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21 February 2013

Dear Sirs

FOA Collateral Opinion

You have asked us to give an opinion in respect of the laws of Germany ("**this jurisdiction**") in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an "**Agreement**") or under an Equivalent Agreement (as defined below).

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

References herein to "*this opinion*" are to the opinions given in paragraph 3.

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of

1.1.1 generally, in respect of Parties which are

(a) Companies;

(b) Partnerships;

(c) Cooperatives;

(d) Financial Services Institutions; and

(e) Credit Institutions;[1]

1.1.2 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are companies, Credit Institutions or insurance companies and which have a branch or branches located in this jurisdiction. insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.3) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 This opinion is also given in respect of Counterparties providing Collateral to a Firm that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

1.2.1 Insurance Companies (Schedule 1);

1.2.2 Investment Fund Companies (Schedule 2);

1.2.3 Individuals (Schedule 3);

1.2.4 Public Sector Entities (Schedule 4);

1.2.5 Foundations (Schedule 5);

1.2.6 Building Societies (Schedule 6); and

1.2.7 Pension Entities (Schedule 7).

insofar as each may act as a Counterparty to a Firm under an Agreement.

1.3 This opinion is only given in respect of cash and securities which are the subject of the Security Interest Provisions (any such assets, the "**Collateral**"). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.4 This opinion relates solely to matters of German law and does not consider the impact of any laws other than German law, even where, under German law, any foreign law falls to be applied. This opinion letter and the opinions given in it are governed by German law and relate only to German law as applied by the German courts as at today's date. All non-contractual obligations and any other matters arising out of or in connection with this opinion letter are governed by German law.

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[1] We do not opine on German Credit Institutions holding a licence as a covered bond bank (*Pfandbriefbank*) with respect to any transactions relating to or included in the cover register (*Deckungsregister*) and we do not give an opinion on regulatory restrictions under the German Covered Bond Act (*Pfandbriefgesetz*).

1.5 This opinion expresses and describes German legal concepts in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying German law concepts. Any issues of interpretation arising in respect of the Agreement or this opinion will be determined by the German courts in accordance with German law and we express no opinion on the interpretation that the German courts may give to any such expressions or descriptions.

1.6 Terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears.

1.7 Any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter.

1.8 Certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2.

1.9 We do not express any opinion as to any matters of fact.

1.10 We do not opine on tax or accounting matters.

1.11 In this opinion letter:

1.11.1 "**Security Interest**" means the security interest created with respect to Collateral pursuant to the Security Interest Provisions;

1.11.2 "**Equivalent Agreement**" means an agreement:

(a) which is governed by the law of England and Wales;

(b) which has a similar function to any of the Agreements listed in Annex 1;

(c) which contains the Core Provisions (with no amendments, or only with Non-material Amendments); and

(d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

References to the "**Agreement**" in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;

1.11.3 a "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 3;

1.11.4 references to "**Core Provisions**" include Core Provisions that have been modified by Non-Material Amendments;

1.11.5 "**enforcement**" means, in the relation to the Security Interest, the act of:

(i) sale and application of proceeds of the sale of Collateral against monies owed, or

(ii) appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions;

1.11.6 in other instances other than those referred to at 1.11.4 above, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.11.7 For purposes hereof, a reference to a "company" is a reference to a stock corporation (*Aktiengesellschaft*, "**AG**") established under the German Stock Corporation Act (*Aktiengesetz*), or a European public limited-liability company (*Societas Europaea*, "**SE**") established under the Regulation (EC) No 2157/2001 on the Statute for a European Company (SE), or a limited liability company (*Gesellschaft mit beschränkter Haftung*, "**GmbH**") established under the German Act on Limited Liability Companies (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*);

1.11.8 a reference to a "**Partnership**" is a reference to a commercial partnership (*offene Handelsgesellschaft*) or a limited partnership (*Kommanditgesellschaft*) organised under the German Commercial Code (*Handelsgesetzbuch*) or a European Economic Interest Grouping (*Europäische Wirtschaftliche Interessenvereinigung*) established in accordance with Regulation (EEC) No 1237/85 of 25 July 1985 on the European Economic Interest Grouping and the German Act on the Implementation of the EEC Regulation on the European Economic Interest Grouping (*Gesetz zur Ausführung der EWG-Verordnung über die Europäische wirtschaftliche Interessenvereinigung*) but excluding a civil law partnership (*Gesellschaft bürgerlichen Rechts*) and excluding a partnership of professionals (*Partnerschaftsgesellschaft*);

1.11.9 a reference to a "**Cooperative**" is a reference to a cooperative established under the German Act on Industrial and Economic Cooperatives (*Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften*);

1.11.10 a reference to a "**Credit Institution**" is a reference to a credit institution (*Kreditinstitut*) within the meaning of section 1 (1) of the German Banking Act (*Kreditwesengesetz*, "**Banking Act**");

1.11.11 a reference to a "**Financial Services Institution**" is a reference to a financial services institution (*Finanzdienstleistungsinstitut*) within the meaning of section 1 (1a) a of the Banking Act;

1.11.12 a reference to an "**Institution**" is a reference to Credit Institutions and Financial Services Institutions collectively;[2]

1.11.13 a reference to the "**EEA**" is a reference to the European Economic Area;

1.11.14 a reference to "**Financial Collateral**" is a reference to an arrangement defined as such in section 1 (17) sentence 1 and 2 of the Banking Act;[3]

1.11.15 a reference to the "**Financial Collateral Directive**" is a reference to the Directive 2002/47/EC of 6 June 2002 on financial collateral arrangements;

1.11.16 a reference to a "**Deposit Taking Credit Institution**" is a reference to a Deposit Taking Credit Institution (*Einlagenkreditinstitut* as defined in section 1 (3d) of the Banking Act which in turn refers to Art. 4 (1) of the EU Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of Credit Institutions, the home member state as defined in Art. 2 of the Winding Up Directive of which is Germany;

1.11.17 a reference to a "**System**" is a reference to a system within the meaning of section 1 (16) of the Banking Act[4];

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[2] See Schedule 4 (Public Sector Entities) as regards institutions organised under public law.

[3] Section 1 (17) sentence 1 and 2 of the Banking Act in its English translation reads as follows: "Financial Collateral within the meaning of this act are cash deposits (*Barguthaben*), cash amounts (*Geldbeträge*), securities, money market instruments and other credit claims within the meaning of Article 2 (1) lit. o of the Financial Collateral Directive including all related rights or claims which have been transferred as collateral either by way of an *in rem* security arrangement (*beschränktes dingliches Sicherungsrecht*) or by way of a money transfer or by way of full title transfer on the basis of an agreement between a secured party and a security provider, each belonging to one of the categories named in Article 1 (2) lit. (a) to (e) of the Financial Collateral Directive. Should the security provider be a person or business undertaking named in Article 1 (2) lit. (e) of the Financial Collateral Directive, financial collateral is only given, if the collateral secures obligations arising under agreements or the procurement of agreements which serve

(a) the acquisition and sale of financial instruments,

(b) sale and repurchase, lending or similar transactions on financial instruments or,

(c) loans to finance the acquisition of financial instruments."

[4] According to section 1 (16) sentence 1 of the Banking Act a "system" is a written agreement within the meaning of Art. 2 (a) of the Settlement Finality Directive as amended, including an agreement between a participant and an indirectly participating Credit Institution which has been notified by Deutsche Bundesbank (the German central bank) or a competent authority of a member state of the EEA to the European Securities and Markets Authority (ESMA). Art. 2 (a) of the Settlement Finality Directive reads as follows: "'system' shall mean a formal arrangement

1.11.18 a reference to a "**Member State**" is a reference to a member state of the European Union.

1.11.19 a reference to the "**EU Insolvency Regulation**" is a reference to the Regulation (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings;

1.11.20 a reference to the "**Settlement Finality Directive**" is a reference to the Directive 98/26/EC of 19 May on settlement finality in payment and securities settlement systems;

1.11.21 a reference to the "**Winding Up Directive**" is a reference to the Directive 2011/24/EC of 4 April 2001 on the reorganisation and winding up of Credit Institutions; and

1.11.22 headings are for ease of reference only and shall not affect the interpretation of this opinion letter.

2. ASSUMPTIONS

We assume the following:

2.1 That the Agreements are legally binding and enforceable against both Parties under their governing laws.

2.2 That the Security Interest Provisions are enforceable under the governing law governing the Agreement and that the Security Interest will be validly created.

2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement, to perform its obligations under the Agreement, and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.

- between three or more participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for the execution of transfer orders between the participants,
- governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and
- designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

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

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

2.4 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.

2.5 That the Agreement has been properly executed by both Parties.

2.6 That the Agreement is entered into prior to the commencement of any insolvency, bankruptcy or analogous proceedings in respect of either Party.

2.7 The Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

2.8 That the Agreement accurately reflects the true intentions of each Party.

2.9 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law governing the Agreement.

2.10 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.

2.11 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the Security Interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.

2.12 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.

2.13 That, except with respect to our opinion in paragraph 3.3, any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions may be located either within or outside this jurisdiction.

2.14 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

2.15 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

2.16 That any Collateral posted under the Agreement consists of securities or cash. Securities may be held in physical or de-materialised form and may be held individually or collectively. Cash serving as Collateral will be provided in the form of payment claims *vis-á-vis* a bank maintaining an account rather than in physical form.

3. OPINIONS

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in paragraph 4 below, we are of the following opinion.

3.1 Valid Security Interest

3.1.1 The obligation under the Security Interest Provisions to create the Security Interest would be recognised in Germany.

3.1.2 Upon the valid creation of the Security Interest and following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

3.1.3 Upon the valid creation of the Security Interest and following exercise of the Firm's rights under the Security Interest Provisions, the Firm's rights in respect of the proceeds of realisation of the Collateral would, outside Insolvency Proceedings, rank ahead of the interests of the Counterparty and any other person therein, if all parties concerned agreed to such priority ranking.

3.1.4 Upon the valid creation of the Security Interest and following exercise of the Firm's rights under the Security Interest Provisions, the ranking of the Firm's rights to the proceeds of realisation of any Collateral located outside this jurisdiction in relation to the interests of the Counterparty and any other person would be a matter to be determined under the law of the place where such Collateral is situated and applicable insolvency laws.

3.2 Further acts

No further acts, conditions or things would be required by the laws of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

3.3 Foreign Collateral Providers

Moreover, the opinions given at paragraphs 3.1 and 3.2 also apply in respect of any Counterparty that is not established or resident in this jurisdiction, where any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions are located within this jurisdiction.

3.4 Right of re-use

With respect to the Eligible Counterparty Agreement 2011, the Retail Client Agreement 2011, the Professional Client Agreement 2011 (or an Equivalent

Agreement in the form of one of the foregoing), the Rehypothecation Clause would be effective in accordance with its terms, such that that Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

The opinion given at this paragraph 3.4 does not apply in respect of an Equivalent 2011 Agreement without Core Rehypothecation Clause.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

4.1 Validity of Security Interest

The conflict of laws provisions regarding the establishment of a security interest depend on the type of security interest to be created and the type of asset over which the security interest is created.

4.1.1 Validity of the obligation to create the Security Interest

The German courts will generally recognise the validity of the obligation to create the Security Interest under an Agreement in accordance with Art. 3 (1) of the Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) ("**Rome I**"). German courts may, however,

(a) give effect to mandatory provisions of the law of the country where the obligations arising out of the Agreement have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the Agreement unlawful (Art. 9 (3) of Rome I);[5]

(b) apply overriding mandatory provisions of German law (Art. 9 (2) of Rome I) irrespective of the choice of the laws of England and Wales under the Agreements;

(c) refuse to apply the laws of England and Wales to the Agreements, to the extent the application of the laws of England and Wales is manifestly incompatible with German public policy (Art. 21 of Rome I);

(d) have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (Art. 12 (2) of Rome I); and

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[5] In accordance with Art. 9 (1) of Rome I, mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under Rome I.

(e) apply the provisions of the law of another Member State which cannot be derogated from by agreement, if English law was chosen to govern the Agreement but all elements relevant to the situation at the time that the Agreement was entered into were located in another Member State than the United Kingdom (Art. 3 (3) of Rome I).

4.1.2 Validity of the Security Interest

In respect of the Security Interest itself it should be noted that German law does not draw a distinction between the creation and the perfection of a security interest. Rather, depending on the type of security interest and the asset used as collateral, different legal and factual actions are required to ensure the creation of each security interest. The requirements which need to be met in order for the German courts to recognise the validity of an instrument which constitutes a valid security interest for the purposes of English law depend on the type and the location of the asset over which such security interest has been created.

