledge and cession in security, such prior pledge and cession will take preference over the later pledge and cession (see paragraph 16 below for a discussion regarding the manner in which competing priorities between creditors are determined in South Africa).

3.5 As discussed in paragraph 2(C) (*Collateral which comprises cash*) above, a commercial practice has developed in South Africa in terms of which a Security Collateral Provider wishing to provide a Secured Party with Cash Collateral effects an outright transfer of such Cash Collateral to the Secured Party as a form of security. See our discussion under PART 2 - paragraph 22(C) (*Cash*) below regarding the enforceability of an outright transfer of Cash Collateral as a form of security.

3.6 If Cash Collateral is deposited with a South African bank in South Africa (a registered branch of a foreign bank in South Africa is included for these purposes), the Cash Collateral will be situated in South Africa and the formalities of South African law for establishing a security interest in claims to the Cash Collateral will apply (see paragraph 2(A) (*General*) – paragraphs 2.9 and 2.10 above).

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

4.1 ***Would the security interest be valid in relation to future obligations of the Security Collateral Provider?***

4.1.1 Under South African law the existence of security interests of the type referred to in this opinion is contingent upon the existence of the principal obligations in respect of which the security interests are established. In other words, the security interests are accessory in nature and cannot subsist without the principal obligations they secure. As soon as the principal obligations are discharged in full, the security interests will also terminate. There is, however, nothing to preclude the Security Collateral Provider from agreeing to establish a security interest in Collateral to secure existing primary obligations arising under concluded Transactions as well as to secure future new primary obligations arising under future Transactions to be concluded by the Parties. There is also nothing to preclude the Security Collateral Provider from agreeing to establish a security interest in Collateral to secure the relevant principal obligations as and when they arise under the relevant Transactions.

4.1.2 Accordingly, it would not be necessary for either Party to perform any action at the time the relevant future obligations arise in order to ensure the effectiveness of the security interest in the Collateral as security for such obligations, and the security interest in the Collateral would take effect in relation to those future obligations without further action by either Party.

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

4.2.1 Under South African law it is not possible for the Secured Party to obtain a security interest in Collateral before the Collateral is delivered to the Secured Party (which, in the case of Collateral comprising intangible movable property, occurs by way of cession – see paragraph 2(A) (*General*) – paragraphs 2.9 and 2.10 above). In respect of security interests in debt securities which are held in the Central Depository, see paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above. Although, as indicated in paragraph 4.1 above, the Security Collateral Provider may validly agree to establish a security interest in future Collateral, the security interest in such Collateral will only be established when such Collateral is delivered to the Secured Party (see paragraph 2(A) (*General*) – paragraph 2.10 above).

4.2.2 Accordingly, it would not be necessary for either Party to perform any action (other than the delivery), at the time of future delivery of the Collateral, in order to ensure the effectiveness of the security interest in such Collateral and the security interest in such Collateral would take effect without further action (other than the delivery) by either Party.

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

4.3.1 With the exception of security interests established pursuant to section 39 of the FMA (see paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above), security interests of the type referred to in this opinion may not be established in fungible property (that is, movable tangible or intangible assets (such as cash) that have not been individually identified but which are described only with reference to their weight, number

or dimensions – see paragraph 2(C) (*Collateral which comprises cash*) – paragraph 2.37 above). Security interests of the type referred to in this opinion may only be established in non-fungible property, that is, property which is separately identified (or identifiable).

4.3.2 It is, however, possible to require delivery of fungible property and to provide for the establishment of a security interest in the fungible property so delivered. In order to establish a security interest in fungible property, such fungible property must be kept separate from other similar fungible property (for example physical notes and coins held in a safety deposit box). Should a security interest be established in fungible property, such security interest will endure for so long as such fungible property remains separately identified and segregated from other similar fungible property (subject to the general requirements for the maintenance of any security interest (see paragraph 7.2 below).

4.3.3 Where fungible property is delivered to a custodian (the "**Custodian**") on the understanding that the Custodian will hold such fungible property in safe custody for the owner then, whether or not such fungible property is subject to a security interest, if such fungible property is held with other similar fungible property (that is, all of the fungible property is "pooled"), the owners of each "portion" of fungible property become co-owners of the entire "pool" of fungible property. In the case of a "pool" of fungible securities (that is, securities having the same issuer and *identical* terms and conditions) that are held in the Central Depository, the relevant holders do not hold separately identifiable securities in that "pool" but a Beneficial Interest as co-owner of an undivided share of all of the securities in that "pool", as contemplated in section 37(1) of the FMA (see paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above).

4.3.4 Where the owner of fungible property deposits such fungible property with a "*financial institution*" (as defined in the Financial Services Board Act, 1990) such as the Central Depository (see paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above), a registered bank, insurer or pension fund, and such fungible property qualifies as "*trust property*" in terms of the Financial Institutions (Protection of Funds) Act, 2001 ("**Protection of Funds Act**"), such fungible property will not, in terms of the Protection of Funds Act, 2001, fall within the insolvent estate of the relevant financial institution but will remain the property of the owner of such fungible property.

4.3.5 Under the Security Documents, the Secured Party will become the owner of Collateral comprising Securities in fungible form delivered to it. Paragraph 6(c) of the NY Annex and paragraph 2(c) of the Deed contemplate that the Security Collateral Provider will, upon release of the security interest in Collateral comprising Securities in fungible form, accept securities of the same type, nominal value, description and amounts as such Securities. Should a South African court be called upon to describe the nature of an outright transfer of securities in fungible form as a method of creating security, it may well find that it constitutes an additional form of security developed through commercial practice (see PART 2 - paragraph 22(C) (*Cash*) – paragraph 22.29 and 22.30 below.

4.3.6 Save for the considerations set out in this paragraph 4.3 above there are no legal impediments in South African law which would preclude the creation of a security interest in Collateral which comprises a fluctuating pool of assets.

4.4 ***Is it necessary under the laws of South Africa for the amount secured by each Security Document to be a fixed amount or subject to a fixed maximum amount?***

It is not necessary under the laws of South Africa for the amount secured by any Security Document to be a fixed amount or to be subject to a fixed maximum amount.

4.5 ***Is it permissible under the laws of South Africa for the Secured Party to hold Collateral in excess of its actual exposure to the Security Collateral Provider under the related Master Agreement?***

There is nothing in South African law which precludes a party from holding security in excess of its actual exposure to the other party, provided that there is always at least some actual or potential exposure (see paragraph 4.1 above). Accordingly, it is permissible under the laws of South Africa for the Secured Party to hold Collateral in excess of its actual exposure to the Security Collateral Provider under the related Master Agreement. Once the Collateral is realised, any excess Collateral (that is, in excess of the indebtedness secured) must be returned to the Security Collateral Provider.

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

Save, in the case of Collateral comprising Debt securities which are held in the Central Depository, for the Section 39 Electronic Flagging requirements (see paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) – paragraphs 2.20 and 2.21 above), there is no filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial or regulatory or other order, consent or approval required in South Africa to establish or "perfect" a security interest in Collateral.

(A) Exchange control requirements

5.1 The exchange control requirements set out in paragraphs 5.3 to 5.10 inclusive below are not necessary to establish or "perfect" a security interest in Collateral, but a failure to observe these exchange control requirements may affect the validity of the Master Agreement and/or the relevant Security Document.

5.2 In terms of the Exchange Control Regulations, 1961 promulgated under the Currency and Exchanges Act, 1933 (the "**Exchange Control Regulations**"), no person may transfer any assets (including cash and securities) out of South Africa or make any payment to a non-resident or give any security in favour of a non-resident without the prior approval of the Financial Surveillance Department of the South African Reserve Bank (the "**Exchange Control Authorities**"). In cases where a South African resident holds assets outside South Africa, the South African resident may only deal in those assets on the terms of the relevant exchange control approval under which such assets were transferred out of South Africa in the first instance. Where there is no such exchange control approval, the South African resident may be required by the Exchange Control Authorities to repatriate its foreign assets to South Africa.

5.3 For the purposes of the Exchange Control Regulations, a South African resident is any person (including a legal entity) who or which has taken up permanent residence, is domiciled or is registered in South Africa. A non-resident is any person (including a legal entity) who or which is not a South African resident. In terms of Regulation 17 (*Businesses controlled by persons outside the Republic*) of the Exchange Control Regulations, "*[w]here the control of any business is established outside the Republic, any transaction with a branch or subsidiary of such business in the Republic shall be treated as if the said branch or subsidiary were a separate person. The manager or controller of such branch or subsidiary in the Republic shall assume the same obligations under these regulations as he would have been required to assume if the said branch or subsidiary were independent of control from outside the Republic*". Accordingly, if a Party maintains a branch in South Africa, then such branch will be deemed to be a separate legal entity, will be considered to be South African resident for the

purposes of the Exchange Control Regulations and will be required to comply with the Exchange Control Regulations.

5.4 Applications for approval under the Exchange Control Regulations are effected through "*authorised dealers*" which assist the Exchange Control Authorities with the monitoring and enforcement of the Exchange Control Regulations ("**Authorised Dealers**"). Authorised Dealers include the major South African banks, and the local branches of foreign banks, which are approved by the Reserve Bank as "authorised dealers" in foreign currency.

5.5 An approval under the Exchange Control Regulations may take the form of (i) a "**specific**" approval granted pursuant to a specific individually motivated application to the Exchange Control Authorities for exchange control approval or (ii) a "general pre-approval" which may take the form of an Exchange Control Circular, Directive or Ruling and which, subject to the terms of the approval, applies generically to certain classes of transactions or all transactions of a particular kind. Note that Exchange Control Circulars and Directives are issued only to Authorised Dealers and are not generally made public.

5.6 The approval contemplated in a "**general pre-approval**" can be granted by Authorised Dealers, subject to compliance by the applicant with the applicable conditions specified in the relevant Exchange Control Circular, Directive or Ruling**.**

5.7 There is a "*general pre-approval*" (which takes the form of an Exchange Control Directive) which applies to derivatives transactions entered into by Authorised Dealers (and certain of their clients) with non-resident counterparties for hedging purposes (the Derivatives Approval). There is a "*general pre-approval*" which applies to the buying and selling of South African listed or quoted securities, including gilts, at market value, and the registration of such securities in the name of non-residents. There is also a "general pre-approval" which applies to certain payments and transactions in respect of which Rand may be exchanged for foreign currency.

5.8 No "*general pre-approval*" applies to the granting of security interests in collateral by South African residents in favour of non-residents.

5.9 Accordingly, subject to the Derivatives Approval (if and to the extent applicable), where a Party to the Master Agreement is a South African resident ("**SA Party**") and the other Party is a non-resident, the entering into of the Master Agreement by the SA Party (and the performance of its obligations thereunder) requires the prior "**specific**" approval of the Exchange Control Authorities pursuant to a specific individually motivated application for exchange control approval**.** If an SA Party is (or may become) a Security Collateral Provider under the relevant Security Document then, if the other Party is a non-resident, the entering into of the relevant Security Document by the SA Party (and the performance of its obligations thereunder) also requires the prior "**specific**" approval of the Exchange Control Authorities pursuant to a specific individually motivated application for exchange control approval.

5.10 It is advisable for any non-resident Party under a Master Agreement to be entered into with an SA Party and/or any non-resident Secured Party under a Security Document to be entered into with an SA Party, to ensure that, before entering into the Master Agreement and/or the relevant Security Document, the SA Party has obtained the necessary exchange control approval/s to enter into and perform its obligations under the Master Agreement and/or the relevant Security Document.

5.11 A judgment rendered by a South African court against the SA Party with respect to its payment obligations under the Master Agreement and/or the relevant Security Document will, if requested, be expressed in the currency in which the relevant amount is payable. However, the judgment amount awarded to the non-resident Party must be paid into a blocked Rand account in terms of the Exchange Control Regulations, unless or until the Exchange Control

Authorities approve the payment of the judgment amount to the non-resident Party in terms of the Exchange Control Regulations.

5.12 The Exchange Control Regulations prohibit the set-off of foreign claims against foreign accruals, without the approval of the Exchange Control Authorities under the Exchange Control Regulations. It would appear to follow that the set-off of local liabilities and accruals against foreign liabilities and accruals will also require the approval of the Exchange Control Authorities under the Exchange Control Regulations. Accordingly, provisions of this nature in the Master Agreement and/or the relevant Security Document may be unenforceable without the prior approval of the Exchange Control Authorities under the Exchange Control Regulations.

5.13 South African law has historically, not been clear as to the status of a transaction concluded by a South African resident in contravention of the Exchange Control Regulations. However, a 2011 case[8] suggests that where the necessary exchange control approval was not obtained prior to the transaction, the transaction is not *ab initio* null and void, as it is possible to obtain approval *ex post facto*. It is only once the necessary approvals are in place that any funds or assets forming the subject matter of the transaction from South Africa, may be transferred from South Africa.

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

6.1 Subject to the applicable provisions of paragraphs 5.1 to 5.5 inclusive above, there are no other requirements to ensure the validity or perfection of a security interest in each type of Collateral created by the Secured Party under each Security Document and there are no other documentary formalities that must be observed in order for a security interest in each type of Collateral created by the Secured Party under each Security Document to be recognized as valid and perfected in South Africa.

6.2 Where the Collateral is located in South Africa, the preference would be for South African law to be selected as the governing law of the relevant Security Document, although this is not a requirement.

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

7.1 Assuming that the Secured Party has obtained a valid and perfected security interest in the Collateral under the laws of South Africa (see paragraph 2(A) (*General*) - paragraphs 2.9 and 2.10 above) by complying with the applicable requirements set out in paragraphs 1 to 6 inclusive above, neither the Secured Party nor the Security Collateral Provider needs to take any action thereafter to ensure that the security interest in the Collateral continues and/or remains perfected (including in relation to additional Collateral pledged or pledged and ceded

[8] Oilwell (Pty) Ltd v Protec International Ltd and Others (2011 (4) SA 394 (SCA)) [2011] ZASCA 29; 295/1.

in security from time to time whenever the Credit Support Amount exceeds the Value of the Collateral held by the Secured Party).

7.2 The security interest in each type of Collateral will continue to remain in force for so long as the principal obligations under the Master Agreement which are secured by such security interest continue to exist and:

7.2.1 in the case of Collateral which comprises tangible movable property, subject to paragraph 7.3 below, the Secured Party remains in possession of the Collateral that was pledged to it;

7.2.2 in the case of Collateral comprising fungible property, subject to paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above, such fungible property remains separately identified and segregated from other similar fungible property (see paragraph 4.3 above).

7.3 Although it is not competent under South African law for the Security Collateral Provider to create a security interest in Collateral *in favour of a third party as agent* of the Secured Party (see paragraph 20.1 below), it is competent for the Secured Party to appoint a third party (as agent or custodian) to *hold (possess)* the Collateral on behalf of the Secured Party.

7.4 Note that, although the exchange control requirements described in paragraph 5(A) (*Exchange control requirements*) above are not necessary to establish or "perfect" a security interest in the Collateral, a failure to observe these exchange control requirements may affect the validity of the Master Agreement and/or the relevant Security Document.

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

Assuming that (a) pursuant to the laws of South Africa, the laws of another jurisdiction govern the creation and/or perfection of a security interest in the Collateral pledged (or pledged and ceded in security) pursuant to each Security Document and (b) the Secured Party has obtained a valid and perfected security interest in the Collateral under the laws of such other jurisdiction then, subject (where applicable) to the exchange control considerations set out in paragraph (*Exchange control requirements*) above, the Secured Party will have a valid security interest in the Collateral so far as the laws of South Africa are concerned and, subject (where applicable) to the exchange control considerations set out in paragraph 5(A) (*Exchange control requirements*) above, no action (filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) is required under the laws of South Africa to establish, perfect, continue or enforce this security interest. There are no other requirements of the type referred to in paragraph 6 above.

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

9.1 Under South African common law, the Secured Party is obliged to take care of the Collateral in its custody. The conduct of the Secured Party in this regard will be measured against the

standard of the "*reasonable person*" so that the Secured Party would be liable for any loss arising from the destruction or deterioration of the Collateral which is caused by the intentional misconduct or negligent conduct of the Secured Party. Under South African law, the "*reasonable person*" or *diligens paterfamilias* is a fictitious person of ordinary intelligence, knowledge and prudence. Where a person is engaged in an activity demanding special knowledge and skill such person is required to measure up to the standard of the reasonable person possessing such special knowledge and skill. The Secured Party will only escape liability if it can rebut the presumption (arising by operation of law) that such loss was due to its fault.

9.2 Where the Secured Party is a South African trustee of a South African trust which holds the Collateral for the benefit of beneficiaries, the Secured Party will be subject to the provisions of the Trust Property Control Act, 1988 ("**TPC Act**"). Where the Secured Party is a foreign trustee of a South African trust or a foreign trust, as the case may be, which holds the Collateral for the benefit of beneficiaries, the Secured Party will be subject to the provisions of the TPC Act, to the extent that the Secured Party administers or disposes of Collateral (that is, "*trust property*") in South Africa.

9.3 In each case described in paragraph 9.2 above, the Secured Party will be subject to, among others, section 9 of the TPC Act, which provides for the care, diligence and skill required of a trustee. In terms of section 9:

"*1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*

(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)."

10 ***Please note that pursuant to the terms of the Deed, the Secured Party is not permitted to use any Collateral securities it holds. This is because it is thought, as a matter of English law that any such use is or may be incompatible with the limited nature of the interest that the Secured Party has in the Collateral. On the other hand, unless otherwise agreed to by the parties, Paragraph 6(c) of the NY Annex grants the Secured Party broad rights with respect to the use of Collateral, provided that it returns equivalent Collateral when the Pledgor (Security Collateral Provider) is entitled to the return of Collateral pursuant to the terms of the NY Annex. Such use might include pledging or rehypothecating the securities, disposing of the securities under a securities repurchase (repo) agreement or simply selling the securities. Do the laws of your jurisdiction recognize the right of the Secured Party so to use such Collateral pursuant to an agreement with the Pledgor (Security Collateral Provider)? In particular, how does such use of the Collateral affect, if at all, the validity, continuity, perfection or priority of a security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under the laws of your jurisdiction?***

10.1 Under South African law, the Security Collateral Provider (pledgor) and the Secured Party (pledgee) may validly agree that the Secured Party may use the Collateral pledged (or pledged and ceded in security) to it. Such an agreement (*pactum antichreseos*) properly constructed, (i) would not adversely affect the validity, continuity, perfection or priority of the security interest in the Collateral otherwise validly created and perfected prior to such use and (ii) may also entitle the Secured Party to retain any fruits derived from the Collateral.

10.2 Subject to the terms of the relevant agreement governing use of the Collateral, pledging or re-hypothecating Collateral comprising securities, disposing of such securities under a securities repurchase (repo) agreement and selling such securities is permissible.

10.3 Use of the Collateral as described in paragraphs 10.1 and 10.2 above will not affect the validity, continuity, perfection or priority of a security interest in the Collateral otherwise validly created and perfected prior to such use; provided that, where the Collateral comprises tangible movable property and the use of such Collateral results in a loss of possession, such loss of possession will, subject to paragraph 7.3 above, result in the termination of the pledge of the Collateral (see paragraph 2(A) (*General*) - paragraphs 2.9 and 2.10 above).

10.4 Subject to the terms of the relevant agreement governing use of the Collateral, there are no other obligations, duties or limitations imposed on the Secured Party with respect to its use of the Collateral under the laws of South Africa.

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

11.1 An agreement permitting the Security Collateral Provider to substitute the Collateral is enforceable. Note that the substitution will result in the termination of the security interest in the substituted Collateral and will require the establishment of a new security interest in the substitute Collateral.

11.2 Effectively, a new pledge (or pledge and cession in security) of the substitute Collateral by the Security Collateral Provider in favour of the Secured Party would be required in order to replace the existing security interest in the existing Collateral with a new security interest in the substitute Collateral, and the required formalities would need to be adhered to in respect of the substitute Collateral (see paragraph 2(A) (*General*) - paragraph 2.9 and 2.10 above).

11.3 The Secured Party would need to consent to the substitution of the Collateral and, to this extent, the requisite consent has been "built into" the relevant Security Document and will have been obtained "upfront" upon the Parties entering into the relevant Security Document, and will cover all substitutions of the Collateral effected in terms of the substitution provisions of the relevant Security Document.

Section 2: Enforcement of Rights under the Security Documents by the Secured Party in the Absence of an Insolvency Proceeding

Note the additional assumption in paragraph (j) under "*Assumptions relating to the Security Documents*" above which applies to questions 12 to 15 below.

References to SA Collateral Provider in this Section 2 below are to a South African company or other entity which is in default under the Master Agreement but which has not been placed in liquidation under the Companies Act, 1973 (the "**Old Companies Act**"), the Insolvency Act, 1936 or any other relevant legislation.

12 *Assuming that the Secured Party has obtained a valid and perfected security interest in the Eligible Collateral under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements contained in the responses to questions 1 to 6 above, as applicable, what are the formalities (including the necessity to obtain a court order or conduct an auction), notification requirements (to the Security Collateral Provider or any other person) or other procedures, if any, that the Secured Party must observe or*

undertake in exercising its rights as a Secured Party under each Security Document, such as the right to liquidate Collateral? For example, is it free to sell the Collateral (including to itself) and apply the proceeds to satisfy the Security Collateral Provider's outstanding obligations under the Master Agreement? Do such formalities or procedures differ depending on the type of Collateral involved?

(A) Enforcement process

12.1 Assuming that the Secured Party has obtained a valid and perfected security interest in the Collateral under the laws of South Africa, to the extent that such laws apply, by complying with the requirements contained in the responses to questions 1 to 6 above, as applicable, the formalities under South African law (including the necessity to obtain a court order or conduct an auction), the notification requirements (to the SA Collateral Provider or any other person) and the other procedures that the Secured Party must observe or undertake in exercising its rights as a Secured Party under each Security Document (such as the right to liquidate the Collateral) are, subject to paragraph 12(B) (*Self-help provisions*) below and paragraph 12(C) (*Business rescue*) below, as follows:

12.1.1 There is no requirement under South African law for the Secured Party to give notice to the SA Collateral Provider (or any other person) in order for the Secured Party to exercise its rights as such and enforce the security interest in the Collateral.

12.1.2 The Secured Party must, upon default of the SA Collateral Provider of its secured obligations under the Master Agreement, apply to the South African courts for a judgment for the amount of the secured debt and a writ of execution for the judicial sale of the Collateral.

12.1.3 The Secured Party may sue for or claim the default amount from the SA Collateral Provider by action or by motion (application) proceedings. Application proceedings are instituted by way of a notice of motion supported by an affidavit as to the facts upon which the Secured Party relies for relief. Action proceedings are instituted by way of summons.

12.1.4 Application proceedings are generally less costly than action proceedings and are generally resolved more expeditiously. However, application proceedings are normally instituted where there is no factual dispute in the matter. Should the Secured Party ignore a possible factual dispute and proceed with application proceedings, the Secured Party runs the risk that the application may be dismissed with costs.

12.1.5 Summons may take several forms. Where the claim against the SA Collateral Provider is one for provisional sentence (see sub-paragraph 12.1.7 below), proceedings are instituted by way of a provisional sentence (or liquid) summons. Where, however, the claim against the SA Collateral Provider is illiquid, a distinction is drawn between (i) a claim for a debt or liquidated demand and (ii) a claim which is not for a debt or liquidated demand. In the case of (i) a simple summons must be issued and, in the case of (ii), a combined summons must be issued.

12.1.6 A "liquid document" is a document that is a written instrument, signed by the judgment debtor or his agent, evidencing an acknowledgement of indebtedness which is unconditional and which is a fixed amount of money. The purpose of provisional sentence is to enable a plaintiff who sues on a "liquid document" to obtain prompt payment by means of a provisional judgment without having to wait for the final determination of the dispute between the parties.

12.1.7 In a provisional sentence procedure, unlike an action commenced by an illiquid summons, pleadings subsequent to the provisional sentence summons are not required or permitted unless ordered by the court, and no extrinsic evidence needs to be introduced except the

"liquid document". Where the document is illiquid, evidence may have to be adduced and expert witnesses called to prove the claim.

12.1.8 The writ of execution must be issued within three years of the judgment being granted. Only one writ of execution may be issued in respect of one judgment, unless a second writ of execution is sanctioned by the court.

12.1.9 The length of time of the court proceedings and the execution of the writ of execution will depend on whether action or application proceedings have been instituted and whether the document being sued on is a "liquid document" and on when the writ of execution is issued. In South Africa, action proceedings are generally not a speedy process; application proceedings tend to be resolved more expeditiously.

12.1.10 The Secured Party is entitled to procure the issue of a writ of execution immediately after the granting of judgment against the SA Collateral Provider. Once the judgment is granted and the writ of execution is issued, the Collateral will be sold by the sheriff by auction (see paragraph 12.2 below), provided that no subsequent stay of execution is granted.

12.1.11 To the extent that the proceeds from the sale in execution of the Collateral exceed the amount of the secured debt, the surplus must be paid to the Security Collateral Provider (who may or may not be the SA Collateral Provider).

12.1.12 If, in realising the Collateral, a sale of the Collateral is concluded with a non-resident which results in a cross border flow of funds, the prior written approval of the Exchange Control Authorities, in terms of the Exchange Control Regulations, will be required before the Collateral can be transferred off-shore and the purchase price remitted to South Africa (see paragraph 5 (*Exchange control requirements*) above).

12.2 Details of the auction process for the sale of Collateral which has been attached in execution (as described in paragraph 12.1 above) are as follows:

12.2.1 In terms of the relevant Court rules and legislation, where any movable property (such as the Collateral) has been attached in execution, the sheriff must "*where practicable*" sell the movable property by public auction to the highest bidder. Where any immovable property has been attached in execution, the sheriff must sell the immovable property by public auction to the highest bidder.

12.2.2 There is no prescribed "starting price/minimum price" at which the Collateral must be sold and there are no provisions of South African law that require that the best price be obtained on realising the Collateral.

12.2.3 The Secured Party must, after consultation with the sheriff, prepare a notice of sale and furnish two copies of it to the sheriff in sufficient time to enable one copy to be affixed not later than ten days before the day appointed for the sale on the notice board or door of the courthouse or other public building in which the court hearing is held and the other copy at or as near as may be to the place where the sale of the Collateral is to take place.

12.2.4 If, in the opinion of the sheriff, the value of the Collateral attached exceeds ZAR5 000, the sheriff must specify a local or other newspaper circulating in the relevant district in which the Secured Party must publish the notice of sale (such notice to be published not later than ten days before the date appointed for the sale of the Collateral). The Secured Party must furnish the sheriff with a copy of such newspaper not later than the day before the date of the sale.

12.2.5 The day appointed for the sale of the Collateral must fall not less than 15 days after the attachment of the Collateral pursuant to a writ of execution (see paragraphs 12.1.8 to 12.1.10 inclusive above).

12.3 For purposes of this opinion, the formalities and procedures described in paragraphs 12.1 and 12.2 above do not differ depending on the type of Collateral involved.

