

CLIFFORD CHANCE

高偉紳律師行

28TH FLOOR
JARDINE HOUSE
ONE CONNAUGHT PLACE
HONG KONG

TEL +852 2825 8888
FAX +852 2825 8800
INTERCHANGE DX-009005 CENTRAL 1
www.cliffordchance.com

NETTING ANALYSER LIBRARY

Our reference: PCDB.70-40531117.RCFC

21 February 2013

The Futures & Options Association
2nd Floor
36-38 Botolph Lane
London EC3R 8DE
United Kingdom

Dear Sirs,

FOA Collateral Opinion

You have asked us to give an opinion in respect of the laws of the Hong Kong Special Administrative Region of the People's Republic of China ("**this jurisdiction**" or "**Hong Kong**") 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 to the terms of reference, definitions, assumptions and qualifications set out in the main body of text of this opinion letter, this opinion is given in respect of Parties which are Hong Kong Companies and Non-Hong Kong Companies (each, as defined below insofar as each may act as a counterparty (a "Counterparty") providing

HKG-1-962660-v6

70-40531117

PARTNERS

E. BRADLEY
N. BUDHWANI
C.S.K. CHAN
P.J. CHARLTON
E.Y.L. CHEN
S.J. COOKE
E.C. DAVIES
R.M. DENNY
F. EDWARDS
M.W. FAIRCLOUGH
M. FELDMANN
B.W. GILCHRIST
C.D. HASSALL
C. HENG

A.E. HO
L. HO
A.D. HUTCHINS
V. LEE
A.S.H. LO
D.K. MALIK
M.D. ROGERS
M.G. SHIPMAN
C.F.M. TANG
M.W. TRUMAN
D. WACKER
J.R. WADHAM
A. WANG

FOREIGN LEGAL CONSULTANTS

L.C. BRICKLEY (NEW YORK, USA)
P.C. DARE BRYAN (ENGLAND AND WALES)
GAO P.J. (PRC)
P.C. GREENWELL (ENGLAND AND WALES)
P.K. KILNER (ENGLAND AND WALES)
T. KOLLAR (NEW YORK, USA)
K.A. SEETULSINGH (ENGLAND AND WALES)
W.L. WYSONG (WASHINGTON D.C., USA)

CONSULTANTS

B.C.J.B. CHAN
L.P. CHEN
S.R. CROSSWELL
P.S. HUGGARD
S. LEE
K.K.C. LEUNG
T.C.S. LEUNG
L. H. LIEU
P.S. O'CONNOR
K.S.H. SANGER

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 to this opinion:

1.2.1 Hong Kong Companies or Non-Hong Kong Companies which are "authorised institutions" under the Banking Ordinance ("**Hong Kong Banks**") (Schedule 1);

1.2.2 Hong Kong Companies which are licensed to carry on a business in a regulated activity in accordance with the Securities and Futures Ordinance ("**Hong Kong Investment Firms**") (Schedule 2);

1.2.3 Hong Kong Companies or Non-Hong Kong Companies which are authorised under the Insurance Companies Ordinance to carry on an insurance business in Hong Kong ("**Hong Kong Insurance Companies**") (Schedule 3);

1.2.4 Hong Kong Individuals (as defined below) (Schedule 4);

1.2.5 persons in their capacity as trustees of trusts which have been validly constituted under Hong Kong law ("**Hong Kong Trusts**"), including charitable trusts, unit trusts that are authorised by the Securities and Futures Commission as collective investment schemes under the Securities and Futures Ordinance and provident fund schemes registered under the Mandatory Provident Fund Schemes Ordinance (Schedule 5);

1.2.6 persons in their capacity as partners in partnerships or limited partnerships ("**Hong Kong Partnerships**") within the meaning of the Partnership Ordinance or the Limited Partnerships Ordinance respectively (Schedule 6); and

1.2.7 the Monetary Authority (Schedule 7),

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

1.3 This opinion is given in respect of cash in account which is the subject of the Security Interest Provisions ("**Cash Collateral**") and account-held securities which are the subject of the Security Interest Provisions ("**Non-Cash Collateral**", and together with Cash Collateral, "**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 In this opinion letter:

1.4.1 "**Banking Ordinance**" means the Banking Ordinance, Chapter 155 of Hong Kong.

- 1.4.2 "**Bankruptcy Ordinance**" means the Bankruptcy Ordinance, Chapter 6 of Hong Kong.
- 1.4.3 "**Companies Ordinance**" means the Companies Ordinance, Chapter 32 of Hong Kong.
- 1.4.4 "**Company**" means a Hong Kong Company or a Non-Hong Kong Company.
- 1.4.5 "**Conveyancing and Property Ordinance**" means the Conveyancing and Property Ordinance, Chapter 219 of Hong Kong.
- 1.4.6 "**Equivalent Agreement**" means an agreement:
- (a) which is governed by the law of England and Wales;
 - (b) which has broadly similar function to any of the Agreements listed in Annex 1;
 - (c) which contains the Core Provisions (with no amendments, or 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).
- 1.4.7 "**Foreign Cash Collateral**" means Cash Collateral located outside Hong Kong.
- 1.4.8 "**Foreign Collateral**" means Foreign Cash Collateral or Foreign Non-Cash Collateral.
- 1.4.9 "**Foreign Non-Cash Collateral**" means Non-Cash Collateral located outside Hong Kong.
- 1.4.10 "**Hong Kong Company**" means a company which is incorporated under the Companies Ordinance.
- 1.4.11 "**Hong Kong Individual**" means an individual (natural person) who:
- (a) is domiciled in Hong Kong;
 - (b) is personally present in Hong Kong on the date on which a petition for his/her bankruptcy is presented to a Hong Kong court under Section 3 of the Bankruptcy Ordinance (the "**Petition Date**"); or

- (c) at any time in the period of three years ending with the Petition Date (i) has been ordinarily resident, or has had a place of residence, in Hong Kong; or (ii) has carried on business in Hong Kong.
- 1.4.12 "**Insolvency Proceeding**" means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this opinion letter, the occurrence of such proceedings in respect of the Counterparty falls within the definition of Event of Default under the Agreement).
- 1.4.13 "**Insurance Companies Ordinance**" means the Insurance Companies Ordinance, Chapter 41 of Hong Kong.
- 1.4.14 "**Limited Partnerships Ordinance**" means the Limited Partnerships Ordinance, Chapter 37 of Hong Kong.
- 1.4.15 "**Local Cash Collateral**" means Cash Collateral located in Hong Kong.
- 1.4.16 "**Local Collateral**" means Local Cash Collateral or Local Non-Cash Collateral.
- 1.4.17 "**Local Non-Cash Collateral**" means Non-Cash Collateral located in Hong Kong.
- 1.4.18 "**Mandatory Provident Fund Schemes Ordinance**" means the Mandatory Provident Fund Schemes Ordinance, Chapter 485 of Hong Kong.
- 1.4.19 "**Non-Hong Kong Company**" means a company incorporated or formed under the laws of another jurisdiction and which is registered as a non-Hong Kong company under Part XI of the Companies Ordinance.
- 1.4.20 a "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 3.
- 1.4.21 "**Partnership Ordinance**" means the Partnership Ordinance, Chapter 38 of Hong Kong.
- 1.4.22 "**Securities and Futures (Client Money) Rules**" means the Securities and Futures (Client Money) Rules, Chapter 571I of Hong Kong.
- 1.4.23 "**Securities and Futures Ordinance**" means the Securities and Futures Ordinance, Chapter 571 of Hong Kong.
- 1.4.24 "**Security Interest**" means the security interest created pursuant to the Security Interest Provisions.
- 1.4.25 terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears.