4.1.3 Collateral assets located in England or Wales

(a) Cash

(i) Art 14 of Rome I contains the relevant conflict of laws provisions for security assignments and pledges over contractual claims. Art 14 (1) of Rome I provides that the relationship between assignor and assignee shall be governed by the law that applies to the contract between the assignor and assignee under Rome I Regulation, i.e. the parties may choose the governing law under Art 3 (1) of Rome I (above, paragraph 3.1.1). Recital 38 of Rome I makes it clear that this also covers the property aspects of the assignment in countries such as Germany where these aspects are legally separate from the law of obligations. The same applies in respect of pledgor and pledgee in case a claim is pledged (Art. 14 (3) of Rome I). The law governing the pledged claim is relevant in determining whether the claim can be pledged, the relationship between the pledgee and the pledgor, the conditions under which the pledge can be invoked against the pledgor and whether the pledgor's obligations have been discharged (Art. 14 (2) of the Rome I Regulation).

(ii) Therefore, where the ownership in cash is transferred or where a security interest is created over cash and such cash is held in a bank account German conflict of laws principles refer to the law governing the account relationship between the bank and the recipient of the cash (in the event the cash is represented by the payee's claim against the bank maintaining his account in regard of the funds transferred). The assignment of claims for the payment of money and the creation of a security interest in

such claims, as well as the effects of such assignment or creation, are governed by the law which governs such claims, i.e. English law where the claim is governed by English law.

(b) Securities

(iii) German conflict of laws provisions concerning moveables in general

Art. 43 (1) of the German Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, "**Introductory Code**") contains the principle of the *lex rei sitae*, i.e. it stipulates that rights to an object (i.e. moveables (including securities) or real estate property) are governed by the laws of the state where the object is situated.

(A) Irrespective of the location of a moveable, German courts may recognise a right over moveables under foreign law in accordance with Art. 46 of the Introductory Code which contains an exemption from the *lex rei sitae* rule. It provides that if there is a substantially closer connection to the laws of a country other than the laws of the country which would be applicable under Art. 43 (1) of the Introductory Code, then such other laws shall be applicable.

(B) Art. 43 (2) of the Introductory Code, on the other hand, provides that where an object is brought to another country rights relating to such object may not be exercised contrary to the laws of the country where the object has been brought (see paragraph 4.1.5 below for further details on situations where this provision may become relevant).

(C) Furthermore, Art. 6 of the Introductory Code provides that provisions of foreign law must not be recognised in Germany, if their application would lead to a result which is incompatible with German public policy (*ordre public*). The scope of application of Art. 6 of the Introductory Code would appear to be very limited in respect of moveables given the application of Art. 43 (2) of the Introductory Code.

(iv) German conflict of laws provisions on securities

Under German law governing international conflict of laws, the validity of the transfer of title in securities is generally determined by the laws of the jurisdiction in which the securities are located (*lex cartae sitae*) in accordance with Art.

43 of the Introductory Code (*Wertpapiersachstatut*), i.e. the principles set out above apply in respect of the *in rem* title to any physical certificate of a security.[6]

(A) The validity of the transfer of the rights represented by the securities (*Wertpapierrechtsstatut*) (e.g. the acquisition of voting, dividend or interest rights) is determined by the laws governing such right, for example in relation to shares the jurisdiction in which the issuer is located or established[7] as the case may be and in relation to bonds the jurisdiction the issuer has chosen to govern the bonds.

(1) Subject to the rules on collectively held securities set out below, if the law governing the transfer of title in securities provides that the transfer of title in the securities requires the delivery of a certificate (bearer securities, *Inhaberpapiere*), the transfer of title in such securities is governed by the laws of the jurisdiction in which the certificate is physically located on completion of delivery.[8]

(2) In respect of negotiable registered securities (*Orderpapiere*), on the other hand, the analysis under German private international law is different[9]:

The law governing the rights represented by the securities (*Wertpapierrechtsstatut*) determines whether the transfer of the title in the securities requires an endorsement, delivery of the certificate or both.

If a registered security bears a blank endorsement (*Blankoindossament*) and the law which governs the securities provides that the

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6 *Welter*, in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4th ed. 2011, § 26 nos. 172 *et seqq.*; *Wendehorst*, in: Münchener Kommentar zum BGB, 5th ed. 2010, Art. 43 EGBGB nos. 194 *et seqq.*

7 According to the case-law of the German Federal Supreme Court (*Bundesgerichtshof*, "**BGH**") the legal status of legal persons established under private law has to be determined in accordance with the laws of the Member State in which it was established, if the legal persons have been established in a Member State (BGH, NZG 2003, 431, 432) whereas the legal status has, in the absence of applicable international treaties, to be determined in accordance with the laws of the state in which the legal person has its effective seat, if it was established in any other state (BGH, NJW 2009, 289, 290).

8 *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB no. 196.

9 *Wendehorst*, in: Münchener Kommentar zum BGB, Art. 43 EGBGB no. 197 *et seq.*

transfer of title in the securities may be transferred by delivery of the certificate, the transfer of title in such security is governed by the laws of the jurisdiction in which the certificate is physically located on completion of delivery.

(3) If an instrument under its governing law is qualified as a claim transferable by assignment rather than as a bearer instrument (for example, *Schuldschein* loans or registered bonds governed by German law (*Namensschuldverschreibung*)), the instrument may only be transferred by assignment of such claim.

(B) With respect to "collectively held securities" which are transferable by booking into an account with constitutive legal effect for the benefit of the transferee, section 17a of the German Safe Custody Act (*Depotgesetz*, "**Safe Custody Act**") provides that the law governing the transfer of such securities is determined by reference to the location of the principal or branch office of the custodian bank (or, as the case may be, the central securities depository) making the account entry in favour of the transferee. [10] For the purpose of this Opinion, "**collectively held securities**" are (i) securities which are kept in collective safekeeping custody (*Sammelverwahrung*) by a central securities depository, (ii) securities represented by a global certificate, or (iii) securities represented by a book entry for a central securities depository (for example, certain German governmental bonds).

(C) With respect to "dematerialised securities" which are transferable by book entry in a register with constitutive legal effect for the benefit of the transferee, section 17a of the Safe Custody Act provides that the law governing the transfer of such securities is determined by reference to the jurisdiction of the country under whose supervision the register is maintained making the

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[10] Section 17a of the Safe Custody Act reads in its English translation as follows: "Any disposal (*Verfügung*) of securities or interests in securities held in a central securities depository system, which are, with constitutive legal effects, entered into a register or booked in an account shall be governed by the laws of the country under whose supervision the register is kept in which such entry for the direct benefit of the transferee is made or in which the main or branch office of the custodian is located which makes the account entry with constitutive legal effect for the benefit of the transferee." Section 17a of the Safe Custody Act implements Art. 9 (2) of the Settlement Finality Directive.

account entry in favour of the transferee. For the purpose of this opinion, "**dematerialised securities**" are securities which are represented by a book entry in a register (*Buchrechte*).

(D) The location of the collectively held securities is irrelevant since section 17a of the Safe Custody Act does not follow the *lex rei sitae* rule.

(E) The afore-described conflict of laws principles constitute mandatory law. However, up to date, certain questions relating to section 17a of the Safe Custody Act remain unresolved, and no court precedent exists in respect of the interpretation of such rule.[11]

(F) Summary

Where Collateral is provided in the form of securities located in England and Wales and Art. 43 of the Introductory Code applies, German courts would generally recognise the validity of a Security Interest created under English law. Where Collateral is posted in the form of collectively held or dematerialised securities and the relevant account or register is maintained in England and Wales, German courts would also recognise the validity of the Security Interest created under English law.

4.1.4 Collateral located outside England or Wales

(a) Cash

As previously stated (paragraph 4.1.3 (a), above) where the ownership in cash is transferred or where a security interest is created over cash and such cash is held in a bank account German conflict of laws principles refer to the law governing the account relationship between the bank and the recipient of the cash. Despite the account relationship being maintained outside England or Wales German courts would recognise the choice of English law to govern the Security Interest to the extent the account relationship is governed by English law in accordance with the principles set out and subject to the qualifications made under paragraph 4.1.1.

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[11] In particular, securities which are transferable by book entry in a register with constitutive legal effect are very rare under German law and it is therefore disputed whether section 17a of the Safe Custody Act has a significant scope of application at all (*Einsele*, Die internationalprivatrechtlichen Regelungen der Finalitätsrichtlinie und ihre Umsetzung in der Europäischen Union, WM 2001, 2415, 2421 *et seqq.*; *Reuschle*, Grenzüberschreitender Effektenverkehr – Die Entwicklung des europäischen und internationalen Wertpapierkollisionsrechts, RabelsZ 68 (2004), 687, 720).

(b) Securities

To the extent Collateral is posted in the form of securities and Art. 43 of the Introductory Code applies, the creation of a the Security Interest over the Collateral would be subject to the laws of the country where the securities are located (above, paragraph 4.1.3(iv)(A)(1)) and German courts would not recognise a contractual agreement to the contrary. To the extent section 17a of the Safe Custody Act applies, the location of the Collateral would be irrelevant and German courts would refer to the law of the country where the relevant account entry is made or where the relevant register is maintained (above paragraphs 4.1.3(iv)(B) to 4.1.3(iv)(E)).

4.1.5 "Movement" of Collateral which is subject to the *lex rei sitae* rule

Based on Art. 43 (2) of the Introductory Code,[12] a special rule established by the German courts applies in respect of security interests over collateral which is brought from one state to another, if the collateral is subject to the *lex rei sitae* or *lex cartae sitae* rule established by Art. 43 (1) of the Introductory Code (above, paragraph 4.1.3(b) 4.1.3(iv)(A))

(a) Under German case law which is commonly referred to as the "doctrine of transposition" (*Transpositionslehre*) the rights (e.g. security interests) over moveables which have been validly created under foreign law would have to be exercised by applying the legal regime applicable to an comparable right under German law.[13]

(b) Thus, where the Security Interest has been validly created under English law and moveables over which it has been created are brought to Germany after the valid creation of the Security Interest, the German courts would not question the valid creation of the Security Interest. If the *lex rei sitae* rule applied to the moveables, the German courts would, however, have to ascertain which of the security interests available under German law it resembles most closely (unless it could be shown that there is a substantially closer connection to the laws of a country other than Germany in accordance with Art. 46 of the Introductory Code (above, paragraph 4.1.3(iii)(B)). In accordance with the doctrine of transposition, the enforcement of the Security Interest would then have to be performed in accordance with the laws applicable to the most closely resembling security interest available under German law.

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[12] Art. 43 (2) of the Introductory Code has been enacted after the German courts had developed the case law described below which has expressly been acknowledged by the German legislator (BT-Drs. 14/343, p. 16).

[13] BGHZ 39, 173, 175; BGHZ 45, 95, 97; BGH, NJW 1991, 1415, 1416.

4.2 German law principles governing security interests

The following summarises German law principles which may be relevant to the Security Interest Provisions, in particular, where German law is applicable in accordance with German conflict of laws principles, e.g. as a result of Collateral assets being located in Germany (above, paragraphs 4.1.3 and 4.1.4), or, where the doctrine of transposition (4.1.5(a)) will be relevant, if and to the extent Collateral assets have been brought to Germany after the Security Interest has been created.

4.2.1 German law pledge

Under German law, pledges (*Pfandrechte*) are among the available security interests over contractual claims (irrespective of whether or not the claim is for the payment of money) and over securities.[14]

(a) In order to create and perfect a pledge over contractual claims, the parties have to agree to pledge the relevant claim and to notify the debtor of the claim of the pledge (section 1205 and 1280 of the German Civil Code (*Bürgerliches Gesetzbuch*, "**Civil Code**")). Under a pledge, the obligor in respect of the claim remains the same whilst the secured party is vested with certain rights in relation to the claim which, in particular, facilitate enforcement. German law pledges are of an accessory nature which means that the existence of the pledge depends on the existence of the secured obligation and that upon the transfer of the secured obligation the pledge will also be transferred, i.e. a transfer of a pledge is legally effected by transferring the secured obligation (upon which the pledge "follows" by operation of mandatory law (section 1250 (1) of the Civil Code)). Where securities are transferred by way of assignment of the underlying claim (e.g. registered bonds, paragraph 4.1.3(iv)(A)(3))), a pledge would have to be created over the claim in accordance with the above rules.

(b) A pledge over moveables requires the parties' agreement on the creation of the pledge. Furthermore, the pledgee has to obtain possession of the pledged moveable but no notification requirement needs to be satisfied. This also applies in respect of pledges over bearer securities (above, paragraph 4.1.3(iii)(A)) in accordance with section 1293 of the Civil Code. For such moveable, the principle of obviousness (*Offenkundigkeit*) is realised by the possession.

(c) To created a pledge over negotiable registered securities (above, paragraph 4.1.3(iv)(A)(2)), the underlying claim may be pledged in accordance with the principles set out under paragraph (a). Alternatively, the relevant certificate may be pledged. This requires the agreement of pledgor and pledgee to create the pledge, the pledgee

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[14] Securities can be pledged by either pledging the account (i.e. by pledging the contractual claim to the account) (*Rechtspfändung*) or by pledging the securities individually.

needs to obtain possession of the pledged assets and the certificate has to bear the requisite endorsement.[15]

4.2.2 Further types of security interests

Contractual claims may serve as collateral for a security assignment (*Sicherungsabtretung*) and a security interest over moveables may be created in the form of a security transfer (*Sicherungsübereignung*).