(B) Self-help provisions

12.4 The Parties may agree to allow the Secured Party to realise the Collateral without an Order of Court ("**parate executie**"). Should such a right be agreed upon, the Secured Party will (subject to paragraphs 12.7 to 12.9 inclusive below and subject to paragraph 12(C) (*Business rescue*) - paragraph 12.10 below) have the right to "take over" the Collateral itself or to sell the Collateral by public auction to the highest bidder or in any other manner as is agreed between the Parties. The Security Documents provide for *parate executie*.

12.5 Various South African Constitutional Court and High Court decisions[9] have suggested that the right of a party to an agreement to enforce security created under such agreement without the intervention of a court (so-called *parate executie* clauses) might be unenforceable. This was based on the view that *parate executie* allows the execution party to resort to "**self-help**", and thereby denies a party its constitutionally guaranteed right of access to a South African court.

12.6 However, the Supreme Court of Appeal in the case of *Bock and others v Duburoro Investments (Proprietary) Limited* 2004 (2) SA 242 (SCA), which concerned an agreement which provided for *parate executie* of pledged shares, the Court reaffirmed the common law approach that a term in an agreement of pledge, which provides for the private sale of the pledged article (which is in the possession of the creditor), is valid, but a debtor may "*seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreements and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.*"

12.7 The decision in the above case has settled the following legal principles:

12.7.1 *parate executie* (that is, immediate execution without a court order) of movable assets which are lawfully in the possession of the creditor is neither unlawful nor unconstitutional (that is, the creditor need not first obtain a court order permitting the creditor to sell the assets if they are already lawfully in his or her possession); provided that "*the debtor may seek the protection of the court if, on any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor acted in a manner which prejudiced him in his rights*";

12.7.2 an agreement in terms of which a creditor may keep an asset subject to a pledge at a fair price determined (at the date of the taking over) either by agreement between the debtor and the creditor or by a third party expert is valid;

12.7.3 an agreement that, if the debtor defaults, the creditor may keep the asset as its own property without reference to its fair value is void.

12.8 There are no provisions of South African law that specifically place an obligation on the Secured Party to obtain the best price on realising the Collateral. However, the Secured Party must act reasonably in realising the Collateral. The applicable *parate executie* provisions of the relevant Security Document will apply, subject only to the SA Collateral Provider's right under South African law to apply to a South African court for relief if the SA Collateral Provider can prove that it will be prejudiced by the price at which the Secured Party will realise the Collateral.

[9] *Findevco (Pty) Limited v FaceFormat SA (Pty) Limited* 2001 (1) SA 251 (E) and *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

12.9 If, in realising the Collateral, a sale of the Collateral is concluded with a non-resident which results in a cross border flow of funds, the prior written approval of the Exchange Control Authorities, in terms of the Exchange Control Regulations, will be required before the Collateral can be transferred off-shore and the purchase price remitted to South Africa (see paragraph 5(A) (*Exchange control requirements*) above).

(C) Business rescue

12.10 Note that if the SA Collateral Provider is a company which is incorporated (or deemed to have been incorporated) under the Companies Act and a business rescue practitioner is appointed in respect of the SA Collateral Provider, section 133 of the Companies Act provides for a general moratorium on legal proceedings against the SA Collateral Provider. It is arguable, although not certain, that *parate executie* provisions in security documents will not be affected by the provisions of section 133 of the Companies Act (see paragraph 14(A) (*Business rescue proceedings*) below).

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

Assuming that (i) pursuant to the laws of South Africa, the laws of another jurisdiction govern the creation and/or perfection of a security interest in Collateral pledged (or pledged and ceded in security) pursuant to each Security Document and (ii) the Secured Party has obtained a valid and perfected security interest in the Collateral under the laws of such other jurisdiction then, subject (where applicable) to paragraph 5(A) (*Exchange control requirements*) above and (if the Secured Party institutes enforcement proceedings in respect of the Collateral in a South African court, subject to paragraph 12(A) (*Enforcement process*) above, and subject to the general requirements relating to the recognition and enforcement of foreign judgments in South Africa), there are no formalities, notification requirements or other procedures that the Secured Party must observe or undertake in South Africa in exercising its rights as the Secured Party under each Security Document.

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

(A) Business rescue proceedings

(a) *Introduction*

14.1 The Companies Act came into effect on 1 May 2011. Subject to paragraph 17(A)(b) (*Liquidation and winding-up*) – paragraph 17.7 below, the Companies Act has replaced the Old Companies Act in its entirety. The business rescue proceedings discussed in this paragraph 14(A) below may become applicable to an SA Collateral Provider.

14.2 Our opinions in relation to the application of the Companies Act in this opinion are based on our interpretation of the Companies Act legislation and, to the extent applicable, prevailing South African common law but with the benefit of only a limited number of judgments where a South African court has considered the Companies Act. It is not possible to predict, as at

the date of this opinion, how South African courts will, in the future, further apply, interpret and/or make findings in relation to the Companies Act.

14.3 Chapter 6 of the Companies Act provides for business rescue, a substantively non-judicial, pre-insolvency commercial process that, in the first instance, aims to rescue a financially distressed company and maximise the likelihood of the company's continued existence on a solvent basis. If business rescue is not possible, the aim of business rescue is to ensure an outcome which provides a better return for the creditors or shareholders of a financially distressed company than would result from the immediate liquidation of the company.

14.4 Because business rescue proceedings can be initiated by a South African company itself, information sharing during the existence of any agreement is very important. We believe that it is prudent to request that a SA Security Collateral Provider deliver to the other Party certain documents (for example, monthly management accounts, annual financial statements, copies of resolutions of shareholders or directors) relating to the entry into or consideration of business rescue proceedings.

14.5 Where a Party is a South African company, you may wish to consider amending the definition of "*Bankruptcy*" in the Master Agreement to include business rescue proceedings under Chapter 6 of the Companies Act.

(b) *Business rescue*

14.6 Section 128(1)(b) of the Companies Act defines "business rescue" as "*proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for -*

14.6.1 *the temporary supervision of the company, and of the management of its affairs, business and property;*

14.6.2 *a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*

14.6.3 *the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;*".

14.7 The business rescue process is formalised following the filing of a board resolution (or application to court to commence the proceedings) and each significant step in the process may allow intervention of affected parties by application to the court. This does, however, remain an engagement amongst the business rescue practitioner (who will be a qualified professional experienced in managing companies in difficulty) and affected persons (being shareholders, creditors and employees (individually or through their representative trade unions) of the company) in devising a business rescue plan to rescue the company.

(c) *Effect of business rescue on employees and contracts*

14.8 In terms of sections 136(2) and (2A) of the Companies Act:

"*(2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may –*

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –

(i) *arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and*

(ii) *would otherwise become due during those proceedings; or*

(b) *apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).*

(2A) *When acting in terms of subsection (2) –*

(a) *a business rescue practitioner must not suspend any provision of –*

(i) *an employment contract; or*

(ii) *an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act No. 24 or 1936), would have applied had the company been liquidated;*

(b) *a court may not cancel any provision of –*

(i) *an employment contract, except as contemplated in subsection (1);*

(ii) *an agreement to which section 35A or 35B of the Insolvency Act, (Act No. 24 of 1936), would have applied had the company been liquidated; and*

(c) *if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.*"

14.9 Accordingly, once appointed, a business rescue practitioner is given significant powers, in terms of section 136(2) of the Companies Act, to suspend (or, with the sanction of the court, cancel) entirely, partially or conditionally any provision of an agreement to which a company is a party at the commencement of the business rescue period (other than an agreement of employment or an agreement contemplated in, among others, section 35B of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) below), notwithstanding any contrary provision contained in the agreement itself.

14.10 The Master Agreement is a "*master agreement*" for purposes of section 35B(1) of the Insolvency Act and the obligations of the SA Collateral Provider provided for in the relevant Security Document "*aris[e] out of … [the Master Agreement]*" for purposes of section 35B(1) of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraphs 17.28, 17.33 and 17.34 below). Accordingly, the Master Agreement, together with the relevant Security Document, is an "agreement *to which …. section 35B of the Insolvency Act … would have applied had the [SA Collateral Provider] been liquidated*" for purposes of section 136(2A) of the Companies Act, and is therefore excluded from the business rescue practitioner's powers set out under section 136(2) of the Companies Act.

(d) *General moratorium on legal proceedings against company*

14.11 Section 133 of the Companies Act provides for a general moratorium on legal proceedings against the affected company as follows:

"*(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company,*

or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers;

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings."

14.12 Note that, although the Master Agreement, together with the relevant Security Document, is excluded from the business rescue practitioner's powers set out under section 136(2) of the Companies Act (see paragraph 14.10 above), the Master Agreement, together with the relevant Security Document, is not excluded from the ambit of section 133 of the Companies Act.

14.13 It is arguable that self-help enforcement provisions in pledges (see paragraph 12(B) (*Self-help provisions*) above) will not be affected by the provisions of section 133 of the Companies Act. This is on account of an interpretation of the wording contained in section 133 which suggests that it contemplates only legal proceedings in an appropriate "forum": the self-help provisions in a pledge would not constitute legal proceedings in a "forum". While we think that this argument can be made, we are conscious that this may be contrary to the general import of Chapter 6 of the Companies Act and could be challenged by the business rescue practitioner. However, even if it is so challenged, the Secured Party's rights in respect of the Collateral will be maintained and, should the SA Security Collateral Provider be placed under business rescue, those rights will be capable of being enforced thereafter.

(e) Protection of property interests

14.14 Section 134 of the Companies Act provides as follows:

"*(1) Subject to subsections (2) and (3), during a company's business rescue proceedings-*

(a) the company may dispose, or agree to dispose, of property only-

(i) in the ordinary course of its business;

(ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner; or

(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;

(b) any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.

(2) The practitioner may not unreasonably withhold consent in terms of subsection (1)(c), having regard to-

(a) the purposes of this Chapter;

(b) the circumstances of the company; and

(c) the nature of the property, and the rights claimed in respect of it.

(3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly-

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person."

14.15 Note that, although the Master Agreement, together with the relevant Security Document, is excluded from the business rescue practitioner's powers set out under section 136(2) of the Companies Act (see paragraph 14.10 above), the Master Agreement, together with the relevant Security Document, is not excluded from the ambit of section 134 of the Companies Act.

14.16 Accordingly, during the business rescue proceedings, the pledged Collateral may be sold by the SA Security Collateral Provider, subject to the prior consent of the Secured Party. Such consent is not required if the proceeds of the sale of the Collateral are sufficient to satisfy the secured indebtedness under the Master Agreement. The SA Security Collateral Provider would be required to pay the proceeds of the sale of the Collateral (up to the amount of the secured indebtedness) to the Secured Party or provide security for the amount of such proceeds to the reasonable satisfaction of the Secured Party.

(B) Liens and hypothecs

14.17 The South African legislature has in certain instances provided for the creation of hypothecs in favour of organisations which grant assistance to individuals or private companies. These provisions cut across common law property rights and also across the provisions of other statutes which afford creditors specific preferences in respect of insolvency proceedings.

14.18 A "hypothec" is a real right of security (such as a pledge or mortgage) arising by operation of law. Hypothecs are created either by South African common law or South African statutory provisions. We set out certain examples of statutory hypothecs below:

14.18.1 In terms of section 84(1) of the Insolvency Act, a seller's claim for outstanding amounts under an instalment sale transaction which is governed by the National Credit Act, 2005, is secured by means of a hypothec over the property that is the subject matter of the instalment sale transaction upon the insolvency of the purchaser.

14.18.2 The Land and Agricultural Development Bank (the "**Land Bank**") enjoys special rights of hypothecation in terms of section 40(4) of the Land and Agricultural Development Bank Act, 2002, in order to secure funds advanced to farmers for certain agricultural projects. In such instances, should the farmer's estate be sequestrated the Land Bank will have an *ex lege* security interest in respect of such farmer's immovable property.

14.18.3 Section 114 of the Customs and Excise Act, 1964 authorises the Commissioner of Inland Revenue to detain property and to sell goods without the need for prior judgment or authorisation from courts in order to collect a customs debt owed. The section further authorises the sale of goods belonging to a third person not being the customs debtor.

14.18.4 PART 4 of Schedule 1 of the Co-operatives Act, 2005 provides for a statutory "*pledge*" over all agricultural products of which a member of such co-operative is the owner at the date on which a debt in respect of the supply of fuel, spare parts, plant material, packing material, agricultural remedies, feeding stuffs, livestock or fertilizer arose *vis-à-vis* the co-operative. These products are deemed to be pledged to the co-operative as fully and effectively as if such products were delivered to the co-operative, and may not be attached or sold in execution at the instance of a creditor except with the consent of the co-operative.

14.19 The South African common law and statutory hypothecs of which we are aware (including the statutory hypothecs mentioned in paragraph 14.18 above) are unlikely to be applicable to the Transactions concluded under a Master Agreement and/or the Collateral and/or the Security Documents. Subject as aforesaid, we are not aware of any current laws or regulations in South Africa that would limit or extinguish the Secured Party's enforcement rights with respect to the Collateral and we are not aware of any types of "statutory liens" that would be deemed to take precedence over the Secured Party's security interest in the Collateral.

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

Our views in paragraphs 12 to 14 inclusive above will remain the same if 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 SA Collateral Provider.

Section 3: Enforcement of Rights Under the Security Documents by the Secured Party after the Commencement of an Insolvency Proceeding

Note the additional assumption in paragraph (k) under "*Assumptions relating to the Security Documents*" above which applies to questions 16 to 18 below.

References to SA Collateral Provider in this Section 3 below are to a South African company which has been placed in liquidation under the Old Companies Act, the Insolvency Act or any other relevant legislation.

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

16.1 Under South African law, if a security interest in the same property (whether tangible movable property or intangible movable property) is granted to two different creditors at different times, the security interest granted first in time will have priority. The creditor to whom the security interest is granted later in time can have priority over the earlier security interest only if the debt owed in respect of the earlier security interest is discharged or if the creditor holding the property in which the earlier security interest was granted agrees to release such security interest.

16.2 There are no conditions to be satisfied to ensure priority over security interests in property (whether tangible movable property or intangible movable property) granted later in time. The security interests granted earliest in time will, in terms of general principles of South African law, enjoy priority over security interests granted later in time.

16.3 Security interests created over intangible movable property by way of a pledge and cession in security rank on the same basis as pledged tangible movable property in that those security interests granted earliest in time will enjoy priority over those granted later in time.

16.4 As regards a pledge of tangible movable property, some South African authorities argue that, due to the requirement of possession (see paragraph 2(A) (*General*) - paragraph 2.10 above), there can be no competing security interests in such property. This issue is not yet settled under South African law, and other South African authorities believe that tangible movable property can be pledged to more than one pledgee simultaneously. In our view, tangible movable property cannot be pledged to two parties simultaneously. Rather, immediately upon termination of the first pledge (through, for example, loss of possession or discharge of the underlying debt), a new (second) pledge of the relevant tangible movable property becomes effective if the (second) pledgee (or its agent) has possession of such property.

16.5 Under South African law, the only items that rank ahead of a secured claim in a liquidation is a liquidator's claim for realisation costs under section 89 of the Insolvency Act. Realisation costs comprise statutory remuneration payable to the liquidator of an insolvent estate. Such realisation costs are 3% of the value of securities, 10% of the value of claims collected and 1% of the amount of money in the insolvent estate.

16.6 In the case of a pledge (or pledge and cession in security) of Collateral, ownership of the Collateral is not transferred to the Secured Party but is retained by the Security Collateral Provider (assuming that the Security Collateral Provider was the owner of the Collateral at the time of the pledge (or pledge and cession in security)).

16.7 Where the Collateral is pledged (or pledged and ceded in security) to the Secured Party in terms of the relevant Security Document and delivery of the Collateral to the Secured Party has occurred (see paragraph 2(A) (*General*) - paragraphs 2.9 and 2.10 above), the Secured Party, as pledgee of the Collateral, will have a real right of security in the Collateral. The Secured Party will, on the insolvency of the SA Collateral Provider, be a secured creditor of

the SA Collateral Provider and will rank ahead of all other creditors of the SA Collateral Provider in respect of the Collateral other than the SA Collateral Provider's liquidator in respect of its costs of realising the Collateral.

16.8 If the Collateral comprises a claim to cash, the liquidator will be entitled, as a realisation cost, to 1% of the amount of the cash. If the Collateral comprises securities, including debt securities (**Securities**), the liquidator will be entitled, as a realisation cost, to 3% of the value of such Securities. The realisation costs are payable by the Secured Party, usually as a deduction or set–off from the proceeds of the realisation of the Collateral.

16.9 We recommend that, in order to avoid a shortfall in the value of the Collateral over the amount owing to the Secured Party, the SA Collateral Provider be required to over-collateralise the Secured Party's exposure to it. Alternatively, the SA Collateral Provider may be required to pay an additional amount which is at least equal to the percentage of the realisation costs payable to the liquidator in respect of the realisation of the particular type of Collateral.

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

(A) South African insolvency law

(a) *Governing law*

17.1 Under South African law, the laws of the *lex situs* (that is, the laws of the place where the Collateral is located) will govern the *formalities for establishing and creating* a valid security interest in and to the Collateral, even where the Parties have agreed that South African law will govern the *contractual aspects* of the Master Agreement and/or the Security Documents (see paragraph 2(A) (*General*) above).

17.2 However, where the SA Collateral Provider is wound up (liquidated), South African insolvency law will apply to the insolvency of the SA Collateral Provider. Therefore, the Insolvency Act will be applicable to the insolvency of the SA Collateral Provider (even if the formalities for establishing and creating a valid security interest in the Collateral and/or the relevant Security Document is governed by a foreign legal system).

17.3 Subject to the principals of comity, the assets of the SA Collateral Provider (wherever such assets are located) will vest in the South African liquidator, but only (in the case of assets located outside South Africa) if the South African liquidator and the South African insolvency proceedings are formally recognised by the courts in the jurisdiction in which such assets are located, and the appropriate letters of authority (or similar instruments) are issued to the South African liquidator by the relevant bankruptcy authority in that country.

17.4 However, where the formalities for establishing and creating a valid security interest in the Collateral are governed by a foreign legal system (that is, where the Collateral is located in a foreign legal system) and the relevant Security Document is governed by a foreign legal system, it is our opinion that the effect and consequences of such security interest (as provided for under the foreign legal system) will apply and be binding (subject to the provisions of the Insolvency Act) on the South African liquidator.

17.5 Further, should a foreign legal system apply to the Collateral, the execution against the Collateral will also be governed by the foreign legal system. The South African liquidator would however, in such circumstances, be entitled to reflect the relevant security interest in the liquidation and distribution account as a security interest (as contemplated under South African law) created over the relevant assets, and the liquidator would be entitled to realisation costs in respect of the realisation of the Collateral (see paragraph 16.8 above).

17.6 The remainder of this paragraph 17 is based on the assumptions that South African law applies to the formalities for establishing and creating a valid security interest in the Collateral (due to the fact that the Collateral is located in South Africa).

(b) *Liquidation and winding-up*

17.7 Schedule 5 to the Companies Act provides that, until a date to be determined by the Minister of Trade and Industry, the Old Companies Act will continue to apply with respect to the winding up and liquidation of companies under the Companies Act, subject to the provisions of items 9(2) and 9(3) of Schedule 5. Accordingly, the winding-up of companies continues to be regulated by the Old Companies Act and the Insolvency Act. Other relevant legislation may also apply to the winding up of insurance companies, banks and the like (see paragraph 17.7(e) (*Special considerations*) below).

17.8 Liquidation or "winding-up" is the process of administering a company's affairs prior to its dissolution by ascertaining and realising its assets, applying the proceeds of such assets to pay creditors, and distributing the residue to shareholders. Winding-up brings about a concourse of the creditors and dissolution of the company. The Master of the High Court appoints a liquidator to conduct the process of winding-up.

17.9 In terms of the Old Companies Act, a company may be wound up (i) voluntarily (a creditors' voluntary winding-up or a members' voluntary winding up) by way of a special resolution of the members of the company or (ii) by the court, by way of a court order upon the application of the members or creditors of the company.

17.10 Where a South African company is placed in liquidation by a South African court, the liquidation is deemed by law to have commenced at the time of presentation to the court of the application for liquidation. An application for liquidation is presented to the court when the application is filed with the Registrar of the Court. This typically occurs some time before the court grants an order for the liquidation.

17.11 Secured creditors will enjoy a preferred claim and certain categories of creditors have statutory preferences over the claims of other creditors.

17.12 To determine whether applications for insolvency have been filed, South African court records need to be consulted. Apart from South African court records and lists of matters on the Court Roll which may set out details of an application for liquidation, formal administrative notices are posted in the office of the Master of the High Court (the Master) (an official who issues mandatory security bonds to cover the costs of a liquidation) when a security bond is issued prior to an application for a liquidation being made. This requires potentially interested parties to scrutinise such notices. The procedure is in effect informal.

(c) *Transactions entered into after liquidation*

17.13 Under South African law, the insolvent estate of the SA Collateral Provider (the "**Insolvent Estate**") is "frozen" as from the date on which a South African court grants an order for the liquidation of the SA Collateral Provider and, as from this date, control of the Insolvent Estate vests in the liquidator of the Insolvent Estate ("**Liquidator**") and is subject to the provisions of the Insolvency Act, notwithstanding any contractual arrangements to the contrary between the SA Collateral Provider and a third party. Any transactions purportedly entered into on behalf of the SA Collateral Provider by anyone other than the Liquidator after the date on which a South African court grants an order for the liquidation of the SA Collateral Provider are void.

17.14 South African law is unclear as to the legal status of transactions purportedly entered into by a South African company between the date of presentation of an application to a South African court for its liquidation (see paragraph 17.10 above) and the date on which the court grants the order for liquidation (see paragraph 17.12 above).

17.15 For the reasons set out in paragraph 17.12 above, there is uncertainty as to whether or not a termination notice as contemplated in Section 6(a) of the Master Agreement can be effectively given after liquidation of the SA Collateral Provider. Notice given before and still running at liquidation would, in accordance with existing decisions of the South African courts, continue to run, but these decisions have been criticised.

17.16 The enforceability of the Automatic Early Termination provisions must be determined with reference to the nature of the specific event that triggers the Automatic Early Termination. Where the specific event that triggers the Automatic Early Termination Event is the date of insolvency of the SA Collateral Provider, the clause in the Master Agreement which provides for such Automatic Early Termination Event will be unenforceable, since control of the insolvent estate of the SA Collateral Provider will have vested in the liquidator of the insolvent estate of the SA Collateral Provider (and the concourse of creditors will already have become effective) as from such date. Where the specific event that triggers the Automatic Early Termination Event is not linked to the date of insolvency of the SA Collateral Provider (for example, the trigger event is the exceeding of assets by liabilities) the clause in the Master Agreement which provides for such Automatic Early Termination will be enforceable under South African law.

17.17 Due to the practical difficulties occasioned by Automatic Early Termination (for example, the disentangling of Transactions entered into subsequent to the early termination) and for the reasons set out in paragraph 17.15 above, participants in the South African market commonly elect to dis-apply the Automatic Early Termination provisions.

17.18 However, since the Master Agreement is a "*master agreement*" as defined in section 35B of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.29 below) and the obligations of the SA Collateral Provider provided for in the relevant Security Document "*aris[e] out of … [the Master Agreement]*" for purposes of section 35B(1) of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraphs 17.33 and 17.34 below), the concerns raised in paragraphs 17.14 to 17.16 inclusive above may be unimportant inasmuch as, upon the insolvency of the SA Collateral Provider, all "**unperformed obligations**" arising out of the Master Agreement (as read with the relevant Security Document) will automatically terminate on the date of liquidation of the SA Collateral Provider (see paragraph 17(C) (*Section 35B of the Insolvency Act*) below). With regards to banks, please see the special considerations discussed in paragraph 17(A)(e) (*Banks*) – paragraph 17.20.3.

(d) *Judicial management*

17.19 Judicial management has been replaced in its entirety by the business rescue proceedings of the Companies Act (see paragraph 14(A) (*Business rescue proceedings) above*). The purpose of judicial management was to prevent a company from being placed in liquidation where, by proper management or conservation of its resources, it would be able to meet its obligations, avoid winding-up and become a successful concern. Judicial management did not bring about a dissolution of the company or a concourse of the creditors, but placed a moratorium on all debt owed by the company. The directors would be divested of their powers and a judicial manager appointed who, under the directions of the court, would run the company.

(e) Special considerations

17.20 The following special considerations apply to the liquidation or business rescue of long-term insurers, short-term insurers and banks:

17.20.1 Long-term insurers

17.20.1.1 In terms of recent amendments to the Long-Term Insurance Act, 1998, the Registrar of Long-term Insurance is now empowered to apply for either the business rescue (see paragraph 14(A) (*Business rescue proceedings*) above or the winding-up of a long-term insurer. The Registrar of Long-term Insurance may also oppose any application for the business rescue or winding up of a long-term insurer if satisfied that the application is contrary to the interests of policyholders. In practice, long-term insurers are usually placed under curatorship which is similar in substance to a business rescue, however, the ultimate aim of a curatorship in this context is to ensure that policy holders are not unduly prejudiced by an insolvency related event.

17.20.1.2 In terms of section 41 of the Long-Term Insurance Act, the Registrar of Long-Term Insurance may make an application under section 131 of the Companies Act, for the business rescue of a long-term insurer, if the Registrar of Long-Term Insurance is satisfied that the business rescue is in the interests of the policyholders of the long-term insurer.

17.20.1.3 Section 131 of the Companies Act sets out the procedure an affected person must follow in order to apply to a court, at any time, for an order placing the company under supervision and commencing business rescue proceedings.

17.20.1.4 The resolution of the long-term insurer to begin business rescue proceedings, the appointment of the business rescue practitioner, the adoption of the business rescue plan and the exercise of the business rescue practitioner's powers under the Companies act, are subject to the approval of the Registrar of Long-Term Insurance.

17.20.1.5 An affected person other than the Registrar of Long-Term Insurance may institute court proceedings to place a long-term insurer into business rescue, which may be opposed by the Registrar of Long-Term Insurance if he or she is satisfied that the application is not in the interests of the policyholders.

17.20.2 Short-term insurers

The provisions applying to short-term insurers are set out in the Short-Term Insurance Act, 1998 and these provisions and recent amendments made thereto are in substance the same as those that apply to long-term insurers (see sub-paragraph 17.20.1 above). However, section 40(1) of the Short-Term Insurance Act provides that sections 128 to 155 of the Companies Act shall apply in relation to the business rescue (see paragraph 14(A) (*Business rescue proceedings*) above of a short-term insurer, whether or not it is a company.