- 1.4.26 any reference to the "**Agreement**" (other than a specific cross reference to a clause in such Agreement and references in the first paragraph of this letter) shall be deemed to be a reference to an Equivalent Agreement.
- 1.4.27 any reference to "**Core Provisions**" include Core Provisions that have been modified by Non-Material Amendments.
- 1.4.28 "**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.
- 1.4.29 in instances other than those referred to at 1.4.28 above, the word "**enforceable**" and cognate terms 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.
- 1.4.30 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.
- 1.4.31 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2.
- 1.4.32 headings in this opinion letter are for ease of reference only and shall not affect its interpretation.

2. **ASSUMPTIONS**

We assume the following:

- 2.1 The Agreement is legally binding and enforceable against both Parties under its governing law.
- 2.2 The Security Interest Provisions are effective under the governing law of the Agreement to create a Security Interest.
- 2.3 Each Party has the capacity, power and authority under each applicable law to enter into the Agreement; to perform its obligations under the Agreement; and each Party has taken all necessary steps to execute, deliver and perform the Agreement.
- 2.4 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 The Agreement has been properly executed by both Parties.
- 2.6 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 The Agreement accurately reflects the true intentions of each Party.
- 2.9 No provision of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidates the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.
- 2.10 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 Interest pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.
- 2.11 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.
- 2.12 Except with respect to our opinion at 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.
- 2.13 Any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.14 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 The matters set out in the Appendix to this opinion letter.

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 Security Interest Provisions would create a valid security interest over the Local Collateral.
- 3.1.2 Following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceeding, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Local Non-Cash Collateral by selling and applying the proceeds of the sale of the Local Non-Cash Collateral towards amounts owing to the Non-Defaulting Party by the Defaulting Party.
- 3.1.3 There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Local Collateral.
- 3.1.4 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 Local Collateral would rank ahead of the interests of the Counterparty and any other person therein.
- 3.1.5 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 Foreign Collateral 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 Foreign Collateral is situated.

3.2 Further acts

No further acts, conditions or things would be required by the law 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 Interest Provisions are located within this jurisdiction.

3.4 Right of re-use

- 3.4.1 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 the Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes

all Foreign Non-Cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

3.4.2 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 Registration of Security

Charges created by a Hong Kong Company

4.1.1 Pursuant to Section 80 of the Companies Ordinance, the instrument by which any "charge" falling within Section 80(2) created by a Hong Kong Company (together with the prescribed particulars of such charge) must be delivered to or received by the Hong Kong Registrar of Companies within five weeks after the date of its creation (i.e. the date of that instrument), failing which any security on the Hong Kong Company's property or undertaking conferred by such charge will be void against the liquidator and any creditor of the Hong Kong Company. The term "charge" for these purposes includes mortgages or security interests governed by foreign law that would be characterised for Hong Kong law purposes as a mortgage or charge. For those purposes, it is irrelevant whether the Collateral is Foreign Collateral or Local Collateral.

Charges created by a Non-Hong Kong Company

4.1.2 Section 91(1) of the Companies Ordinance extends the application of the requirements referred to above to charges on property situated in Hong Kong which are created by a Non-Hong Kong Company. Accordingly, if a company was registered as a Non-Hong Kong Company on or before the date on which it enters into an instrument constituting the charge and the charged assets consist of Local Collateral, then it would be necessary for such instrument (together with the prescribed particulars thereof) to be delivered to the Hong Kong Registrar of Companies within five weeks after the date of that instrument, failing which such charge may be void against the liquidator or any creditor of that Non-Hong Kong Company.

4.1.3 Pursuant to Section 91(5) of the Companies Ordinance, if a company shall, at any time after the date on which it enters into an instrument constituting the charge, become registered as a Non-Hong Kong Company, it shall, within five weeks after the date of its being so registered, deliver to the Hong Kong Registrar of Companies for registration such instrument (together with the prescribed particulars thereof). Whilst failure by such Non-Hong Kong Company to comply with such obligation under Section 91(5) of the Companies Ordinance may subject it and its officers to a fine, such failure

would not render such security void against the liquidator or any creditor of such Non-Hong Kong Company.

After acquired property

- 4.1.4 If the instrument creating a charge provides that the charge is to attach to any property upon the fulfilment of a stipulated condition in respect of that property (for example, upon the chargor's acquisition of property falling within a certain description), then upon the fulfilment of such stipulated condition, the charge will attach to such property without any further act by either the chargor or the chargee. The attachment will take effect from the date of the creation of the charge. Accordingly, there is no requirement under the Companies Ordinance for a Hong Kong Company or a Non-Hong Kong Company to deliver any instrument or document to the Hong Kong Registrar of Companies for registration as and when the relevant condition is satisfied in respect of the relevant property. Prior to the satisfaction of such condition, the chargee will have only an "inchoate" security interest in such property.

Registrable charges

- 4.1.5 The Security Interest created by the Security Interest Provisions may fall within one of the types of registrable charges set out in Section 80(2), including, without limitation:
- (a) a floating charge; or
 - (b) a charge on book debts.
- 4.1.6 Whether or not a security arrangement constitutes a fixed or floating charge is a question of fact, and we would expect the Hong Kong courts to analyse the conduct of the parties and the rights created between them before applying the legal principles to such rights and conduct. The essential element that distinguishes a fixed charge from a floating charge is the degree of control that the chargee has over the chargor's ability to deal with the charged assets. Where the chargor is free to deal with the charged assets without the consent of the chargee, the Hong Kong courts would be likely to hold that the charge constitutes a floating charge, notwithstanding that it may be described as a fixed charge.
- 4.1.7 The term "book debt" is not defined in the Companies Ordinance, but the generally accepted view is that a book debt is a debt arising out of the trading activities of the company that should properly be entered in the company's books. Whether a debt would be treated in this way therefore depends on normal accounting practices, which will usually be determined by reference to expert evidence. While the amounts due in respect of certain types of debt securities may constitute "debts", we understand that they would normally be accounted for as holdings in securities, rather than as debts per se. Despite the view expressed above, the case law in this area is limited and so a degree of

uncertainty remains. A charge over credit balances in cash accounts may well constitute a charge over book debts.

- 4.1.8 A charge over shares only is not among the list of charges in Section 80(2), but it is the practice of some legal practitioners in Hong Kong to deliver to the Hong Kong Registrar of Companies instruments constituting that type of security together with the prescribed particulars thereof within the five week period, and in most cases the Hong Kong Registrar of Companies accepts for registration charges over shares granted by Hong Kong Companies.