(a) Under a security assignment the claim is assigned to the secured party (section 398 of the Civil Code but the secured party is bound by an underlying fiduciary relationship to dispose over the claim only for security purposes. Normally, no notification requirement applies in respect of security assignments. A security assignment can be notified to the debtor or be effected without a notification ("silent assignment"). In the latter case, the debtor of the assigned claim would continue to be entitled to discharge obligations under the assigned claim by paying the assignor (section 407 (1) of the Civil Code) unless it had otherwise become aware of the assignment.

(b) A security transfer of moveables requires the parties to agree that the title in the moveable is transferred to the secured party and that the security provider exercises possession on behalf of the secured party under a bailment agreement (*Besitzmittlungsverhältnis*) (sections 929, 930 and 868 of the Civil Code); the secured party will be bound by an underlying fiduciary relationship which strictly limits the exercise of the rights arising from such title transfer for security purposes.

4.2.3 Ranking of security interests under German law

(a) Security interests usually rank by time of creation. To determine priority in respect of pledges over contractual claims, the time when notice to the third party debtor is given will be decisive.

(b) The parties may agree on the ranking of (secured) claims prior to and in an insolvency. Such agreements will only be binding on the parties to the agreement and must not affect third parties.

(c) In Insolvency Proceedings, mandatory rules on ranking apply (paragraphs 4.3.2 to 4.3.4).

4.3 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction are the procedures under the

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[15] See *Damrau*, in: Münchener Kommentar zum BGB, 5th ed. 2009, § 1292 nos. 4 *et seqq.* for further details.

German Insolvency Code (*Insolvenzordnung*, "**Insolvency Code**"). For purposes hereof, the laws and procedures of the Insolvency Code are called "**Insolvency Proceedings**". Upon the opening of Insolvency Proceedings, the enforcement of any security interest will be subject to mandatory procedural provisions of the Insolvency Code. The general rule is that all creditors rank *pari passu* except where they are entitled to preferential treatment or subject to subordination.

4.3.1 Scope of application of Insolvency Proceedings

Where the Defaulting Party is incorporated or formed under the laws of another jurisdiction (a "**foreign Defaulting Party**") the foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction. The question whether German insolvency laws apply would in the first place be decided having regard to the EU Insolvency Regulation. In relation to any sets of circumstance to which the EU Insolvency Regulation does not apply, the Insolvency Code contains the relevant conflict of laws provisions.

(a) Scope of the EU Insolvency Regulation

(i) The EU Insolvency Regulation applies to insolvency proceedings as specified in Art. 1 (1) in conjunction with Annex A of the EU Insolvency Regulation. The EU Insolvency Regulation is not applicable to Insolvency Proceedings concerning insurance companies (*Versicherungsunternehmen*), Credit Institutions, investment undertakings (*Wertpapierfirmen*) [16] which provide services involving the holding of funds or securities for third parties, and collective investment undertakings (*Organismen für gemeinsame Anlagen*)[17] (Art. 1 (2) of the EU Insolvency Regulation; for

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[16] There is no definition of "investment undertaking" in EU directives but Article 4 para. 1 no. 1 of the European Parliament and Council Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and the Council and repealing Council Directive 93/22/EEC as amended ("**MiFID**") defines the term "investment firm" to include any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis (see also *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, no. 59). The German wording of both the EU Insolvency Regulation (as defined below) and the MiFID uses the term "*Wertpapierfirma*" which confirms this interpretation.

[17] In our view, the term "collective investment undertaking" means, in accordance with Art. 1 no. 2 of the Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("**UCITS Directive**") undertakings (i) the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading, and (ii) the units of which are, at the request of the holders, re-purchased or redeemed, directly or indirectly, out of those undertakings' assets ("**UCITS**"). This interpretation is based on the assumption made by *Virgós/Schmit* (Report on the Convention on Insolvency Proceedings, no. 56 *et seq.*) according to which the rationale behind the exceptions provided in Art. 1 (2) of the EU Insolvency Regulation is to exclude such entities, which are subject to specific EU regulations and supervision by regulators in their respective Member States. Investment Companies which qualify as UCITS are regulated and supervised in accordance with the UCITS Directive and, hence, they are to be excluded from the scope of application of the EU Insolvency Regulation.

purposes of this paragraph any such references are not only references to German entities).[18]

(ii) Within this scope of application, Art. 3 (1) of the EU Insolvency Regulation gives the courts of the Member States (other than Denmark) within the territory of which the "centre of main interests" of a debtor is situated, the ability to open main insolvency proceedings (as specified in Annex A to the EU Insolvency Regulation). In case of a legal entity, the place of the registered office is presumed to be the centre of its main interests in the absence of proof to the contrary (Art. 3 (1) of the EU Insolvency Regulation). These proceedings are, with regard to other Member States, international in scope, generally speaking governed by the law of the Member State where such proceedings are opened and to be effective in all Member States, unless secondary proceedings are opened in another Member State.

(iii) If the "centre of main interests" of a debtor is in one Member State (other than Denmark), under Art. 3 (2) of the EU Insolvency Regulation, the courts of another Member State (other than Denmark) may open "territorial proceedings" or, after the opening of main proceedings, "secondary proceedings" in the event that such debtor possesses an establishment within the territory of such other Member State. The applicable law of such territorial or secondary insolvency proceedings will be the law of that other Member State. However, territorial or secondary insolvency proceedings are limited in scope to the debtor's assets in that Member State and will, thus, not extend beyond the Member State where they are opened. Furthermore, under Art. 3 (3) sentence 2 of the EU Insolvency Regulation, secondary proceedings are limited to winding-up proceedings. Generally, secondary insolvency proceedings will be opened following the opening of the main insolvency proceedings, but there are exceptions to this principle as set out in Art. 3 (4) of the EU Insolvency Regulation.

From our point of view, this general analysis should prevail over the wording of the EU Insolvency Regulation which might lead to the conclusion that the term "collective investment undertaking" within the meaning of the EU Insolvency Regulation corresponds to the equivalent term in Art. 3 (a) of the UCITS Directive according to which it is used for such undertakings which do not qualify as UCITS as defined in the UCITS Directive. It must be noted, however, that due to the lack of court precedents dealing with this topic a certain degree of uncertainty remains. See Schedule 2 (Investment Companies) for further explanation on collective investment undertakings.

[18] As pointed out by *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, no. 54 the entities outside the scope of the EU Insolvency Regulation are all subject to prudential supervision by virtue of European Union legislation. This would hold true in respect of most Credit Institutions and financial services institutions which are therefore normally outside the scope of the EU Insolvency Regulation:

(iv) The better view is that the EU Insolvency Regulation applies only insofar as insolvency proceedings have a cross-border effect in a Member State (other than Denmark).[19] We note, however, that this issue has not yet been resolved. The BGH has referred in June 2012 the question whether the courts of the Member State where insolvency proceedings over the assets of the insolvency debtor's estate have been opened are competent in respect of insolvency clawback actions against a person or entity which has its habitual residence or is located outside the European Union to the Court of Justice of the European Union ("**CJEU**") (on the basis of the BGH's position that it is not clear whether Art. 3 (1) of the EU Insolvency Regulation requires a cross-border effect among Member States).[20]

(v) As to the jurisdiction of German insolvency courts within the scope of application of the EU Insolvency Regulation the following distinctions have to be made:

(A) If the centre of main interests of the Insolvent Party is in Germany, an Insolvency Proceeding is instituted in Germany with respect to the Insolvent Party irrespective of whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of a branch office or any other assets of the Insolvent Party in such jurisdiction.[21]

(B) Where the centre of main interests of the Insolvent Party is in an Member State other than Germany or Denmark and the Insolvent Party has an establishment (within the meaning of the EU Insolvency Regulation) in Germany, the German insolvency courts will have jurisdiction in respect of such assets of the Insolvent Party which are situated in Germany. An establishment is defined as any place of operations where the debtor

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[19] *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, no. 11. However, the EU Insolvency Regulation does not define as to when a cross-border effect in another Member State (other than Denmark) is given. According to legal commentators (*Reinhart*, in: Münchener Kommentar zur Insolvenzordnung Vol. 3, 2nd ed. (2008), VO (EG) 1346/2000 Article 1. no. 14) and certain case law (AG Hamburg NZI 2006, 652 et seq.) any cross-border effect which is regulated in the EU InsVO, in the specific decisions, the existence of a creditor with registered seat in another Member State (Article 39 of the EU Insolvency Regulation) is sufficient.

[20] BGH, decision of 21 June 2012 (IX ZR 2/12).

[21] The CJEU has specified that the "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties (Case C-341/04, *Eurofood, IFSC Ltd*, [2006] ECR I-3854, I-3868). Objective facts ascertainable by third parties also have to be present in order to rebut the presumption, e.g. where the location of a company's central administration and of its registered office are not identical (Case C-396/09 of 20 October 2011, *Interdil Srl, in liquidation v. Fallimento Interdil Srl, Intesa Gestione Crediti SpA*, recital 51).

carries out a non transitory economic activity with human means and goods (such term including branch offices) (Art. 2 (h) of the EU Insolvency Regulation).

(C) Where the centre of main interests of the Insolvent Party is in an Member State other than Germany or Denmark and the Insolvent Party has no establishment (within the meaning of the EU Insolvency Regulation) in Germany, the German insolvency courts will have no jurisdiction in respect of such Insolvent Party.

(D) Payment claims are deemed to be situated in the country in which the debtor of such claim has the centre of its main interests (Art. 2 (g) of the EU Insolvency Regulation). Therefore, if the centre of main interests of the Solvent Party is in another Member State (other than Denmark), and there are secondary proceedings under the EU Insolvency Regulation in respect of the Insolvent Party in that Member State, then, the claims of such Insolvent Party against the Solvent Party would be deemed under the EU Insolvency Regulation to be situated outside of Germany. The Insolvency Representative would be required to defer to the jurisdiction of the insolvency representative appointed in such other Member State in relation to such claims.

(b) Jurisdiction of German insolvency courts outside the scope of application of the EU Insolvency Regulation

(i) In case the Insolvent Party is a Deposit Taking Credit Institution, where the place of general jurisdiction of the Insolvent Party is in Germany (section 3 (1) of the Insolvency Code) Insolvency Proceedings are opened in Germany with respect to the estate of the Insolvent Party irrespective of whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of a branch of the Insolvent Party in such jurisdiction. In case of a legal entity, the place of general jurisdiction is the registered seat, except that, if the centre of that legal entity's independent business activity is located elsewhere (e.g. if the management is located at a place different to the registered seat) such place determines the competent insolvency court (section 3 (1) 2 of the Insolvency Code). Therefore, if the centre of an independent business activity of the Insolvent Party is located outside Germany, the German insolvency courts have no jurisdiction except for the opening of territorial or secondary insolvency proceeding.

(ii) In case the Insolvent Party is a Deposit Taking Credit Institution having its seat within the EEA, the opening of

secondary or territorial Insolvency Proceedings is excluded (section 46e (2) of the Banking Act).[22] Insolvency Proceedings may be opened in Germany only if Germany is considered to be the home state (section 46e (1) of the Banking Act).

(iii) Secondary or territorial Insolvency Proceedings can otherwise be commenced in Germany under section 354 (1) of the Insolvency Code if the Insolvent Party has an establishment in Germany. Where the Insolvent Party has no establishment in Germany, a sufficient basis for separate proceedings in Germany under the Insolvency Code is also provided in respect of assets located or deemed to be located in Germany upon request of a creditor, if such creditor provides evidence for its "special interest" in the opening of German territorial proceedings due to the fact that it would have worse prospects for the settlement of its debt in the non-German proceedings (section 354 (2) of the Insolvency Code). There is no comparable restriction as to the opening of secondary Insolvency Proceedings in Germany (section 356 of the Insolvency Code).

(iv) If territorial or secondary Insolvency Proceedings are opened, they take precedence over the non-German insolvency proceedings in relation to those assets of the Insolvent Party which are situated in Germany. Such territorial or secondary Insolvency Proceedings and, thus, the applicability of the German insolvency law rules set out above are, however, limited in scope to the debtor's assets in Germany.

(v) Payment obligations are assets deemed to be located in Germany if they are payable by a debtor located in Germany to the Insolvent Party. Therefore, only payment obligations which are payable by the Solvent Party out of Germany are assets deemed to be located in Germany and provide a sufficient basis for separate Insolvency Proceedings in relation to such Insolvent Party.

(vi) Under German international insolvency laws, section 335 of the Insolvency Code provides that insolvency proceedings and their effects are, in general, governed by the laws of the jurisdiction in which the proceedings have been opened (this principle is also established under Art. 4 of the EU Insolvency Regulation). However, the Insolvency Code provides for some exceptions to this principle.

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[22] See also Art. 3 (1) of the Winding Up Directive.