17.20.3 Banks

17.20.3.1 As regards a bank which is registered as such in terms of the Banks Act, 1990 (the "**Banks Act**"), section 5(4)(b)(i) of the Companies Act provides that any applicable provisions of the Banks Act will prevail, except to the extent provided otherwise in section 49(4) of the Companies Act (which deals with uncertificated securities). In terms of the Banks Act, the Registrar of Banks has the right to apply for the winding-up of a bank and he may oppose any such application by another person. Only a person approved by the Registrar of Banks may be appointed as the liquidator of a bank.

17.20.3.2 In addition to liquidation, a bank may be placed under curatorship by the Minister of Finance if the Registrar of Banks is of the opinion that the bank is in financial difficulty (if, for instance, the bank is unable to repay its deposits). On appointment of the curator, the management of the bank vests in the curator, subject to the supervision of the Registrar of Banks. The curator is vested with the power to sell the assets of the bank, provided that such sale is in the ordinary course of the bank's business. While a bank is under curatorship, all actions, legal proceedings and legal process, including rights under collateral arrangements, against the bank are stayed and may not be instituted or proceeded with, without the leave of the court.

17.20.3.3 With effect from 29 June 2015, certain amendments were made with regards to curatorship of a bank under the Banks Act. Sections 128 to 154 of the Companies Act as they relate to business rescue will not apply to a bank.[10] The provisions of section 155 of the Companies Act relating to an arrangement or compromise between a company and its creditors shall not apply to a bank unless it is under curatorship in terms of section 69 of the Banks Act and the curator has been empowered to propose and enter into such an arrangement or compromise by the Minister of Finance in terms of section 69(3)(t) of the Banks Act. A further amendment to the curatorship regime includes confirmation that any references to the board of a company, the liquidator of a company or an authorised director in the Companies Act must be regarded as a reference to a curator in the context of banks.

17.20.3.4 Section 69 (6B) of the Banks Act provides that Section 35(B) of the Insolvency Act applies *mutatis mutandis* to the curator of a bank under curatorship and states as follows:

"*Notwithstanding any provision to the contrary contained in this Act, sections 35(A), 35(B) and 46 of the Insolvency Act, 1936 (Act No. 24 of 1936), shall mutatis mutandis apply to the curator of any bank under curatorship and to such a bank as if the curator were a trustee of an insolvent estate and the bank were an insolvent or a sequestrated estate as contemplated in those sections.*"

Section 69(6)(B) of the Banks Act (as read together with section 35(B)) therefore means that once a bank enters into curatorship proceedings, the curator must deal with Master Agreements and Credit Support Documents entered into by the bank in accordance with the provisions of section 35(B) of the Insolvency Act), notwithstanding that curatorship is typically a pre-insolvency step.

17.20.3.5 With regards to the application of section 35(B) of the Insolvency Act, please see paragraph 17(C)(a) - (f). With effect from 29 June 2015, a new section 69(2)(C) has been inserted into the Banks Act to create a legislative basis for the splitting of the assets and liabilities of a financially distressed bank into what has generally been termed a "good bank" and a "bad bank". The curator of a bank may dispose of any of the bank's assets ("**disposal**"), transfer any of its liabilities ("**transfer**") or dispose of any of its assets and transfer any of its liabilities ("**disposal and transfer**") in the ordinary course of the bank's business. Any such disposal, transfer or disposal and transfer must be made in accordance with the regulatory approvals required from the Registrar of Banks and/or the Minister of Finance (as applicable) under section 54 of the Banks Act.

17.20.3.6 When consent is sought for the disposal, transfer or disposal and transfer, the curator must report to the Minister of Finance and/or the Registrar of Banks (whichever is applicable) on the expected effect of such disposal, transfer or disposal and transfer on the bank's creditors and whether:

[10] Sections 128 to 154 of the Companies Act are discussed at paragraph 14(A) (*Business rescue proceedings*) above.

(1) the creditors are treated in an equitable manner; and

(2) a reasonable probability exist that a creditor will not incur greater losses as at the date of the proposed disposal, transfer or disposal and transfer than would have been incurred if the bank have been wound up under section 68 of the Banks Act on the date of the proposed disposal, transfer or disposal and transfer. The Minister of Finance and/or the Registrar of Banks (whichever is applicable), must consider whether such disposal, transfer or disposal and transfer, is reasonably likely to promote the maintenance of a stable banking sector in South Africa or public confidence in the banking sector in South Africa.

17.20.3.7 Section 69(3) of the Banks Act provides that "*The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his or her discretion, but subject to any condition which the Minister may impose — [among other things]*

(a) to suspend or reduce, as from the date of the curator's appointment as such or any subsequent date, the right of creditors of the bank concerned to claim or receive interest on any money owing to them by that bank;

(b) to make payments, whether in respect of capital or interest, to any creditor or creditors of the bank concerned at such time, in such order and in such manner as the curator may deem fit;

(c) to cancel any agreement between the bank concerned and any other party to advance moneys due after the date of the curator's appointment as such, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator, such advance or any loan under such facility would not be adequately secured or would not be repayable on terms satisfactory to the curator or if the bank lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the bank;

(d) to convene from time to time, in such manner as the curator may deem fit, a meeting of creditors of the bank concerned for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with such creditors in so far as their interests may be affected by decisions taken by the curator in the course of the management of the affairs of the bank concerned;

(e) to negotiate with any individual creditor of the bank concerned with a view to the final settlement of the affairs of such creditor with the bank;

(f) to make and carry out any decision in respect of the bank which in terms of the provisions of this Act, the Companies Act, the bank's memorandum of incorporation or the rules of any securities exchange, on which any securities of the bank or its controlling company are listed, would have required an ordinary resolution or a special resolution of shareholders of the bank or its controlling company;

(g) to cancel any lease of movable or immovable property entered into by the bank concerned prior to its being placed under curatorship: Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of such cancellation may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation;

(i) *to cancel any guarantee issued by the bank concerned prior to its being placed under curatorship, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator: Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of any loss sustained by or damage caused to any person as a result of the cancellation of a guarantee in terms of this paragraph, may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation;*

(j) *to raise funding from the Reserve Bank, or any entity controlled by the Reserve Bank, on behalf of the bank and, notwithstanding any contractual obligations of the bank, but without prejudice to real security rights, to provide security over the assets of the bank in respect of such funding: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security;*

(k) *without limiting any other power of the curator in terms of this section, to propose and enter into an arrangement or compromise between the bank and all its creditors, or all the members of any class of creditors, in terms of section 155 of the Companies Act.*"

(B) Enforcement process

17.21 Upon the liquidation of the SA Collateral Provider, a concursus creditorum is instituted. Innes,- J described a concursus creditorum in Walker v Syfret NO 1911 AD 141 as "*the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transactions can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order*". Accordingly, the Insolvent Estate is frozen at the date of the concursus and there will be a time delay (as described below) before the Secured Party is entitled to deal with any Collateral. The provisions of the Insolvency Act will prevail over any contrary provisions in the relevant Security Document.

17.22 The general principles underlying the realisation of security in terms of the Insolvency Act, and the formalities and procedures that the Secured Party must observe or undertake in exercising its rights as a Secured Party under each Security Document (such as the right to liquidate the Collateral), are as follows:

17.22.1 Subject to the remaining provisions of this paragraph 17.22below, the right to determine the manner and conditions of the sale of property in the Insolvent Estate rests with the creditors of the SA Collateral Provider (the "**Creditors**"), but they may not abuse that right. The court has inherent power to set aside any resolution of Creditors which was not passed in good faith.

17.22.2 The liquidator of the Insolvent Estate (the "**Liquidator**") must, as soon as he is authorised to do so at the second meeting of Creditors (see paragraph 17.23below), sell all the property in the Insolvent Estate in accordance with the directions of Creditors (but subject to sub-paragraphs 17.22.7 to 17.22.9 inclusive below). Should the Liquidator wish to sell the property in a manner other than that authorised by the Creditors it is his duty to obtain the prior consent of the Creditors.

17.22.3 The Secured Party (as a Creditor who holds movable property as security for its claim) must, before the second meeting of the Creditors, give notice in writing of that fact to the Master of the High Court (the "**Master**"), and to the Liquidator if one has been appointed.

There is no other requirement under South African law for the Secured Party to give notice to the SA Collateral Provider before realising the Collateral.

17.22.4 The Liquidator is obliged to realise the property in the Insolvent Estate in good time, but he need not act precipitately and he may, where necessary, delay the sale for a reasonable time.

17.22.5 If, before the final closing of the second meeting of Creditors, no directions have been given by Creditors to the Liquidator, the Liquidator must (subject to sub-paragraphs 17.22.7 to 17.22.9 inclusive below) sell the property in the Insolvent Estate by public auction or public tender. A sale by public auction or tender may only take place after notice in the Government Gazette and after such other notices as the Master may direct and, in the absence of directions from Creditors concerning conditions of sale, upon such conditions as the Master may direct.

17.22.6 As a general rule the Liquidator may not sell the property in the Insolvent Estate before the second meeting of Creditors. However, if at any time before the second meeting of Creditors, the Liquidator is satisfied that any movable or immovable property in the Insolvent Estate should be sold immediately, he may recommend in writing accordingly to the Master, stating his reasons for the recommendation. The Master may authorise the sale of all or any part of such property and give directions on the conditions and manner of the sale. If the Master has notice that any of such property is subject to a right of preference, he may not authorise the sale of such property unless the person entitled to the right consents in writing to the sale, or the Liquidator has indemnified that person against any loss arising from such sale.

17.22.7 If the Collateral comprises bills of exchange (see paragraph 2(B)(b) (*Debt securities which qualify as "negotiable instruments"*) above) or securities that are listed or quoted on any South African exchange, the Secured Party may, after giving the notice mentioned in sub-paragraph 17.22.3 above and before the second meeting of Creditors, realise the Collateral. The Insolvency Act does not specifically make provision for realising Collateral comprising non-South African listed or quoted securities. Therefore, on a strict interpretation of the Insolvency Act, the Secured Party may have to deal with Collateral comprising non-South African listed or quoted securities either by delivering them to the Liquidator for realisation or by realising them by public auction. However, the realisation of Collateral comprising non-South African listed or quoted securities may, depending upon the legal system designated by the applicable private international law principles or rules, be governed by a legal system other than that of South Africa (see paragraph 17(A)(a) (*Governing law*) above). Collateral which comprises bills of exchange must be realised in the manner approved by the Liquidator or by the Master. Applications to the Master for such approval must be made individually.

17.22.8 If the Collateral does not comprise bills of exchange (see sub-paragraph 17.22.7 above) or securities that are listed or quoted on any South African exchange (see sub-paragraph 17.22.7 above), the Liquidator may, within 7 days from receipt of the notice referred to in sub-paragraph 17.22.3 above or within 7 days from the date upon which the Liquidator is appointed, whichever is the later, take over the Collateral from the Secured Party at a value agreed upon between the Liquidator and the Secured Party or at the full amount of the Secured Party's claim. If the Liquidator does not so take over the Collateral the Secured Party may, after expiry of such period but before the second meeting of Creditors, realise the Collateral. Collateral comprising rights of action (including claims for payment of money) must be realised in the manner approved by the Master. Applications to the Master for such approval must be made individually. Collateral comprising any other assets must be realised by way of public auction.

17.22.9 Once the Secured Party has realised the Collateral, the Secured Party must pay the net proceeds of the realisation to the Liquidator or, if there is no Liquidator, to the Master, and thereafter the Secured Party is entitled to payment, out of such proceeds, of the Secured Party's preferent claim (provided such claim was proved and admitted in terms of the applicable liquidation procedures – see paragraph 17.23 below).

17.22.10 If, in realising the Collateral, a sale of the Collateral is concluded with a non-resident which results in a cross border flow of funds, the prior written approval of the Exchange Control Authorities, in terms of the Exchange Control Regulations, will be required before the Collateral can be transferred off-shore and the purchase price remitted to South Africa (see paragraph 5(A) (*Exchange control requirements*) above).

17.23 The general principles underlying proof of claims in terms of the Insolvency Act, and the formalities and procedures that the Secured Party must observe or undertake in order to prove the validity of its claim against the SA Collateral Provider ("**Claim**"), are as follows:

17.23.1 The Claim must be proved by way of an affidavit in the prescribed form. The affidavit may be made by the Secured Party or any person "fully cognizant" of the Claim. Amongst other things, the affidavit must outline the nature and particulars of the Collateral held by the Secured Party.

17.23.2 The affidavit and supporting vouchers must be delivered to the office of the presiding officer of the Creditors' meeting not less than 24 hours before the advertised time. If the required documents are not delivered timeously, the Claim cannot be admitted to proof at the Creditors' meeting, unless the presiding officer is of the opinion that the Secured Party was unable to deliver the Claim documents through no fault on its part.

17.23.3 The Creditors, the Liquidator and the SA Collateral Provider, or their representatives, may inspect the Claim documents during office hours free of charge.

17.23.4 In principle, a Creditor is entitled to prove its claim at any time before the final distribution of the Insolvent Estate (the Liquidator has a period of 6 months after the date of its appointment to draw up the required liquidation and distribution accounts). However, once 3 months have lapsed since the finalisation of the second Creditors' meeting, the Creditor would only be able to prove its claim if it obtained leave from the Master or a court of law. In practice, claims are generally proved at the first Creditors' meeting (see sub-paragraph 17.23.5 below). In principle, claims must be proved within 6 months following the date of appointment of the Liquidator.

17.23.5 As to the timing of the first and second Creditors' meetings, the Master must give notice in the *Government Gazette*, immediately after the final liquidation order of the Insolvent Estate is granted, of the first Creditors' meeting. This notice must appear not less than 10 days before the date of such meeting (counting backwards from the date of such meeting and excluding the first day) and the notice must state the time and the place at which such meeting is to be held. The purpose of the first Creditors' meeting is to allow Creditors to prove their claims and to elect a Liquidator.

17.23.6 After the first Creditors' meeting, the Master must choose a date for the second Creditors' meeting. Notice of the second Creditors' meeting must also be given in the *Government Gazette.* Although there is no prescribed period of time between which such notice is given and the date of the second Creditors' meeting, interested parties should be given sufficient time to attend the second Creditors' meeting and to decide upon the course of action to be taken at such meeting.

17.23.7 The Insolvency Act does not require the Secured Party to attend the Creditors' meeting in order to prove the Claim. Where the Secured Party has submitted the Claim documents timeously (that is, at least 24 hours before the advertised time of the Creditors' meeting)

to the presiding officer of the Creditors' meeting ("**Presiding Officer**"), the Secured Party is deemed to have tendered proof of the Claim at that Creditors' meeting. However, it may be advisable for the Secured Party, or its representative, to be present at the Creditors' meeting to deal with any queries or objections to the admission of the Claim.

17.23.8 The Secured Party must reflect the Claim in Rand. The Claim will need to be reflected as the Rand amount owing to the Secured Party as at the date of the SA Collateral Provider's liquidation (see paragraph 17(A)(c) (*Transactions entered into after liquidation*) - paragraph 17.13 above). There is no prescribed rate of exchange.

17.23.9 The Secured Party may also claim interest on the Claim from the date of the SA Collateral Provider's liquidation (see paragraph 17(A)(c) (*Transactions entered into after liquidation*) - paragraph 17.13above) to the date of payment at an agreed rate. The Secured Party, as it holds Collateral to secure payment of the Claim, is entitled to claim interest on the Claim as from such date but, in terms of section 103(2) of the Insolvency Act, the interest rate will be limited to 8% per annum unless a higher interest rate has been provided for in the Master Agreement and/or the relevant Security Document[11].

17.23.10 The Presiding Officer may call upon any person present at the Creditors' meeting who wishes to prove, or has proved, a claim against the Insolvent Estate to submit to interrogation, under oath, in regard to the claim. The interrogation may be conducted by the Presiding Officer himself or by the Liquidator or by a Creditor who has proved a claim (or by the agent or both of them). A Creditor may send a third party representative (for example, local counsel) to attend the Creditors' meeting on its behalf, and if such third party representative becomes subject to interrogation in regard to the claim, such third party representative must testify on behalf of the Creditor. If the claimant is not present at the Creditors' meeting, the Presiding Officer may summon him to appear for the purpose of being interrogated. In the case of a claimant which is a corporate entity, it is our view that any duly authorised third party of the Secured Party who is present at the Creditors' meeting would mean that the Secured Party is "present" at the Creditors' meeting. The Insolvency Act does not make provision for the submission of an affidavit in lieu of live testimony for purposes of an interrogation of a claimant in respect of a claim. If a Creditor fails without reasonable excuse to appear or, when present, refuses to submit to the interrogation or answer satisfactorily a lawful question put to him, his claim may be rejected by the Presiding Officer or, if already proved, expunged by the Master.

17.23.11 A claim must be proved to the satisfaction of the Presiding Officer who must either admit or reject it. In reaching his decision, the Presiding Officer performs a quasi-judicial function and, as such, must exercise an independent judgment. If the claim is on the face of it bad (for example, if it has been prescribed), the Presiding Officer will reject it. Conversely, if *prima facie* proof of the claim is produced, the Presiding Officer will normally admit the claim. It should be noted that a rejection of the claim does not debar a Creditor from proving it at a subsequent meeting of Creditors or from establishing it by action at law.

17.23.12 The admission of a claim by the Presiding Officer is, in a sense, only provisional because the Liquidator may still dispute the claim. However the admission of a claim has the effect of putting the onus of disproving the existence of the claim on the Liquidator. After a meeting of Creditors at which claims have been proved, the Presiding Officer must deliver to the Liquidator every claim proved along with the documents filed in support of it. The Liquidator is obliged to examine all available books and documents relating to the Insolvent Estate for the purpose of ascertaining whether the Insolvent Estate in fact owes the amount claimed. He must, in other words, determine whether the records of the Insolvent Estate reflect the indebtedness which is the subject of the proved claim. To dispute a claim validly,

[11] Under the Insolvency Act, notwithstanding any contrary provisions in the relevant agreement, a party (claimant) is not entitled to interest on its claims against the party in liquidation (insolvency party) AFTER the date of the insolvent party's liquidation except to the extent that the claimant holds security for payment of its claims or where the unsecured and non-preferential claims of the insolvent party's creditors are paid in full and there is a balance remaining for distribution to creditors. In such event, in terms of section 103(2) of the Insolvency Act, the interest rate will be limited to 8% per annum unless a higher interest rate has been provided for in the relevant agreement.

the Liquidator must have a reasonable belief, based on facts which he has ascertained, that the Insolvent Estate is not indebted to the Creditor concerned: a mere suspicion about the claim does not suffice. If the Liquidator decides to dispute the claim, he must report this in writing to the Master, stating his reasons. At the same time, he must give the claimant a copy of such reasons and notify him that he may, within 14 days, or such longer period as the Master may on application allow, show why his claim should not be disallowed or reduced. The reduction or disallowance of the claim does not debar the claimant from establishing it by action at law.

17.23.13 Claims that are rejected by a meeting of Creditors can be admitted by the Liquidator (without such claims being "*proved*") upon the Master consenting to such admission.

17.23.14 The action to establish a claim which has been rejected by the Presiding Officer or disallowed by the Master lies against the Liquidator. The Creditor does not, for instance, have a right to compel the Master to allow the claim against the Insolvent Estate. Furthermore, the fact that a claim has been rejected at a meeting of Creditors does not bar an action to enforce the claim nor is a rejection a prerequisite for such an action. A Creditor may sue to enforce its claim even if it has not been rejected by the Presiding Officer.

17.23.15 Any person (including a Creditor, the SA Collateral Provider and the Liquidator) who is aggrieved by the decision of the Presiding Officer or the Master to admit or reject a claim may apply to court to have the decision reviewed. On review, the court's powers are of the widest kind. It may adjudicate on the claim from scratch and may consider fresh evidence not available to the Presiding Officer or the Master.

(C) Section 35B of the Insolvency Act

(a) *Introduction*

17.24 Section 35B of the Insolvency Act provides as follows:

"*(1) Notwithstanding any rule of the common law to the contrary, all unperformed obligations arising out of one or more master agreements between the parties, or obligations arising from such agreement or agreements in respect of assets in which ownership has been transferred as collateral security, shall, upon the sequestration of the estate of a party to such master agreement, terminate automatically at the date of sequestration, the values of those obligations shall be calculated at market value as at that date, the values so calculated shall be netted and the net amount shall be payable.*

(2) For purposes of this section "master agreement" means-

(a) an agreement in accordance with standard terms published by the International Swaps and Derivatives Association, the International Securities Lenders Association, the Bond Market Association or the International Securities Market Association, or any similar agreement, which provides that, upon the sequestration of one of the parties-

(i) all unperformed obligations of the parties in terms of the agreement-

(aa) terminate or may be terminated; or

(bb) become or may become due immediately; and

(ii) the values of the unperformed obligations are determined or may be determined; and

(iii) the values are netted or may be netted, so that only a net amount (whether in the currency of the Republic or any other currency) is payable to or by a party,

and which may further provide that the values of assets which have been transferred as collateral security for obligations under that agreement shall be included in the calculation of the net amount payable upon sequestration; or

(b) any agreement declared by the Minister, after consultation with the Minister of Finance, by notice in the Gazette to be a master agreement for the purposes of this section.

(3) The provisions of this section shall not apply to-

(a) a transaction contemplated in section 35A; or

(b) a netting arrangement contemplated in the National Payment System Act, 1998 (Act No. 78 of 1998).

(4) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of this Act shall not apply to dispositions in terms of a master agreement."

17.25 The purpose of section 35B of the Insolvency Act is to create more certainty in respect of the post-insolvency netting or set-off of parties' unperformed obligations.

17.26 Section 35B of the Insolvency Act also recognises the creation of security or collateral by means of an outright transfer of ownership of collateral, and seeks to ensure that such security will be recognised as valid (post-insolvency), notwithstanding any conflicting rule or principle of South African common law (see PART 2 – paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraphs 26.8 and below).

17.27 We would stress that there is no reported case law on matters relating to section 35B of the Insolvency Act, and we are not aware that a South African court has been requested to consider section 35B at all. It is accordingly not certain what interpretation a South African court would give to any of the provisions of section 35B of the Insolvency Act.

(b) *"master agreement"*

17.28 In terms of section 35B(2) of the Insolvency Act (see paragraph 17.24above), in order for an agreement to qualify as a "*master agreement*" for purposes of section 35B of the Insolvency Act, that agreement must:

17.28.1 be an agreement in accordance with standard terms published by one of the entities mentioned in section 35B(2)(a) (including, among others, the International Swaps and Derivatives Association Incorporated or any similar agreement; and

17.28.2 provide that, upon the liquidation of one of the parties, all unperformed obligations of the parties in terms of the agreement will terminate or may be terminated or become or may become due immediately; and

17.28.3 provide that the values of the unperformed obligations are determined or may be determined; and

17.28.4 provide that the values are netted or may be netted so that only a net amount is payable by or to a party.

17.29 The Master Agreement is "*an agreement in accordance with standard terms published by the International Swaps and Derivatives Association*" for purposes of section 35B(2)(a) of the Insolvency Act (see paragraph 17.28.1 above)[12] and the Master Agreement satisfies the remaining criteria set out under paragraphs 17.28.2 to 17.28.4inclusive above.

17.30 Accordingly, the Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act and falls within the scope of section 35B of the Insolvency Act.

(c) Security Document

17.31 In terms of section 35B(1) of the Insolvency Act (see paragraph 17.24 above), post-insolvency netting will only be possible in respect of "*unperformed obligations*" arising out of one or more "*master agreements*" or in respect of "*obligations*" arising from "*such agreement or agreements in respect of assets in which ownership has been transferred as collateral security*".

17.32 It is our opinion that the reference to "*all unperformed obligations arising out of one or more master agreements between the parties*" is a reference to obligations that arise out of the "*master agreement*" itself.

17.33 The question, therefore, is whether the obligations under the relevant Security Document "*aris[e] out of*" the Master Agreement for purposes of section 35B(1) of the Insolvency Act.

17.34 As noted in paragraph 4.1.1 above, under South African law the existence of security interests/proprietary interests of the type referred to in this opinion is contingent upon the existence of the principal obligations in respect of which the security interests/proprietary interests are established - the security interests/proprietary interests are accessory in nature and cannot subsist without the relevant principal obligations. The principal obligations of the SA Collateral Provider are set out in, and arise in terms of, the Master Agreement. These principal obligations are secured by the pledge and cession in security of the Collateral, by the SA Collateral Provider in favour of the Secured Party, in terms of the relevant Security Document. However, if the principal obligations provided for in the Master Agreement are discharged in full, the security interest in the Collateral, and the (accessory) obligations in respect of the Collateral, provided for in the relevant Security Document will also terminate. Accordingly, it is our view that the (accessory) obligations of the SA Collateral Provider provided for in the relevant Security Document "*aris[e] out of … [the Master Agreement]*" for purposes of section 35B(1) of the Insolvency Act, notwithstanding that such (accessory) obligations are documented separately in the relevant Security Document.

17.35 In addition, one or more apparently separate documents will be regarded as forming part of a single agreement, rather than separate agreements, if the intention of the parties were such that they would not have entered into one part of the transaction without having entered into the other part. The security arrangements in respect of the Master Agreement are not documented in the Master Agreement itself but are documented separately in the relevant Security Document. However, the NY Annex provides that "*[t]his Annex supplements, forms part of, and is subject to the above-referenced [Master [A]greement, is part of its Schedule and is a Credit Support Document under this Agreement with respect to each [P]arty*" and the Deed provides that "*[t]his Deed is a Credit Support Document with respect to both [P]arties in*

[12] It is not clear to what extent it would be permissible to alter the Master Agreement before it ceases to be "*an agreement in accordance with standard terms published by the International Swaps and Derivatives Association*" for purposes of section 35B(2)(a) (see paragraph 17.28 above): for example, where "non-vanilla" Transactions that would not ordinarily be covered by a Master Agreement become so covered by substantially amending the relevant ISDA Definitions in order to provide for such "non-vanilla" Transactions, the Master Agreement under which such "non-vanilla" Transactions (as provided for under the relevant amended ISDA Definitions) are covered may no longer qualify as "*an agreement in accordance with standard terms*" for the purposes of section 35B(2)(a) of the Insolvency Act. It is our opinion that, where the Master Agreement is supplemented and/or amended such that the terminology and terms retain the meaning and effect substantially as set out in the various ISDA Definitions published by the International Swaps and Derivatives Association, Inc., the Master Agreement will remain "*an agreement in accordance with standard terms*" for the purposes of section 35B(2)(a). In our opinion, where the Master Agreement is amended as suggested in paragraph 14.6 above, the Master Agreement will remain "*an agreement in accordance with standard terms published by the International Swaps and Derivatives Association*" for purposes of section 35B(2)(a) of the Insolvency Act.

relation to the ISDA Master Agreement referred to above …". Accordingly, we believe that, for the reasons set out in this paragraph 17.34, there is a strong argument that the relevant Security Document forms an integral part of the Master Agreement and that the Master Agreement and the relevant Security Document form part of a single agreement.