4.2 Effectiveness of Security

4.2.1 We express no opinion as to:

- (a) whether a Counterparty has good legal or other title to any Collateral, or as to the existence or value of any Collateral;
- (b) the priority of the Security Interest created under the Security Interest Provisions among security interests created by the Counterparty or whether the Security Interest constitutes a legal or equitable security interest or whether it constitutes a fixed or floating charge; or
- (c) whether the Security Interest Provisions breach any other agreement or instrument.

4.2.2 The exercise by a Firm of the powers and remedies conferred by the Security Interests Provisions or by law is subject to general equitable principles regarding the enforcement of security and the supervisory powers of the Hong Kong courts.

4.2.3 The opinions set out in paragraphs 3.1 (*Valid security interest*) and 3.2 (*Further acts*) are subject to the following, with reference to the Collateral that may be referred to in the Security Interest Provisions:

- (a) any item of Collateral which is intended to be the subject of the Security Interest must be capable of forming the subject of a security interest and must not otherwise, by reason of a contractual prohibition against assignment or consideration of public policy, be incapable of transfer;
- (b) any item of Collateral that was not the subject of the Security Interest at the time of entry into the Agreement must be capable of being ascertained as and when it is expressed to become the subject of the Security Interest;
- (c) any authorisation, consent, condition or formality which, by the terms governing or regulating an item of Collateral intended to be the subject of the Security Interest, is required to be satisfied, obtained or done prior to or as a consequence of such item of Collateral becoming the

subject of the Security Interest, must have been satisfied, obtained or done; and

- (d) any contract the benefit of which is intended to be the subject of the Security Interest must not be capable of being set aside as a result of any fraud or misrepresentation, or any bribe or corrupt conduct.

4.3 Limitations arising from Insolvency and Similar Laws

4.3.1 The opinions in this opinion letter are subject to any limitations arising from insolvency, bankruptcy, liquidation, administration, moratorium, reorganisation and similar laws generally affecting the rights of creditors (whether under statute law, common law or equity).

4.3.2 Without prejudice to paragraph 4.3.1 above, the opinions in this opinion letter are subject to any obligation expressed to be assumed, or any security interest created or purported to be created, or any disposition of property made or purported to be made, or any other action taken or to be taken, under or pursuant to the Security Interest Provisions being held to be wholly or partly invalid as a result of:

- (a) any of the following sections of the Companies Ordinance (if the circumstances described in any of these sections are applicable):
 - (i) Section 268 (*disclaimer of onerous property in case of company wound up*);
 - (ii) Sections 266 (*fraudulent preference*), 266A (*liabilities and rights of certain fraudulently preferred persons*) and 266B (*fraudulent preference deemed to be an unfair preference*); and
 - (iii) Section 267 (*effect of floating charges*); and/or
- (b) Section 60 (*voidability of dispositions to defraud creditors*) of the Conveyancing and Property Ordinance.

4.3.3 Certain preferential payments of a Hong Kong Company or a Non-Hong Kong Company, such as taxes and other debts owing to the Hong Kong government and unpaid wages and other amounts owing to employees may, under Section 265 of the Companies Ordinance, be paid out of the proceeds of any property subject to any floating charge created under the Security Interest Provisions, in priority to the claims of the holder of the floating charge.

4.3.4 Any of the Security Interest Provisions which confers, purports to confer or waives a right of set-off or similar right may be ineffective against a liquidator, or creditor, if and to the extent that such right (or purported right) or waiver (or purported waiver) would, if given effect, produce a different effect from the mandatory set-off prescribed by Section 35 of the Bankruptcy Ordinance,

which is made applicable to companies by Section 264 of the Companies Ordinance.

4.4 **Application of Foreign Law**

- 4.4.1 Under the conflict of laws rules of Hong Kong, the law governing the proprietary aspects of the Security Interest is the law of the place where the Collateral is situated, or deemed to be situated. Accordingly, we express no opinion on whether the Security Interest Provisions would create a valid Security Interest over any Foreign Collateral.
- 4.4.2 If any obligation is to be performed in a jurisdiction outside Hong Kong, it may not be enforceable in Hong Kong to the extent that performance would be illegal or contrary to public policy under the laws of the other jurisdiction and if the matter were to arise before it a Hong Kong court may take into account any overriding mandatory provisions of the law of the place of performance insofar as they render the performance unlawful or otherwise take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance.

4.5 **Right of Re-Use**

- 4.5.1 As issues relating to the rights or obligations connected with, or arising from, Non-Cash Collateral (including whether a Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes such Non-Cash Collateral) are determined by the law of the place where the relevant Non-Cash Collateral is situated, it would be necessary to consider Hong Kong law in order to determine whether the Rehypothecation Clause would be effective in accordance with its terms in relation to any Local Non-Cash Collateral. From the perspective of Hong Kong law, the fact that the Rehypothecation Clause in respect of such Local Non-Cash Collateral is valid and enforceable under the chosen governing law of the Agreement would not, of itself, make such right valid and enforceable under Hong Kong law.
- 4.5.2 We believe the Rehypothecation Clause may contravene two long-standing rules of common law, which are:
- (a) the doctrine against clogging the equity of redemption; and
 - (b) the rule against collateral advantages.

Clog against the equity of redemption

- 4.5.3 One of the essential features of a security interest is the existence of residual property rights in favour of the security giver, known as the "equity of redemption". Because the security giver retains a property right in the secured assets, the security taker is, in the absence of default, not free to dispose of them, or create an inconsistent security over them, but must hold the original

secured assets available for return upon the discharge of the secured obligation. Although a security taker which has exercised a right of use in respect of secured assets would normally be under an obligation to return equivalent assets to the security giver or to account for the proceeds of such secured assets, these obligations are merely personal in nature, are capable of being discharged by set-off and are at risk of not being performed in full on the insolvency of the security taker. By contrast, because the equity of redemption is a property right, the secured assets are not at risk on the insolvency of the security taker. Upon the discharge of the secured obligation, the security giver is entitled to recover the secured assets in full from the security taker's insolvency officials.

- 4.5.4 In the decision in the English case of *Kreglinger v New Patagonia Meat and Cold Storage Co. Ltd* [1914] AC 25, the House of Lords held that any term which clashes directly with a security giver's equitable right to redeem is said to constitute a "clog" and would *always* be held to be inoperative and void, even if it was freely negotiated between sophisticated counterparties on arm's length terms. Thus, for example, a term which gives the security taker a beneficial interest in the secured property itself or a term which gives the security taker an option to acquire such an interest would constitute a "clog", and accordingly be inoperative and void.
- 4.5.5 In our view, the Rehypothecation Clause would constitute a clog because it provides that the Local Non-Cash Collateral would become absolute property of the Firm (or that of the Firm's transferee), free from any equity, right, title or interest of the Counterparty (including the Counterparty's equity of redemption in the Local Non-Cash Collateral).
- 4.5.6 It has also been argued in some academic texts that the doctrine against "clogging" would not apply to a security interest created over dematerialised securities in electronic form. In such a case, the security interest is created over co-proprietary rights in a fungible pool of securities. The assets in such a pool are shifting in nature, and it is simply not possible for the security provider to receive a return of the precise original assets. Therefore, it is argued that there cannot be a "clog" preventing the security provider in such circumstances from getting back exactly what it provided. While this may be the case, we take the view the doctrine against "clogging" is directed primarily against any term which purports to interfere with or diminish the security provider's proprietary interest in the secured assets (and not simply whether the security provider would be able to get back exactly what it had provided). Even in the case of a security interest created over dematerialised securities, a right of use over such securities would have the effect of replacing the security provider's original proprietary interest in such assets with merely a personal right against the security taker; in our view, the fact that the original subject-matter of the security is dematerialised shares or debt securities would not, of itself, lead the court to find that it was impossible for a "clog" to exist.