(vii) With respect to insolvency proceedings instituted in a jurisdiction other than Germany, section 351 of the Insolvency Code (see also Art. 5 of the EU Insolvency Regulation) provides that rights *in rem* of creditors or third parties in assets of the Insolvent Party's estate will not be affected by the foreign proceedings provided that the relevant assets are situated in Germany at the time of the opening of the foreign proceedings and such right *in rem* entitles the creditor or, as the case may be, the third party to segregation of the relevant asset from the insolvency estate or separate satisfaction (*Absonderung*).

(c) Territorial scope of Insolvency Proceedings

All the assets which belong to the Insolvent Party when Insolvency Proceedings are opened or which the Insolvent Party acquires during Insolvency Proceedings form part of the Insolvency Proceedings (section 35 (1) of the Insolvency Code). According to German case law, (German main) Insolvency Proceedings apply universally, i.e. they cover all the assets of the Insolvent Party irrespective of whether or not they are located within Germany.[23]

4.3.2 Effects of the opening of Insolvency Proceedings

(a) Upon the opening of the Insolvency Proceedings, the Insolvency Administrator shall be vested with an insolvent party's right to manage and transfer the insolvency estate (section 80 (1) of the Insolvency Code). Therefore, if following the commencement of Insolvency Proceedings, a party transfers an object forming part of the insolvency estate, such transfer shall be legally invalid (section 81 (1) sentence 1 of the Insolvency Code).

(b) If the debtor transfers an asset forming part of the insolvency estate on the day on which the Insolvency Proceedings are opened, such transfer shall be presumed to have been effected after the opening of the Insolvency Proceedings. However, if at least the transferee qualifies as a credit or Financial Services Institution, including (without limitation) financial institutions within the meaning of Art. 1 (2) (d) of the Financial Collateral Directive, any transfer by the debtor in respect of Financial Collateral following the opening of Insolvency Proceedings shall, subject to general avoidance rules (please refer to paragraph 4.3.5 below), be legally valid if it occurred on the day of the opening and the other party proves that it was neither aware of nor should have been aware of the opening of the proceedings (section 81 (3) of the Insolvency Code).

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[23] BGH, NJW 1983, 2147;1992, 2026, 2027.

4.3.3 Rights to segregation

(a) A party is entitled to preferential treatment under German insolvency law if it may avail itself of a right to segregation (*Aussonderungsrecht*) from the insolvency estate or separate satisfaction (*Absonderungsrecht*) within Insolvency Proceedings. Section 47 of the Insolvency Code serves the explicit purpose of safeguarding third-party rights and property from inclusion in the insolvency estate, and, moreover, explicitly refers to the statutes that apply outside Insolvency Proceedings with regard to establishing and realising a right to segregation. It has to be assessed on the basis of substantive law, whether any assets belong to the insolvency estate or to the estate of a creditor.

(b) We are not aware of any case law which provides guidance as to how German courts would determine whether and under which circumstances rights created under foreign law such as the Security Interest would grant a right to segregation under section 47 of the Insolvency Code. Given that section 47 of the Introductory Code refers to the laws which apply outside Insolvency Proceedings to determine whether certain assets from part of the insolvency estate, the rules set out under paragraphs 4.1.3 to 4.1.5 would appear to be relevant.

(i) Section 47 of the Insolvency Code not only refers to rights *in rem* but also to contractual claims that can provide the respective person with such right. However, the BGH held that in general only absolute rights *in rem* which can be asserted against any third party would be covered by section 47 of the Insolvency Code.[24] Only in exceptional cases would contractual claims entitle the creditor to a right of segregation.

(ii) It is questionable whether the restrictions of the principle of transposition (paragraph 4.1.5, above) would also (i) apply with respect to segregation claims under section 47 of the Insolvency Code and (ii) lead to a non-recognition of a segregation right in Insolvency Proceedings. The doctrine of transposition has been developed with regard to movable assets which have been moved to Germany and their effects in Germany after such transfer. If moveables were not brought to Germany, the question whether any right over the moveables would entitle the beneficiary to claim segregation under section 47 of the Insolvency Code upon the opening of Insolvency Proceedings would depend on whether the effects of such right under its governing law are comparable to German law rights in respect of which segregation may be claimed.

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[24] BGH, VIZ 2004, 196, 197 *et seqq.*

(iii) It is disputed in German legal literature which law applies when determining not only the creation of third party rights regarding assets located abroad, but especially their consequences in Insolvency Proceedings (i.e. to determine whether such third party rights provide for a right of segregation). Section 351 of the Insolvency Code which stipulates that if the creditor has a right to segregation under German law for assets that are located in Germany at the opening of foreign insolvency proceedings, this segregation right will not be affected does not cover the reverse scenario, i.e. that (German) Insolvency Proceedings are opened but third party rights exist with regard to non-German assets.

(A) Generally it is the *lex fori concursus* (i.e. German law) that determines which assets form part of the insolvency estate. As a consequence, certain legal commentators take the view that the *lex fori concursus* would also have to decide which consequences a certain right *in rem* would have in Insolvency Proceedings, e.g. whether it would entitle a third party to claim segregation of certain assets from the insolvency estate.[25]

(B) Other authors take the view that this should be subject to the *lex causae* or *lex rei sitae,* depending on the nature of the relevant asset.[26] If a court followed this view it would have to apply the *lex causae* or *lex rei sitae* either of the Agreement or of the relevant security interest. As the two *leges causae* and their respective national insolvency laws could possibly lead to different conclusions a court would have to decide on this query.

(C) A third group of legal commentators is of the opinion that the *lex fori concursus* and the *lex causae* should be combined that way that with respect to an asset that is located in another state (than Germany), German insolvency law should be applicable but only to the extent that it does not restrict the creditor's right in a more restrictive way than it would be restricted by the insolvency law identified by way of the process set out under paragraph (b)(B) above.[27]

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[25] *Kindler*, in Kindler/Nachmann, Handbuch Insolvenzrecht in Europa, 2010, § 4 no. 51; *Ehret*, in: Braun, Insolvenzordnung, 5th ed. 2012, § 351 no. 1.

[26] *Gottwald/Kolman*, in Insolvenzrechtshandbuch, 4th ed. 2010, § 132 no. 20; *Geimer*, Internationales Zivilprozessrecht, 6th ed. 2009, no. 3553.

[27] See *Reinhart*, in Münchener Kommentar zur Insolvenzordnung, 2nd ed. 2008, § 335 no. 58 for an overview.

(D) We take the view that the treatment of assets located abroad upon the opening of Insolvency Proceedings should be determined in accordance with the rules of the Insolvency Code but the characterisation of any rights in relation to such asset should be determined in accordance with the governing law of these rights.

4.3.4 Separate satisfaction

If the secured party was not entitled to segregate collateral but rather had a security interest over the collateral in order to secure its repayment claim, the collateral would form part of the relevant Party's insolvency estate. If an *in rem* right has been granted for security purposes (e.g. pledges (section 50 (1) of the Insolvency Code) and security assignments or security transfers (section 51 no. 1 of the Insolvency Code)) under German law such right *in rem* would provide a right to preferred satisfaction (*Absonderungsrecht*) within Insolvency Proceedings.[28]

Where a security interest provides the secured party with a right to preferred satisfaction, a distinction generally has to be drawn between such security interests which may be enforced by the secured party and security interests which are enforced by the Insolvency Representative.

(a) A secured party who is entitled to separate satisfaction may in any event realise security interests which collateralise claims under a System as well as security interests which qualify as Financial Collateral itself even within Insolvency Proceedings (section 166 (3) nos. 1 and 3 of the Insolvency Code). Both these exemption apply irrespective of the type of security interest. Furthermore, a secured party may enforce pledges over contractual claims itself (section 173 (1) of the Insolvency Code).

(b) Where section 166 (1) and (2) of the Insolvency Code applies, a security interest would be enforced by the Insolvency Representative (e.g. pledges over moveables). The Insolvency Representative would in such case be obliged to transfer any proceeds realised after deduction of a lump sum fee for the determination of the security right amounting to 4 per cent (*Feststellungskosten*) plus up to 5 per cent (in certain cases even more than 5 per cent) for any cost incurred in the context of the realisation of the security provided (*Verwertungskosten*) (plus applicable VAT on the proceeds of realisation to the creditor).

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[28] The provisions dealing with separate satisfaction do, however, not address an outright title transfers for security purposes. Where collateral is posted by means of an outright title transfer, the collateral assets form part of the secured party's estate and the secured party would hence have a claim to segregation in respect of such collateral in the event of the collateral provider's insolvency.

4.3.5 Insolvency clawback

(a) Principles governing insolvency clawback

(i) In accordance with section 129 (1) of the Insolvency Code any legal act (*Rechtshandlung*) which is detrimental to the insolvency estate made during hardening periods prior to the opening of Insolvency Proceedings may be subject to clawback action by an Insolvency Representative under sections 130 to 146 of the Insolvency Code. Clawback periods will have to be ascertained separately in respect of each legal act. For example, where at any instance margin is delivered, substituted or returned under the Agreement, the delivery, substitution or return each qualify as new legal acts.

(ii) If BaFin has, prior to a Party's insolvency, issued pre-insolvency orders under section 46 (1) of the Banking Act such as a payment moratorium to prevent the Party from becoming illiquid and Insolvency Proceedings are subsequently opened, hardening periods will begin to run (counting backwards) on the day on which such an order has been issued (section 46c (1) of the Banking Act) rather than on the later day of the filing for Insolvency Proceedings which is usually relevant (as stated in more detail below). Furthermore, where legal acts have been made between the release of pre-insolvency measures by BaFin in accordance with section 46 (1) sentence 2 nos. 4 to 6 of the Banking Act and an application for the opening of Insolvency Proceedings, such legal acts are presumed not to have been detrimental to creditors as a whole (section 46 (2) sentence 1 of the Banking Act).

(b) Conflict of laws rules governing insolvency clawback

(i) To the extent the EU Insolvency Regulation applies, Art. 13 of the EU Insolvency Regulation provides that German provisions on insolvency clawback shall be inapplicable, if the beneficiary of the relevant act proves that the act as a whole is subject to the laws of a Member State other than Germany and that such law does not allow any means of challenging the act at the case in point.[29]

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[29] Art. 13 of the EU Insolvency Regulation reads as follows: "Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

- that law does not allow any means of challenging that act in the relevant case."

(ii) Similarly, to the extent the Insolvency Code applies, section 339 of the Insolvency Code provides that German provisions on insolvency clawback shall be inapplicable, if the beneficiary of the relevant act proves that the act as a whole is subject to the laws of a state other than Germany and that such law does not allow any means of challenging the act at the case in point.[30]

(c) Clawback provisions relevant to the Security Interest

Legal acts of made in connection with the Security Interest may, in particular, be subject to clawback action under the following circumstances:

(i) Under section 130 (1) sentence 1 of the Insolvency Code, a legal act may be subject to clawback action, if it gives or makes available to a creditor security or satisfaction and (i) it was effected during the last three months prior to the filing for the opening of Insolvency Proceedings, if the insolvent party was unable to pay its debts when due at the time of the legal act and if the creditor had knowledge of such inability to make payments at such time; or (ii) it was effected after the filing for the opening of Insolvency Proceedings and the creditor had knowledge of the Insolvent Party's inability to make payments or the petition for opening of Insolvency Proceedings at the time of the legal act ("congruent coverage" (*kongruente Deckung*)).

Knowledge of circumstances which necessarily lead to the conclusion that the Client was unable to make payments will be regarded as equivalent to actual knowledge of the Insolvent Party's inability to make payments or of the filing for opening of Insolvency Proceedings (section 130 (2) of the Insolvency Code).

(ii) Where a legal act gives or makes possible to a creditor, security or satisfaction to which it has no right or no right to claim in such manner or at such time, the legal act will be subject to clawback action, (i) if the legal act is effected during the last month prior to filing for the opening of Insolvency Proceedings or following such filing; or, (ii) if the legal act is effected during the second or third month prior to filing for the opening

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[30] Section 339 of the Insolvency Code in its English convenience translation reads as follows: Section 339 of the Insolvency Code reads in English as follows: "A legal act may be subject to clawback, if the requirements for insolvency clawback are met in accordance with the laws of the jurisdiction in which the insolvency proceedings have been opened, unless the party against which the clawback is instituted (*Anfechtungsgegner*) provides proof that the said act is subject to the laws of another jurisdiction and that does not allow any means of challenging that legal act in the relevant case."

of Insolvency Proceedings and the insolvent party was unable to make payments at the time of the legal act; or, (iii) if the legal act is effected during the second or third month prior to filing for the opening of Insolvency Proceedings and the creditor has knowledge at the time of the legal act that it is detrimental to the insolvent party. In relation to (iii), knowledge of circumstances that necessarily lead to the conclusion that a legal act is detrimental to the insolvent party is equivalent to actual knowledge of such detriment (section 131 (2) of the Insolvency Code ("incongruent coverage" (*inkongruente Deckung*))).