(d) Post-insolvency netting

17.36 Accordingly, for purposes of section 35B(1) of the Insolvency Act (see paragraph 17.24 above), all "*unperformed obligations*" arising out of, the Master Agreement *(as read with the relevant Security Document)* will, on the date of liquidation of the SA Collateral Provider (that is, the date on which a South African court grants an order for the liquidation of the SA Collateral Provider), terminate automatically, the values of those "*unperformed obligations*" (see sub-paragraph (e) ("*unperformed obligations*") below) must be calculated at "*market value*" (see sub-paragraph (f) ("*market value*") below) as at the date of such liquidation, the values so calculated must be netted and the net amount will be payable.

(e) "*unperformed obligations*"

17.37 The question of whether any "*obligation*" (such as an obligation to pay additional costs, including breakage costs incurred as a result of the early unwinding of hedging activities and costs incurred in the process of calculating the value of obligations) constitutes an "*obligation*" arising out of a "*master agreement*" is a question of law which must be determined with reference to the contractual provisions of the particular "*master agreement*".

17.38 The question of whether any "obligation" arising out of a "master agreement" is, as at the date of liquidation of a party, an "unperformed obligation" ("**Unperformed Obligation**") is a question of fact.

17.39 All obligations arising out of the Master Agreement (as read with the relevant Security Document) which qualify as Unperformed Obligations as at the date of liquidation of the SA Collateral Provider will be capable of post-insolvency set-off and can be included in the set-off or close-out amount. A claim in respect of such Unperformed Obligations will not have to take the form of a separate claim (secured or unsecured) against the insolvent estate of the SA Collateral Provider.

17.40 Any obligation arising out of the Master Agreement (as read with the relevant Security Document) which does not qualify as an Unperformed Obligation as at the date of liquidation of the SA Collateral Provider will not be capable of post-insolvency set-off and cannot be included in the set-off or close-out amount. The Secured Party may, however, have a separate claim (secured or unsecured) in respect of such obligation against the insolvent estate of the SA Collateral Provider.

(f) "market value"

17.41 In terms of section 35B(1) of the Insolvency Act, Unperformed Obligations must be calculated at "market value" as at the date of liquidation of the SA Collateral Provider. The term "*market value*" is not defined in section 35B of the Insolvency Act and there are no guidelines as to how or by whom "*market value*" should be determined.

17.42 The method of determining the value of Unperformed Obligations stipulated in the relevant "*master agreement*" may not necessarily be accepted as the "*market value*", as this would leave the concept of "*market value*" and the results of the netting procedure set out in section 35B of the Insolvency Act open to manipulation and distortion. If, for example, a contract placed an unrealistically high value on the relevant asset, this may lead to the prejudice of other creditors.

17.43 However, the sanctity of contract is an important principle of South African law, and South African courts are generally loathe to interfere with the terms agreed upon between the parties. Accordingly, notwithstanding paragraph 17.41 above, the courts may give effect to the intention of the parties (as expressed in the method of determining the value of an Unperformed Obligation stipulated in the relevant "*master agreement*"), subject to the qualification that the court may fall back upon the calculation in accordance with the market price rule (see paragraph 17.44 below) should the court find that the "*market value*" of any such Unperformed Obligation, calculated in accordance with the relevant "*master agreement*", is contrary to public policy.

17.44 Under South African law, where a solvent debtor fails to perform, a creditor is entitled to claim performance while he tenders counter-performance – this means that he would claim the value due to him minus the value of his own performance (which amounts to claiming the net value after set-off). The non-defaulting party would be entitled to the difference between the purchase price and the value of the thing sold, this value being determined by means of the ruling market price of similar goods in the market at that time. The application of this method of assessment turns on the market price or market value of the object in question. The value of something can be said to be its market price and refers, in the first instance, to the price at which the relevant asset can actually be sold, and also to the price which a potential purchaser is reasonably prepared to pay for the relevant asset. The word "*market*" in connection with "*price*" refers to any source to which a purchaser may reasonably turn in order to obtain the relevant asset[13]. If there is an actual organised market where the relevant asset can be bought and sold, prices quoted at that market should be used to determine the market price of the relevant asset. Market value is usually calculated with reference to the place of delivery of the relevant asset in terms of the relevant agreement, but if the value of the relevant asset at such place cannot be determined, the market value will be the price of the relevant asset in the nearest available market[14].

17.45 Subject to the concerns relating to the interpretation of the term "*market value*" expressed in this paragraph 17(C)(f) ("*market value*") above, the method of determining the value of Unperformed Obligations stipulated in the Master Agreement, as read with the relevant Security Document, will in our opinion, be applied by the South African courts in determining the "*market value*" of such Unperformed Obligations and such method will not, in our opinion, be regarded as manipulating or distorting the application of section 35B of the Insolvency Act.

(D) Post-liquidation set-off

Subject to the exceptions provided for in section 35B of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) above), South African law precludes the discharge by set-off of any debt after the debtor is placed in liquidation[15].

(a) Enforcement of the settlement and close-out netting provisions post-insolvency

17.46 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.29 above) and the obligations of the SA Collateral Provider provided for in the relevant Security Document "*aris[e] out of … [the Master Agreement]* " for purposes of section 35B(1) of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraphs 17.33 and 17.34 above). Accordingly, in terms of section 35B of the Insolvency Act, the prohibition against post-insolvency set-off does not apply to the Master Agreement, as read with the relevant Security Document.

[13] P J Visser, J M Potgieter *et al*, *Visser & Potgieter's Law of Damages*, Second Edition (2003) 315.

[14] *Visser & Potgieter*'s *Law of Damages* 317.

[15] Provisions of South African law that preclude post-insolvency set-off include the *pari passu* principle described in the case of *Walker v Syfret* 1911 AD 141 at 166, common law principles of set-off that allow for set-off only under limited circumstances and section 341(2) of the Old Companies Act.

17.47 The settlement and close-out netting provisions of the Master Agreement, as read with the relevant Security Document, in respect of all Unperformed Obligations (see paragraph 17(C)(e) *("unperformed obligations")* above) are enforceable under South African law, after the insolvency of the SA Collateral Provider, in accordance with their respective terms.

17.48 The calculation of the "market value" of the Unperformed Obligations must be done as at the date of liquidation of the SA Collateral Provider (that is, the date on which a South African court grants an order for the liquidation of the SA Collateral Provider) (see paragraph 17(C)(f) *("market value")* above). Any contrary provisions in the Master Agreement, as read with the relevant Security Document, will be ineffective. The aggregate "*market value*" so calculated will be netted and the net amount will be payable (see paragraph 17(C)(d) *(Post-insolvency netting)* above). If the value of any Unperformed Obligation calculated in accordance with the Master Agreement, as read with the relevant Security Document, is not the "*market value*" of such Unperformed Obligation (see paragraph 17(C)(f) *("market value")* above), the difference will not be recoverable or qualify for set-off in terms of section 35B of the Insolvency Act, as section 35B takes priority over any contrary terms in the Master Agreement, as read with the relevant Security Document.

(E) Cross-border insolvency law

17.49 The Cross-Border Insolvency Act, 2000, introduced in 2003, deals with situations involving cross-border insolvency and regulates the procedures to be followed and the conduct of proceedings. The Cross-Border Insolvency Act, 2000, however, only relates to countries specifically designated in the South African Government Gazette and to date no countries have been designated.

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

(A) Voidable dispositions

18.1 Subject to the exceptions provided for in section 35B of the Insolvency Act (see paragraph 18.2 below), liquidation has the effect that certain transactions entered into by an insolvent prior to its liquidation may be set aside at the instance of the liquidator. The transactions which may be set aside include dispositions made without value (section 26(1)[16] of the Insolvency

[16] Section 26(1) of the Insolvency Act provides that: "*Every disposition of property not made for value may be set aside by the Court if such disposition was made by an insolvent-*

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities,

provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

Act), voidable preferences (section 29(1)[17] of the Insolvency Act), undue preferences (section 30(1)[18] of the Insolvency Act) and collusive dealings (section 31 of the Insolvency Act).

18.2 In terms of section 35B(4) of the Insolvency Act "Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of the Insolvency Act shall not apply to dispositions in terms of a master agreement" (see paragraph 17(C) (Section 35B of the Insolvency Act) – paragraph 17.24 above). The effect of section 35B(4) is that section 341(2)[19] of the Old Companies Act and sections 26, 29 and 30 of the Insolvency Act do not apply to dispositions in terms of a "master agreement".

18.3 The Master Agreement is a "master agreement" as defined in section 35B(2) of the Insolvency Act (see paragraph 17(C) (Section 35B of the Insolvency Act) – paragraph 17.29 above), the obligations of the SA Collateral Provider provided for in the relevant Security Document "aris[e] out of … [the Master Agreement] " for purposes of section 35B(1) of the Insolvency Act (see paragraph 17(C) (Section 35B of the Insolvency Act) – paragraph 17.33 above) and the relevant Security Document forms an integral part of the Master Agreement (see paragraph 17(C) (Section 35B of the Insolvency Act) – paragraph 17.34 above). Accordingly, the voidable disposition, voidable preference and undue preference provisions set out in sections 26, 29 and 30 of the Insolvency Act are not applicable to any dispositions effected in terms of the Master Agreement, as read with the relevant Security Document, prior to the liquidation of the SA Collateral Provider.

18.4 However, the collusive dealings provisions set out in section 31 of the Insolvency Act remain applicable to dispositions effected in terms of the Master Agreement, as read with the relevant Security Document, prior to the liquidation of the SA Collateral Provider.

18.5 Section 31 of the Insolvency Act provides that:

"*(1) After the sequestration of a debtor's estate the Court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.*

(2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the Court may adjudge, not exceeding the amount by which he would have benefited by such dealings if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.

(3) Such compensation and penalty may be recovered in any action to set aside the transaction in question."

18.6 "*Disposition*" is widely defined in the Insolvency Act and would include the granting of a security interest in Collateral by the SA Collateral Provider. In determining whether the granting of a security interest in Collateral by the SA Collateral Provider amounts to a "*collusive dealing*" for the purposes of preferring one creditor over another in terms of section 31 of the Insolvency Act, the South African courts apply a test based largely upon a determination of the Parties' intention which, in turn, is determined with reference to factors

[17] Section 29(1) of the Insolvency Act provides that: "*Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.*"

[18] Section 30(1) of the Insolvency Act provides that: "If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated the Court may set aside the disposition."

[19] The Old Companies Act will continue to apply with respect to the winding up and liquidation of companies under the Companies Act until a date to be determined by the Minister of Trade and Industry.

such as whether the granting of a security interest in Collateral was "*in the ordinary course of business*" of the SA Collateral Provider. In essence, for the granting of a security interest in Collateral to amount to a collusive dealing, such transaction would have to be tantamount to fraud.

18.7 Section 31 of the Insolvency Act is not limited to a defined "suspect period" occurring prior to the liquidation of the SA Collateral Provider but would apply to any "*disposition*" made by the SA Collateral Provider, prior to its insolvency, if the criteria of section 31 are satisfied. Any substitution of Collateral by the SA Collateral Provider (prior to its liquidation) to the other Party would qualify as a "*disposition*" for purposes of section 31 and could be set aside if the remaining criteria of section 31 are satisfied. Similarly, any posting of additional Collateral, whether or not pursuant to the mark-to-market provisions of the relevant Security Document, would qualify as a "*disposition*" for purposes of section 31 and could be set aside if the remaining criteria of section 31 are satisfied (see paragraphs 18.5 and 18.6 above).

(A) Setting aside of pre-liquidation set-off

18.8 Subject to, among others, the section 35B of the Insolvency Act "set-off exception" provided for in the proviso to section 46 of the Insolvency Act (see paragraph 18.9 below), liquidation has the effect that a set-off effected under an agreement prior to the liquidation of a party may be set aside at the instance of the liquidator.

18.9 Section 46 of the Insolvency Act provides that: "*if two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set-off, … ; then the trustee of the sequestrated estate may … abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place; provided that any set-off shall be effective and binding on the trustee of the insolvent estate if … it takes place under an agreement defined in Section 35B.*"

18.10 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.29 above) and the obligations of the SA Collateral Provider provided for in the relevant Security Document "*aris[e] out of … [the Master Agreement]*" for purposes of section 35B(1) of the Insolvency Act (see paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraphs 17.33 and 17.34 above). Accordingly, the proviso to section 46 of the Insolvency Act is applicable, the prohibition against post-insolvency set-off does not apply to the Master Agreement, as read with the relevant Security Document, and the liquidator may not, after the liquidation of the SA Collateral Provider, set aside any set-off effected under the Master Agreement, as read with the relevant Security Document, before the liquidation of the SA Collateral Provider.

MISCELLANEOUS

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

19.1 The choice of the governing law of the relevant Security Document is a valid choice of law under the laws of South Africa and, accordingly, will be applied by the courts of South Africa if the relevant Security Document or any claim made under the relevant Security Document is brought before any South African court, upon proof of the relevant provisions of the laws of the chosen jurisdiction.

19.2 Note that South African insolvency law will always apply to the insolvency of the SA Collateral Provider. In addition, if the Collateral is located in South Africa, the formalities for establishing and creating a valid security interest in the Collateral will be governed by South African law.

19.3 The clauses in the relevant Security Document which provide for the submission by the SA Collateral Provider to the jurisdiction of the courts of England and/or New York are legal, valid and binding on the SA Collateral Provider, and would be upheld by the South African courts.

19.4 Subject to certain exceptions which are applicable to the recognition and enforcement of all foreign judgments (for example, the South African courts will not enforce a foreign judgment to the extent that it is contrary to public policy in South Africa), a judgment rendered by any foreign court of competent jurisdiction against the SA Collateral Provider in respect of any of its obligations under the relevant Security Document will be recognised by the courts of South Africa and will be enforced in South Africa against the SA Collateral Provider without the re-examination or re-litigation of any of the matters which are the subject of that judgment. We are not aware of any South African court decisions in which the recognition and enforcement of any English law or New York law foreign judgment has been found to be against South African public policy.

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

20.1 It should be noted that it is not competent under South African law for the Security Collateral Provider to create a security interest in Collateral *in favour of a third party as agent* of the Secured Party. It is, however, competent under South African law for the Security Collateral Provider to create a security interest in Collateral in favour of the Secured Party *as principal*, and for the Secured Party in turn to be obligated to pay the proceeds to third parties. In these circumstances, the Secured Party (and not the other creditors of the Security Collateral Provider) would be the secured creditor of the Security Collateral Provider in respect of the Collateral but would be contractually obliged, upon an event of default under the Master Agreement, as read with the relevant Security Document), to enforce its security interest in the Collateral, and to procure that the realisation proceeds of such Collateral are distributed to such other creditors. The required contractual link between the Security Collateral Provider, the Secured Party and the other creditors would ordinarily be achieved through a guarantee/counter-indemnity structure.

20.2 Subject to paragraph 20.1 above, there are no other South African law considerations that we would recommend the Secured Party to consider in connection with taking and realizing the Collateral from the Security Collateral Provider.

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

We foresee no other circumstances under South African law that might affect the Secured Party's ability to enforce its security interest in the Collateral in South Africa.

PART 2

TITLE TRANSFER APPROACH PURSUANT TO THE TRANSFER ANNEX

In this PART 2 of our opinion, we consider issues relating to the Transfer Annex. For this purpose you have asked us to assume the same facts as set out in PART 1 above, but on the assumption that the Parties have entered into a Transfer Annex in connection with a Master Agreement rather than a Security Document. For this purpose, assumptions (a) to (k) under (*Assumptions relating to the Security Documents*) under PART 1 should be read as modified by the following: references to the "*Security Document(s)*" should be deemed to be references to the "*Transfer Annex*"; references to the "*Security Collateral Provider*" and "*Secured Party*" should be deemed to be references to "*Transferor*" and "*Transferee*"*,* respectively; and references to "*Collateral*" should be deemed to be references to "*Eligible Credit Support*".

Assumptions relating to the Transfer Annex

In addition we make the following additional assumptions:

a. The Transferor has entered into a Master Agreement governed by English law and a Transfer Annex with the Transferee.[20] Pursuant to the terms of the Transfer Annex, and as a matter of English law, transfers of Eligible Credit Support involve an outright transfer of title, free and clear of any liens, claims, charges or encumbrances or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance system). If an Event of Default exists with respect to either party, an amount equal to the Value of the Credit Support Balance is deemed to be an Unpaid Amount under the Master Agreement and therefore is taken into account for purposes of determining the amount due upon close-out of the Transaction pursuant to Section 6(e) of the Master Agreement. Although such arrangement has an economic effect similar to the Collateral arrangements evidenced by the Security Documents, the Transfer Annex is not intended to create any form of security interest.

b. We have assumed that transfers under the Transfer Annex would not be re-characterized as creating a form of security interest by an English court, provided that the Transfer Annex was not amended in any material way and provided further that the parties by their conduct did not otherwise clearly evidence an intention to create a security interest in the transferred Eligible Credit Support.

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

(A) Introduction

22.1 The Transfer Annex provides for the outright transfer of ownership (full title transfer) of Eligible Credit Support comprising securities ("**Securities**") by the Transferor to the Transferee, subject to a conditional obligation to return equivalent fungible securities in various circumstances or, on default, to account for the value of those securities as part of the close-out netting calculations under Section 6(e) of the Master Agreement. The Transfer Annex also provides for the full title transfer, by the Transferor to the Transferee, of Eligible

[20] We assume for purposes of our analysis of the Transfer Annex, that it is being used together with either the 1992 version of the Master Agreement or the 2002 ISDA Master Agreement. Given that the Eligible Credit Support arrangements in the Transfer Annex are deemed to constitute a Transaction for purposes of the Master Agreement and that the Transfer Annex contemplates physical delivery of Eligible Credit Support in the form of securities, the Transfer Annex cannot be used with the 1987 version of the Master Agreement without significant amendment.

Credit Support comprising cash ("**Cash**"). The Transferee is obliged to repay the Cash amount in various circumstances, either with or without interest as the Parties may agree or, on default, to account for the Cash amount as part of the close-out netting calculations under Section 6(e) of the Master Agreement.

22.2 In order to establish the enforceability of the Eligible Credit Support provisions under South African law, the nature of the Eligible Credit Support must be considered.

22.3 We deal with Eligible Credit Support comprising Securities (see paragraph 22(B) (*Securities*) below) and Eligible Credit Support comprising Cash (see paragraph 22(C) (*Cash*) below) separately, focusing on the risks of (i) a South African court finding that a full title transfer of the Eligible Credit Support is a pledge and cession in security of the Eligible Credit Support on the basis of the *Grobler* case (see paragraphs 22.11 to 22.15 inclusive below) or (ii) a South African court re-characterising a full title transfer of the Eligible Credit Support as a pledge and cession in security of the Eligible Credit Support on the basis that the true intention of the Parties was the creation of a security interest in the Eligible Credit Support.

22.4 The concerns raised in this paragraph 22 below relate only to Eligible Credit Support that is located in South Africa. We assume, unless otherwise stated, that for purpose of this paragraph 22, the Transferor is a South African Party ("**SA Transferor**"). As regards Eligible Credit Support that is located outside South Africa, see paragraph 22(D)(*Eligible Credit Support situated outside South Africa*) below.

(B) Securities

(a) General

22.5 Under South African law a share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends (*Standard Bank of SA Limited v Ocean Commodities Inc 1983(1) SA 276(A).* Debt securities constitute personal rights against the issuer of such debt securities. Both shares and debt securities ("**Securities**") comprise intangible movable property.

22.6 Under South African common law there are two formalities for transferring ownership (full title transfer) of movable Eligible Credit Support:

22.6.1 there must be an agreement between the SA Transferor (the owner of the Eligible Credit Support) and the Transferee to transfer ownership (full title transfer) of the Eligible Credit Support to the Transferee; and

22.6.2 there must be delivery of the Eligible Credit Support to the Transferee.

22.7 A pledge and cession in security is an appropriate method of creating a security interest in intangible movable property (see PART 1 - paragraph 2(A) (*General*) - paragraphs 2.92.9 and 2.10 above).

22.8 Both a valid transfer of ownership of intangible movable property and the creation of a security interest (by way of a pledge and cession in security) in intangible movable property require delivery of the intangible movable property. Delivery is effected by way of cession: The agreement of cession of the intangible movable property itself effects delivery (cession) of the intangible movable property to the transferee/pledgee.

22.9 As regards a transfer of ownership of Eligible Credit Support comprising Securities which are held in the Central Depository, note the legislative formality prescribed by section 38 of the FMA: transfer of a Beneficial Interest in such Securities "*must be effected*" by electronic book entry in the central securities account (or the relevant securities account) of the SA Transferor and the Transferee (see PART 1 – paragraph 2(B)(a) (*Debt securities which are held in the*

Central Depository) – paragraph 2.19 above). Section 39 Electronic Flagging is required in the case of a pledge and cession in security of Securities which are held in the Central Depository (see PART 1 – paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) – paragraphs 2.20 to 2.22 inclusive above).

(b) Nature of a cession in security

22.10 The question as to the nature and effect of a cession *in securitatem debiti* (cession in security) of intangible movable property (such as rights) has been considered in a number of South African judgments. Cessions in security have been construed as either:

22.10.1 an out-and-out cession (full title transfer) of the rights involved, subject to an undertaking by the cessionary to restore the right to the cedent on satisfaction of the secured debt (this is a separate and distinct act of re-cession) (the "outright cession" theory); or

22.10.2 a "pledge" of the rights involved, in which event the cedent retains "ownership" of the right and the cessionary is vested with certain limited powers in respect of such right (including, generally, the power to institute action to enforce the right) (the "pledge" theory).

22.11 The weight of authority since the early 1900's has been that cessions in security take the form of a pledge of the right concerned and not an out-and-out transfer of the right. This principle was confirmed by the highest court in the case of *Grobler v Oosthuizen* (2009) ZA SCA51 where a full bench of the Supreme Court of Appeal noted, in its discussion of the "pledge theory" of personal rights (intangible movable property), that the "pledge theory" "*is inspired by the parallel with a pledge of a corporeal asset*".

22.12 The court in the *Grobler* case noted that "*despite the doctrinal difficulties arising from the ["]pledge theory["], this court has in its latest series of decisions – primarily for pragmatic reasons – accepted that theory in preference to the ["]outright cession["] … construction….In the light of these decisions the doctrinal debate must …be regarded as settled in favour of the ["]pledge theory["]*"

22.13 Counsel's alternative argument in the *Grobler* case "*was based on the postulate that even though this court – in the series of decisions … referred to – opted for the ["]pledge theory["] it did not thereby in effect forbid the parties to mould their cession in securitatem debiti in the alternative form of an out-and-out cession coupled with a pactum fiduciae [(the "outright cession" theory)]. The validity of this postulate appears to be accepted by some authorities*".

22.14 Note, however, that the court in the *Grobler* case did not consider the validity or efficacy of an out-and-out cession (full title transfer) of the right concerned and found it "*unnecessary to decide this debate one way or another. Suffice it to say … that at best for [the respondent], the position must be this: even if the option of an alternative form of cession in securitatem debiti [(the "outright cession" theory)] were held to be open to the parties, their intention to do so would have to be clearly expressed. Absent such clear expression of intention, the pledge construction [the "pledge theory"] must prevail …, which means that the default position will be that the ["]pledge theory["] will apply.*"

22.15 Accordingly, current authority suggests that, in the absence of clear wording that provides for an out-and-out cession (full title transfer) of the right concerned, South African courts will interpret any attempt to use claims (or other personal rights) as security as a pledge *in securitatem debiti* of the right concerned, and not as an outright transfer of such right. There is also a risk that, at some future date, the Supreme Court of Appeal will consider the validity and efficacy of an out-and-out cession (full title transfer) of the right concerned and find such out-and-out cession (full title transfer) to be invalid.

(c) *Re-characterisation*

22.16 South African courts have a power (which is generally exercised circumspectly) under the common law to re-characterise a transaction where the real intention of the parties to the transaction is disguised. Where a court is satisfied that the real intention of the parties (that is, the substance of the transaction) differs from the artificial or simulated intention (that is, the form of the transaction) it will disregard the form of the transaction. Accordingly, a court will not re-characterise a transaction if such transaction represents the real intention of the parties.

22.17 Due to the ancillary nature of the Eligible Credit Support provisions, and their function within the Master Agreement, there is a risk that a South African court may regard the object of an out-and-out cession of Eligible Credit Support comprising Securities as being a pledge and cession in security of such Securities (that is, the creation of a security interest in the Securities) for obligations arising pursuant to the Master Agreement.

(d) *Risks*

22.18 In our opinion, there is a risk that a South African court may find (on the basis of the *Grobler* judgment (see paragraph 22.12 above)) an out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of such Securities. There is also a risk that a South African court may, for the reasons set out in paragraph 22.17 above, re-characterise an out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities as a pledge and cession in security of such Securities.

(e) *Risk mitigation*

22.19 In order to mitigate the risks referred to in paragraph 22.18 above, the Parties should ensure that the out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities is fully supported by the wording of the Eligible Credit Support provisions and the conduct and the practice of the Parties. The Parties should be aware and (where applicable) comply with, the legal and tax consequences associated with a full title transfer of such Securities. In this regard, it should be noted that full title transfer of Eligible Credit Support comprising Securities may have tax implications for the transferee in the form of securities transfer tax, which is generally payable upon a change in beneficial ownership in securities. Certain exemptions have been granted in terms of the amendments to the Securities Transfer Tax Act, 2007 (effective 1 January 2016). If listed Securities are transferred under a qualifying "collateral arrangement" as defined, such transfer may be exempt from transfer tax. In order to ensure that the out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities is fully supported by the wording of the Eligible Credit Support provisions, you may wish to supplement the Eligible Credit Support provisions by adding wording along the following lines "*In relation to the delivery, transfer or deposit of any Eligible Collateral Support, the Parties agree and acknowledge that it is their intention that all such deliveries, transfers or deposits of such Eligible Collateral Support made pursuant to this Annex be effected by an out-and-out cession (full title transfer) of such Eligible Collateral Support, and not by a pledge of such Eligible Collateral Support.*"

(f) Pre-insolvency consequences

References to "**SA Transferor**" in this paragraph (f) below are to a South African company or other entity which is in default under the Master Agreement but which has not been placed in liquidation under the Old Companies Act, the Insolvency Act and any other relevant legislation.

22.20 A finding (or re-characterisation) of the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, will impact prior to the liquidation of the SA Transferor, upon the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of the Eligible Credit Support provisions, which may be unenforceable against the SA Transferor.

22.21 If a South African court finds (or re-characterises) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, we do not believe that set-off would be possible, prior to the liquidation of the SA Transferor, in respect of such Securities, as a pledge and cession in security of such Securities (which pledge neither creates nor is a claim) cannot be set-off against the relevant contractual claim which the Transferee may have against the SA Transferor in respect of such Securities.

22.22 In addition, if a South African court finds (or re-characterises) the outright transfer (full title transfer) of Securities to be a pledge and cession in security of the Securities, note the Section 39 Electronic Flagging requirements in the case of a pledge and cession in security of Securities which are held in the Central Depository (see PART 1 – paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) – paragraphs 2.20 to 2.22 inclusive above).