- 4.5.7 Moreover, while the strictness of the doctrine has been criticized on a number of occasions, including, more recently in the English Court of Appeal decision in *Jones v Morgan* [2001] EWCA Civ 995 and in some academic texts, we believe the better view is that the "unqualified" approach adopted by the House of Lords in *Kreglinger* remains authoritative in Hong Kong.

Rule against collateral advantages

- 4.5.8 By contrast, the rule against collateral advantages, which was developed in England at a time when rates of interest were limited by statute, has been modified in recent times such that the rule's application is limited to situations where advantages are unfair and unconscionable (and not merely unreasonable).
- 4.5.9 We mention this rule here because the Rehypothecation Clause could, arguably, be seen as a collateral advantage to a Firm - in the sense that a Customer is required not only to perform its secured obligations (including the payment of interest) but also to grant the Firm the right to "use" Non-Cash Collateral. The Rehypothecation Clause would certainly confer an advantage to a Firm; and it is granted to the Firm in the context of its holding security over Local Non-Cash Collateral.
- 4.5.10 In determining whether this advantage is unfair or unconscionable, the Hong Kong courts would likely have regard to, among other things, the relative bargaining strengths of the Parties; whether any provision in the nature of penalising a Counterparty exists; and whether a Counterparty is contractually entitled to any real and tangible benefits by agreeing to grant a Firm such right.

4.6 Enforcement of Security Interest

- 4.6.1 Under Hong Kong law, a chargee has only the remedies of: (a) sale of the secured assets; and (b) appointment of a receiver. The remedy typically exercised by a chargee in relation to collateral in the form of securities would be the power of sale, because the appointment of a receiver is generally not thought to confer any practical advantage. A chargee (unlike a mortgagee) has no right to obtain foreclosure.
- 4.6.2 The opinion set out in paragraph 3.1.2 is subject to the following, with reference to Local Non-Cash Collateral that may be the subject of the Security Interest Provisions:
- (a) in exercising its right of sale, a Firm is required to act in good faith and to take reasonable care to obtain whatever is the true market value of Local Non-Cash Collateral at the moment it chooses to sell it (although it may sell promptly and does not have to wait in the hope of achieving a better price at a later date);

- (b) a Firm may not sell the Local Non-Cash Collateral to itself, unless the sale is ordered by the court and the Firm has obtained leave to bid (because such a transaction would amount to foreclosure without the leave of the court); and
- (c) a Firm may sell to a company in which it is interested *provided that* the company is not a pure nominee, but it must prove that the sale was in good faith and that it had taken reasonable steps to obtain the best price reasonably obtainable at that time.

4.7 Other qualifications

- 4.7.1 Where any party to the Agreement is vested with a discretion or may determine a matter in his, her or its opinion, that party may be required to exercise his, her or its discretion in good faith, reasonably and for a proper purpose, and to form his, her or its opinion in good faith and on reasonable grounds.
- 4.7.2 The parties to the Agreement may be able to amend that document by oral agreement or by conduct despite any provision to the contrary.
- 4.7.3 Any term of the Agreement stating that a failure or delay, on the part of any party, in exercising any right or remedy under the Agreement shall not operate as a waiver of such right or remedy may not be effective.
- 4.7.4 The opinions expressed in this Opinion Letter are subject to the effects of any United Nations sanctions or other similar measures implemented or effective in Hong Kong with respect to any party to Agreement which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.
- 4.7.5 Any term of the Security Interest Provisions permitting the enforcement of security by a Firm after the occurrence of an Event of Default but before the determination of any amount(s) owing by a Counterparty and intended to be secured thereby may be unenforceable or void for uncertainty.

There are no other material issues relevant to the issues addressed in this opinion letter 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 subscribe 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,

Clifford Chance

SCHEDULE 1

HONG KONG BANKS

Subject to the provisions of this Schedule 1 (*Hong Kong Banks*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party which is a Hong Kong Bank.

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) and references to "*sections*" are to sections of this Schedule.

1. QUALIFICATIONS

The following additional qualification shall apply:

1.1 Small depositors of banks

In addition to the preferential payments referred to in paragraph 4.3.3 above, a Hong Kong Bank's debt in respect of certain deposits (of up to a certain amount) may, under Section 265(1)(db) of the Companies Ordinance, be paid out of the proceeds of any property subject to any floating charge created under the Security Interest Provisions, in priority to the claims of the holder of the floating charge.

SCHEDULE 2
HONG KONG INVESTMENT FIRMS

The opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Hong Kong Investment Firms.

SCHEDULE 3 HONG KONG INSURANCE COMPANIES

Subject to the provisions of this Schedule 3 (*Hong Kong Insurance Companies*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party which is a Hong Kong Insurance Company.

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) and references to "*sections*" are to sections of this Schedule.

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 3 (*Hong Kong Insurance Companies*):

"**LTB Fund**" has the meaning given to it in section 3.2.2.

"**Multi-Fund Insurance Company**" has the meaning given to it in section 3.2.4.

2. ASSUMPTIONS

The following additional assumption shall apply:

- 2.1 Where the Counterparty providing Collateral to a Firm is a Multi-Fund Insurance Company, the Agreement stipulates that Collateral consisting of assets attributed to one LTB Fund may be used only to secure against the liabilities of the same LTB Fund.

3. QUALIFICATIONS

The following additional qualifications shall apply:

3.1 Insurance claims

In addition to the preferential payments referred to in paragraph 4.3.3 above, a Hong Kong Insurance Company's debt in respect of certain claim (other than a claim for a refund of premium) made under or in accordance with a contract of insurance (but not a contract of reinsurance) effected by the Hong Kong Insurance Company as part of its general business carried on in or from Hong Kong may, under Section 265(1)(e) of the Companies Ordinance, be paid out of the proceeds of any property subject to any floating charge created under the Security Interest Provisions, in priority to the claims of the holder of the floating charge.

3.2 Insurance Companies Ordinance

- 3.2.1 Insurance business under the Insurance Companies Ordinance is broadly divided into "long-term insurance business" and "general insurance business".