(iii) A legal act by the insolvent party that is directly detrimental to the creditors is subject to clawback action, (i) if it was effected in the last three months prior to the filing for the opening of Insolvency Proceedings, if the insolvent party was unable to pay its debts when due at the time of the legal act and if the other party had knowledge of such inability to make payments at such time; or, (ii) where it was effected after filing for the opening of Insolvency Proceedings and the other party had knowledge of the inability of the insolvent party to make payments or of the petition for opening of Insolvency Proceedings at the time of the legal act (section 132 (1) of the Insolvency Code).

(iv) A legal act which involves the insolvent party losing a right, or pursuant to which the insolvent party is no longer able to assert such a right, or which results in a property claim against the insolvent party being maintained or becoming enforceable is equivalent to a legal act that is directly detrimental to the creditors (section 132 (2) of the Insolvency Code).

(v) A legal act made by the insolvent party during the last ten years prior to the filing for the opening of Insolvency Proceedings, or subsequent to such request, with the intention to disadvantage his creditors may be subject to clawback action, if the other party is aware of the debtor's intention on the date of such legal act (section 133 (1) 1 of the Insolvency Code). Such awareness will be presumed if the Solvent Party knew of the imminent inability of the Insolvent Party to make payment when due, and that the transaction constituted a disadvantage for the creditors (section 133 (1) sentence 2 of the Insolvency Code).

(vi) Under section 133 (2) of the Insolvency Code, a contract for a consideration entered into by the insolvent party and a person with whom the insolvent party has a close relationship which is directly detrimental to the creditors will be subject to insolvency clawback action unless it was entered into more than two years prior to the filing for the opening of Insolvency

Proceedings or the other party was unaware of an intention of the insolvent party to prejudice the creditors.[31] In respect of person with whom the insolvency debtor has a close relationship, the requisite knowledge or awareness of the relevant circumstance under the different clawback provisions will be presumed (sections 130 (3), 131 (2) sentence 2 and 132 (2) of the Insolvency Code).

(vii) Under section 147 sentence 1 of the Insolvency Code legal acts performed after the opening of the Insolvency Proceedings but being legally effective in accordance with section 81 (3) sentence 2 of the Insolvency Code (above, paragraph 4.3.2) may be subject to insolvency clawback in accordance with the provisions governing the clawback in respect of legal acts performed before the Insolvency Proceedings were opened (as set out in this paragraph 4.4.3). The application of section 147 sentence 1 of the Insolvency Code shall, however, in respect of legal acts relating to claims and performances which fall within the scope of section 96 (2) of the Insolvency Code (above, not reverse the netting of account balances or affect the validity of the payment orders, orders of payment services providers or intermediate providers or orders for the transfer of securities (section 147 sentence 2 of the Insolvency Code).

(d) Conditions precedent

Section 140 (3) of the Insolvency Code provides that in case of a legal act which is subject to a condition precedent, the satisfaction of the condition precedent shall not be taken into account, i.e. the agreement on the condition precedent (rather than the later satisfaction of the condition precedent) will be the legal act which is relevant for purposes of insolvency clawback.

However, it is possible that German courts take the view that the opening of Insolvency Proceedings may not be agreed on as a condition precedent for the purposes of section 140 (3) of the

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[31] If the insolvent party is a legal person, the term "person with whom the insolvency debtor has a close relationship" shall, in accordance with section 138 (2) of the Insolvency Code, mean:

1. the members of the management or supervisory board and personally liable shareholders of the insolvent party as well as person which hold more than one quarter of the insolvent party's share capital;

2. a natural or legal person which due to a comparable connection with the insolvent party established under the articles of association, partnership agreement or under a service contract is able to obtain information on the insolvent party's economic situation;

3. a person as described under nos. 1 and which has a personal relationship as set out under paragraph 1 (i.e. in particular near relatives and persons which under contractual arrangements are able obtain information on the insolvent party's economic status) unless the person described under nos. 1 and 2 is under a statutory obligation to maintain confidentiality in matters of the insolvent party.

Insolvency Code. The German Federal Supreme Employment Law Court (*Bundesarbeitsgericht*) has taken the view, that section 140 (3) of the Insolvency Code will not apply where the parties agree on the occurrence of an insolvency as such condition.[32]

(e) Defence to clawback

Section 142 of the Insolvency Code provides that payments on the part of a Insolvent Party in return for which the Insolvent Party's estate benefited directly from an equivalent consideration (i.e. there was an exchange of services or goods of the same value within a narrow time frame[33]) would only be subject to clawback action, if the payment was made with the intention to prejudice the creditors as set out under section 133 (1) of the Insolvency Code (above, paragraph 4.3.5(c)(v)).

It is not entirely clear whether the Federal Republic of Germany has fully implemented the Settlement Finality Directive and the Financial Collateral Directive.[34] We do not express any opinions as to whether a Party may directly invoke provisions of the Settlement Finality Directive or the Financial Collateral Directive in the event of a failure of the Federal Republic of Germany to implement such provisions into German law.[35]

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[32] BAG NZI 2007 58, 61. Its position is shared by the OLG Frankfurt am Main NZI 2006, 241, 243 and by *Kirchhof*, in Münchener Kommentar zur Insolvenzordnung, volume 2, 2nd ed. 2008, § 140 no. 52; whereas the contrary view has been taken by *von Wilmowsky*, ZIP 2007, 553, 562; *Huhn/Bayer*, ZIP 2003, 1965 et seq.

[33] BGH NJW 2002, 1722, 1724.

[34] The German legislator has taken the view that to the extent Art. 8 (3) of the Financial Collateral Directive requires Member States to "ensure that the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that:

(i) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement or in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures; and/or

(ii) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral"

no changes to German law were required as section 142 of the Insolvency Code would cover such situations (BT-Drs. 15/1853, p. 12).

[35] In this context it should be noted that, whilst it has been established in the case law of the CJEU that subject to certain criteria being met, individuals may rely on provisions of Directives which a Member State failed to transpose into national law *vis-à-vis* such Member States (judgment of 4 December 1974, Case 41-74, *Yvonne van Duyn v Home Office* [1974] ECR 1337), the CJEU has refrained from giving "horizontal direct effect" to Directives, i.e. its has not allowed one private individual to rely on provisions of a Directive *vis-à-vis* another (judgment of 26 February 1986, Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723). It should further be noted that the German courts have accepted their obligation to construe national law which implements EU Directives so as to give

4.4 Pre-insolvency proceedings by a German insolvency court

Upon an application for the opening of Insolvency Proceedings being filed but before the opening of Insolvency Proceedings a German insolvency court is entitled to appoint a preliminary administrator (*vorläufiger Insolvenzverwalter*) and to release court orders in respect of the allegedly defaulting party.

4.4.1 Within the scope of preliminary proceedings, however, the insolvency court's competences are restricted to attachments (freezing injunctions) that prevent the Insolvent Party from disposing of his assets and thus jeopardising the purpose of Insolvency Proceedings. Such a freezing injunction may cover all the assets of the Insolvent Party or parts thereof.

4.4.2 The insolvency court may impose a general prohibition of transfers on the debtor (section 21 (2) sentence 1 no. 2 of the Insolvency Code), order that the debtor's transfers of property require the consent of the preliminary administrator (section 21 (2) sentence 1 no. 2 of the Insolvency Code) or order a restriction (or temporary restriction) in certain measures of enforcement (*Zwangsvollstreckungsmaßnahmen*) against the Insolvent Party (section 21 (2) sentence 1 no. 3 of the Insolvency Code).

4.4.3 A preliminary administrator does not have any powers which would entail a "cherry-picking" right in accordance with section 103 of the Insolvency Code.

4.4.4 Preliminary measures do not affect the validity of dispositions over Financial Collateral and the validity of the netting of obligations based on transfer orders that have been entered into a System (section 21 (2) sentence 2 of the Insolvency Code).

4.5 Regulatory pre-insolvency measures

4.5.1 BaFin may take various pre-insolvency measures in respect of institutions. In particular, where the fulfillment of an institution's obligations towards its creditors and, in particular, the security of the assets entrusted to it are jeopardised or if effective supervision is no longer possible, BaFin may take temporary measures under section 46 (1) of the Banking Act, in particular:

(a) issue instructions for the management of the institution's business;

(b) prohibit the acceptance of deposits or funds or securities from customers and the granting of loans

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full effect to such Directives (as to which obligation see CJEU, judgment of 10 April 1984, Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 1891) but have always held that such obligation is limited to circumstances where the wording of the national law in gives them discretion for statutory construction, i.e. it is not clear and unequivocal (BGH NJW 2012, 1073, 1075 *et seq.*).

(c) prohibit owners and managers from carrying out their activities or limit such activities;

(d) temporarily prohibit the disposition of assets by the relevant institution and issue a payment moratorium;

(e) close the institution for ordinary business with customers; and

(f) unless an applicable deposit or customer protection scheme ensures full satisfaction of the customers, prohibit the institution from accepting payments except those made in respect of obligations owed to the institution.

For purposes hereof, none of these measures constitute Insolvency Proceedings.

4.5.2 If economic difficulties of Credit Institutions are to be feared which give rise to the assumption that the national economy, in particular payment transactions in general, are severely endangered, the German Federal Government may under section 47 of the Banking Act, by enacting a regulation (*Rechtsverordnung*):

(a) grant a Credit Institution a payment moratorium and order that enforcement proceedings or preliminary proceedings against a Credit Institution or Insolvency Proceedings over its assets may not be commenced for a as long as the moratorium persists

(b) order that Credit Institutions be closed for business with customers and may neither render nor accept payments or remittances with customers; such order may be restricted to certain kinds or groups of Credit Institutions or types of banking business; or

(c) order that exchanges within the meaning of the German Act on Exchanges (*Börsengesetz*) be closed.

For purposes hereof, none of these measures constitute Insolvency Proceedings.

4.5.3 The German Bank Reorganisation Act (*Kreditinstitute-Reorganisationsgesetz* - "**Bank Reorganisation Act**") contains a set of pre-insolvency measures in order to limit systemic risks resulting from financial difficulties of Credit Institutions having their seat in Germany.

The measures implemented by the Bank Reorganisation Act, i.e. restructuring proceedings (*Sanierungsverfahren*) and reorganisation proceedings (*Reorganisationsverfahren*) as well as the transfer order (*Übertragungsordnung*) pursuant to sections 48a *et seq.* of the Banking Act do not qualify as Insolvency Proceedings for purposes hereof.

4.5.4 Effects of regulatory pre-insolvency measures on Financial Collateral

(a) Section 46 (2) sentence 6 of the Banking Act provides that provisions of the Insolvency Code which provide for the protection of Financial Collateral shall apply *mutatis mutandis* to any measures taken by BaFin under sections 45 and 46 of the Banking Act. This reference would appear to include, in particular, sections 81 (3) (above paragraph 4.3.2(b) and 166 of the Insolvency Code (above, paragraph 4.3.4) as both provisions serve the protection of Financial Collateral Directive and transpose the Settlement Finality Directive and the Financial Collateral Directive into German law.[36]

(b) Similarly, section 23 of the Bank Reorganisation Act stipulates that provisions of the Insolvency Code protecting Systems and Financial Collateral shall apply *mutatis mutandis*. It is clear from legislative reasoning that section 23 of the Bank Reorganisation Act is intended to ensure that the statutory protection of Financial Collateral is the same in restructuring proceedings as it is in Insolvency Proceedings as mandated by the Settlement Finality Directive and the Financial Collateral Directive. Therefore, sections 81 (3) and 166 of the Insolvency Code are also applicable to any reorganisation proceedings.[37]

4.6 Substitution

4.6.1 Substitution of collateral in general

Under German law, the contractual right to the transfer of title has to be distinguished from the actual transfer of title.

(a) The right to exchange collateral is a contractual right. An agreement on a right to substitute collateral would be recognised under Rome I in accordance with the principles set out under paragraph 4.1.1 above.

(b) The substitution of collateral would require the transfer of the relevant assets to be replaced by the transferee to the transferor and a transfer of the assets newly provided as eligible collateral by the transferor to the transferee. Hence, each of such transfers needs to be made in compliance with the applicable requirements to validly transfer the title in the asset. The German conflict of laws provisions applicable to the substitution of collateral therefore differ depending on the type of asset which subject to a transfer in accordance with the principles set out under paragraph 4.1.2 to 4.1.5 above.

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[36] *Lindemann*, in Boos/Fischer/Schulte-Mattler, KWG, 4th ed. 2012, § 46 nos. 108 and 116.

[37] *Fridgen*, in Boos/Fischer/Schulte-Mattler, KWG, 4th ed. 2012, § 23 KredReorgG nos. 4 and 5.

4.6.2 The German law requirement of identifiability

(a) The creation of security interests under German law is subject to the requirement of identifiability (*Bestimmtheit*) of the collateral asset.[38] As far as fluctuating assets used as collateral are concerned, the legal ramifications of the fluctuation depend on the type of security interest involved.

(b) In order to satisfy the requirement of identifiability it would under German law, depending on the type of the relevant security interest, at least be necessary that there are objective criteria present which enable an neutral party to determine which assets fall within the scope of such security interest at any given time.[39]

(c) There is to our knowledge no guidance from the German courts whether and under which circumstances a German court would not recognise a security interest which has been validly created under English (or any other foreign) law for lack of identifiability of the underlying collateral assets.