22.23 If a South African court does not find (or re-characterise) the outright transfer (full title transfer) of the Securities to be a pledge and cession in security of the Securities, the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of the Eligible Credit Support provisions, will be enforceable under South African law, prior to the insolvency of the SA Transferor, in accordance with their respective terms.

(g) *Post-insolvency consequences*

22.24 As regards the effect of section 35B of the Insolvency Act on the outright transfer (full title transfer) of the Securities see paragraph 26(B) (*Post-insolvency of the SA Transferor*) below.

(C) Cash

22.25 It is a general principle of South African law that (subject to PART 1 – paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above), the transfer of fungible property (that is, movable tangible or intangible property such as cash that has not been individually identified but which is described only with reference to its weight, number or dimensions) to a person who mixes such fungible property with similar fungible property of his own results in the ownership of such fungible property transferring to that person. Accordingly, a security interest cannot be established in cash itself (except in circumstances where physical notes or coins are pledged and held on a non-fungible basis), but can be established in respect of the rights to claim such cash from a third party (for example a banking institution). If money is, for example, received on deposit, the depositor may have a claim for repayment of an equivalent amount, but will have no right in or to the money itself.

22.26 A commercial practice has developed in South Africa in terms of which a security provider wishing to provide a secured party with cash collateral effects an outright transfer of such cash collateral to the secured party: this practice is now common practice in the South African markets, and has not been attacked in, or held to be unenforceable by, the South African courts.

22.27 The risk of an outright title transfer of non-fungible corporeal property being re-characterised as a pledge of such assets is mainly derived from the matter of *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A). In the *Vasco* matter the court re-characterised the sale of certain corporeal property as a pledge and cession in security of such property, since the court found a pledge and cession in security to have been the true intention of the parties.

22.28 We do not believe that the principles laid down in the *Vasco* matter will (or can) apply to cash: due to the fungible nature of cash, any transfer of cash (whether as collateral or otherwise) will result in the transfer of ownership of such cash. A pledge of cash (not being a pledge of the physical notes and coins) is not competent under South African common law.

22.29 In our opinion, should a South African court be called upon to describe the nature of an outright transfer of cash as a method of creating security, it may well find that it constitutes an additional form of security developed through commercial practice, or a form of early pre-payment of the debt owing. There is an argument that the Eligible Credit Support provisions can be regarded, in relation to Eligible Credit Support comprising Cash, as a form of early pre-payment under the Master Agreement (as read with the Transfer Annex). We do not believe that, in relation to Eligible Credit Support comprising Cash, the Eligible Credit Support provisions constitute an early pre-payment of the debt owing, since the terms of the Master Agreement (as read with the Transfer Annex) provide that the Eligible Credit Support will be returned to the Transferor in circumstances where the Master Agreement (as read with the Transfer Annex) is terminated for reasons other than the occurrence of an Event of Default. We believe it more likely (taking into regard the provisions of the Transfer Annex relating to the utilisation of the Eligible Credit Support after the occurrence of an Event of Default) that, in relation to Eligible Credit Support comprising Cash, the Eligible Credit Support provisions may be held to be the additional form of security developed through commercial practice which secures the obligations of the Transferee under the Master Agreement (as read with the Transfer Annex). In either case, due to the fungible nature of the Cash, and notwithstanding the nature that a South African court ascribes to such a transfer, we regard the risk of a court finding that title to the Cash remains with the Transferor, as remote.

22.30 For the reasons set out in this paragraph 22(C) (*Cash*) above, and because Cash comprises fungible corporeal property and a pledge of fungible corporeal property (not being a pledge of the physical notes and coins) is not competent under South African common law, it is our opinion that a South African court will not be able to find and/or re-characterise the outright transfer of Eligible Credit Support comprising Cash as a pledge and cession in security of the Cash. Note that we are not aware of any case law that deals with this point.

(D) Eligible Credit Support situated outside South Africa

22.31 Under South African law, the laws of the *lex situs* (that is, the laws of the place where the Eligible Credit Support is located) will govern the *formalities for establishing and creating* a valid security interest in and to the Eligible Credit Support, even where the Parties have agreed that South African law will govern the *contractual aspects* of the Master Agreement and/or the Transfer Annex.

22.32 In circumstances where the Eligible Credit Support is located outside South Africa then the *formalities for establishing and creating* a valid security interest in and to the Eligible Credit Support will be governed by the relevant foreign legal system and, it is our opinion that, in these circumstances, the effect and consequences of such security interest (as provided for under the foreign legal system) will apply and be binding on the South African liquidator of the SA Transferor. In this regard, it should be noted that South African Securities will generally be regarded as located in South Africa where the share or bond register is located in South Africa.

22.33 Therefore if, under the relevant foreign legal system, the Eligible Credit Support provisions result in the outright transfer (full title transfer) of Eligible Credit Support to the Transferee, such transfer will be binding on the SA Transferor (or, subject to the Insolvency Act), the South African liquidator of the SA Transferor, as applicable) and the Eligible Credit Support will not form part of the insolvent estate of the SA Transferor.

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

23.1 Assuming that the Transferee receives an absolute ownership interest in the Eligible Credit Support, the Transferee is not required to take any additional action thereafter to ensure that its title (ownership) of the Eligible Credit Support continues, subject, in the case of Eligible Credit Support comprising Securities which are held in the Central Depository, to the requirements of section 38 of the FMA (see PART 1 – paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) – paragraph 2.20 above).

23.2 No filing or perfection requirements are necessary or advisable (including taking any of the actions referred to in question 5); provided that an out-and-out cession (full title transfer) of Eligible Credit Support from an SA Transferor to a non-resident Transferee requires the prior approval of the Exchange Control Authorities (see PART 1 – paragraph 5(A) (*Exchange control requirements*) above).

23.3 There are no other procedures that must be followed, or consents or other governmental or regulatory approvals that must be obtained, to establish, enforce or continue an ownership interest in the Eligible Credit Support.

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

24.1 The provisions in the Transfer Annex that provide for the exchange of Eligible Credit Support are valid, and such provisions have no impact on the validity of the Transfer Annex or the arrangements contemplated therein. Note that the formalities described in paragraph 22(B)(a) (*General*) – paragraphs 22.6, 22.8 and 22.9 above must be complied with in respect of the exchanged Eligible Credit Support.

24.2 The Transferee would need to consent to the exchange of the Eligible Credit Support and, to this extent, the requisite consent has been "built into" the Transfer Annex and will have been obtained "upfront" upon the Parties entering into the Transfer Annex. We note, however, that paragraph 3(c)(ii) of the Transfer Annex provides that the Transferee must consent to each such substitution.

24.3 If a South African court finds (or re-characterises) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities (see paragraph 22(B) (*Securities*) - paragraph 22.18 above), the provisions of PART 1 – paragraph 11 above will apply *mutatis mutandis* to the "exchange" of such Securities.

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

Assuming that Section 6 of the Master Agreement is valid and enforceable in South Africa insofar as it relates to the determination of the net amount payable by either Party on the termination of the Transactions (see, as regards pre-insolvency of the SA Transferor, paragraph 22(B)(f) (*Pre-insolvency consequences*) above and, as regards post-insolvency of the SA Transferor,

paragraph 26(B)(f) (*Conclusion*) below), 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 the net amount payable under Section 6(e) of the Master Agreement.

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

(A) Pre-insolvency of the SA Transferor

References to **SA Transferor** in this paragraph (A) below are to a South African company or other entity which is in default under the Master Agreement but which has not been placed in liquidation under the Old Companies Act, the Insolvency Act or any other relevant legislation.

26.1 If a South African court finds (or re-characterises) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, we do not believe that set-off would be possible, prior to the liquidation of the SA Transferor, in respect of such Securities, as a pledge and cession in security of such Securities (which pledge neither creates nor is a claim) cannot be set-off against the relevant contractual claim which the Transferee may have against the SA Transferor in respect of such Securities (see paragraph 22(B)(f) (*Pre-insolvency consequences)* above).

26.2 Accordingly, if a South African court finds (or re-characterises) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of the Eligible Credit Support provisions, will not be fully enforceable under South African law, prior to the insolvency of the SA Transferor, in accordance with their respective terms.

26.3 If a South African court does not find (or re-characterise) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of the Eligible Credit Support provisions, will be fully enforceable under South African law, prior to the insolvency of the SA Transferor, in accordance with their respective terms.

26.4 Subject to paragraph 26.2 above, the rights of the Transferee under the Master Agreement (as read with the Transfer Annex) will be fully enforceable under South African law, prior to the insolvency of the SA Transferor, in accordance with the terms of the Master Agreement (as read with the Transfer Annex).

(B) Post-insolvency of the SA Transferor

References to **SA Transferor** in this paragraph (B) below are to a South African company which has been placed in liquidation under the Old Companies Act, the Insolvency Act or any other relevant legislation.

(a) (Section 35B of the Insolvency Act

26.5 Subject to the exceptions provided for in section 35B of the Insolvency Act (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) above), South African law precludes the discharge by set-off of any debt after the debtor is placed in liquidation.

26.6 It is clear that the Master Agreement is a "*master agreement*" as defined in section 35B of the Insolvency Act (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraphs 17.28 and 17.29 above).

26.7 In terms of section 35B(2)(a) of the Insolvency Act (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.24 above), a "*master agreement*" may also provide "*that the values of assets which have been transferred as collateral security for obligations under that [master] agreement shall be included in the calculation of the net amount payable upon [liquidation]*". Accordingly, section 35B of the Insolvency Act recognises the validity of an out-and-out cession (full title transfer) of assets transferred as collateral security, and seeks to ensure that such security will be recognised as valid (post-insolvency), notwithstanding any conflicting rule or principle of South African common law.

26.8 In terms of section 35B(1) of the Insolvency Act, post-insolvency netting will only be possible (i) in respect of "*unperformed obligations*" arising out of one or more "*master agreements*" (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.35 above) or (ii) in respect of "*obligations*" arising from "*such agreement or agreements in respect of assets in which ownership has been transferred as collateral security*".

26.9 It is our opinion that the reference to "*obligations arising from such agreement or agreements in respect of assets in which ownership has been transferred as collateral security*" is a reference to obligations (i) that arise from the "*master agreement*" itself (ii) in respect of assets in which ownership has been transferred as collateral security.

26.10 The Transfer Annex provides for obligations of the Parties in respect of "*assets [the Eligible Credit Support] in which ownership has been transferred as collateral security*" (the Parties' respective obligations in respect of Eligible Credit Support upon the occurrence of an Event of Default). The question, therefore, is whether these obligations "*aris[e] from*" the Master Agreement for purposes of section 35B(1) of the Insolvency Act.

26.11 As noted in PART 1 – paragraph 4.1.1 above, under South African law the existence of security interests/proprietary interests of the type referred to in this opinion is contingent upon the existence of the principal obligations in respect of which the security interests/proprietary interests are established - the security interests/proprietary interests are accessory in nature and cannot subsist without the relevant principal obligations. The principal obligations of the SA Transferor are set out in, and arise in terms of, the Master Agreement. It is our view that the (accessory) obligations of the SA Transferor in respect of the Eligible Credit Support provided for in the Transfer Annex "*aris[e] from … [the Master Agreement]* " for purposes of section 35B(1) of the Insolvency Act, notwithstanding that such (accessory) obligations are documented separately in the Transfer Annex.

26.12 In addition, one or more apparently separate documents will be regarded as forming part of a single agreement, rather than separate agreements, if the intention of the parties were such that they would not have entered into one part of the transaction without having entered into the other part. The Eligible Credit Support provisions are not documented in the Master Agreement but are documented separately in the Transfer Annex. However, the Transfer Annex provides that "*This Annex supplements, forms part of, and is subject to the … Master Agreement … and is part of its Schedule*". Accordingly, we believe that, for the reasons set out in this paragraph 26.12, there is a strong argument that the Transfer Annex forms an integral part of the Master Agreement and that the Master Agreement and the Transfer Annex form part of a single agreement.

(b) *Post-insolvency netting*

26.13 Accordingly, for purposes of section 35B(1) of the Insolvency Act, (i) all "*unperformed obligations*" arising out of the Master Agreement, as read with the Transfer Annex, and (ii) all "*obligations*" arising from the Master Agreement, as read with the Transfer Annex, in respect of the Eligible Credit Support will, on the date of liquidation of the SA Transferor (that is, the date on which a South African court grants an order for the liquidation of the SA Transferor), terminate automatically, the values of those "*unperformed obligations*" and those "*obligations*" (see sub-paragraph (c) ("unperformed obligations" and "*obligations*") below) must be

calculated at "*market value*" (see sub-paragraph (d) ("*market value*") below) as at the date of such liquidation, the values so calculated must be netted and the net amount will be payable.

(c) "unperformed obligations" and "obligations"

26.14 The provisions of PART 1 – paragraph 17(C)(e) ("unperformed obligations") – paragraphs 17.37 to 17.40 inclusive above apply *mutatis mutandis* to "*unperformed obligations*" arising out of the Master Agreement, as read with the Transfer Annex (Unperformed Obligation) and "*obligations*" arising from the Master Agreement, as read with the Transfer Annex, in respect of the Eligible Credit Support (Collateral Obligations).

(d) "*market value*"

26.15 The provisions of PART 1 - paragraph 17(C)(f) ("*market value*") – paragraphs 17.41 to 17.45 inclusive above apply *mutatis mutandis* to the "*market values*" of Unperformed Obligations and Collateral Obligations.

26.16 Subject to the concerns relating to the interpretation of the term "*market value*" expressed in PART 1 - paragraph 17(C)(f) ("*market value*") - paragraphs 17.41 to 17.45 inclusive above, the method of determining the value of Unperformed Obligations and Collateral Obligations stipulated in the Master Agreement as read with the Transfer Annex will, in our opinion, be applied by the South African courts in determining the "market value" of such Unperformed Obligations and Collateral Obligations, and such method will not, in our opinion, be regarded as manipulating or distorting the application of section 35B of the Insolvency Act.

(e) Security by title transfer of Eligible Credit Support

26.17 It is anomalous that section 35B of the Insolvency Act recognises an out-and-out cession (full title transfer) of Eligible Credit Support where the SA Transferor is insolvent (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) - paragraph 26.7 above) whereas, pre-insolvency of the SA Transferor, an out-and-out cession (full title transfer) of Eligible Credit Support comprising any assets other than cash may be found to be (or re-characterised as) a pledge and cession in security of such assets (see paragraph 22(B)(d) (*Risks*) – paragraph 22.18 above).

26.18 This anomaly means that, if a South African court finds (or re-characterises) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of the Eligible Credit Support provisions, will not be fully enforceable under South African law, prior to the insolvency of the SA Transferor, in accordance with their respective terms (see paragraph 26(A) (*Pre-insolvency of the SA Transferor*) above) but, upon the insolvency of the SA Transferor, the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of all Collateral Obligations (see paragraph 26(B)(c) ("unperformed obligations" and "obligations") – paragraph 26.14 above), would be fully enforceable against the SA Transferor.

26.19 Under South African law, legislation (such as the Insolvency Act) does not amend the common law, except where there is an explicit statement that an amendment of the common law is intended, or where an amendment of the common law is a necessary inference to be drawn from the legislation.

26.20 Since the Insolvency Act only applies in circumstances where a party is insolvent, it is unlikely that a court will regard a provision of the Insolvency Act as relevant when applying common law principles in circumstances where all the parties to the agreement remain solvent. As a result, it is in our opinion unlikely that the provisions of section 35B of the Insolvency Act will be taken into account by a South African court, prior to the insolvency of the SA Transferor, when considering whether an out-and-out cession (full title transfer) of Eligible Credit Support

comprising Securities could be found to be (or re-characterised as) a pledge and cession in security of such Securities (see paragraphs 22(B)(b) (*Nature of a cession in security*) and 26(B)(c) (*Re-characterisation*) above).

26.21 The position is, however, somewhat unclear, as it could be argued that the anomalous results which we discuss in paragraphs 26.17 and 26.18 above necessarily implies that, in regard to section 35(B) of the Insolvency Act, the legislature intended an amendment of the common law position in relation to the creation and validity (pre-insolvency) of security interests by way of title transfer. This issue has not been considered by South African courts.

26.22 There is a risk that this somewhat awkward position could lead to unexpected and potentially undesirable results. For example, it is conceivable that the Transferee may accelerate a decision to place the SA Transferor in liquidation in circumstances where, but for section 35B of the Insolvency Act, it may have sought alternative remedies.

26.23 It is also not ideal, from a legal perspective, that an agreement (or any provisions thereof) which may, in solvent circumstances, be regarded as invalid by a South African court could, upon the insolvency of a party to such agreement, become valid and binding on the parties. There is a risk (which we think is small) that a South African court may conclude that the provisions in the Transfer Annex providing for the out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities did not constitute a valid agreement between the Parties in the first place, and that there could therefore have been no valid transfer of title of the Securities. This issue has not been considered by the South African courts.

(f) Conclusion - enforcement of the settlement and close-out netting provisions post-insolvency

26.24 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.6 above) and the obligations of the SA Transferor provided for in the Transfer Annex "*aris[e] from … [the Master Agreement]* " in respect of "*assets [the Eligible Credit Support] in which ownership has been transferred as collateral security*" for purposes of section 35B(1) of the Insolvency Act (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraphs 26.11 and 26.12 above). Accordingly, in terms of section 35B of the Insolvency Act, the prohibition against post-insolvency set-off does not apply to the Master Agreement, as read with the Transfer Annex.

26.25 The settlement and close-out netting provisions of the Master Agreement, as read with the Transfer Annex, in respect of all Unperformed Obligations (see paragraph 26.14 above) and, subject to the risk referred to in paragraph 26.23 above, all Collateral Obligations (see paragraph 26(B)(c) ("*unperformed obligations" and* "*obligations*") – paragraph 26.14 above) are enforceable under South African law, after the insolvency of the SA Transferor, in accordance with their respective terms.

26.26 The calculation of the "market values" of the Unperformed Obligations and the Collateral Obligations" (see paragraph 26(B)(c) ("*unperformed obligations" and* "*obligations*") – paragraph 26.14 above) must be done as at the date of liquidation of the SA Transferor (that is, the date on which a South African court grants an order for the liquidation of the SA Transferor) (see paragraph 26(B)(d) ("*market value*") – paragraphs 26.15 and 26.16 above). Any contrary provisions in the Master Agreement, as read with the Transfer Annex, will be ineffective. The aggregate "*market values*" so calculated will be netted and the net amount will be payable (see paragraph 26(B)(b) *(post-insolvency netting)* – paragraph 26.13 above). If the value of any Unperformed Obligation or any Collateral Obligation, as the case may be, calculated in accordance with the Master Agreement, as read with the Transfer Annex, is not the "*market value*" of such Unperformed Obligation or such Collateral Obligation (see paragraph 26(B)(d) ("*market value*") – paragraphs 26.15 and 26.16 above), the difference will not be recoverable or qualify for set-off in terms of section 35B of the Insolvency Act, as section 35B takes priority over any contrary terms in the Master Agreement, as read with the Transfer Annex.

26.27 Subject to the risk referred to in paragraph 26.23 above, the rights of the Transferee under the Master Agreement, as read with the Transfer Annex, will be fully enforceable under South African law, after the insolvency of the SA Transferor, in accordance with the terms of the Master Agreement, as read with the Transfer Annex.

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

References to **SA Transferor** in this paragraph 27 below are to a South African company which has been placed in liquidation under the Old Companies Act, the Insolvency Act or any other relevant legislation.

(A) Voidable dispositions

27.1 Subject to the exceptions provided for in section 35B of the Insolvency Act (see paragraph 27.2 below), liquidation has the effect that certain transactions entered into by an insolvent prior to its liquidation may be set aside at the instance of the liquidator.

27.2 In terms of section 35B(4) of the Insolvency Act "*Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of the Insolvency Act shall not apply to dispositions in terms of a master agreement*" (see PART 1 - paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.24 above). The effect of section 35B(4) is that section 341(2)[21] of the Old Companies Act and sections 26, 29 and 30 of the Insolvency Act do not apply to dispositions in terms of a "*master agreement*".

27.3 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.6 above), the obligations of the SA Transferor provided for in the Transfer Annex "*aris[e] from … [the Master Agreement]* " in respect of "*assets [the Eligible Credit Support] in which ownership has been transferred as collateral security*" for purposes of section 35B(1) of the Insolvency Act (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.11 above) and the Transfer Annex forms an integral part of the Master Agreement (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.12 above). Accordingly, the voidable disposition, voidable preference and undue preference provisions set out in sections 26, 29 and 30 of the Insolvency Act are not applicable to any dispositions effected in terms of the Master Agreement, as read with the Transfer Annex, prior to the liquidation of the SA Transferor.

27.4 However, the collusive dealings provisions set out in section 31 of the Insolvency Act remain applicable to dispositions effected in terms of the Master Agreement, as read with the Transfer Annex, prior to the liquidation of the SA Transferor (see PART 1 – paragraph 18(A) (*Voidable dispositions*) – paragraph 18.5above).

[21] The Old Companies Act will continue to apply with respect to the winding up and liquidation of companies under the Companies Act until a date to be determined by the Minister of Trade and Industry.

27.5 "*Disposition*" is widely defined in the Insolvency Act and would include the transfer of Eligible Credit Support by the SA Transferor. In determining whether the transfer of Eligible Credit Support by the SA Transferor amounts to a "*collusive dealing*" for the purposes of preferring one creditor over another in terms of section 31 of the Insolvency Act, the South African courts apply a test based largely upon a determination of the Parties' intention which, in turn, is determined with reference to factors such as whether the transfer of Eligible Credit Support by the SA Transferor was "*in the ordinary course of business*" of the SA Transferor. In essence, for the transfer of Eligible Credit Support to amount to a collusive dealing, such transaction would have to be tantamount to fraud.

27.6 Section 31 of the Insolvency Act is not limited to a defined "suspect period" occurring prior to the liquidation of the SA Transferor but would apply to any "*disposition*" made by the SA Transferor, prior to its insolvency, if the criteria of section 31 are satisfied. Any substitution of Eligible Credit Support by the SA Transferor (prior to its liquidation) to the other Party would qualify as a "*disposition*" for purposes of section 31 and could be set aside if the remaining criteria of section 31 are satisfied. Similarly, a transfer of additional Eligible Credit Support, whether or not pursuant to the mark-to-market provisions of the Transfer Annex, would qualify as a "*disposition*" for purposes of section 31 and could be set aside if the remaining criteria of section 31 are satisfied.

(B) Setting aside of pre-liquidation set-off

27.7 Subject to, among others, the section 35B of the Insolvency Act "set-off exception" provided for in the proviso to section 46 of the Insolvency Act (see PART 1 - paragraph 18(B) (*Setting aside of pre-liquidation set-off*) – paragraph 18.9 above), liquidation has the effect that a set-off effected under an agreement prior to the liquidation of a party may be set aside at the instance of the liquidator.

27.8 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.6 above) and the obligations of the SA Transferor provided for in the Transfer Annex "*aris[e] from … [the Master Agreement]* " in respect of "*assets [the Eligible Credit Support] in which ownership has been transferred as collateral security*" for purposes of section 35B(1) of the Insolvency Act (see paragraph 26(B) (*Section 35B of the Insolvency Act*) – paragraphs 26.11 and 26.12 above).

27.9 Accordingly, the proviso to section 46 of the Insolvency Act is applicable (see PART 1 - paragraph 18(B) (*Setting aside of pre-liquidation set-off*) – paragraph 18.9 above), the prohibition against post-insolvency set-off does not apply to the Master Agreement, as read with the Transfer Annex, and the liquidator may not, after the liquidation of the SA Transferor, set aside any set-off effected in terms of the Master Agreement, as read with the Transfer Annex, before the liquidation of the SA Transferor.

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

28.1 The choice of the governing law of the Transfer Annex is a valid choice of law under the laws of South Africa and, accordingly, will be applied by the courts of South Africa if the Transfer Annex or any claim made under the Transfer Annex is brought before any South African court, upon proof of the relevant provisions of the laws of the chosen jurisdiction.

28.2 Note that South African insolvency law will always apply to the insolvency of the SA Transferor. In addition, if the Eligible Credit Support is located in South Africa, the formalities for establishing and creating a valid proprietary interest in the Eligible Credit Support will be governed by South African law.

28.3 The clauses in the Transfer Annex which provide for the submission by the SA Transferor to the jurisdiction of the courts of England and/or New York are legal, valid and binding on the SA Transferor, and would be upheld by the South African courts.

28.4 Subject to certain exceptions which are applicable to the recognition and enforcement of all foreign judgments (for example, the South African courts will not enforce a foreign judgment to the extent that it is contrary to public policy in South Africa), a judgment rendered by any foreign court of competent jurisdiction against the SA Transferor in respect of any of its obligations under the Transfer Annex will be recognised by the courts of South Africa and will be enforced in South Africa against the SA Transferor without the re-examination or re-litigation of any of the matters which are the subject of that judgment. We are not aware of any South African court decisions in which the recognition and enforcement of any English law or New York law foreign judgment has been found to be against South African public policy.

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

29.1 Subject to the provisions of (i) paragraph 22(B)(a) (*General*) – paragraphs 22.6, 22.8 and 22.9 above, (ii) paragraph 22(B)(d) (*Risks*) - paragraph 22.18 above and (iii) paragraph 22(B)(e) (*Risk mitigation*) - paragraph 22.19 above, we are of the opinion that the Transfer Annex is in an appropriate form to create the intended outright transfer of ownership in the Eligible Credit Support to the Transferee.

29.2 Note that PART 1 - paragraph 5(A) (*Exchange control requirements*) is applicable *mutatis mutandis* to the Transfer Annex. The exchange control requirements set out in PART 1 - paragraph 5(A) (*Exchange control requirements*) are not necessary to establish or "perfect" the intended outright transfer of ownership in the Eligible Credit Support to the Transferee, but a failure to observe these exchange control requirements may affect the validity of the Master Agreement and/or the Transfer Annex. Subject as aforesaid and subject to the provisions of paragraph 22(B)(a) (*General*) – paragraphs 22.6, 22.8 and 22.9 above, there are no other requirements to ensure the validity of the intended outright transfer of ownership in each type of Eligible Credit Support by the SA Transferor under the Transfer Annex.

29.3 Subject to paragraphs 29.1 and 29.2 above, there are no other requirements to ensure the validity or perfection of the intended outright transfer of ownership in the Eligible Credit Support to the Transferee under the Transfer Annex, and there no other documentary formalities that must be observed in order for the intended outright transfer of ownership in the Eligible Credit Support to the Transferee under the Transfer Annex to be recognized as valid in South Africa.

PART 3

ADDITIONAL CONSIDERATIONS - CAPACITY

We set out in this PART 3 below the laws which apply generally to the capacity of certain types of persons to enter into derivative transactions and the transactions in the Credit Support Documents ("**Transactions**"). If a Party enters into a Transaction where it does not have the capacity or authority to do so, the Transaction may be unenforceable.