3.2.2 Section 22 of the Insurance Companies Ordinance requires a Hong Kong Insurance Company carrying on "long-term insurance business" to *identify* assets and liabilities attributable to its long-term insurance business (and differentiate those from the assets and liabilities attributable to its general insurance business) and to maintain a separate account in respect of each of:

- (a) its Class G insurance;¹
- (b) its Class H insurance;² and
- (c) the remaining classes of long-term insurance business excluding Classes G and H

(each of (a), (b) and (c) a "**LTB Fund**").

3.2.3 Any receipts (being premium and investment income) from any one LTB Fund should be recorded by the Insurance Company in its own separate account opened and held for that LTB Fund. The account balance of each LTB Fund will form a separate fund identified and named specifically for that relevant part of the long-term insurance business.

3.2.4 A Hong Kong Insurance Company that:

- (a) carries on any long-term business and general insurance business; or
- (b) carries on only long-term business and, due to the nature of the long-term business it carries on, is such as to require it to maintain two or three LTB Funds,

(such Hong Kong Insurance Company, a "**Multi-Fund Insurance Company**") is subject to the requirements of Section 23(1) of the Insurance Companies Ordinance, which stipulates that (subject to certain exceptions) "*assets representing a fund maintained by an insurer in respect of its long term business shall be applicable only for the purposes of that part of that business to which the fund relates.*"

3.2.5 Our view is that the requirement in Section 23 of the Insurance Companies Ordinance is of general application and is expressed in respect of relevant assets, instead of being a prohibition on the relevant Multi-Fund Insurance Company. We are of this view because:

- (a) the language of Section 23(1) appears to have been deliberately drafted in the passive voice (in contrast to Section 23(6)); and

¹ Class G insurance is guaranteed capital or return retirement scheme or management.

² Class H insurance is non-guaranteed capital or return retirement scheme or management.

(b) the relevant words in Section 23(1) ("assets" and "shall be applicable") can therefore be broken down to mean "the assets shall not be capable of being applied": this is on the basis of interpreting "applicable" as "able or capable of being applied".

3.2.6 Consequently, a Multi-Fund Insurance Company cannot apply the relevant assets for any purpose other than the purposes of the relevant LTB Fund and in addition, no other legal person may apply the relevant assets for any other purpose other than the purposes of the relevant LTB Fund. Any contractual term purportedly agreed between a Hong Kong Insurance Company and its counterparty contrary to Section 23 will not be enforceable to the extent it contravenes Section 23.

3.2.7 Accordingly, we are of the view that Hong Kong law will not permit the creation of a Security Interest in respect of Collateral consisting of assets attributed to one LTB Fund to secure against the liabilities of another LTB Fund.

SCHEDULE 4 HONG KONG INDIVIDUALS

Subject to the provisions of this Schedule 4 (*Hong Kong Individuals*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party who is a Hong Kong Individual.

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) and references to "*sections*" are to sections of this Schedule.

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 4 (*Hong Kong Individuals*):

"**Bills of Sale Ordinance**" means the Bills of Sale Ordinance, Chapter 20 of Hong Kong.

2. ASSUMPTIONS

The following additional assumption shall apply:

- 2.1 We assume that each Hong Kong Individual is of full age and sound mind and has the mental capacity and full legal capacity under any applicable law relating to him or her to enter into and to exercise his or her rights and to perform his or her obligations under the Agreement.

3. QUALIFICATIONS

The following additional qualifications shall apply:

3.1 Registration of Security

Bills of sale

- 3.1.1 Section 7 of the Bills of Sale Ordinance provides that every bill of sale must be duly attested and registered (with the Registrar of the High Court) within seven clear days after its execution or, if it is executed outside Hong Kong, within seven clear days after the time at which it would, in the ordinary course of post, arrive in Hong Kong if posted immediately after its execution. Otherwise, the bill of sale will be void in respect of the chattels comprised therein, if:

- (a) it was made or given by a Hong Kong Individual;
- (b) it was made or given by way of security for the payment of money; and
- (c) "personal chattels" are purportedly the subject of such security.

- 3.1.2 The term "personal chattels" is defined in the Bills of Sale Ordinance to mean "goods, furniture, and other articles capable of complete transfer by delivery [...] but does not include [...] shares or interests in the stock, funds, or securities of any government or in the capital or property of incorporated or joint-stock companies, or choses in action [...] ". We have no reason to believe that, apart from exceptional circumstances, any such personal chattels are to be taken as security under the Security Interest Provisions.

Assignment of book debts

- 3.1.3 Section 48 of the Bankruptcy Ordinance provides that, where a person engaged in any trade or business makes an assignment to any other person of his or her existing or future book debts or any class thereof and is subsequently adjudicated bankrupt, the assignment shall be void against the trustee in bankruptcy as regards any book debts which have not been paid before the date of the bankruptcy order, unless the assignment has been registered with the Registrar of the High Court of Hong Kong. However, Section 48 specifically excludes from its operation an assignment of debts becoming due under specified contracts. Accordingly, the Security Interest constituted by the Security Interest Provisions will not be void against the trustee in bankruptcy of a Hong Kong Individual by reason of non-registration under section 48 of the Bankruptcy Ordinance. There is no functional equivalent of Section 48 applicable to a Hong Kong Company or a Non-Hong Kong Company.

3.2 **Effectiveness of Security: Floating charges**

There is some uncertainty under Hong Kong law whether a Hong Kong Individual may create a floating charge. We believe the better view is that a Hong Kong Individual may not create a floating charge in respect of personal chattels (due to the requirement, under the Bills of Sale Ordinance, for there to be a schedule annexed to, or written on, a bill of sale containing an inventory of the personal chattels comprised in the bill – which prevents "after-acquired" property being covered by such security bill), but there is in principle no reason why a floating charge cannot be created by a Hong Kong Individual in respect of assets or property which are not personal chattels (such as cash or securities). Although we are not aware of any case law directly on point, we note that in *Tailby v The Official Receiver* (1888) 13 App Cas 523 it was held that an assignment by an individual of future book debts, being a chose in action and therefore not registrable as a bill of sale, was effective.

3.3 **Limitations arising from Insolvency Law**

Paragraph 4.3.2 shall be delete and replaced with:

"Without prejudice to paragraph 4.3.1, the opinions in this opinion letter are subject to any obligation expressed to be assumed, or any security interest created or purported to be created, or any disposition of property made or purported to be made, or any other action taken or to be taken, under or

pursuant to the Security Interest Provisions being held to be wholly or partly invalid as a result of:

- (a) any of the following sections of the Bankruptcy Ordinance (if the circumstances described in any of these sections are applicable):*
 - (i) Sections 20 to 20L relating to voluntary arrangements;*
 - (ii) Section 48 (avoidance of general assignment of book debts unless registered);*
 - (iii) Section 49 (transactions at an undervalue);*
 - (iv) Section 50 (unfair preferences); and*
 - (v) Section 59 (disclaimer of onerous property); and/or*
- (b) Section 60 (voidability of dispositions to defraud creditors) of the Conveyancing and Property Ordinance."*

SCHEDULE 5 HONG KONG TRUSTS

Subject to the provisions of this Schedule 5 (*Hong Kong Trusts*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party who or which is a Hong Kong Trustee.