4.7 Further Acts

Where a security interest is governed by and has been validly created under non-German law, there are no registration, notification or similar requirements required under German law to ensure its enforceability.

4.8 Foreign Collateral Providers

From a German law perspective (both under conflict of laws provisions and under substantive civil law), whilst the location of collateral assets would be a crucial factor in determining the validity and enforceability of a security interest, the location of the collateral provider would generally not be relevant.

4.9 Right of re-use

4.9.1 The contractual right to re-use Collateral would generally be recognised by the German courts in accordance with the principles set out under paragraph 4.1.1 above.

4.9.2 A German court would not refuse to recognise the Rehypothecation Clause on the ground that it contravenes public policy (above, paragraph 4.1.1(c)).

Under German law security assignments and security transfers the collateral taker is bound by a fiduciary relationship underlying the security interest.[40]

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[38] BGH, NJW 1974, 1130; *Damrau*, in: Münchener Kommentar zum BGB, 5th ed. 2009, § 1204 no. 23; *Roth*, in: Münchener Kommentar zum BGB, 6th ed. 2012

[39] BGH, NJW-RR 1994, 1537; BGH, NJW 1992, 1161.

[40] BGH, NJW 1960, 1712, 1714; BGH, NJW 1994, 861, 862.

The fiduciary relationship includes the obligation on the part of the collateral taker not to dispose over collateral as long as no agreed enforcement event has occurred.[41] However, it is generally accepted that the parties may waive such obligation. [42] Furthermore, the concept of full title transfer in order to collateralise obligations is part of German law as section 1 (17) of the Banking Act refers to the provision of collateral by means of full title transfer. Thus, where German law is applicable, a right of re-use of collateral can be validly agreed on and hence there is no ground for not recognising such an agreement under English law. Since German courts would generally recognise the choice of English law to govern the Security Interest Provisions, we take the view that German courts would not qualify the obligation to provide Collateral by means of a full title transfer as a money loan (*Gelddarlehen*) or a loan in kind (*Sachdarlehen*).[43]

4.9.3 We therefore take the view that the German courts will recognise the right of re-use of the collateral provided under the Rehypothecation Clause in accordance with the principles set out under paragraph 4.1.1. Any transfers made in accordance with the Rehypothecation Clause would have to comply with the principles set out under paragraphs 4.1.2 to 4.1.5.

4.10 General

4.10.1 Under Art. 20 of Rome I, the application of the law of any country specified by Rome I generally means the application of the rules of law in force in that country other than its rules of private international law (exclusion of *renvoi*). By way of contrast, where the Introductory Code applies, Art. 4 (1) sentence 1 of the Introductory Code provides that any references of German law to the laws of another country include the conflict of laws provisions of the other country. If these conflict of laws provisions re-refer to German law, German courts will accept the re-referral and apply German substantive law (Art. 4 (1) sentence 2 of the Introductory Code). It is unclear whether Art. 4 (1) of the Introductory Code also applies in respect of the conflict of laws provisions of the Insolvency Code[44] or the Safe Custody Act.

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41 *Kindl*, in: Beck'scher Online-Kommentar BGB (24th ed., 1 August 2012), § 930, no. 13.

42 *Ganter*, in: Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4the ed. 2011, § 95 no. 127.

43 Even where German law applies, an obligation to provide collateral by means of full title transfer cannot be qualified as a loan. Under a loan, the lender is obliged to transfer certain assets to the borrower who in turn is obliged to re-transfer assets of the same kind at a later date (sections 488 (1) and 607 (1) of the Civil Code). Where the parties agree to collateralise certain obligations by means of a full title transfer any re-transfer is subject to certain conditions (e.g. the fluctuation of the value of the collateralised claims and the absence of a default of the collateral provider). In addition, the parties to a loan are primarily concerned with the amount of interest or consideration to be paid in return for the transfer of the relevant assets.

44 See the overview given by *Reinhardt*, in: Münchener Kommentar Insolvenzordnung, 2nd ed. 2008, Vorbemerkungen §§ 335 ff. Inso no. 38, who advocates the application of Art. 4 (1) of the Introductory Code.

4.10.2 If a party is substantially over-collateralised, a security interest governed by German law can be void in case of an initial over-collateralisation for being contrary to public policy (section 138 (1) of the Civil Code).[45] In case of subsequent over-collateralisation, the secured party may be required to release part of the security transferred. Whether or not a party is substantially over-collateralised generally depends on the relation of the value of the secured obligation towards the realisable value of the collateral.[46]

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

4.10.3 To the extent a security interest is governed by German law, special rules on the enforcement of such security interest apply depending on the type of security interest and the type of collateral over which it is created.[47]

4.10.4 The general business conditions of German banks ("**AGB-Banken**") as published by the Association of German Private Banks (*Bundesverband deutscher Banken*) are frequently used by private Credit Institutions. Where the AGB-Banken govern a business relationship with a German Credit Institution, any account maintained with the Credit Institution will usually be subject to a first ranking account pledge created in favour of the bank. Even were the AGB-Banken are not used, similar general business conditions are most likely to be in place when dealing with a German Credit Institution. Similar restrictions may apply under general business conditions used by savings banks and cooperation banks.

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[45] BGH, NJW 1998, 2047. Which limit exists for an over-collateralisation being substantial, has not yet been determined for all circumstances by German courts.

[46] Whilst there is a lack of guidance from the German courts as to the types of situations under which German courts would find that one party has been initially over-collateralised, the BGH in its decision BGH, NJW 1998, 671 provided the following guidance in respect of subsequent over-collateralisation: the claim for release of security is triggered once the realisable value of the collateral not only temporarily exceeds the value of the secured obligation by 10 per cent. The BGH further stated that even if an agreement whereby a security transfer is effected does not provide for provisions on the release of the collateral, the debtor has an inherent claim for release if a (subsequent) over-collateralisation has occurred. Therefore, such security right should not be void due to a substantial over-collateralisation (however, this does not apply in case of an initial over-collateralisation); the secured party would only be obliged to return the excess collateral.

[47] Enforcement is generally facilitated where the relevant security interest qualifies as Financial Collateral.

4.10.5 On the basis of section 2(b) of Art. VIII of the International Monetary Fund Agreement, as interpreted and applied by German courts, an obligation which is contrary to the exchange control regulations of another member state of the International Monetary Fund may not be enforceable in this jurisdiction.

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

4.10.7 We do not opine on regulatory consequences the enforcement of a security interest may have (e.g. notification requirements under German large shareholding provisions where enforcement results in the acquisition of voting rights in German issuers).

4.10.8 In respect of cross-border cash payments the notification requirements under the German Foreign Trade Act (*Außenwirtschaftsgesetz*) and the German Foreign Trade Regulation (*Außenwirtschaftsverordnung*) need to be observed. The reports have to be submitted to the Deutsche Bundesbank using the applicable notification forms. With regard to payments this is usually done via the banks involved in the execution of such payments. A failure to do so would, however, by no means endanger the validity of the respective transaction.

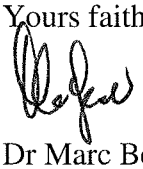
4.10.9 We express no opinion as to whether any Party has complied with any applicable provisions of Title II of Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**") and any delegated or implementing acts adopted thereunder and any German legal measures to implement EMIR in respect of anything done by it in relation to or in connection with any of the Agreement. However, Article 12 (3) of EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the Agreement invalid or unenforceable.

There are no other material issues relevant to the issues addressed in this opinion which we draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribers to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups,

as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully,



Dr Marc Benzler

CLIFFORD CHANCE PARTNERSCHAFTSGESELLSCHAFT

SCHEDULE 1
Insurance Companies

Subject to the modifications and additions set out in this Schedule 1 (Insurance Companies) the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies. For the purposes of this Schedule 1 (Insurance Companies), "**Insurance Companies**" means insurance undertakings (*Versicherungsunternehmen*) within the meaning of section 1 of German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*, "**Insurance Supervisory Act**") established as an AG, a SE or a mutual insurance association (*Versicherungsverein auf Gegenseitigkeit*) in accordance with section 15 of the Insurance Supervisory Act which are subject to supervision by BaFin.[48]

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

ADDITIONAL QUALIFICATIONS

The following additional qualifications apply in respect of the opening of Insolvency Proceedings over an Insurance Company' s assets:

1. Only BaFin is entitled to institute Insolvency Proceedings over the estate of an Insurance Company by filing a petition for commencement of Insolvency Proceedings with the competent insolvency court (section 88 (1) of the Insurance Supervisory Code).

2. If an audit of the management and financial position of an Insurance Company leads to the conclusion that the Insurance Company will not permanently be able to meet its liabilities, but it seems to be in the best interest of the insured to avoid Insolvency Proceedings, BaFin may release orders under section 89 (1) of the Insurance Supervisory Act, in particular,

2.1 require the representatives of the Insurance Company to change the bases for the operating principles within a certain period, or to otherwise remedy the deficiencies; and

2.2 temporarily prohibit all kinds of payments, in particular the payment of insurance benefits, profit distributions and, for life insurance, surrenders or policy loans or advances.

For purposes hereof, none of these measures constitute Insolvency Proceedings.

3. In case the Insolvent Party is an insurance undertaking having its seat within the EEA, the opening of secondary or territorial Insolvency Proceedings is excluded (section 88 (1a) of the Insurance Supervisory Act). Insolvency Proceedings may be opened in

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[48] See Schedule 4 (Public Sector Entities) as regards Insurance Companies organised under public law.

Germany only if Germany is considered to be the home state (section 88 (1b) of the Insurance Supervisory Act.

4. The EU Insolvency Regulation is not applicable to insurance undertakings. Whilst the EU Insolvency Regulations contains no definition of "insurance undertaking", it is commonly accepted that the term refers to insurance undertakings which have received official authorisation in accordance with Art. 6 of the Directive 73/239/EEC 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance or Art. 6 of the Directive 2002/83/EC of 5 November 2002 concerning life assurance as the insolvency of such institutions is dealt with under the Directive 2001/17/EC 19 March 2001 on the reorganisation and winding-up of insurance undertakings.[49]

This is regularly the case for Insurance Companies, and hence Insurance Companies do not fall within the scope of the EU Insolvency Regulation.

5. The Insurance Supervisory Act contains various restrictions an Insurance Company has to comply with which may also affect the obligation to create the Security Interest and the actual creation of the Security Interest, in particular:

5.1 Restricted Assets

The Insurance Supervisory Act contains investment restrictions regarding the guarantee assets (*Sicherungsvermögen*, "**guarantee assets**") and other restricted assets (*sonstiges gebundenes Vermögen*) (together, the "**restricted assets**" (*gebundenes Vermögen*)) of Insurance Companies. The investment and disposition of restricted assets by an Insurance Companies is subject to various restrictions. To the extent claims of the Insurance Company under an Agreement are included in the guarantee assets of the restricted assets of the relevant Insurance Company, any transfer is subject to the consent of the statutory trustee (*Treuhänder*) of the Insurance Company in accordance with section 72 (1) of the Insurance Supervisory Act.

5.2 Permissible Transaction

An Insurance Company may only deal in futures, options and other financial instruments if these instruments hedge against price and interest rate risks in connection with existing assets or future purchases of securities or if any additional return is to be generated on existing securities, without performance of delivery obligations causing a shortfall of the restricted assets (section 7 (2) sentence 2 of the Insurance Supervisory Act).[50]

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[49] *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, no. 57; *Braun/Heinrich*, Finanzdienstleister in der "grenzüberschreitenden" Insolvenz - Lücken im System? - Ein Beitrag zu der Verordnung (EG) Nr. 1346/2000 des Rates vom 29. 5. 2000 über Insolvenzverfahren, NZI 2005, 578, 581.

[50] Guidance on these restrictions can be found in the circular R/2000 of 19 October 2000 of the Federal Insurance Supervisory Authority (*Bundesaufsichtsamt für das Versicherungswesen*), one of BaFin's predecessors.

5.3 Generally, the German courts take the view that violations of regulatory law do render contractual agreements void.[51] Where provisions under regulatory law serve to protect the interests of a certain counterparty, such counterparty may, however, be entitled to claim damages in tort in order to be put in the position it would be in, if no violation of regulatory law had occurred.[52]

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[51] BGH, NJW 2011, 3024, 3025; BGH NJW 1980, 1394; BGH, WM 1978, 785.

[52] BGH, NJW 2005, 2703 *et seq.*; BGH, NJW-RR 2006, 1713 *et seq.*

SCHEDULE 2
Investment Companies

Subject to the modifications and additions set out in this Schedule 2 (Investment Companies), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Companies. For the purposes of this Schedule Schedule 2 (Investment Companies), "**Investment Companies**" means German Investment Fund Companies (*Kapitalanlagesellschaften*) within the meaning of section 2 (6) of the German Investment Act (*Investmentgesetz*, "**Investment Act**") which manage a special pool of assets without legal personality within the meaning of section 2 (2) of the Investment Act ("**Fund**") on behalf of investors and are subject to supervision by BaFin.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

ADDITIONAL QUALIFICATIONS

1. The following additional qualifications apply in respect of the opening of Insolvency Proceedings over an Investment Company' s assets:

1.1 Only BaFin may file for the opening of Insolvency Proceedings against the assets of an Investment Company (section 19k of the Investment Act in conjuncture with section 46b (1) sentence 4 of the Banking Act).