30 Statutory corporations

30.1 Statutory corporations are established by a specific Act of Parliament. Examples of statutory corporations are the Reserve Bank (see paragraph 31 below), the Land Bank, the South African Development Bank Limited and the Industrial Development Corporation.

30.2 A statutory corporation only has the capacity and power conferred upon it by the statute (Act of Parliament) that creates it, and its capacity to enter into any particular Transaction must be ascertained by an examination of the statute.

31 Reserve Bank

31.1 The Reserve Bank established in terms of the South African Reserve Bank Act, 1989 (the "**Reserve Bank Act**"), derives its powers from the Constitution of the Republic of South Africa, 1996 and the Reserve Bank Act. The SARB, as well as being the regulator of the banking sector in South Africa, has an oversight role in respect of the application and enforcement of the Exchange Control Regulations.

31.2 The powers and duties of SARB are set out in section 10 of the Reserve Bank Act. In terms of section 10(1) of the Reserve Bank Act, SARB may, among other things (subject to the provisions of section 13 of the Reserve Bank Act "*buy, sell or deal in financial instruments and, in accordance with the provisions of any law regulating the safe deposit of securities, hold such financial instruments in safe custody, or cause such financial instruments to be held in safe custody, for other persons*" and "*buy and sell foreign currencies*".

31.3 Section 13 of the Reserve Bank Act restricts SARB from conducting certain business activities.

31.4 A "*financial instrument*"" is defined in the Reserve Bank Act with reference to the definition of "*securities*" in the (now repealed) Stock Exchanges Control Act, 1985 and the definition of "*financial instruments*" in the (now repealed) Financial Markets Control Act, 1989. The Stock Exchanges Control Act, 1985 and the Financial Markets Control Act, 1989 were replaced by the Securities Services Act, 2004, which has, as of 3 June 2013, been replaced with the FMA. The definition of "*financial instruments*" in the (now repealed) Financial Markets Control Act, 1989 and the definition of "*securities*" in the FMA, include derivatives. In our view, a "*financial instrument*" for purposes of the Reserve Bank Act includes derivative transactions.

31.5 In terms of section 26(1) of the Reserve Bank Act " [a]ll assets of [SARB] expressed in currencies other than the currency of [South Africa], including special drawing rights but excluding any dividends, discount or interest or the usual exchange margins in connection therewith, shall be for the profit or loss of the Government [of South Africa] ". SARB is required, in terms of section 26(2) of the Reserve Bank Act, to establish a Foreign Exchange Adjustment Account in which it must account for such profits and/or losses.

31.6 SARB has the capacity and power, in terms of section 10(1) of the Reserve Bank Act, to enter into the Transactions. We can find nothing in the Reserve Bank Act or the Regulations relating to the South African Reserve Bank (Regulations GNR.808 of 13 September 2010:

Government Gazette No. 33552) ("**Reserve Bank Regulations**") that imposes any limits or restrictions on its capacity and power to do so.

31.7 We can also find nothing in the Reserve Bank Act or the Reserve Bank Regulations that imposes limits or restrictions on the SARB's capacity and power to grant a security interest over its assets.

31.8 However, before a Transaction is entered into or a security interest is granted (for example under the Security Documents), the board of directors of the SARB would have to approve the granting of the security interest through the governor of the SARB and his/her deputy governors and all procedurally required resolutions and permissions must be in place.

31.9 The SARB is not able to rely on any sovereign immunity. The SARB is however subject to the Institution of Legal Proceedings against Organs of State Act, 2002, which sets out different prescription periods that apply to dealings with organs of state and the periods within which legal notices are to be served on organs of state.

31.10 In addition, there are special insolvency provisions which apply to the winding up of the SARB. The SARB can only be wound up by means of an act of parliament and this act of parliament will govern the SARB's winding up.

31.11 Section 38 of the Reserve Bank Act further provides as follows:

31.11.1 in the event of a liquidation of the SARB, any reserve funds and surplus assets will be divided between the government and the shareholders in the proportion of 60% to 40% respectively; and

31.11.2 if the amount payable to a shareholder in terms of section 38 of the Reserve Bank Act exceeds the average market price of that shareholder's holdings in the Reserve Bank over a 12-month period preceding a day, three months' prior to the date upon which a bill providing for the liquidation of the Reserve Bank is introduced in parliament, and so much of the amount that exceeds the said average will be paid to the government; and

31.11.3 no writ of execution, attachment or process in the nature thereof shall be issued or proceeded with against the Reserve Bank if the Minister of Finance has certified that he or she has introduced or that it is his or her intention to introduce into parliament a bill placing the Reserve Bank in liquidation and the Minister of Finance has not withdrawn that certificate.

32 Companies

32.1 Companies are those entities that are incorporated (or deemed to have been incorporated) under the Companies Act. A company has the capacity and power conferred upon it by its Memorandum of Incorporation, as read with the Companies Act. Historically, any third party which contracted with a company could accept that the company had unlimited capacity to enter into the transaction. This principle applied even if the company's capacity to enter into the transaction was limited in terms of its Memorandum of Incorporation. However, under the Companies Act, a person will be regarded as having knowledge of or having received notice of provisions of the Memorandum of Incorporation of a company if the Memorandum of Incorporation draws attention to certain provisions as prescribed by the Companies Act. Such a company would include the designation "RF" which stands for "Ring Fenced" in the company's name.

32.2 Note that additional special considerations apply to companies which are, among others, long-term insurers, short-term insurers and banks.

33 Common law corporations

Under South African common law, an association of persons, or *universitas*, acquires separate legal personality by simply acting as such. A common law corporation only has the capacity and power set out in its founding document.

34 Trusts

34.1 The Trust Property Control Act, 1988 ("**TPC Act**"), recognizes both (i) the English law type of trust where the trustees own the trust assets but the trust assets are administered by the trustees for the benefit of the beneficiaries and (ii) a Roman-Dutch "*bewind*" trust where the beneficiaries own the trust assets but the assets are placed under the control of the trustees and administered for the benefit of the beneficiaries.

34.2 A trust is not a separate legal entity under South African law (except where it is deemed to be so for purposes of, for example the Income Tax Act, 1962).

34.3 Trusteeship of a trust which is constituted under the laws of South Africa is a regulated activity within South Africa (under the TPC Act) to the extent that the trust assets constitute "*trust property*" and the trust deed qualifies as a "*trust instrument*". A "*trust instrument*" is, among other things, a written agreement according to which a trust is created.

34.4 In terms of section 4 of the TPC Act, " *… a trustee … shall, before he assumes control of the trust property, upon payment of the prescribed fee, lodge with the Master the trust instrument in terms of which the trust property is to be administered or disposed of by him ….*". The "*Master*" is the Master of the High Court (the "**Master**").

34.5 The TPC Act defines "*trust property*" as "*movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee*".

34.6 A person may only act in its capacity as trustee if authorized thereto in writing by the Master that is, issued with "letters of authority". In this regard, section 6(1) of the TPC Act provides that: " *(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master."*

34.7 The trustees of a trust have the capacity and power conferred upon them by the trust deed, as read (where applicable) with the TPC Act. The trustees will have no power or capacity to enter into a Transaction unless such power and capacity is conferred on them by the trust deed and unless, in the case of a trust to which the TPC Act is applicable, the trustees have been issued with "letters of authority" by the Master (see paragraph 34.6 above).

34.8 Section 9 of the TPC Act provides for the care, diligence and skill required of a trustee. In terms of section 9:

" *(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.*

(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)."

35 Co-operative societies

The Co-operatives Act, 2005 provides for the establishment of three types of co-operative societies, namely agricultural co-operatives, special farmers co-operatives and trading co-operatives. Generally, co-operatives have the powers specifically conferred on them in terms of the Co-operatives Act, 2005 together with those powers specifically conferred by the Minister of Agriculture.

36 Banks

36.1 The Banks Act, 1990 (the "**Banks Act**") regulates, among other things, banks which are registered as such under the Banks Act ("**Banks**"). In terms of the Banks Act only companies which are incorporated as public companies, or certain South African branches of foreign institutions, qualify for banking licences under the Banks Act.

36.2 The general considerations relating to companies (see paragraph 32 above) therefore apply to licensed banks which are incorporated as companies.

36.3 There is nothing in the Banks Act that specifically precludes Banks from entering into the Transactions. There are, however, a number of general limitations on the capacity of Banks to do business, but these limitations are unlikely to affect a Bank's capacity to enter into the Transactions or the Credit Support Documents.

36.4 Sections 70 and 72 of the Banks Act provide for certain minimum capital and liquid asset requirements of a Bank. The transfer by a Bank of assets in title may impact upon these requirements. Section 73 of the Banks Act provides that a Bank may not grant credit to any individual person in an amount exceeding 10% of the Bank's capital and reserves without first obtaining the permission of its board of directors or of a committee appointed for such purpose by its board of directors. The failure of a Bank to comply with the prescribed capital adequacy requirements and/or to adhere to the specific limitations imposed in terms of the Banks Act has certain implications for the Bank (such as rendering the bank liable to a fine or other regulatory sanction) but not for the Bank's counterparty.

36.5 Where a Bank issues a guarantee in respect of the liabilities of an "associate" of the Bank (as defined in the Banks Act) the further provisions of section 77 of the Banks Act must be complied with.

36.6 Subject to the capital adequacy requirements set out in the Banks Act, Banks have the capacity and power to enter into derivative transactions (including the Transactions). Subject to the capital adequacy requirements set out in the Banks Act, we can find nothing in the Banks Act or any of the regulations promulgated under the Banks Act that imposes any limits or restrictions on the capacity and power of Banks to enter into derivative transactions (including the Transactions) or to enter into the Credit Support Documents.

36.7 Special considerations apply to the winding-up and curatorship of Banks under the Insolvency Act, and the Companies Act as read with the Banks Act and as set out in PART 1 paragraphs 17(A)(e) (*Special Considerations*) – paragraph 17.20.3.

37 Long-term insurance companies

37.1 Section 34(2) of the Long-Term Insurance Act, 1998 (the "**Long-Term Insurance Act**") provides that long-term insurers registered as such under the Long-Term Insurance Act ("**Long-Term Insurers**") "*shall not invest in derivatives other than for one or more of the following reasons:*

(a) derivatives designated as an asset in respect of a linked policy;

(b) *derivatives acquired out of or in respect of assets that are in excess of the assets required to meet the long-term insurer's liabilities under long-term policies and capital adequacy requirement in terms of section 30(1);*

(c) *for the purpose of efficient portfolio management;*

(d) *for the purpose of reducing investment risk:*

Provided that—

(i) *in respect of paragraphs (a), (b) and (c), the long-term insurer will, or reasonably expects to, have the asset at the settlement date of the derivative instrument which matches the obligations under that instrument and from which it can discharge those obligations;*

(ii) *in respect of paragraph (d), the statutory actuary has in writing agreed thereto."*

37.2 A "linked policy" is defined in the Long-Term Insurance Act as "*a long-term policy of which the amount of the policy benefits is not guaranteed by the long-term insurer and is to be determined solely by reference to the value of particular assets or categories of assets which are specified in the policy and are actually held by or on behalf of the insurer specifically for the purposes of the policy*".

37.3 Accordingly, a Long-Term Insurer may only enter into the Transactions for the purposes set out in sections 34(2)(a) to (d) inclusive of the Long-Term Insurance Act and then, depending on which of such purposes the Transactions are entered into for, subject to the limitations set out in section 34(2)(i) or section 34(2)(ii), as applicable.

37.4 Section 34(1) of the Long-Term Insurance Act provides that a Long-Term Insurer "*shall not -*

(a) *encumber its assets;*

(b) *allow its assets to be held by another person on its behalf;*

(c) *directly or indirectly borrow any asset;*

(d) *by means of suretyship or any other form of personal security, whether under a primary or accessory obligation, give security in relation to obligations between other persons;*

(e) *include in its assets shares held directly or indirectly in its holding company,*

*without the approval of the Registrar [of Long-Term Insurance (the "**Registrar**")], given generally or in a particular case, and subject to such conditions as the Registrar may determine.*"

37.5 A pledge (or pledge and cession in security) of Collateral under the relevant Security Document (see PART 1 above) is an "encumbrance" of a Long-Term insurer's assets for purposes of section 34(1)(a) of the Long-Term Insurance Act. Accordingly, such pledge (or pledge and cession in security) of Collateral by a Long-Term Insurer in terms of the relevant Security Document requires the prior approval of the Registrar.

37.6 There is some debate as to whether the outright transfer of Eligible Credit Support by a Long-Term Insurer in terms of the Transfer Annex is an "encumbrance" of its assets for purposes of section 34(1)(a) of the Long-Term Insurance Act. In the case of an outright transfer of Eligible Credit Support ownership of the Eligible Credit Support is transferred to the Transferee, whereas in the case of a pledge (or pledge and cession in security) of Collateral, ownership of the Collateral remains with the Security Collateral Provider (pledgor).

37.7 This ownership distinction referred to in paragraph 37.6 above is, we believe, crucial for purposes of interpreting section 34(1)(a) of the Long-Term Insurance Act. Part IV of the Long-Term Insurance Act, which provides for the capital adequacy requirements and prudential regulation of Long-Term Insurers, makes numerous references to a Long-Term Insurer "*having*" or "*holding*" assets and assets which are "held" by a Long-Term Insurer. For example, section 30 of the Long-Term Insurance Act provides, among other things, that a Long-Term Insurer shall "*have assets*" the aggregate value of which, on any day, is not less than the aggregate value, on that day, of its liabilities and capital adequacy requirements. Section 32 of the Long-Term Insurance Act provides that (subject to certain exceptions) an asset shall be deemed "*not to be held*" by a Long-Term Insurer if, among other things, it has been encumbered contrary to section 34(1)(a) of the Long-Term Insurance Act.

37.8 Accordingly, the disposal of an asset by a Long-Term Insurer may, depending on the nature of the asset and the accounting treatment of the associated liability (see paragraph 37.9 below), have consequences for purposes of calculating its capital adequacy requirements and prudential base and, subject as aforesaid, a Long-Term Insurer may have to "top up" its assets in order to meet the requirements of Part IV of the Long-Term Insurance Act. It is interesting to note, in this regard, that where an asset has been encumbered in contravention of section 34(1)(a) of the Long-Term Insurance Act, the asset is deemed "not to be held" by the Long-Term Insurer, and the prudential consequences to the Long-Term Insurer are accordingly the same as if the Long-Term Insurer had disposed of that asset.

37.9 In our view, the outright transfer of Eligible Credit Support by a Long-Term Insurer in terms of the Transfer Annex is not an "encumbrance" for purposes of section 34(1)(a) of the Long-Term Insurance Act and does not require the consent of the Registrar. The outright transfer of Eligible Credit Support by a Long-Term Insurer in terms of the Transfer Annex is a disposal of its assets. However, depending on the nature of the Eligible Credit Support and the accounting treatment of the associated liabilities, the disposal of the Eligible Credit Support by a Long-Term Insurer is likely to be neutral in respect of its capital adequacy requirements.

37.10 For the reasons set out in this paragraph 37 above, the outright transfer of Eligible Credit Support by a Long-Term Insurer in terms of the Transfer Annex is not an "encumbrance" for purposes of section 34(1)(a) of the Long-Term Insurance Act and does not require the consent of the Registrar.

38 Short-term insurance companies

38.1 Considerations similar to those relating to Long-Term Insurers (see paragraph 37 above) also apply to short-term insurers ("**Short-Term Insurers**") registered as such under the Short-Term Insurance Act, 1998 (the "**Short-Term Insurance Act**"). The Short-Term Insurance Act also provides for the capital adequacy requirements and prudential regulation of Short-Term Insurers. One notable difference is that Short-Term Insurers are unable to issue "linked policies" (see paragraph 37.2 above) and therefore there are no provisions dealing with "*linked policies*" under the Short-term Insurance Act.

38.2 Section 33(2) of the Short-Term Insurance Act provides that a Short-Term Insurer "*shall not invest in derivatives other than for one or more of the following reasons:*

(a) Derivatives acquired out of or in respect of assets that are in excess of the assets required to meet the short-term insurer's liabilities under short-term policies and capital adequacy requirement in terms of section 29;

(b) for the purpose of reducing investment risk; or

(c) for the purpose of efficient portfolio management.

Provided that the short-term insurer will, or reasonably expects to, have the asset at the settlement date of the derivative instrument which matches obligations under that instrument and from which it can discharge those obligations."

38.3 Accordingly, a Short-Term Insurer may only enter into the Transactions for the purposes set out in sections 33(2)(a) to (c) inclusive of the Short-Term Insurance Act and then subject to the limitations set out in the proviso to section 33(2).

38.4 In terms of section 33(2) of the Short-Term Insurance Act a Short-Term Insurer "*shall not -*

(a) encumber its assets;

(b) allow its assets to be held by another person on its behalf;

(c) directly or indirectly borrow any asset;

(d) by means of suretyship or any other form of personal security, whether under a primary or accessory obligation, give security in relation to obligations between other persons, unless the short-term insurer is registered to provide policy benefits in terms of a guarantee policy and does so in terms of a guarantee policy;

(e) include in its assets, shares directly or indirectly held in its holding company,

*without the approval of the Registrar [of Short-Term Insurance (the "**Registrar**")], given generally or in a particular case, and subject to such conditions as the Registrar may determine.*"

38.5 A pledge (or pledge and cession in security) of Collateral by a Short-Term Insurer under the relevant Security Document (see PART 1 above) is an "encumbrance" of a Short-Term Insurer's assets for purposes of section 33(2)(a) of the Short-Term Insurance Act. Accordingly, the pledge (or pledge and cession in security) of Collateral by a Short-Term Insurer under the relevant Security Document requires the prior approval of the Registrar.

38.6 In our view, the outright transfer of Eligible Credit Support by a Short-Term Insurer in terms of the Transfer Annex is not an "encumbrance" for purposes of section 33(2)(a) of the Short-Term Insurance Act and does not require the consent of the Registrar. The outright transfer of Eligible Credit Support by a Short-Term Insurer in terms of the Transfer Annex is a disposal of its assets. However, depending on the nature of the Eligible Credit Support and the accounting treatment of the associated liabilities, the disposal of the Eligible Credit Support by a Short-Term Insurer is likely to be neutral in respect of its capital adequacy requirements.

38.7 For the reasons set out in this paragraph 38 above, the outright transfer of Eligible Credit Support by a Short-Term Insurer in terms of the Transfer Annex is not an "encumbrance" for purposes of section 33(2)(a) of the Short-Term Insurance Act and does not require the consent of the Registrar.

39 Pension funds

39.1 Pension funds ("**Pension Funds**") registered as such under the Pension Funds Act, 1956 (the "**Pension Funds Act**") are governed principally by the Pension Funds Act and the rules of the Pension Fund in question (the "**Rules**"). Note that there are different types of Pension Funds and certain types of pension fund (such as pension funds established for state owned entities, the Government Employees Pension Fund etc.) may be subject to special rules and its own governing legislation.

39.2 Section 13 of the Pension Funds Act provides that once a Pension Fund has been registered in terms of section 4 of the Pension Funds Act, the Pension Fund's rules become binding on the Pension Fund members, beneficiaries, board members and principal officer. The Rules

of any specific Pension Fund must be reviewed on an individual basis in order to determine whether or not the Rules allow the Pension Fund to invest in a particular asset or asset class (including derivatives), and to what extent and under what conditions the Pension Fund may do so.

39.3 In terms of section 5(1)(b) of the Pension Funds Act, a Pension Fund owns its assets.

39.4 Section 36(1)(bB) of the Pension Funds Act empowers the Minister of Finance to pass regulations prescribing the investment limitations into which a Pension Fund's assets can be invested and limiting the amount which, and the extent to which, a Pension Fund may invest in a particular asset or in a particular asset class. These regulations are set out in Regulation 28 ("**Regulation 28**") of the regulations promulgated under the Pension Funds Act (the "**Regulations**").

39.5 The preamble to Regulation 28 states that: "*a fund has the fiduciary duty to act in the best interests of its members whose benefits depend on the responsible management of fund assets. This duty supports the adoption of a responsible investment approach to deploying into markets that will earn adequate risk adjusted returns suitable for the fund's member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund's assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of a fund in a stable and transparent environment.*"

39.6 The regulation of the kind of assets that may be invested in by a Pension Fund has moved towards a principles-based system of investment. These principles are set out in Regulation 28(2). A Pension Fund and its board must, in terms of Regulation 28(2)(c), *inter alia:*

39.6.1 ensure that the fund's assets are appropriate for its liabilities;

39.6.2 before making a contractual commitment to invest in a third party managed asset or investing in an asset, perform reasonable due diligence taking into account risks relevant to the investment including, but not limited to, credit, market and liquidity risks, as well as operational risk for assets not listed on an exchange;

39.6.3 in addition to 39.6.2 above, before making a contractual commitment to invest in a third party managed foreign asset or investing in a foreign asset, perform reasonable due diligence taking into account risks relevant to a foreign asset including but not limited to currency and country risks;

39.6.4 in performing the due diligence referred to in 39.6.2 to 39.6.3, a fund may take credit ratings into account, but such credit ratings should not be relied on in isolation for risk assessment or analysis of an asset, should not be to the exclusion of a fund's own due diligence, and the use of such credit ratings shall in no way relieve a fund of its obligation to comply with all the principles set out in Regulation 28(2);

39.6.5 understand the changing risk profile of assets of the fund over time, taking into account comprehensive risk analysis, including but not limited to credit, market, liquidity and operational risk, and currency, geographic and sovereign risk of foreign assets;

39.6.6 before making an investment in and while invested in an asset consider any factor which may materially affect the sustainable long term performance of the asset including, but not limited to, those of an environmental, social and governance character.

39.7 A "derivative instrument" is defined in Regulation 28(1) as having the meaning assigned to it in section 1 of the Securities Services Act, 2004 (repealed in its entirety by the FMA). Section- 1 of the FMA, defines a "*derivative instrument*" as: "*any - (a) financial instrument; or (b) contract, that creates rights and obligations and that derives its value from the price or value, or the value of which may vary depending on a change in the price or value, of some other particular product or thing*".

39.8 Regulation 28(7) empowers a Pension Fund "*[n]otwithstanding sub-regulation 3(d)*" to invest in derivatives subject to "*conditions as prescribed*". Sub-regulation 3(d) states that a Pension Fund must not invest or contractually commit to invest in an asset, including a hedge fund or private equity fund, where the Pension Fund may suffer a loss in excess of its investment or contractual commitment in the asset. This prohibition should be read as prohibiting the use of derivatives as an investment instrument that allows a Pension Fund to leverage a particular asset which it owns.

39.9 At the time of issue of this opinion, the Registrar of Pension Funds has published only a draft notice setting out the conditions for the use of derivative instruments, as per regulation 28(7) of the Regulations made under the Pensions Funds Act (the "**Draft Notice**"). No indication has been given by the Registrar of Pension Funds as to when the Draft Notice may become final. Furthermore, we cannot comment on whether the Draft Notice will be amended prior to finalisation, or finalised in its current form.

39.10 Under the Draft Notice, a Pension Fund must not use a derivative instrument for purposes of speculation or to obtain leverage. A Pension Fund may use a derivative instrument to obtain effective economic exposure to the reference assets set out in Table 1 of Regulation 28 for purposes of reducing risk, reducing cost, generating capital or income for the fund and effective portfolio management.

39.11 In addition, the Draft Notice provides guidance to the board of a Pension Fund on investments in derivatives for purposes of Regulation 28. In terms of the Draft Notice, a Pension Fund may invest in derivatives subject to the following considerations:

39.11.1 the investment is not to be used to circumvent any principle, regulation or limit as set out in regulation 28 on an effective economic exposure basis;

39.11.2 the investment to be used in a manner consistent with a fund's investment objectives, as contained in its investment policy statement;

39.11.3 the sum of the effective exposures to derivative instruments, together with the market value of all the physical underlying assets of the investment of the fund, may not exceed the relevant asset limits as set out in Table 1 to Regulation 28;

39.11.4 the investment must be covered by sufficient liquid assets to meet the fund's forthcoming obligations, taking into consideration the fund's liability position;

39.11.5 the investment must not involve the use of leverage, gearing or result in net short positions at a fund level, other than those allowed for the purposes of interest rate hedging and the netting rules;

39.11.6 the investment must be subject to reliable, independent and verifiable valuation on a regular basis; and

39.11.7 the investment must, at the Pension Fund's initiative, be able to be sold, liquidated or closed out by an offsetting transaction at any time.

39.12 With regards to risk, the Draft Notice provides that a Pension Fund must be aware of all risks inherent in derivative instruments and must have risk management processes and procedures in place to identify, manage and measure risk and exposure to all derivative instruments and the contribution of these to the overall risk profile of the investment portfolio of the Pension Fund's total assets. Such risk management policies must, *inter alia*, include procedures for selecting counterparties, managing counterparty exposure, monitoring counterparties, managing counterparty risks and close-outs in the event of counterparty defaults. A Pension Fund must also be aware of the fees and costs associated with these derivative instruments including those fees and costs which may be netted off against the returns of the derivative instrument. All costs must be reported to the board of the Pension Fund in a transparent, clear and understandable manner.

39.13 The Draft Notice specifically provides that a Pension Fund must ensure that its investments in unlisted derivatives are made under a 2002 ISDA Master Agreement.

39.14 A Pension Fund may only invest in derivative instruments, provided that the financial services provider which is mandated to make the investments on behalf of the Pension Fund, has adopted a policy for the valuation of derivatives which must at least provide:

39.14.1 for the valuation process to take place independently from the investment management decision function and to be audited by the financial services provider's auditor; and

39.14.2 that the valuation must be done by an independent third party.

39.15 When calculating a Pension Fund's exposure to a particular asset, the Pension Fund must ensure that the calculation of assets and categories of assets referred to in Regulation 28 must include the effective economic exposure of a derivative instrument in that underlying asset, subject to paragraph 5 (*Netting*) of the Draft Notice.

39.16 The further requirements that must be considered when calculating counterparty exposure are set out in paragraph 4 of the Draft Notice and further provide that exposure to a counterparty may be netted off with exposure to that same counterparty on condition that the ISDA Master Agreement has been entered into and gives effect to netting, as contemplated in section 35(B) of the Insolvency Act to create a single obligation, covering the relevant transactions included in the calculation of the counterparty exposure. The Master Agreement must provide that, where a counterparty fails to perform, or in instances of bankruptcy, liquidation or any similar circumstance, the Pension Fund would have a preferent claim to receive or an obligation to pay only the net sum of the positive and the negative mark-to-market values of the underlying transactions. The exposure to a counterparty in respect of collateral must be included.

39.17 According to the Draft Notice, the value of the assets held by the Pension Fund may be netted with the effective economic exposure to a derivative instrument used for hedging purposes but only where the reference asset of the derivative instrument is identical or similar to the assets held by the Pension Fund. Whether an asset is identical or similar to assets held by the Pension Fund must be determined in accordance with the further provisions of paragraph 5(1) of the Draft Notice.