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) and references to "*sections*" are to sections of this Schedule.

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 5 (*Hong Kong Trusts*):

- 1.1 "**Authorized Unit Trust**" means a Hong Kong Trust that is a unit trust that is authorized by the Securities Futures Commission as a collective investments scheme under the Securities and Futures Ordinance.
- 1.2 "**Charitable Trust**" means a Hong Kong Trust that has been established for exclusively charitable purposes.
- 1.3 "**Hong Kong Trustee**" means a Hong Kong Company, a Non-Hong Kong Company or a Hong Kong Individual acting as trustee of a Hong Kong Trust.
- 1.4 "**MPF Scheme**" means a Hong Kong Trust that is a provident fund scheme registered under the Mandatory Provident Fund Schemes Ordinance.
- 1.5 "**Trustee Ordinance**" means the Trustee Ordinance, Chapter 29 of Hong Kong.
- 1.6 Where a body of trustees act as trustee of a Hong Kong Trust, references in this opinion to a trustee shall be to such body of persons acting jointly as trustees.

2. ASSUMPTIONS

The following additional assumptions shall apply:

- 2.1 Where a Party to the Agreement is expressed to be a Hong Kong Trust, the contracting party to such Agreement is the Hong Kong Trustee of such Hong Kong Trust, acting in his, her or its capacity as such.
- 2.2 Each Hong Kong Trust is an express trust validly constituted under a written trust instrument governed by Hong Kong law (including a Charitable Trust, an Authorized Unit Trust and an MPF Scheme), but excluding (without limitation) any trust arising by operation of law, any statutory trust, any trust of which a judicial trustee is trustee, any trust of which an official trustee is trustee, any bare trust (simple trust), and any trust of which a person is trustee by virtue of being a personal representative of a deceased estate.

- 2.3 Each trustee of a Hong Kong Trust is a Hong Kong Trustee.
- 2.4 Each Hong Kong Trustee, in entering into the Agreement, is not in breach of any of his, her or its express or implied duties under the relevant trust instrument or otherwise in connection with the relevant Hong Kong Trust and is acting in accordance with the terms, express or implied, and conditions and purpose of the relevant Hong Kong Trust.
- 2.5 During the life of the Agreement, each Hong Kong Trustee will remain a trustee of the relevant Hong Kong Trust.
- 2.6 Each Hong Kong Trustee will have assumed or undertaken all obligations and liabilities under the Agreement in his, her or its capacity as trustee of the relevant Hong Kong Trust and not in his, her or its personal capacity, and will have agreed, by express contractual provision with the other Party, that any power or right conferred on the other Party under the Agreement, or any recourse therefor, shall not extend to any personal assets of that Hong Kong Trustee or any assets held by that Hong Kong Trustee as trustee of any trust other than the relevant Hong Kong Trust.

4. **QUALIFICATIONS**

The following additional qualifications shall apply:

4.1 **Registration of Security**

Trustees that are Companies

- 4.1.1 There is some uncertainty whether Section 80 of the Companies Ordinance (the provisions of which are described in paragraph 4.1 (*Registration of Security*) above) applies to a charge created by a Hong Kong Trustee that is a Company.
- 4.1.2 We believe, on balance, that Section 80 of the Companies Ordinance does not apply to a charge created by a Hong Kong Trustee that is a Company. This is because
- (a) Section 80 refers to "any security on the company's property", and assets held beneficially for another is not the company's property (i.e. is not the Hong Kong Trustee's property); and
 - (b) in any case, the consequences of invalidity do not apply since the trust assets do not belong beneficially to the Hong Kong Trustee and neither the liquidator nor any creditor of the Hong Kong Trustee would obtain any benefit if the unregistered charge were invalidated.
- 4.1.3 However, we recognize that an argument may be made on policy grounds that registration under Section 80 would warn subsequent potential creditors and other third parties dealing with the relevant trust assets that they are subject to a charge.

- 4.1.4 In light of these uncertainties, it may be prudent to treat a charge created by a Hong Kong Trustee that is a Company as being caught by the provisions of Section 80 of the Companies Ordinance. The current practice of the Hong Kong Registrar of Companies is that, in most cases, he/she accepts for registration a charge created by a Hong Kong Trustee that is a Company (although it is not clear whether the Registrar of Companies will record on the register that the Hong Kong Trustee is acting in a trustee, rather than a personal, capacity).

Beneficiaries that are Companies

- 4.1.5 We believe an argument may be made that a charge over trust assets held for the benefit of a beneficiary may require to be submitted (under Section 80 of the Companies Ordinance) to the Hong Kong Registrar of Companies for registration against a beneficiary of the relevant trust, if the beneficiary is a Company. We believe this argument has greater force if the trust assets are held under a bare trust as the assets would, in practice, be under the beneficiary's control and considered the beneficiary's property.
- 4.1.6 Accordingly, it may be prudent to treat a charge over assets held by a bare trustee for a beneficiary that is a Company as being caught by the provisions of Section 80 of the Companies Ordinance. As charges are rarely submitted for registration against a beneficiary company in this jurisdiction, we are not aware whether the Hong Kong Registrar of Companies would in practice accept such charges for registration.

Trustees or beneficiaries who are Hong Kong Individuals

- 4.1.7 Section 7 of the Bills of Sale Ordinance provides that every bill of sale made or given by a Hong Kong Individual must be duly attested and registered or it will be void in respect of the chattels comprised therein. It is possible that the requirements under Section 7 of the Bills of Sale Ordinance apply to Hong Kong Trustees or beneficiaries of a Hong Kong Trust who are Hong Kong Individuals. However, as mentioned in section 3.1 (*Registration of Security*) of Schedule 4 (*Hong Kong Individuals*), we have no reason to believe that, apart from exceptional circumstances, any such personal chattels are to be taken as security under the Security Interest Provisions.

4.2 Effectiveness of Security: Floating Charges created by Hong Kong Trustees who are Hong Kong Individuals

- 4.2.1 There is some uncertainty under Hong Kong law whether a Hong Kong Individual (including a Hong Kong Individual acting in his or her capacity as a trustee of a Hong Kong Trust) may create a floating charge. We believe the better view is that a Hong Kong Individual may not create a floating charge in respect of personal chattels (due to the requirement, under the Bills of Sale Ordinance, for there to be a schedule annexed to, or written on, a bill of sale containing an inventory of the personal chattels comprised in the bill – which

prevents "after-acquired" property being covered by such security bill), but there is in principle no reason why a floating charge cannot be created by a Hong Kong Individual in respect of assets or property which are not personal chattels (such as cash or securities). Although we are not aware of any case law directly on point, we note that in *Tailby v The Official Receiver* (1888) 13 App Cas 523 it was held that an assignment by an individual of future book debts, being a chose in action and therefore not registrable as a bill of sale, was effective.

4.3 Insolvency of Hong Kong Trustees.

A Hong Kong Trustee is not the beneficial owner of any property held by the Hong Kong Trustee in his/her/its capacity as trustee. If the Hong Kong Trustee becomes the subject of any Insolvency Proceeding, such property is not a property of the Hong Kong Trustee for the purpose of such Insolvency Proceeding. Accordingly, the qualification set out in paragraph 4.3 (*Limitations arising from Insolvency and Similar Laws*) do not apply.