1.2 BaFin may take appropriate measures, if, amongst other things, an Investment Company fails to meet own funds requirements set out under the Investment Act (section 19i of the Investment Act)) of if there is a danger in respect of the fulfilment of the Investment Company's obligations *vis-à-vis* its creditors or in respect of the effective supervision of the Investment Company (section 19j of the Investment Act). In the absence of case-law or administrative practice it has been suggested in German legal literature that the powers conferred on BaFin by virtue of section 19j of the Investment Act include the right to release a payment moratorium.[53] It is, however, doubtful whether BaFin may take far-reaching measures as under the Banking Act as the German legislator did not explicitly confer the necessary powers on BaFin.

Measures under sections 19i and 19j of the Investment Act do not constitute Insolvency Proceedings.

1.3 It is not entirely clear whether an Investment Company qualifies as a collective investment undertaking within the meaning of Art. 1 (2) of the EU Insolvency Regulation (and, as a consequence, falls outside the scope of the EU Insolvency Regulation).

a. As previously mentioned (above, footnote 17), we take the view that in light of the purpose of the exemption for collective investment undertakings, the term "collective investment undertaking" means, in

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[53] Beckmann/Scholtz/Vollmer, Investment, § 19j no. 34 (2nd supplemental 2011).

accordance with Art. 1 no. 2 of the UCITS Directive UCITS as defined therein.

b. By referring to collective investment undertakings Article 1 (2) of the EU Insolvency Regulation seems to cover collective investment schemes only (i.e. the pool of collective investments). However, where such collective investment undertakings have no separate legal personality as it would be the case under German law with respect to Funds, we would construe Art. 1 (2) of the EU Insolvency Regulation so as to apply to the management company (i.e. Investment Companies) provided that such management company is focusing on the administration and managements of such collective investment undertaking's assets.

c. As a consequence, the international scope of application of Insolvency Proceedings of an Investment Company should regularly be governed by the Insolvency Code.

1.4 The right of the Investment Company to manage the Funds will cease to exist, if Insolvency Proceedings are opened over the assets of the Investment Company. The Funds do not form part of the insolvency estate upon the Investment Company's insolvency (section 38 (3) sentence 2 of the Investment Act). As soon as the right to manage the Funds expires, the Funds or, as the case may be, the right to make dispositions with regard to the Funds passes on to the custodian bank with which the assets of the Funds are deposited (section 39 (1) of the Investment Act). The custodian bank will then either wind up the Funds and distribute the assets of the Funds to the investors of the Funds (section 39 (2) of the Investment Act) or, if BaFin approves, entrust the management of the Funds to another Investment Company (section 39 (3) sentence 1 of the Investment Act).

1.5 Section 31 (5) of the Investment Act provides that assets which belong to a Fund may not be pledged or otherwise encumbered, assigned or transferred for security purposes and that any actions to the contrary shall be void *vis-à-vis* investors. Section 31 (5) of the Investment Act does, however, not generally prevent the creation of the Security Interest over assets which belong to a Fund. Section 31 (5) sentence 2 of the Investment Act provides for an exemption which applies, amongst other things, to the entry into financial and currency forward transactions and swaps and similar contracts entered into in accordance with section 51 of the Investment Act, i.e. Collateral may be posted to create the Security Interest in connection with transactions under an Agreement where the requirements set out under section 51 of the Investment Act are satisfied.[54]

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[54] Section 51 (1) of the Investment Act in its English convenience translation reads as follows: "The special fund may, for investment purposes, only invest in derivatives which derive from financial indices within the meaning of Art. 9 (1) of the Directive 2007/16/EC, interest rates, foreign exchange rates and currencies in which the special fund may invest according to its contract terms. Sentence 1 shall apply mutatis mutandis to financial instruments embedding derivatives within the meaning of the Directive 2007/16/EC."

1.6 Generally, the German courts take the view that violations of regulatory law do render contractual agreements void.[55] Where provisions under regulatory law serve to protect the interests of a certain counterparty, such counterparty may, however, be entitled to claim damages in tort in order to be put in the position it would be in, if no violation of regulatory law had occurred.[56]

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[55] BGH, NJW 2011, 3024, 3025; BGH NJW 1980, 1394; BGH, WM 1978, 785:

[56] BGH, NJW 2005, 2703 *et seq.*; BGH, NJW-RR 2006, 1713 *et seq.*

SCHEDULE 3
Individuals

Subject to the modifications and additions set out in this Schedule 3 (Individuals), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Individuals. For the purposes of this Schedule 3 (Individuals), "**Individuals**" means natural persons (*natürliche Personen*) who have their habitual residence in Germany and whose legal capacity (*Geschäftsfähigkeit*) as defined under section 116 of the Civil Code is not restricted.

Except where the context otherwise requires, references in this Schedule to "**paragraph**" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

ADDITIONAL QUALIFICATIONS

1. The recognition of choice of law (paragraph 4.1.1) may be further restricted in respect of Individuals who qualify as consumers[57] in accordance with the following provisions:

1.1 Art. 6 (1) and (2) of Rome I provide that a contract concluded between a professional and a consumer shall with respect to mandatory consumer protection laws be governed by the laws of the country where the consumer has its habitual residence, if (i) the professional pursues its commercial or professional activities in the country of the consumer's habitual residence or (ii) by any means directs its activities to that country and the contract falls within the scope of such activities.

1.2 Mandatory consumer protection laws would in the light of recital 25 of Rome I appear to be such rules of the country of the consumers' habitual residence that cannot be derogated from by agreement.

1.3 Art. 6 (1) and (2) of Rome I shall; however, not apply

a) to a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence (Art. 6 (4) (a) of Rome I); and

b) to rights and obligations which constitute a financial instrument[58] and rights and obligations constituting the terms and conditions governing the issuance

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[57] For purposes of Rome I, an Individual will qualify as a consumer, if it concludes a contract for a purpose which can be regarded as being outside his trade or profession (Art. 6 (1) of Rome I).

[58] According to Art. 4 (1) point (17) of the Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC as amended ("**MiFID**"), financial instruments are transferable securities, money-market instruments, units in collective investment undertakings and a number of derivatives defined comprehensively in the MiFID. Financial services which are not within the scope of the exemption under Art. 6 (4) (d) of the Rome I Regulation are, inter alia, reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, dealing on own account, portfolio management, investment advice, safekeeping and administration of financial instruments for the account of clients including custodianship and related services such as cash/collateral management and granting credits

or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute the provision of a financial service (Art. 6 (4) (d) of Rome I).

1.4 A number of EU consumer protection Directives contain provisions which oblige the Member States to ensure that that consumers do not lose the protection granted by such Directives by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.[59]

Germany has transposed these provisions by enacting Art. 46b of the Introductory Act which stipulates that national provisions transposing consumer protection directives are to be applied to contracts which contain a choice of the laws of a non-Member State, if the contract bears a close connection to one or several Member States. Such close connection is presumed in situations where (i) the professional pursues its trade or profession in the Member State where the consumer has its habitual residence or (ii) if it by any means directs such activities to one or several Member States and the contract falls within the scope of these activities (Art. 46b (2) of the Introductory Act).

2. In respect of Insolvency Proceedings (above, paragraph 4.2), the following additional qualifications apply:

2.1 For Individuals which have not pursued and do not pursue an independent economic profession, the Insolvency Code prescribes a procedure under which the consumer and its creditors shall attempt to agree on a plan of liquidation of debts which is given effect by the competent insolvency court if agreement is reached. If no agreement can be reached, insolvency proceedings may be instituted pursuant to the general rules but some modifications apply for the purpose of simplification. Natural persons who have pursued an economic profession may fall under the above-mentioned rules provided their financial circumstances are unambiguous and there are no unsettled claims from legal relationships under employment law against them.

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or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction (Annex I Sections A and B of the MiFID).

[59] The Directives covered by Art. 46b of the Introductory Act are

i. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;

ii. Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts;

iii. Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees;

iv. Directive 2002/65/EG of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; and

v. Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

2.2 Once Insolvency Proceedings are opened, under sections 286 *et seqq.* of the InsO, an Individual may be relieved of obligations which remain unperformed. This is achieved by means of a residual debt relief (*Restschuldbefreiung*). Such residual debt relief will be effective if a court orders so and is subject to a number of obligations of the debtor (e.g. assignment of the debtor's current earnings to the extent permitted by law for a period of six years to a trustee appointed by the court).

2.3 Where the Insolvent Party is an Individual, for purposes of insolvency clawback persons with whom the debtor has a close relationship (see above, paragraph 4.3.5(c)4.3.5(vi)) are

i. the debtor's spouse even if the marriage was concluded only after the relevant legal act or was dissolved during the last year prior to the relevant legal act;

ii. the ascendants or descendants of the debtor or of the spouse, the brothers and sisters related by consanguinity and affinity to the debtor and the spouse designated, and the spouses of such persons; and

iii. persons living in the debtor's household or having lived in the debtor's household during the last year prior to the relevant legal act.

2.4 If German law were applicable, the Security Interest Provisions would be likely to qualify as general business conditions (*Allgemeine Geschäftsbedingungen*), i.e. pre-formulated conditions which are presented by one party to its counterparty without being negotiated. Sections 305 to 310 of the Civil Code confer a high level protection on any person to whom general business conditions are presented by its counterparty. Since the choice of English law to govern the Security Interest Provisions would generally be recognised, sections 305 to 310 of the Civil Code would not normally be applicable to the Security Interest Provisions but sections 305 to 310 of the Civil Code would be likely to qualify as mandatory consumer protection laws if used *vis-à-vis* consumers.[60]

2.5 It is conceivable that the German courts would generally seek to award a high level of protection to Individuals which enter into agreements for the creation of a security interest. In particular, the Rehypothecation Clause may be held to be too uncommon (section 305c (1) of the Civil Code) or intransparent (section 307 (1) of the Civil Code) and therefore not to form part of an agreement with Individuals or construed in favour of the Individual (section 305c (2) of the Civil Code).

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[60] Sections 305 to 310 of the Civil Code serve, amongst other things, the implementation of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

SCHEDULE 4
Public Sector Entities

Subject to the modifications and additions set out in this Schedule 4 (Public Sector Entities), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Public Sector Entities. For the purposes of this Schedule 4 (Public Sector Entities), "**Public Sector Entities**" means the Federal Republic of Germany (*Bundesrepublik Deutschland*, "**Federal Republic**"), the German federal states (*Länder*, "**Federal States**"), German municipalities (*Gemeinden*, "**Municipalities**"), German administrative districts (*Kreise* or *Landkreise*, respectively, "**Administrative Districts**"), other legal corporations established under public law (*Körperschaften des öffentlichen Rechts*) ("**Public Law Corporations**") and institutions established under public law (*Anstalten des öffentlichen Rechts*) ("**Public Law Institutions**").

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

1. ADDITIONAL ASSUMPTIONS

We assume:

1.1 that none of the Parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process; and

1.2 that, where a Public Sector Entity enters into the Agreement, the execution of the Agreement and any Transactions constitutes, and the exercise of that Party's rights and performance of its obligations thereunder will constitute, private and commercial acts done and performed for private and commercial purposes.

2. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualifications.

2.1 Insolvency Proceedings

Under section 12 (1) no. 1 of the Insolvency Code Insolvency Proceedings may not be opened over the assets of the Federal Republic or a Federal State. Insolvency Proceedings over the assets of an entity organised under public law which is subject to supervision by a Federal State may not be opened, if the law of the Federal State to under the laws of which such public law entity is organised prohibits the opening of Insolvency Proceedings (section 12 (1) no. 2 of the Insolvency Code). All Federal State laws governing Municipalities and Administrative Districts do contain prohibitions on the opening of insolvency proceedings over Municipalities and, to the extent applicable, over the assets of Administrative Districts. Whether this also holds true in respect of Public Law Corporations and Public Law Institutions needs to be checked in each individual case by assessing the relevant Federal State law.

The conclusions reached above (paragraphs 3.3 and 3.4) therefore apply *mutatis mutandis* to Public Sector Entities except that, as a rule, Public Sector Entities may not legally become insolvent, even if they are unable to meet their payment obligations.

Legal entities established under private law which are owned by a Public Sector Entity are generally not exempt from Insolvency Proceedings and will be treated as any other Party to the Agreement which has been established under private law.[61]

2.2 General restrictions on Public Sector Entities

The German courts hold the view that Public Sector Entities may enter into contracts under private law where this is not expressly prohibited. However, where Public Sector Entities engage in commercial acts under private law they are bound by the general restrictions applicable to Public Sector Entities.[62] In particular, they are bound by the fundamental rights (*Grundrechte*) of the German Constitution (*Grundgesetz*) and the rule of law (*Rechtsstaatsprinzip*). On the facts of each individual case, the German courts may therefore reach the conclusion that general restrictions of Public Sector Entities under public law prevent Public Sector Entities from exercising rights they have under private law or to exercise their rights in a certain manner.