39.18 The Draft Notice restricts the type of counterparties with whom a Pension Fund may enter into transactions with. In terms of paragraph 3 of the Draft Notice, a Pension Fund may only invest in derivative instruments where the counterparties are:

39.18.1 the South African Government;

39.18.2 South African banks;

39.18.3 long-term insurers;

39.18.4 short-term insurers;

39.18.5 foreign banks;

39.18.6 authorised users (of the JSE);

39.18.7 clearing houses; or

39.18.8 an entity prescribed by the Registrar.

39.18.9 The Financial Services Board ("**FSB**"), the regulator responsible for monitoring compliance with the Pensions Funds Act, has not provided any guideline as to when the Draft Notice is likely to be finalised. The Draft Notice was subject to a consultation period (which has expired) during which the public was invited to provide comment. As such, it is possible that the provisions of the final notice may differ to those of the Draft Notice.

39.18.10 The capacity and power of Pension Funds to enter into the Transactions is subject to the restrictions set out in the Pension Fund Act and Regulation 28 thereto, and may further be restricted by the provisions of its Rules.

39.18.11 As regards the relevant Security Document (which provides for the creation of a security interest in Collateral by way of a pledge (or pledge and cession in security) of the Collateral), there is nothing in the Pension Funds Act which prohibits a Pension Fund from encumbering its assets. However, section 5 of the Pension Funds Act requires that the assets owned by a Pension Fund be kept either by the Pension Fund itself or by certain designated persons (and then subject to certain prescribed conditions). Accordingly, a Pension Fund may pledge (or pledge and cede in security) the Collateral in terms of the relevant Security Document; provided that at all times the Collateral is held by the Pension Fund or the relevant designated persons, subject to any restrictions imposed by conditions prescribed by the Registrar of Pension Funds.

39.19 With regards to Collateral, paragraph 6 of the Draft Notice states as follows:

"(1) W*here a collateral arrangement is entered into, the [Pension] fund must ensure that the ISDA Master Agreement includes a bi-lateral collateral agreement which is referred to as the credit support annexure;*

(2) C*ollateral received must be - "*

(a) liquid;

(b) transparent and identifiable;

(c) valued daily;

(d) held by the [Pension] fund or an approved nominee or independent custodian in a segregated depository account on behalf of the [Pension] fund. Where held by an independent custodian, such collateral must not form part of the assets of that custodian and will not be regarded as counterparty exposure; and

(e) if it consist of securities, subject to an appropriate level of discount ("haircut").

(3) Where a [Pension] fund posts collateral to a counterparty with transfer of legal title, the over collateralised amount (where the collateral posted is greater than the exposure to the counterparty) must be taken into account when calculating the counterparty exposure."

40 Financial advisors and intermediaries

40.1 Certain financial services providers may be required to be licensed under the Financial Advisory and Intermediary Services Act, 2002 (the "**FAIS Act**"). The FAIS Act provides, among other things, that no person may provide "*advice*" or render an "*intermediary service*" in respect of any "*financial product*" unless that person is duly licensed as an authorised "*financial services provider*" ("**FSP**") under the FAIS Act.

40.2 A "financial product" is very broadly defined in the FAIS Act and includes, among other things, "securities and instruments", a "foreign currency denominated investment instrument, including a foreign currency deposit" and "derivative instruments". A "derivative instrument" is defined in the FAIS Act as "any – (a) financial instrument; or (b) contract, that creates rights and obligations and that derives its value from the price or value, or the value of which may vary depending on a change in the price or value, of some other particular product or thing".

40.3 The term "intermediary service" is defined in the FAIS Act to include, among other things, asset management services. Although FAIS defines the term "intermediary service", a literal definition of "intermediary", is that of one who "acts between others; a go-between", is retained in the statutory definition. Subparagraph (a) of the definition of "intermediary service", namely "any act … performed by a person for or on behalf of a client or product supplier … the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier", applies where the actions of the relevant service provider, acting as intermediary, directly result in the applicable transaction in respect of a financial product. An example of such function is the role played by an asset manager who is mandated to act on behalf of the client. In the case of *Tristar Investments v the Chemical Industries National Provident Fund* (2013) ZASCA 59, the court, in an attempt to clarify what constitutes an 'intermediary service' under FAIS, held that the necessary consideration was whether the service in issue constitutes an "intermediary service" i.e. does the person rendering the service act as a "go-between" the clients and the FSP, to give effect to the relevant transactions. The court in this case held that including actions which indirectly result in the applicable transactions would lead to absurdities (although it did not say what those absurdities were).

40.4 A duly licensed FSP may therefore (among other things) render asset management services with regard to its clients' investments in "derivative instruments".

40.5 FSPs are registered under different categories of FAIS licences (Category I, II, IIA, III and IV) depending on the precise nature of the activities comprising the "intermediary service" (including asset management services) and/or "advice" to be rendered by the FSP. Category I FSPs provide "advice" and "intermediary services" (including asset management services) on a non-discretionary basis. Category II FSPs are "discretionary FSPs" which render "intermediary services" (including asset management services) of a discretionary nature as regards the choice of certain specified "financial products".

40.6 The provisions of FAIS do not expressly restrict licensed FSPs from rendering asset management services with regard to its clients' investments in "derivative instruments". However, the terms of the particular mandate (whether discretionary or non-discretionary) entered into by the FSP with each client will determine whether or not the FSP may invest in "derivative instruments" on behalf of that client and, if so to what extent.

40.7 We can find nothing in the FAIS Act or any of the Regulations promulgated under the FAIS Act that imposes any limits or restrictions on the capacity and power of FSPs to enter into the Transactions on behalf of their clients. However, whether or not an FSP is empowered to enter into the Transactions on behalf of a client will depend on the particular terms of the mandate entered into by the FSP with that client. Each such mandate will therefore need to be reviewed on an individual basis in order to determine whether an FSP may enter into the Transactions on behalf of a client, and to what extent and under what conditions the FSP may do so.

40.8 We can find nothing in the FAIS Act or any of the Regulations promulgated under the FAIS Act that imposes any limits or restrictions on the capacity and power of an FSP to enter into the Transactions in its own name and for its own account.

41 Collective investment schemes

41.1 The Collective Investment Schemes Control Act, 2002 ("**CISCA**") regulates a "*collective investment scheme*" (as defined in CISCA) ("**CIS**") and stipulates that the managers of a CIS ("**CIS Manager**") shall be limited in their investments to certain kinds of assets and to a limited extent.

41.2 CIS in securities

41.2.1 Section 40 of CISCA provides that the Registrar of Collective Investment Schemes ("**Registrar**") may determine the securities or classes of securities which may be included in a portfolio of a CIS in securities. The Registrar may also determine the manner in which, and the limits and conditions subject to which, securities or classes of securities may be included in a portfolio of a CIS in securities.

41.2.2 The following provisions of the Regulations promulgated under sections 40, 45, 46 and 85 of CISCA should be noted:

41.2.2.1 The Registrar has made a determination in a notice published in 2014 titled Board Notice 90 "Determination of securities, classes of securities, assets or classes of assets that may be included in a portfolio of a collective investment scheme in securities and the manner in which and limits and conditions subject to which securities or assets may be so included" ("**Notice 90**"). Notice 90 replaces its predecessor, Board Notice 80 of 2012 (also titled "Determination of securities, classes of securities, assets or classes of assets that may be included in a portfolio of a collective investment scheme in securities and the manner in which and limits and conditions subject to which securities or assets may be so included"), and the provisions of Board Notice 80 of 2012 are no longer in force. Chapter 1 of Notice 90 applies to standard portfolios but does not apply to money market portfolios, fund of funds portfolios and feeder fund portfolios which are governed by Chapters II, III, and IV of Notice 90.

41.2.2.2 A CIS Manager of a CIS in securities will not be permitted to invest in derivatives except as specifically provided for in Chapter 1, read together with Chapter 5, of Notice 90.

41.2.2.3 "Listed financial instruments" in section 2(b) of Notice 90 are -

(a) a futures contract;

(b) an option contract;

(c) a warrant;

(d) an index tracking certificate; and

(e) an instrument based on an underlying asset, or basket of underlying assets as defined in Chapter 5 of Notice 90, other than an Islamic Bond (Sukuk) or an Isamic Complaint Instrument.

41.2.2.4 An "underlying asset, in relation to a financial instrument" in section 13 of Notice 90 is:

(a) any security;

(b) an index determined by an exchange;

(c) a group of securities which is the subject matter of the financial instrument, whether such group of securities is represented by an index or not;

(d) a currency rate; or

(e) an interest rate.

~~41.3~~41.2.3 It appears that the catch-all listed in sub-paragraph 41.2.2.3(e) above: "*an instrument based on an underlying asset*" would encompass various other types of listed derivatives not specifically included in the definition (such as listed swaps, or listed contracts for differences and the like).

~~41.4~~41.2.4 Summary of limits:

~~41.4.1~~41.2.4.1 A CIS Manager of a CIS in securities must include securities in a portfolio which consist, subject to sub-paragraphs 3(3) and 3(9) of Chapter 1 of Notice 90, to the extent of at least 90% of the market value of the portfolio, of –

~~41.4.1.1~~41.2.4.1.1 exchange securities[22];

~~41.4.1.2~~41.2.4.1.2 instruments contemplated in sub-paragraphs 3(8) and 3(9) of Chapter 1 (financial instruments and rated non-equity securities);

~~41.4.1.3~~41.2.4.1.3 securities (other than exchange securities) acquired by a CIS Manager pursuant to the exercise of rights attaching to any exchange securities included in the portfolio.

~~41.4.2~~41.2.4.2 This means that a portfolio must consist of 90% of the above named instruments, and only 10% of the portfolio's value may be applied to all other types of investments, including derivatives contracts.

~~41.4.3~~41.2.5 Unlisted Derivatives

A CIS Manager of a CIS in securities may, subject to Chapter 5 of Notice 90, only include the following unlisted derivatives in a portfolio:

(a) forward currency swaps;

(b) forward currency options issued by a bank;

(c) interest rate swaps;

(d) index swaps; or

(e) exchange rate swaps,

and only where this is done for efficient portfolio management. This means that a CIS Manager may only invest in these types of unlisted derivatives and it may only invest for this purpose.

~~41.4.4~~41.2.5.1 According to paragraph 17(3) of Notice 90, the duration exposure to a non-equity security may be hedged and netted with a financial instrument whose underlying asset is a government bond, a basket of government bonds or a government bond index, a corporate bond, a basket of corporate bonds or a corporate bond index, Johannesburg Interbank Agreed Rate (JIBAR) swap rate, inflation rate, the SARB repurchase rate, or

[22] This is a reference to exchange-traded securities, ie those securities which are listed on a licensed stock exchange.

any other rate that is an index. However, any consequential or residual spread exposure as a result of netting must be accounted for and disclosed.

41.541.3 CIS in property

41.5.141.3.1 On 21 June 2013, the Financial Services Board issued Board Notice 126 of 2013 "Determination of an instrument which may be included in a portfolio of a collective investment scheme in property" ("**Board Notice 126**"). Board Notice 126 is the first notice that deals with instruments to be included in a portfolio of a CIS in property.

41.5.241.3.2 Board Notice 126 applies to a CIS in property and provides in section 2 that:

> *"**a.** a manager of a collective investment scheme in property may use interest rate swaps for the purpose of effective portfolio management;*
>
> ***b.** the interest rate swaps may only be included for purposes of mitigating interest rate risk and not for purposes of investment or speculation."*

41.5.341.3.3 Board Notice 126 accordingly allows for a manager of a CIS in property to use interest rate swaps for efficient portfolio management only, and clearly restricts the utilisation of interest rate swaps for investment or speculative purposes.

41.5.441.3.4 No other types of options, swaps, forwards (or other types of over-the-counter derivatives) may be included in the portfolio of a CIS in property.

41.4 CIS in hedge funds

41.4.1 Hedge funds have been declared, in terms of Board Notice 141 in Government Gazette 38503 of 25 February 2015 ("**Notice 141**") to be collective investment schemes as defined in CISCA.

41.4.2 The additional capacity and further considerations which will apply to a CIS in hedge funds, and the restrictions imposed upon a CIS in hedge funds, when entering into derivatives Transactions are set out in Appendix C to this opinion.

PART 4

EXECUTIVE SUMMARY

42 The Security Documents

42.1 The proprietary aspects of a security interest in Collateral (including the validity and enforceability of the security interest upon insolvency) are governed by the law of the place where the Collateral is situated. If the Collateral is situated in South Africa, the formalities of South African law for establishing a security interest in the Collateral must be fulfilled (see PART 1 – paragraph 2(A) (*General*) above).

42.2 Under South African common law there are two formalities for establishing a "perfected" security interest in Collateral:

42.2.1 there must be an agreement between the Secured Party and Security Collateral Provider to establish a security interest in the Collateral (that is, an agreement to pledge or an agreement to pledge and cede in security); and

42.2.2 there must be delivery of the Collateral to the Secured Party.

42.3 Please note the legislative formality (described in PART 1 – paragraph 2(B)(a) (*Debt securities which are held in the Central Depository*) above) for a pledge and cession in security of Collateral which comprises debt securities which are held in the Central Depository.

42.4 South African law does not allow a security interest to be created in Cash Collateral itself but does allow the creation of a security interest in the claim to Cash Collateral (which comprises the rights to the separate bank account in which the Cash Collateral is deposited), by way of an agreement of pledge and cession in security of such claim between the Security Collateral Provider and the Secured Party and delivery (by way of a cession) of such claim to the Secured Party (see PART 1 – paragraph 2(C) (*Collateral which comprises cash*) above).

42.5 **Pre-insolvency and post-insolvency**

Subject to paragraph 42.2 above, where the Collateral is pledged (or pledged and ceded in security) to the Secured Party in terms of the relevant Security Document and delivery of the Collateral to the Secured Party has occurred (see paragraph 42.2 above), the Secured Party (as pledgee of the Collateral) will, prior to and after the insolvency of the SA Collateral Provider, (i) have a real right of security in the Collateral, (ii) be a secured creditor of the SA Collateral Provider in respect of the Collateral and (iii) rank ahead of all other creditors of the SA Collateral Provider in respect of the Collateral other than, on the insolvency of the SA Collateral Provider, the SA Collateral Provider's liquidator in respect of its costs of realising the Collateral.

42.6 **Post-insolvency (and business rescue)**

42.6.1 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.28 above). The obligations of the SA Collateral Provider provided for in the relevant Security Document "*aris[e] out of … [the Master Agreement]* " for purposes of section 35B(1) of the Insolvency Act (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.34 above) and the relevant Security Document forms an integral part of the Master Agreement (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.35 above).

42.6.2 The Master Agreement, together with the relevant Security Document, is excluded from the business rescue practitioner's powers set out under section 136(2) of the Companies Act (see PART 1 – paragraph 14(A) (*Business rescue proceedings*) above).

42.6.3 The settlement and close-out netting provisions of the Master Agreement, as read with the relevant Security Document, in respect of all Unperformed Obligations" (see PART 1 – paragraph 17(C)(e) ("*unperformed obligations*") – paragraphs 17.36 to 17.40 above) are enforceable under South African law, after the insolvency of the SA Collateral Provider, in accordance with their respective terms.

42.6.4 The voidable disposition, voidable preference and undue preference provisions set out in sections 26, 29 and 30 of the Insolvency Act are not applicable to any dispositions effected in terms of the Master Agreement, as read with the relevant Security Document, prior to the liquidation of the SA Collateral Provider (see PART 1 – paragraph 18(A) (*Voidable dispositions*) above).

42.6.5 The liquidator may not, after the liquidation of the SA Collateral Provider, set aside any set-off effected under the Master Agreement, as read with the relevant Security Document, before the liquidation of the SA Collateral Provider (see PART 1 – paragraph 18(B) (*Setting aside of pre-liquidation set-off*) above.

43 Transfer Annex

43.1 Under South African common law there are two formalities for transferring ownership (full title transfer) of Eligible Credit Support:

43.1.1 there must be an agreement between the SA Transferor (the owner of the Eligible Credit Support) and the Transferee to transfer ownership (full title transfer) of the Eligible Credit Support to the Transferee; and

43.1.2 there must be delivery of the Eligible Credit Support to the Transferee.

43.2 Please note the legislative formality (described in PART 2 – paragraph 22(B)(a) (*General*) - paragraph 22.9 above) for a transfer of ownership of Eligible Credit Support which comprises Securities which are held in the Central Depository.

44 Pre-insolvency – Securities

44.1 In relation to Eligible Credit Support which comprises Securities, there is a risk that a South African court may find (on the basis of the *Grobler* judgment (see PART 2 – paragraph 22(B)(b) (*Nature of a cession in security*) above) an out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of such Securities. There is also a risk that a South African court may (as set out in PART 2 – paragraph 22(B)(c) (*Re-characterisation*) above), re-characterise an out-and-out cession (full title transfer) of Eligible Credit Support comprising Securities as a pledge and cession in security of such Securities.

44.2 If a South African court finds (or re-characterises) the outright transfer (full title transfer) of Eligible Credit Support comprising Securities to be a pledge and cession in security of the Securities, we do not believe that set-off would be possible, prior to the liquidation of the SA Transferor, in respect of such Securities, as a pledge and cession in security of such Securities (which pledge neither creates nor is a claim) cannot be set-off against the relevant contractual claim which the Transferee may have against the SA Transferor in respect of such Securities (see PART 2 – paragraph 22(B)(f) (*Pre-insolvency consequences)* above). Accordingly, in these circumstances, the netting provisions of the Master Agreement (as read with the Transfer Annex) in respect of the Eligible Credit Support provisions will not be fully

enforceable under South African law, prior to the insolvency of the SA Transferor, in accordance with their respective terms.

45 Pre-insolvency – Cash

45.1.1 South African law does not allow a security interest to be created in Eligible Credit Support which comprises cash itself but does allow the creation of a security interest in the claim to such cash (see PART 2 – paragraph 22(C) (*Cash*) above). A commercial practice has developed in South Africa in terms of which a security provider wishing to provide a secured party with cash collateral effects an outright transfer of such cash collateral to the secured party: this practice is now common practice in the South African markets, and has not been attacked in, or held to be unenforceable by, the South African courts.

45.1.2 For the reasons set out in PART 2 – paragraph 22(C) (*Cash*) above, and because Cash comprises fungible corporeal property and a pledge of fungible corporeal property (not being a pledge of the physical notes and coins) is not competent under South African common law, it is our opinion that a South African court will not be able to find and/or re-characterise the outright transfer of Eligible Credit Support comprising Cash as a pledge and cession in security of the Cash.

45.2 **Post-insolvency (and business rescue)**

45.2.1 The Master Agreement is a "*master agreement*" as defined in section 35B(2) of the Insolvency Act (see PART 2 – paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.6 above). The obligations of the SA Transferor provided for in the Transfer Annex "*aris[e] from … [the Master Agreement]*" in respect of "*assets [the Eligible Credit Support] in which ownership has been transferred as collateral security*" for purposes of section 35B(1) of the Insolvency Act (see PART 2 – paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.11 above) and the Transfer Annex forms an integral part of the Master Agreement (see PART 2 – paragraph 26(B)(a) (*Section 35B of the Insolvency Act*) – paragraph 26.12 above).

45.2.2 The Master Agreement, together with the Transfer Annex, is excluded from the business rescue practitioner's powers set out under section 136(2) of the Companies Act (see PART 1 – paragraph 14(A) (*Business rescue proceedings*) above.

45.2.3 The settlement and close-out netting provisions of the Master Agreement, as read with the Transfer Annex, in respect of all Unperformed obligations (see PART 2 – paragraph 26(B)(c) ("unperformed obligations" and "obligations") – paragraph 26.14 above) and, subject to the risk referred to in PART 2 – paragraph 26(B)(e) (*Security by title transfer of Eligible Credit Support*) - paragraph 26.23 above, all Collateral Obligations (see PART 2 – paragraph 26(B)(c) ("unperformed obligations" and "obligations") – paragraph 26.14 above), are enforceable under South African law, after the insolvency of the SA Transferor, in accordance with their respective terms.

45.2.4 The voidable disposition, voidable preference and undue preference provisions set out in sections 26, 29 and 30 of the Insolvency Act are not applicable to any dispositions effected in terms of the Master Agreement, as read with the Transfer Annex, prior to the liquidation of the SA Transferor (see PART 2 – paragraph 27(A) (*Voidable dispositions*) above).

45.2.5 The liquidator may not, after the liquidation of the SA Transferor, set aside any set-off effected under the Master Agreement, as read with the Transfer Annex, before the liquidation of the SA Transferor (see PART 2 – paragraph 27(B) (*Setting aside of pre-liquidation set-off*) above.

PART 5

CLOSE OUT AMOUNT PROTOCOL

46 You have requested our advice on the 2009 ISDA Close-out Amount Protocol published on Monday February 27, 2009 (the "**Protocol**"):

46.1 We understand that the purpose of the Protocol is to facilitate amendment of existing 1992 ISDA Master Agreements to replace Market Quotation and (subject to the election to preserve Loss provisions) Loss with Close-out Amount.

46.2 We assume that, as a matter of the relevant governing law of the agreement, the amendments are valid and enforceable. We understand that, since all opinions commissioned by ISDA assume (as requested by ISDA) that the governing law of the agreement is either New York or English law, counsel in England and Wales, and counsel in New York have each agreed to confirm not only that that the amendments made by the Protocol do not affect the conclusions reached in their opinions but also that they are valid and legally enforceable as a matter of their law.

46.3 On the basis that the amendments made by the Protocol to the Credit Support Documents do not alter the security or transfer provisions of the Credit Support Documents but merely seek to ensure that the exposure calculation reflects the amended close-out amount calculations, we confirm that these amendments will not affect the conclusions reached in our opinion in PART 1 and PART 2 above in regard to the Credit Support Documents.

47 Benefit of opinion

This opinion:

47.1 is addressed to ISDA for its benefit and may be relied upon by ISDA, its members, regulators, supervisory authorities and their professional advisors;

47.2 may not, without our prior express written consent be shared with, distributed to or disclosed in whole or in part to any non-ISDA member (other than those persons identified in paragraph 45.1).

Yours sincerely

BRIDGET KING
CLIFFE DEKKER HOFMEYR INC

APPENDIX A
AUGUST 2015

CERTAIN TRANSACTIONS UNDER THE ISDA MASTER AGREEMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B
SEPTEMBER 2009

CERTAIN COUNTERPARTY TYPES[23]

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

Description	Covered by opinion	Legal form(s)
Bank/Credit Institution. A legal entity, which may be organized as a corporation, partnership or in some other form, that conducts commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individual and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" category below.) This type of entity is referred to as a "credit institution" in European Community (EC) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity (as in the case of a building society in the United Kingdom (UK)).	Yes	Banks which are registered as such under the Banks Act are covered by this opinion but are subject to the capacity considerations set out in PART 3 - paragraph 36 (*Banks*) above. Special considerations also apply to the winding up and curatorship of banks under the Insolvency Act and the Companies Act, as read with the Banks Act, set out in PART 1 – paragraph 17(A)(e) (*Special Considerations*) – paragraphs 17.20.3.
Central Bank. A legal entity that performs the function of a central bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).	Yes	The South African Reserve Bank is covered by this opinion but is subject to the additional capacity consideration and special insolvency provisions set out in PART 3 – paragraph 31 (*Reserve Bank*) above.
Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix B.	Yes	
Hedge Fund/Proprietary Trader. A legal entity, which may be organized as a corporation, partnership or in some other legal form, the principal business of which is to deal in and/or manage securities and/or other financial instruments and/or otherwise to carry on an investment business predominantly or exclusively as principal for its own account.	NoYes	Collective Investment Schemes in hedge funds which are registered under the Collective Investment Schemes Control Act, 2002 are covered by this opinion, subject to the additional capacity considerations set out in PART 3 paragraph 41.4 (*Collective Investment Schemes in hedge funds*) above.

Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.	Yes	Long-term insurers which are registered as such under the Long-Term Insurance Act, 1998 are covered by this opinion but are subject to the additional capacity considerations set out in PART 3 - paragraph 37 (*Long-term insurance companies*) above. Special considerations also apply to the winding up of long-term insurers under the Insolvency Act and the Companies Act, as read with the Long-Term Insurance Act, 1998, as set out in PART 1 - paragraph 17(A) (*Special considerations*) – paragraph 17.20.1. Short-term insurers which are registered as such under the Short-Term Insurance Act, 1998 are covered by this option but are subject to the additional capacity considerations set out in PART 3 – paragraph 38 (*Short-term insurance companies*) above. Special considerations also apply to the winding up of short-term insurers under the Insolvency Act and the Companies Act, as read with the Short-Term Insurance Act, 1998, as set out in PART 1 paragraph 17(A)(e) (*Special considerations*) – paragraph 17.20.2.
International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and similar organizations established by treaty.	No	

Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.	No	As regards only the capacity considerations of asset managers which are licensed under the Financial Advisory and Intermediary Services Act, 2002 see PART 3 - paragraph 40 (*Financial Advisors and Intermediaries*) above.
Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	Yes	Investment Funds which are "*collective investment schemes*" (in securities and property) as defined in the Collective Investment Schemes Control Act, 2002, are covered by this opinion, subject to the additional capacity considerations set out in PART 3 - paragraph 41 (*Collective investment schemes*) above.
Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.	No	Local authorities are extensively regulated and may be regulated under, among others, the Public Finance Management Act, 1999 and/or the Local Government: Municipal Finance Management Act, 2003.

Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this Appendix B. If it does not have legal personality, it may nonetheless be treated as though it were a legal person for certain purposes (for example, for insolvency purposes) and not for other purposes (for example, tax or personal liability).	No	
Pension Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide pension benefits to a specific class of beneficiaries, normally sponsored by an employer or group of employers. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by pensions legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Pension Fund (for example, a trustee of a pension scheme in the form of a common law trust) contract on behalf of the Pension Fund and are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	Yes	Pension funds which are registered as such under the Pension Funds Act, 1956 are covered by this opinion but are subject to the additional capacity considerations set out in PART 3 - paragraph 39 (*Pension funds*) above. Special considerations also apply to the winding up of pensions funds under the Insolvency Act and the Companies Act, as read with the Pension Funds Act, 1956 as set out in PART 3 – paragraph 39 (*Pension funds*) above.
Sovereign. A sovereign nation state recognized internationally as such, typically acting through a direct agency or instrumentality of the central government without separate legal personality, for example, the ministry of finance, treasury or national debt office. This category does not include a State of a Federal Sovereign or other political sub-division of a sovereign nation state if the sub-division has separate legal personality (for example, a Local Authority) and it does not include any legal entity owned by a sovereign nation state (see "**Sovereign-owned Entity**").	No	
Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "**Sovereign Wealth Fund**" excludes a Central Bank.	No	

Sovereign-Owned Entity. A legal entity wholly or majority-owned by a Sovereign, other than a Central Bank, or by a State of a Federal Sovereign, which may or may not benefit from any immunity enjoyed by the Sovereign or State of a Federal Sovereign from legal proceedings or execution against its assets. This category may include entities active entirely in the private sector without any specific public duties or public sector mission as well as statutory bodies with public duties (for example, a statutory body charged with regulatory responsibility over a sector of the domestic economy). This category does not include local governmental authorities (see "Local Authority").	No	State-owned entities are extensively regulated and may be regulated by, among others, the Public Finance Management Act, 1999.
State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.	No	

APPENDIX C

1 Collective investment schemes in hedge funds ("CIS in hedge funds")

1.1 Hedge funds have been declared, in terms of Board Notice 141 in Government Gazette 38503 of 25 February 2015 ("**Notice 141**") to be collective investment schemes as defined in CISCA.