4.4 Charitable Trusts

Under Section 57A of the Trustee Ordinance, upon an application made to a Hong Kong court by:

- (a) two or more persons who have the consent in writing of the Secretary for Justice to make the application;
- (b) the Secretary for Justice; or
- (c) all or any one or more of the trustees or persons administering a charitable trust, or persons claiming to administer the charitable trust, or persons otherwise interested in the charitable trust; and

either

- (i) complaining of a breach of the trust or supposed breach of the trust; or
- (ii) for the purposes of the better administration of the trust,

the Hong Kong court may provide such relief, make such order, or give such direction, as it thinks just. It is possible that such relief, order or direction given by the court might adversely affect the operation of the Security Interest Provisions.

SCHEDULE 6 HONG KONG PARTNERSHIPS

Subject to the provisions of this Schedule 6 (*Hong Kong Partnerships*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of Parties who or which are partners in a Hong Kong Partnership.

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) and references to "*sections*" are to sections of this Schedule.

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 6 (*Hong Kong Partnerships*):

1.1 "General Partner" means:

1.1.1 in respect of a General Partnership, a "partner" as defined in the Partnership Ordinance; and

1.1.2 in respect of a Limited Partnership, a "general partner" as defined in the Limited Partnerships Ordinance.

1.2 "General Partnership" means a "partnership" as defined in the Partnership Ordinance.

1.3 "Limited Partner" means a "limited partner" as defined in the Limited Partnerships Ordinance.

1.4 "Limited Partnership" means a "limited partnership" as defined in the Limited Partnerships Ordinance.

1.5 "Partner" means a General Partner or a Limited Partner.

1.6 "Partner Sole Insolvency Proceedings" means:

(a) in respect of a Partner that is a Company, the procedures listed in paragraph 3.1; and

(b) in respect of a Partner that is a Hong Kong Individual, the procedures listed in section 3.1 of Schedule 4 (*Hong Kong Individuals*).

1.9 "Partnership Insolvency Proceedings" means the procedures listed in section 3.1.

2. ASSUMPTIONS

The following additional assumptions shall apply:

- 2.1 Where a Party to the Agreement is expressed to be a Hong Kong Partnership, the contracting party to such Agreement is one or more General Partners of such Hong Kong Partnership, acting as agent on behalf of all the Partners of the Hong Kong Partnership.
- 2.2 Each Hong Kong Partnership that is a General Partnership is validly formed and existing in accordance with the Partnership Ordinance throughout the life of the Agreement.
- 2.3 Each Hong Kong Partnership that is a Limited Partnership is validly formed, registered and existing in accordance with the Limited Partnerships Ordinance throughout the life of the Agreement.
- 2.4 Each General Partner which enters into the Agreement on behalf of a Hong Kong Partnership:
 - 2.4.1 has the capacity, power and authority under all applicable laws to enter into the Agreement; and
 - 2.4.2 has taken all necessary steps to execute, deliver and perform the Agreement, such that it creates legal, valid and binding obligations of such Hong Kong Partnership.
- 2.5 Each Partner in a Hong Kong Partnership is a Company or a Hong Kong Individual.
- 2.6 A General Partner, by entering into the Agreement on behalf of a Hong Kong Partnership, is not in breach of any of his/her/its express or implied duties under the relevant partnership agreement, the Partnership Ordinance or the Limited Partnerships Ordinance (as applicable).
- 2.7 Each Limited Partner in a Limited Partnership does take part in the management of the business of such Limited Partnership.
- 2.8 The membership of each Hong Kong Partnership remains unchanged throughout the life of the Agreement.

3. **QUALIFICATIONS**

The following additional qualifications shall apply:

3.1 **Partnership Property**

- 3.1.1 Under the Partnership Ordinance, "partnership property" consists of all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, and which are applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

- 3.1.2 Although we are aware of academic opinion to the contrary, we believe the better view is that, unless the partnership agreement provides otherwise, each Partner has a beneficial interest in every partnership asset and collectively the Partners own every partnership asset, as a Hong Kong Partnership is not a separate entity capable of holding property. However, a Partner's interest in the partnership assets is not a title to specific property but a right to his/her/its proportion of the surplus after the realisation of assets and the payment of debts and liabilities of the Hong Kong Partnership.

3.2 Registration of Security

Partners that are Companies

- 3.2.1 There is some uncertainty whether Section 80 of the Companies Ordinance (the provisions of which are described in paragraph 4.1 (*Registration of Security*) above) applies to a charge over partnership property created by a Partner that is a Company.
- 3.2.2 Section 80 refers to "any security on the company's property" and, as mentioned, we believe the better view is that, unless the partnership agreement provides otherwise, each Partner has a beneficial interest in every partnership asset (although not to specific property).
- 3.2.3 However, it could be argued that Section 80 does not apply to a charge over partnership property created by a Partner that is a Company as the consequences of invalidity do not apply (because, if the Partner were to be wound up, the liquidator of the Partner would be entitled to only a proportion of any surplus after the debts and liabilities of the Hong Kong Partnership had been paid, and neither the liquidator nor any creditor of the Partner would obtain any benefit if the unregistered charge were invalidated).
- 3.2.4 We understand the current practice of the Hong Kong Registrar of Companies, though, is that, in most cases, he/she accepts for registration a charge over partnership property if a Partner in the relevant Partnership is a Company (although it is not clear whether the Registrar of Companies will record on the register that the Partner is acting on behalf of the Partnership, rather than in its personal capacity).

Partners who are Hong Kong Individuals

- 3.2.5 Section 7 of the Bills of Sale Ordinance provides that every bill of sale made or given by a Hong Kong Individual must be duly attested and registered or it will be void in respect of the chattels comprised therein. It is possible that the requirements under Section 7 of the Bills of Sale Ordinance apply to Partners who are Hong Kong Individuals. However, as mentioned in section 3.1 (*Registration of Security*) of Schedule 4 (*Hong Kong Individuals*), we have no reason to believe that, apart from exceptional circumstances, any such

personal chattels are to be taken as security under the Security Interest Provisions.

3.3 **Other qualifications**

- 3.3.1 Where a Partner is a Hong Kong Individual, the additional qualifications set out at section 3 of Schedule 4 (*Hong Kong Individuals*) shall apply as if set out herein.

SCHEDULE 7 MONETARY AUTHORITY

Subject to the provisions of this Schedule 7 (*Monetary Authority*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party who is the Monetary Authority.

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) and references to "*sections*" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 5 (*Hong Kong Trusts*):

"**Exchange Fund Ordinance**" means the Exchange Fund Ordinance, Chapter 66 of Hong Kong.

"**Financial Secretary**" means the Financial Secretary of Hong Kong.

"**Financial Secretary Incorporation Ordinance**" means the Financial Secretary Incorporation Ordinance, Chapter 1015 of Hong Kong.