2.3 The German public law doctrine of *ultra vires*

Under the German public law doctrine of *ultra vires*, the power and capacity of a legal entity established under public law to validly enter into a legally binding agreement under private law is limited. Public law entities may principally only enter into transactions that fall within their scope of competence (*Verbandskompetenz*) and functions (*Wirkungskreis*) as defined by the laws establishing or applicable laws conferring its powers and capacities upon such public law entity.[63] If a public law entity purports to enter into a contract under private law that is beyond or exceeding its functions, such a contract might be considered *ultra vires* and therefore void.[64] Provided that the *ultra vires* doctrine is applicable, it applies regardless of the good faith of the counterparty or any representation by the public law entity to the contrary. As a rule, *ultra vires* measures are utterly unenforceable. They may not be ratified.

However, a crucial distinction needs to be drawn between the Federal Republic and the Federal States on the one hand and other entities organised under German public law. Whilst the Federal Republic of Germany and the Federal States are sovereigns and do not derive their power from a superior body but are only limited by their respective constitutions, other entities established under public law have limited

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61 *Ott/Vuia*, in: Münchener Kommentar zur Insolvenzordnung, 2nd ed. 2007, § 12 no. 16.

62 BGH, NJW 1967, 1911; BGH, NJW 2003, 2451, 2452 *et seqq.*

63 BGH, NJW 1956, 746, 747; BGH, NJW 1969, 2198, 2199; Higher Administrative Court (Oberverwaltungsgericht) Lüneburg NVwZ-RR 2010, 639, 641.

64 BGH, NJW 1956, 746, 747 *et seq.*; *Gurlit*, in: Erichsen/Ehlers, Allgemeines Verwaltungsrecht, 14th.ed. 2010, § 31 no. 5.

functions which may be exercised only in accordance with their legal purpose. Only the latter entities are subject to the doctrine of *ultra vires* meaning that legal acts outside the scope of their legal functions are void.[65]

2.4 The prohibition on speculation

It is often argued that Public Sector Entities are subject to a prohibition on speculation even though the legal basis of such prohibition is very unclear.[66] The prohibition on speculation would prevent Public Sector Entities from entering into Transactions for speculative purposes. In the absence of a clear legal basis or this principle the position of German courts has been that the prohibition on speculation – irrespective of the question whether and to what extent it constitutes a rule of law – would not lead to the voidness of contracts under section 134 of the Civil Code.[67]

2.5 Budgetary laws

Budgetary provisions are under German law considered to constitute internal law of the Federal Republic, the Federal States, Administrative Districts and Municipalities. meaning that the violation of the budgetary laws does not affect the dealings with third parties.[68] However, under extraordinary circumstances the violation of budgetary provisions may result in the voidness of agreements entered into by an entity established under German public law. German courts might in severe cases reach the conclusion that the entry into an agreement by a Public Sector Entities may threaten third parties or if the entry into the agreement is highly detrimental to the public good and therefore void under section 138 (1) of the Civil Code.[69] The latter may be given, if there is a violation of budgetary provisions which can be "subjectively attributed" (*subjektiv zugerechnet werden*) to both parties.[70]

2.6 The principle of connectivity

There is also considerable uncertainty as to whether a principle of connectivity (*Konnexität*) applies in respect of Public Sector Entities. [71] The principle of connectivity would require Public Sector Entities to only enter into Transactions to hedge against certain risks from underlying contracts which the Transaction matches.

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[65] *Forsthoff*, Lehrbuch der Verwaltungsrechts Band I: Allgemeiner Teil, 10th ed. 1973, 583 *et seq.*; *Kewenig/Schneider*, Swap-Geschäfte der öffentlichen Hand in Deutschland, WM-Sonderbeilage Nr. 2, 1992, 1, 5.

[66] OLG Bamberg BKR 2009, 288, 292.

[67] E.g. Higher Regional Court (*Oberlandesgericht*) of Naumburg, NJOZ 2005, 3420, 3425; Local Court (*Landgericht*) Düsseldorf, judgment of 11 May 2012 – 8 O 77/11.

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

[69] BGH, NJW 2005, 1490, 1491.

[70] BGH, NVwZ-RR 2007, 47, 48; BGH, NJW 1962, 955, 956 *et seq.*

[71] *Endler*, in: Zerey, Finanzderivate, 3rd ed. 2012, § 28 no. 89.

2.7 Investment advice

In one case, a German court has argued that Credit Institutions may be under an obligation to inform a Public Sector Entity of its restrictions under public law prior to the entry into a derivative transaction and, failing to do so, may be liable to pay damages for wrongful investment advice.[72]

We do not express any opinions on the existence and scope of duties of disclosure and advice a Party may have *vis-à-vis* another Party which is a Public Sector Entity.

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[72] Higher Regional Court of Naumburg, NJOZ 2005, 3420, 3427 *et seqq.*

SCHEDULE 5
Foundations

Subject to the modifications and additions set out in this Schedule 5 (Foundations), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Foundations. For the purposes of this Schedule 5 (Foundations), "**Foundations** " means Foundations (*Stiftungen*) with legal capacity within the meaning of section 80 (1) of the Civil Code which have been recognised by the competent authority of the Federal State within which they are located.

Except where the context otherwise requires, references in this Schedule to a "**paragraph**" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

ADDITIONAL QUALIFICATIONS

1. Establishment and constitution of Foundations

1.1 The valid establishment of a Foundation not only requires a legal act under private law (*Stiftungsgeschäft*) but also an administrative act by the competent authority under which the Foundation is recognised as such. Once established, the Foundation is subject to supervision of the competent authority of the Federal State in which the Foundation is located. The private law act establishing the Foundation has to determine the Foundation's purpose (*Stiftungszweck*) (section 81 (1) sentence 3 no. 3 of the Civil Code).

2. Entry into the Agreement

2.1 Despite the requirement of recognition by the competent authority, Foundations qualify as private law entities and hence are not subject to the public law doctrine of *ultra vires* (above, paragraph 2.3 of Schedule 4 (Public Sector Entities)).[73] There is no concept of *ultra vires* under German private law.[74] However, the power of representation of the management (*Vorstand*) of the Foundation may be restricted under section 86 in conjunction with section 26 (1) of the Civil Code and hence where a member of the Foundation's management purports to enter into a transaction on behalf of the Foundation which is outside its purpose, the transaction may not be binding on the Foundation.

2.2 Whether there are any restrictions on the entry into enter into an Agreement largely depends on applicable public law of the Federal States which needs to be checked in each individual case.

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[73] *Reuter*, in: Münchener Kommentar zum BGB, 6th ed. 2012, § 81 no. 97; *Hadding*, in Soergel, 13th ed. 2000, Vor § 21 no. 24.

[74] *Boesche*, in: Oetker, Handelsgesetzbuch, 2nd ed. 2011, 3 126 no. 5; *Fleischer*, in: Spindler/Stilz, Aktiengesetz, 2nd ed. 2010, § 78 no. 9.

SCHEDULE 6
Building Societies

Subject to the modifications and additions set out in this Schedule 6 (Building Societies), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Foundations. For the purposes of this Schedule 6 (Building Societies), " **Building Societies** " means Building Societies (*Bausparkassen*) within the meaning of the Act on Building Societies (*Bausparkassengesetz*, "**Building Societies Act**"), i.e. Credit Institutions in the form of an AG or established under public law which are subject to BaFin supervision.

Except where the context otherwise requires, references in this Schedule to a "**paragraph**" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

ADDITIONAL QUALIFICATIONS

1. Entry into the Agreement

1.1 The Building Societies Act contains various restriction on Building Societies' entry into agreements. The purpose of these restrictions is to ensure that Building societies focus on deposit-taking and the granting of loans related to the construction or purchase of housing. In particular, section 4 of the Building Societies Acts sets out conclusively the activities a Building Society may engage in. All these activities relate to the purchase and construction of housing.

1.2 In its decision on the construction of section 4 of the Building Societies Act dated 26 January 2005 (BA 3 21.00), BaFin stated that Building Societies may engage in derivatives transactions not expressly mentioned under section 4 of the Building Societies Act, if such derivatives transactions hedge against risks from permissible transactions and do not create further independent risks. It is unclear what consequences violations of section 4 of the Building Societies Act will have under civil law. Generally, the German courts take the view that violations of regulatory law do render contractual agreements void.[75] Where provisions under regulatory law serve to protect the interests of a certain counterparty, such counterparty may, however, be entitled to claim damages in tort in order to be put in the position it would be in, if no violation of regulatory law had occurred.[76]

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[75] BGH, NJW 2011, 3024, 3025; BGH NJW 1980, 1394; BGH, WM 1978, 785:

[76] BGH, NJW 2005, 2703 *et seq.*; BGH, NJW-RR 2006, 1713 *et seq.*

SCHEDULE 7
Pension Entities

Subject to the modifications and additions set out in this Schedule 7 (Pension Entities), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Pension Entities. For the purposes of this Schedule 7 (Pension Entities), "**Pension Entities**" means pension funds (*Pensionsfonds*) within the meaning of section 112 of the Insurance Supervisory Act ("**Pension Funds**") and pension schemes (*Pensionskassen*) within the meaning of section 118a of the Insurance Supervisory Act ("**Pension Schemes**").[77]

Except where the context otherwise requires, references in this Schedule to a "**paragraph**" are to paragraphs in the opinion letter (but not to its Annexes or Schedules).

ADDITIONAL QUALIFICATIONS

1. Pension funds

1.1 Pension Funds are regulated under the Insurance Supervisory Act and subject to BaFin's supervision. Whilst they do not qualify as Insurance Companies, many provisions of the Insurance Supervisory Act apply analogously (section 113 of the Insurance Supervisory Act) and the modifications to opinions and qualifications set out in Schedule 1 (Insurance Companies) hence generally apply. In the absence of any specific guidance, we take the view that in particular the restrictions on the scope of permissible transactions apply analogously (paragraph 5 of Schedule 1 (Insurance Companies)).

1.2 However, whether the EU Insolvency Regulation rather than the Insolvency Code would appear to be applicable in respect of the conflict of insolvency laws (i.e. paragraphSchedule 14 of Schedule 1 (Insurance Companies) is inapplicable). This is because Pension Funds are regulated on European Union level in accordance with Directive 2003/41/EC of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision and would therefore not be covered by the Directives applicable to Insurance Companies (above, paragraph 4 of Schedule 1 (Insurance Companies)).

2. Pension Schemes

Pension Schemes do qualify as Insurance Companies under section 118a of the Insurance Supervisory Act (but are exempted from a number of provisions applicable to Insurance Companies generally) but as Pension Funds, they are regulated on European Union level in accordance with Directive 2003/41/EC of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision and our statement given in respect of Pension Funds therefore apply *mutatis mutandis*. In the

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[77] An Investment Company (see Schedule 2 (Investment Companies) above) may manage a special retirement fund (*Altersvorsorge-Sondervermögen*) in which case it would be subject to further investment restrictions than Investment Companies generally in accordance with sections 87 *et seqq.* of the Investment Act.

absence of any specific guidance, we take the view that in particular the restrictions on the scope of permissible transactions apply analogously (paragraph 5 of Schedule 1 (Insurance Companies)).

ANNEX 1
FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2007**")

2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")

3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")

4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")

5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")

6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")

7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")

8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")

9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the "**FOA Published Form Agreement**") expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).

2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).

3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).

4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.

5. "**Core Provisions**" means:

   (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and

   (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.

6. "**Rehypothecation Clause**" means:

   (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

   (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

   (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); and

   (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7. "**Security Interest Provisions**" means:

(a) the "**Security Interest Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (***Security interest***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (***Security interest***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (***Security interest***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (***Security interest***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (***Security interest***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (***Security interest***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (***Security interest***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (***Security interest***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (***Security interest***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(b) the "**Power to Charge Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (***Power to charge***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (***Power to charge***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (***Power to charge***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (***Power to charge***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (***Power to charge***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (***Power to charge***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (***Power to charge***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (***Power to charge***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (***Power to charge***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(c) the "**Power of Sale Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***); and

(x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(d) the "**Power of Appropriation Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (***Power of appropriation***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (***Power of appropriation***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (***Power of appropriation***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (***Power of appropriation***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (***Power of appropriation***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (***Power of appropriation***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (***Power of appropriation***)

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (***Power of appropriation***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (***Power of appropriation***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(e) the "**Lien Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (***General lien***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (***General lien***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (***General lien***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (***General lien***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (***General lien***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (***General lien***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (***General lien***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (***General lien***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (***General lien***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and

(f) the "**Client Money Additional Security Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).

8. "**Two Way Clauses**" means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

ANNEX 3
NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B") provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.

4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.

5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.

6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).

8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

9. Any change clarifying that the Non-defaulting Party must notify the other party of its exercise of rights under the Security Interest Provisions or other provision.