1.2 A CIS in hedge funds means an arrangement in pursuance of which members of the public are invited or permitted to invest money or other assets and which uses any strategy or takes any position which could result in the arrangement incurring losses greater than its aggregate market value at any point in time, and which strategies or positions include but are not limited to –

1.2.1 leverage; or

1.2.2 net short positions.

1.3 Board Notice 52 in Government Gazette 38540, 2015 as amended by Board notice 70, 2015 sets outs out the requirements with which a CIS in hedge funds must comply ("**Notice 52**").

1.4 All of the provisions of CISCA apply to hedge funds (see paragraph 41 above). However, in terms of Notice 52, certain provisions of CISCA do not apply in respect of a CIS in hedge funds. In this paragraph we deal only with the additional requirements imposed under Notice 52.

1.5 According to Section 16 of Notice 52, a CIS Manager may only establish a CIS in hedge funds using the following structures:

1.5.1 a collective investment scheme trust arrangement as contemplated in CISCA; or

1.5.2 an *en commandite* partnership.

1.6 Therefore, for purposes of our analysis on the insolvency of a CIS in hedge funds, the provisions regarding the insolvency of a trust or partnership must be considered.

1.7 The South African Insolvency Act deals with the sequestration of any "debtor". Section 149 gives the relevant court jurisdiction "*over every debtor and in regard to the estate of every debtor*" who:

1.7.1 is domiciled or owns or is entitled to property situated within the jurisdiction of the relevant court; or

1.7.2 at any time within twelve months immediately preceding the application for sequestration ordinarily resides or carries on business within the jurisdiction of the court;

1.8 "*Debtor*" is defined in the Insolvency Act as, "*in connection with the sequestration of the debtor's estate, [means] a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies …*"

1.9 The two important aspects of this definition are as follows:

1.9.1 the only exclusion from the definition of "*debtor*" is an entity which may be liquidated under South African companies law (see paragraph 1.12 and 1.13 below); and

1.9.2 it includes generally a debtor "*in the usual sense of the word*".

1.10 A CIS in hedge funds can (by virtue of Notice 141 as read with Notice 52) never be a company capable of being liquidated under the company laws of South Africa. Therefore, a CIS in hedge funds would not fall within the exclusion in the definition of "*debtor*".

1.11 South African companies are now regulated by the Companies Act.

1.12 Item 9 of Schedule 5 to the Companies Act expressly states that the winding up and liquidation of South African companies will continue to be regulated by the provisions of the Old Companies Act. Chapter 14 of the Old Companies Act deals generally with the winding up of companies in solvent circumstances and expressly states at section 339 that: "*in the winding up of a company which is unable to pay its debts, the provisions of the laws relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act*".

1.13 The relevant legislation clearly demarcates that solvent winding up of companies will be regulated by the Old Companies Act and the insolvent winding up of a company unable to pay its debts, will be regulated by the Insolvency Act.

Winding up under CISCA

1.14 Sections 102 and 103 of CISCA deal with the winding up of a CIS which, as read with Notice 141, now includes a CIS in hedge funds. Because sections 102 and 103 have not been designated as sections which do not apply to a CIS in hedge funds, sections 102 and 103 of CISCA will apply to a CIS in hedge funds.

1.15 In our view, there are no provisions in CISCA which deal with the insolvent winding up of a CIS. CISCA deals only with the solvent winding up of a CIS. In our opinion, no conflict exists between the provisions of CISCA and the provisions of the Insolvency Act. CISCA deals with the winding up of a CIS in solvent circumstances whilst the Insolvency Act deals with a winding up of a CIS in insolvent circumstances.

Liabilities of a CIS

1.16 A CIS may incur debts which debts may (in terms of section 93 of CISCA) be deducted from the portfolio of the CIS. Such debts may include the following:

1.16.1 brokerage charges;

1.16.2 securities taxes, value added taxes, stamp duties etc;

1.16.3 auditors' fees, bank charges, trustee and custodian fees and other levies or taxes;

1.16.4 share creation fees payable to the Registrar of Companies ("**CIPC**") for the creation of authorised capital (or in the case of a CIS in property, the costs incurred in creating and issuing participatory interests);

1.16.5 the agreed service charges payable to the CIS Manager; and

1.16.6 any stock exchange costs associated with the listing of a CIS in property.

1.17 Furthermore, under section 96 of CISCA, the CIS Manager may (on behalf of a CIS) borrow funds up to 10% of the market value of the "*relevant portfolio*" at the time of the borrowing. The borrowing of money must be at the best commercial terms available from a registered financial institution.

1.18 Therefore, it follows that a CIS can be a debtor in the usual sense of the word and may be indebted to various creditors (including registered financial institutions, the South African Revenue Services ("**SARS**"), CIPC, the CIS Manager, stock exchanges and other creditors who may have provided loans, broking services, auditing services, custody services and the like.

1.19 It follows therefore, that a CIS may indeed be a debtor "*in the usual sense of the word*" as contemplated in section 2 of the Insolvency Act.

Pre-insolvency Steps under CISCA

1.20 Section 15 of CISCA grants the Registrar of Collective Investment Schemes ("**registrar**") the authority to conduct certain on-site visits or inspections into the affairs of a CIS. Where it is in the interests of the investors of the CIS or of members of the public, the registrar may take further steps (following the inspection) by:

1.20.1 applying to court under the New Companies Act for the winding up of a CIS Manager or of a CIS itself (with regards to solvent and insolvent winding up of a company please see paragraph 1.12 and 1.13 above);

1.20.2 applying to court for the appointment of a curator in respect of the CIS Manager or the business of a CIS portfolio;

1.20.3 mandating the CIS Manager to replace a trustee or custodian with another competent person nominated by the registrar;

1.20.4 taking steps under section 102 of CISCA for the winding up of a portfolio of a CIS (see paragraph 1.22 below) and for the realisation of the assets and the distribution of the net proceeds, together with any income accruals or other monies available for distribution, among the investors in proportion to their respective participatory interests;

1.20.5 directing the CIS Manager, trustee or custodian to remedy irregularities and undesirable practices etc;

1.20.6 directing the CIS Manager to withdraw from the administration of the CIS and to appoint another CIS Manager to take over;

1.20.7 applying to court, if a person administers a CIS in contravention of CISCA, to have the CIS wound up (in which case the court may make any order it considers appropriate for the winding up of the CIS);

1.20.8 instruct the CIS Manager to wind up a portfolio or amalgamate a portfolio with another portfolio.

1.21 The above list is a summary of the powers which the registrar has following an on-site visit or inspection. In our view, all of the above listed steps contemplate pre-insolvency steps (for example curatorship, solvent winding up under the Companies Act, replacing the CIS Manager, replacing any trustee or custodian to continue to run the CIS or a CIS portfolio whilst it is a going concern).

1.22 Section 102 is titled "Winding-Up of Portfolio of Collective Investment Schemes". Section 102(1) only deals with the winding up of a portfolio which, when first formed, had no fixed period for the duration of the portfolio. In these circumstances, the CIS Manager, trustee or custodian may apply to the registrar for the winding up of that portfolio at any time (subject to the terms and conditions determined by the registrar).

1.23 Section 102(1) therefore does not deal with insolvent winding up, it merely deals with the winding up of a portfolio which had no fixed end date at the time it was formed. Importantly, this type of winding up can be applied for at any time.

1.24 Section 102(2) states that the court may, on the application of a CIS Manager, trustee or custodian, order any portfolio to be wound up if the court is satisfied that it would in the interests of investors to do so. The court therefore has a discretion in this regard based solely on the interest of investors, and not for example on the interests of the general body of creditors).

1.25 Section 102(3) provides as follows:

> "*Upon the winding up of a portfolio in terms of this section, the manager must, under the control and supervision of the trustee or custodian realise all the assets of such portfolio as soon as possible having regard to the interest of investors, but the manager incurs no liability by reason of the exercise in good faith of its discretion as to the time of realisation of any assets unless the discretion is exercised in a grossly negligent manner.*"

1.26 Our view is that this clause only refers to the winding up of a portfolio in terms of section 102 of CISCA and does not apply to any other type of winding up not governed by section 102 of CISCA. This is evident from the use of the phrase "*in terms of this section*" highlighted above.

1.27 In our view, section 102(4) provides further authority for the view that section 102 of CISCA deals only with the winding up of a CIS in solvent circumstances. Section 102(4) provides as follows:

> "*The net proceeds of the realisation of such assets must be deposited in the trust account referred to in section 105 and must under the control and supervision of the trustee or custodian be distributed by the manager or the trustee or custodian, as the case may be, amongst the investors and the manager in proportion to their respective participatory or other interests in the portfolio.*"

1.28 The language used by the legislature indicates that the circumstances described in this section contemplate that "*net proceeds*" will result upon the "*realisation of assets*". "*Net proceeds*" implies a positive number. In other words, the realisation of the assets will, after the deduction of certain amounts, yield a positive balance, which balance can then be distributed to investors. In our view, this supports the argument that only a solvent winding up is provided for in section 102 of CISCA.

1.29 Furthermore, the sub-section does not deal with how creditors of the CIS should be paid. As discussed in paragraph 1.16 above, the CIS may have multiple creditors including banks and financial institutions, SARS, CIPC, stock exchanges, its own CIS Manager and other administrators, auditors and the like. The sub-section is however silent on how the claims of these creditors should be dealt with. Section 102(4) therefore only regulates a solvent winding up of the CIS.

1.30 Sub-section 102(5) reiterates that pending the realisation of the assets in such winding up, the manager, trustee or custodian must on behalf of the CIS "*collect all income accruals in respect of such portfolio and must deposit and distribute the amounts collected in the manner prescribed in sub-section (4).*"

1.31 Section 105(6) deals with CIS's which are established in the form of open-ended investment companies ("**OEICs**"). We point out that a CIS in hedge funds may never be established as an OEIC. However, we have included an analysis of the treatment of OEIC's. We are not aware of any CIS's currently established as OEICs under South African law. The majority of CIS's are trusts or partnerships.

1.32 It is a principle of statutory interpretation that the common law is only amended to the extent that a particular statute explicitly amends a provisions of the common law. Without an express provision which contradicts or overrides the common law, the common law will prevail. This is important when interpreting section 102(6) in the context of the larger section 102 as a whole. Here, in respect of OEICs only, the legislature has dealt expressly with the applicability of the provisions of the Old Companies Act and explicitly states that the provisions of the Old Companies Act will not apply to the winding up of a portfolio of an OEIC and that instead, sections 103 and 104 must be applied to the winding up of a portfolio of an OEIC. The sub-section goes further to expressly state that:

> "*…none of the assets of a portfolio administered by such a company may be utilised for the payment of any claim of a creditor of the company*".

1.33 In this sub-section, the rights of creditors of an OEIC to receive payment have been expressly carved out. It is our view that had the legislature intended that the rights of creditors of a CIS established as a trust or partnership be excluded in the same fashion, they would have explicitly said so in section 102, in the same manner expressed in section 102(6).

1.34 However, the legislature did not include a similar exclusion of the rights of creditors of a trust or partnership also. To infer that it was their intention to do so (in the absence of express language to that effect), is in our view not correct. Furthermore, just because section 102 provides no methodology for the payment of creditors of a trust or partnership CIS, that does not mean that those creditors should not be paid at all.

1.35 To suggest that sections 102(3) and (4) are an exclusive set of rules for the solvent and insolvent winding up of a CIS is in our view not correct.

South African Case Law

1.36 For the reasons set out above, our view is that in solvent circumstances, the procedure outlined in CISCA must be followed for the winding up of a CIS. However, upon insolvency a CIS must be wound up as a "*debtor*" in accordance with the Insolvency Act. Our view is that CISCA does not expressly amend the common law of insolvency and that the Insolvency Act will continue to apply to the insolvency of a CIS, provided that a CIS is a "*debtor*" as defined in the Insolvency Act. In arriving at this conclusion, we have relied on the following authority:

1.36.1 Lawclaims (Pty) Ltd vs Rea Shipping Co SA [1979 (4) NPD] ("**Lawclaims Case**")

1.36.1.1 In the Lawclaims Case a foreign company (Rea Shipping) which was neither an external company nor a company registered in South Africa under the company laws of South Africa. The court considered the meaning of a "debtor" under the Insolvency Act (please see paragraph 1.8 above), in the context of a foreign company. It was argued (and the court agreed in its ruling) that the effect of the exclusionary proviso in the definition of "debtor" was that any body corporate or company which could not be placed in liquidation under the Companies Act could be sequestrated under the Insolvency Act, if that body corporate or company was a debtor in the ordinary sense of the term and if the court had jurisdiction over that entity in terms of section 149 of the Insolvency Act.

1.36.1.2 The court agreed that once it is established that the foreign company cannot be wound up in terms of the Companies Act, the exclusionary proviso in the definition of "debtor" ceases to apply to that debtor and consequently the foreign entity can be sequestrated under the Insolvency Act. Since the foreign company was neither a company nor a body corporate which "*may be placed in liquidation under the law relating to companies*", it followed that the winding up of such an entity must occur under the Insolvency Act. The court set out that although the foreign company was undoubtedly a body corporate, it did not carry on business in the recognised sense within the area

of jurisdiction of any South African court and could not therefore be wound up in terms of the Companies Act. However, the court stated:

"*I do not think that it follows that it may not be sequestrated at all. If it is to be sequestrated, this can only be done under the Insolvency Act*".

1.36.1.3 The court held that it was correct to submit that the foreign company was a debtor in terms of the definition of section 2 of the Insolvency Act and the exclusionary proviso in relation to the Companies Act did not apply to that foreign company. Consequently, the court ruled that it was of the opinion that the court had the power to sequestrate the foreign company under the Insolvency Act.

1.36.1.4 The foreign company was the type of entity over which the court had jurisdiction under section 149(1) the Insolvency Act by virtue of the fact that that foreign company owned property situated within the jurisdiction of the court.

1.36.1.5 For reasons which are not relevant to this analysis, the court did not sequestrate the foreign company because the application had been brought in order to frustrate the claims of a certain third party bond holder and to sequestrate the foreign company in South Africa would not have been to the benefit of the general body of creditors.

1.36.1.6 The Lawclaims judgment sets out that where the Companies Act does not expressly deal with the winding up or liquidation of a certain entity, it does not automatically follow that the Insolvency Act does not find application. Essentially the court held that liquidation under the Companies Act would apply to companies and body corporates which could be liquidated under the Companies Act, but the Insolvency Act would apply to companies and body corporates which could not be liquidated under the Companies Act. This supports our view that the Companies Act does not amend or oust the application of the Insolvency Act where there is no conflict between the two pieces of legislation and there is no such express intention set out in the Companies Act.

1.36.2 Reddy vs Body Corporate of CroftDene More 2002(5) SA 640 ("**Body Corporate Case**")

1.36.2.1 In the Body Corporate Case similar principles were discussed. The essential issue was whether a body corporate established under the Sectional Titles Act, 1986 ("**Sectional Titles Act**") should be wound up under the provisions of the Sectional Titles Act or under the provisions of the Insolvency Act. Unlike in the Lawclaims Case, the Sectional Titles Act specifically sets out the method for dealing with unsatisfied judgments taken against body corporates.

1.36.2.2 Section 47(1) of the Sectional Titles Act is titled "*Recovery from owners of unsatisfied judgment against body corporates, and non-liability of bodies corporate for debts and obligations of developers*". The section provides as follows:

"*If a creditor of a body corporate has obtained judgment against the body corporate, and such judgment, notwithstanding the issue of a writ, remains unsatisfied, the judgment creditor may, without prejudice to any other remedy he may have, apply to the court which gave the judgment, for the joinder of the members of the body corporates in their personal capacities as joint judgment debtors in respect of the judgment debt and, upon such joinder, the judgment creditor may recover the amount of the judgment debt still outstanding from the said members on a pro rata basis in proportion to their respective quotas or a determination made in terms of section 32(4) of the …*".

1.36.3 The court stated that the legislature indicated that if the levying of execution did not result in a judgment being satisfied or if a *nulla bona* return was issued, the judgment creditor must apply to court and join the members of the body corporates as joint judgment debtors

who are obliged to satisfy the judgment in proportion to their participation quotas in the scheme. The judge held "*in my view, this indicates clearly that the legislature did not intend that the law of insolvency or of winding up of companies as a means to enforce payment of a debt would apply to bodies corporate.*"

1.36.4 The court furthermore confirmed that the remedy which the creditors of the body corporate have is one against all current members of the body corporate and is not limited only to those persons who were members at the time the debt was incurred. The court held that in its view the legislature did not intend that bodies corporate established under the Sectional Titles Act should be wound up for non-payment of its debts or by virtue of insolvency. This finding was based on the fact that special provisions are contained in the Sectional Titles Act which indicate expressly that the winding up provisions of the Companies Act would not apply to a body corporate, instead the Sectional Titles Act envisages that the court make an order for the winding up of the affairs of the body corporate only in the context of the sectional titles scheme ceasing to exist whether by virtue of the destruction of the buildings or notional destruction.

1.36.5 Unlike CISCA, the Sectional Titles Act specifically deals with how unsatisfied judgments (unpaid debts) of a body corporate must be dealt with. Action is to be taken against the individual members of the body corporate in their personal capacities. These types of express legislative provisions therefore do override the typical laws of insolvency.

1.36.6 However, in the Lawclaims Case, the Companies Act did not expressly contain a similar override and as a result where the foreign entity could not be placed under liquidation in terms of companies law, it followed that, provided the court had jurisdiction and provided the foreign entity was a "*debtor*" as defined, the foreign entity must be sequestrated under the Insolvency Act.

1.36.7 Applying these findings to CISCA, we are of the view that CISCA does not contain any explicit provisions dealing with insolvency, the methods for paying creditors, for dealing with unsatisfied judgments and unpaid debts and that therefore, in those circumstances, the Insolvency Act must be followed.

Post-insolvency netting

1.37 With regards to netting under the Master Agreement, the provisions of section 35B of the Insolvency Act must be considered (see PART 1 – paragraph 17(C) (*Section 35B of the Insolvency Act*) – paragraph 17.24 above).

1.38 We would stress that there is no reported case law on matters relating to a CIS in hedge funds and section 35B of the Insolvency Act, and we are not aware that a South African court has been requested to consider section 35B in the context of a CIS in hedge funds (or at all). It is accordingly not certain what interpretation a South African court would give to any of the provisions of section 35B of the Insolvency Act.

1.39 However, in our view, upon the insolvency of a CIS in hedge funds, the provisions of section 35B of the Insolvency Act will apply to the "*unperformed obligations*" arising out of the ISDA master agreement itself (and those arising out of agreements in which ownership of assets have been transferred as collateral security. These unperformed obligations:

1.39.1 will terminate automatically;

1.39.2 as at the date of sequestration of the CIS in hedge funds;

1.39.3 the values of the unperformed obligations will be calculated at "market value";

1.39.4 the values of those unperformed obligations will be netted off against one another; and

1.39.5 a net amount will be payable by one party to the other.

1.40 For a full discussion of the operation of section 35B of the Insolvency act, please see paragraph 17(C) (*Section 35B of the Insolvency Act*) paragraph 17.24 to 17.45 above.

1.41 The conclusions reached above are subject to the additional capacity and authority considerations set out below at paragraph 1.42 to 1.53.8 which apply to a CIS in hedge funds. Notice 52 imposes certain restrictions on a CIS in hedge fund's ability to trade derivatives under the ISDA master agreement and ability to post collateral under the Credit Support Documents.

Restrictions on a CIS in hedge fund's trading derivatives

1.42 Section 21 of Notice 52 states that a CIS in hedge funds may only invest in derivatives where the counterparty is –

1.42.1 the South African Government;

1.42.2 a bank as defined in the Banks Act, 1990;

1.42.3 a long-term insurer registered or deemed to be registered as a long-term insurer under the Long-term Insurance Act, 1998;

1.42.4 a short-term insurer registered or deemed to be registered as a short-term insurer under the Short-term Insurance Act, 1998;

1.42.5 a clearing house;

1.42.6 an authorised user; or

1.42.7 a person outside the Republic who is registered, licensed, recognised, approved or otherwise authorised to render services or conduct the business of a bank or a business referred to in paragraphs 1.42.2 to 1.42.6 by a foreign regulator with functions similar to those of the Registrar, the Registrar of Banks, the Registrar of Financial Services Providers or the Registrar of Long-term or Short-term Insurance.

1.43 A CIS Manager must conduct appropriate stress-testing to assess counterparty exposure and the impact of a change in the risk profile of the counterparty on financing and collateral requirements.

1.44 In terms of section 3(g) of Notice 52, a QI fund may include assets set out in its founding documents provided that the following principles are adhered to –

1.44.1 the liquidity of securities may not compromise the liquidity terms of the portfolio;

1.44.2 securities based on the value of physical commodities may be traded, provided that:

1.44.2.1 the security is listed on an exchange;

1.44.2.2 specific disclosure is made to investors of the nature and extent of the exposure to physical delivery of the commodity;

1.44.2.3 the liquidity terms of the QI fund are not compromised;

1.44.2.4 the position is closed out before physical delivery is required.

1.44.3 securities must be subject to reliable valuation by the CIS Manager and must be negotiable and transferable.

1.44.4 A Retail Fund may specifically trade derivative instruments as defined in the FMA.

1.44.5 Section 7 of Notice 52 states that where the inclusion of a derivative instrument, in a Retail Fund, results in an immediate or future commitment for a portfolio, the following liquidity requirements apply –

1.44.5.1 for a derivative that may require settlement in cash, the portfolio must at all times hold sufficient assets in liquid form to effect the required settlement; and

1.44.5.2 for a derivative that requires physical settlement, the portfolio must hold the physical asset or hold sufficient assets in liquid form to cover the full payment obligation for the physical asset.

1.45 When a CIS Manager includes derivatives in the portfolio of a Retail Fund, section 12 of Notice 52 states that the CIS Manager must –

1.45.1 ensure that the exposure does not exceed the net asset value of that portfolio, provided that when a transferable security or money market instrument contains an embedded derivative, the exposure created by that derivative must be taken into account when exposure is calculated;

1.45.2 be satisfied that an over-the counter derivative can be valued with reasonable accuracy and on a reliable and consistent basis;

1.45.3 ensure that the derivative can be sold, liquidated or closed out by an offsetting transaction, at market value at any time, at the CIS Manager's initiative;

1.45.4 ensure that the fund administrator has the ability to value the derivatives instruments independently, where applicable;

1.45.5 ensure that the underlying assets of the derivative are taken into consideration in determining the resulting exposure;

1.45.6 not permit the position exposure to the underlying assets of derivatives (including embedded derivatives in transferable securities, money market instruments or investment funds) when combined with positions resulting from direct investments, to exceed the investment limits or counterparty limits; and

1.45.7 ensure that the derivative does not result in the delivery of a security that is not permitted under Notice 52.

1.46 In addition to 1.45 above, section 12(2) of Notice 52 states that a Retail Fund CIS Manager must also ensure that the portfolio –

1.46.1 is at all times capable of meeting its payment and delivery obligations for cash settled derivatives by holding assets in liquid form which are sufficient to cover the obligations; and

1.46.2 establishes and maintains risk management processes which monitor derivative positions so that they are adequately covered in accordance with these requirements.

1.47 Section 10 of Notice 52 states that a CIS Manager may only include investments in other Retail Funds or in CIS in securities in accordance with the limits set out in Annexure A to Notice 52 ("**Annexure A**").

1.48 Section 10(2) of Notice 52 states that a CIS Manager may only include securities in a portfolio as set out in its founding document, subject to the exposure limits set out in Annexure A and provided that the following principles are adhered to –

1.48.1 where the securities are listed, the securities must be dealt with on an exchange, or on a market which is regulated, operates regularly, is recognised and open to the public;

1.48.2 a security based on the value of a commodity must comply with paragraph 1.44.2 above and must be settled prior to its maturity so as not to require physical delivery of any commodity;

1.48.3 a reliable valuation for the security must exist; and

1.48.4 the liquidity of instruments must not compromise the liquidity terms of the portfolio.

1.49 Section 11 of Notice 52 states that a CIS Manager of a Retail Fund may not include in a portfolio, investments in –

1.49.1.1 immovable property;

1.49.1.2 a portfolio of a QI fund; or

1.49.1.3 a private equity fund.

1.50 Section 8 of Notice 52 states that a CIS Manager –

1.50.1 must limit the counterparty exposure of a portfolio to the net asset value of the portfolio per one counterparty subject to Annexure A; and

1.50.2 may only net the counterparty exposure with the same counterparty and in the same portfolio, provided that the CIS Manager is able to legally enforce netting arrangements with that counterparty.

Restrictions on a CIS in hedge funds providing collateral

1.51 Section 17 of Notice 52 states that a CIS Manager of a CIS in hedge funds may only use assets which are included in the portfolio as collateral.

1.52 In addition, section 9 of Notice 52 states that a Retail Fund may-

1.52.1 post collateral to its counterparties; or

1.52.2 receive collateral to manage its counterparty exposure or where counterparty limits have been breached.

1.53 Section 9(2) of Notice 52 states that a Retail Fund CIS Manager must ensure that collateral arrangements satisfy the following rules and principles –

1.53.1 Legal Agreements: Collateral arrangements must be governed by appropriate global master collateral agreements (i.e. the Master Agreement and the Credit Support Documents).

1.53.2 Liquidity: Collateral must be sufficiently liquid to ensure that it can be converted to cash within 7 (seven) days in a default event at a price that is close to its pre-sale valuation.

1.53.3 Valuations: Collateral must be capable of being valued on a daily basis and must be marked-to-market daily taking into account any haircuts on non-cash collateral, where applicable.

1.53.4 Issuer credit quality: Creditworthiness of the issuer of the collateral must be taken into account and relevant haircuts must be applied to take into account issuer default risk.

1.53.5 Legal rights: A CIS Manager must ensure that the collateral obligation is legally enforceable and that the collateral will be available to a portfolio without recourse to a counterparty, in the event of a default by the counterparty.

1.53.6 Concentration risks: A CIS Manager must take into account the concentration risks to a single issuer in a portfolio.

1.53.7 Relatedness: A CIS Manager may not accept securities issued by the counterparty as collateral.

1.53.8 Cash collateral: A CIS Manager must appropriately manage the reinvestment risk of cash collateral.