"**Hong Kong Government**" means the Government of the Hong Kong Special Administrative Region of the People's Republic of China.

2. ASSUMPTIONS

The following additional assumptions shall apply:

2.1.1 The Monetary Authority is entering into the Agreement not in his or her personal capacity but in his or her capacity as either:

- (a) a delegate of the Financial Secretary; or
- (b) an officer of the Hong Kong Government in performance of his or her statutory functions.

2.1.2 If the Monetary Authority is entering into the Agreement as a delegate of the Financial Secretary, he or she is acting within the proper parameters of the powers that have been delegated to him or her by the Financial Secretary.

2.1.3 If the Monetary Authority is entering into the Agreement in performance of his or her statutory functions, he or she is acting within the proper parameters of such statutory functions.

3. QUALIFICATIONS

The following additional qualifications shall apply:

3.1 Parties to the Agreement

- 3.1.1 The Monetary Authority is an individual appointed by the Financial Secretary of the Hong Kong Government under the Exchange Fund Ordinance. The individual who has been appointed to be the Monetary Authority is a legal person. That individual is currently Norman T.L. Chan, GBS, JP.
- 3.1.2 Under the Financial Secretary Incorporation Ordinance, the person for the time being performing the duties of the Financial Secretary shall be a corporation sole and shall have the name of "the Financial Secretary Incorporated". Accordingly, "the Financial Secretary Incorporated" is a separate legal person from the individual who for the time being holds the position of Financial Secretary (currently John C Tsang, GMB, JP).
- 3.1.3 The Monetary Authority is the chief executive of an organisation commonly known as the "Hong Kong Monetary Authority". The Hong Kong Monetary Authority does not have legal personality under Hong Kong law.
- 3.1.4 In a letter from the then Financial Secretary addressed to the "Monetary Authority" entitled "*Functions and Responsibilities in Monetary and Financial Affairs*" dated 25 June 2003, the then Financial Secretary (in his capacity as the Financial Secretary Incorporated) delegated certain of his powers to the Monetary Authority. Accordingly, we are of the view that any contract entered into by (or on behalf) of the Monetary Authority within the proper parameters of such powers, is a contract entered into by the Financial Secretary Incorporated (rather than a contract entered into by the individual appointed to be the Monetary Authority or the Financial Secretary in his or her respective personal capacity).
- 3.1.5 In addition, the Monetary Authority is directly assigned certain functions by or pursuant to a number of statutory provisions, including provisions of the Banking Ordinance. Accordingly, we are of the view that any contract entered into by (or on behalf) of the Monetary Authority in the perform of such statutory functions, is a contract entered into by the Hong Kong Government (rather than a contract entered into by the individual appointed to be the Monetary Authority in his or her personal capacity).

3.2 Registration of Security

The Financial Secretary Incorporated and the Hong Kong Government are not Companies or individuals and accordingly neither the provisions of the Companies Ordinance for the registration of charges nor the provisions of the Bills of Sale Ordinance for the registration of bills of sale apply to them.

It follows that there is no basis on which any document creating a mortgage or charge or similar security created by the Financial Secretary Incorporated or the Hong Kong Government can be submitted to the Hong Kong Registrar of Companies or the Registrar of the High Court, and no statutory provision which will render such

mortgage, charge or other security void if it is not submitted to the Hong Kong Registrar of Companies or the Registrar of the High Court within a prescribed period of time.

3.3 Insolvency of the individual who is appointed for the time being as the Financial Secretary or the Monetary Authority

3.3.1 On the assumption that contracts entered into by (or on behalf) of the Monetary Authority are within the proper parameters of the powers that have been delegated to him or her or his or her statutory functions, such contracts would not have been entered into by the Monetary Authority in his or her personal capacity. Accordingly, any amounts owing in respect of powers and rights and obligations and liabilities under or in respect of such contracts would lie outside any bankruptcy proceeding in respect of the individual for the time being appointed as the Monetary Authority.

3.3.2 By virtue of Section 3 of the Financial Secretary Incorporation Ordinance, all property and rights transferred to the Financial Secretary Incorporated shall vest or remain vested in the corporation and shall not vest in any individual occupant in his or her personal capacity. Accordingly, we are of the view that any amounts owing in respect of powers and rights (and, by implication, any obligations and liabilities) under or in respect of contracts entered into by the Financial Secretary in the performance of his duties as such would lie outside any bankruptcy proceeding in respect of the individual for the time being appointed as the Financial Secretary.

3.4 Political risks

In theory, it is possible that the Hong Kong Government might repudiate its or the Financial Secretary Incorporated's obligations under the Agreement or pass legislation to invalidate them. However, any such action might be inconsistent with Article 105 of the Basic Law of the Hong Kong Special Administrative Region and it is possible that such action might be successfully challenged before a Hong Kong court.

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, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.

APPENDIX

1. On 1 July 1997, Hong Kong became the Hong Kong Special Administrative Region (the "HKSAR") of the People's Republic of China (the "PRC"). On 4 April 1990, the National People's Congress (the "NPC") of the PRC adopted the Basic Law of the HKSAR (the "Basic Law"). Under Article 8 of the Basic Law, the laws of Hong Kong in force at 30 June 1997, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the HKSAR. Under Article 160 of the Basic Law, the laws of Hong Kong in force at 30 June 1997 shall be adopted as laws of the HKSAR unless they are declared by the Standing Committee of the NPC (the "Standing Committee") to be in contravention of the Basic Law and, if any laws are later discovered to be in contravention of the Basic Law, they shall be amended or cease to have force in accordance with the procedure prescribed by the Basic Law.
2. On 23 February 1997, the Standing Committee adopted a decision (the "Decision") on the treatment of laws previously in force in Hong Kong. Under paragraph 1 of the Decision, the Standing Committee decided that "the laws previously in force in Hong Kong, which include, the common law, rules of equity, ordinances, subsidiary legislation and customary law, except for those which contravene the Basic Law, are to be adopted as the laws of the HKSAR". Under paragraph 2 of the Decision, the Standing Committee decided that the ordinances and subsidiary legislation set out in Annex 1 to the Decision "which are in contravention of the Basic Law" are not to be adopted as the laws of the HKSAR. One of the ordinances set out in that Annex is the Application of English Law Ordinance (Cap. 88) (the "English Law Ordinance"). The English Law Ordinance applied the common law and rules of equity of England to Hong Kong. We have assumed in giving the opinions in this opinion letter that the effect of paragraph 2 of the Decision, insofar as it relates to the English Law Ordinance, is to repeal the English Law Ordinance prospectively and that the common law and rules of equity of England which applied in Hong Kong on 30 June 1997 continue to apply, subject to their subsequent independent development which will rest primarily with the courts of the HKSAR which are empowered by the Basic Law to refer to precedents of other common law jurisdictions when adjudicating cases. In our view, the judgment of the Court of Appeal of the High Court in *HKSAR v Ma Wai Kwan David and Others* [1997] 2 HKC 315 supports the assumption that the common law and rules of equity of England which applied in Hong Kong on 30 June 1997 continue to apply to the HKSAR.