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NETTING ANALYSER LIBRARY: LEGAL OPINION ON THE VALIDITY AND ENFORCEABILITY UNDER THE LAWS OF SWITZERLAND OF THE SECURITY INTEREST PROVISIONS AND THE TITLE TRANSFER PROVISIONS UNDER THE FOA AGREEMENTS

DATED AS OF JANUARY 15, 2013

TABLE OF CONTENTS

I. Introduction

On behalf of the Futures and Options Association ("**FOA**"), Clifford Chance LLP has asked us to render a legal opinion as per the instruction letter dated September 24, 2012 (the "**Instruction Letter**") with respect to the validity and enforceability under the laws of Switzerland of the Security Interest Provisions and the Title Transfer Provisions contained in an agreement on the terms of the forms specified in Annex 1 hereto (each referred to in this legal opinion as the "**Agreement**") or contained in an Equivalent Agreement (as defined below). 1

This legal opinion is given in respect of the following parties (each, a "**Swiss Party**"): 2

(i) A corporation incorporated under the Swiss Code of Obligations ("**CO**")[1] and having its registered seat in Switzerland. For the purposes of this legal opinion, corporations include (a) joint stock corporations (*Aktiengesellschaft*) subject to Art. 620 et seq. CO, (b) companies with unlimited partners (*Kommanditaktiengesellschaft*) subject to Art. 764 et seq. CO, (c) limited liability companies (*Gesellschaft mit beschränkter Haftung*) subject to Art. 772 et seq. CO, and (d) cooperatives (*Genossenschaft*) subject to Art. 828 et seq. CO; 3

(ii) a partnership organized under the CO and having its registered seat in Switzerland. For the purposes of this legal opinion, partnerships include (a) general partnerships (*Kollektivgesellschaft*) subject to Art. 552 et seq. CO, and (b) limited partnerships (*Kommanditgesellschaft*) subject to Art. 594 CO; 4

(iii) an individual to the extent such individual is subject to bankruptcy or composition proceedings under the Swiss Federal Act on Debt Enforcement and Bankruptcy ("**SDEBA**")[2]. For the purposes of this legal opinion, an individual is (a) a person operating a trading, manufacturing or other type of commercial business (*Inhaber einer Einzelfirma*) subject to Art. 934 et seq. CO, (b) a partner of a general partnership (*Kollektivgesellschaft*) subject to Art. 552 et seq. CO, (c) a general partner with unlimited liability of a limited partnership (*Kommanditgesellschaft*) subject to Art. 594 CO, and (d) a director of a company with unlimited partners (*Kommanditaktiengesellschaft*); 5

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1 Schweizerisches Obligationenrecht (OR), SR 220.

2 Bundesgesetz über die Schuldbetreibung und Konkurs (SchKG), SR 281.1.

(iv) a banking institution licensed under the Swiss Federal Act on Banks and Savings Banks ("**Banking Act**")[3], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Bank**"); 6

(v) a securities dealer licensed under the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**")[4], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Securities Dealer**"); 7

(vi) an insurance company licensed under the Swiss Federal Act on the Supervision of Insurance Companies ("**SIL**")[5], organized in the form of a joint stock corporation (*Aktiengesellschaft*) or a cooperative (*Genossenschaft*) and having its registered seat in Switzerland (an "**Insurance Company**"); 8

(vii) a collective investment vehicle licensed under the Swiss Federal Act on Collective Investment Schemes ("**CISA**")[6], organized under Swiss law as (a) a contractual fund (*Vertraglicher Anlagefonds*) subject to Art. 25 et seq. CISA ("**Contractual Fund**"), (b) an investment company with variable capital (*Investmentgesellschaft mit variablem Kapital, SICAV*) subject to Art. 36 et seq. CISA ("**SICAV**"), (c) a limited partnership for collective capital investments (*Kommanditgesellschaft für kollektive Kapitalanlagen*) subject to Art. 98 et seq. CISA, or (d) as an investment company with fixed capital (*Investmentgesellschaft mit festem Kapital, SICAF*) subject to Art. 110 et seq. CISA, in each case having its registered seat or being organized in Switzerland (a "**Collective Investment Scheme**"), 9

(each of the entities under n. 6 through 9 above, a "**Special Insolvency Regime Entity**"); 10

(viii) a pension fund registered pursuant to the Swiss Federal Act on Occupational Benefit Plans ("**OBPA**")[7] as a foundation (*Stiftung*) subject to Art. 80 et seq. of the Swiss Civil Code (*Schweizerisches Zivilgesetzbuch (ZGB), SR 210*) ("**CC**") or as a cooperative (*Genossenschaft*) subject to Art. 828 et seq. CO, in each case having its registered seat in Switzerland (a "**Pension Fund**"); 11

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3 Bundesgesetz über Banken und Sparkassen (BankG), SR 952.0.

4 Bundesgesetz über die Börsen und den Effektenhandel (BEHG), SR 954.1.

5 Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (VAG), SR 961.01. The analysis and the conclusions contained in this legal opinion do not necessarily apply to other types of insurance companies and in particular not to insurance companies established under Swiss federal or cantonal public law.

6 Bundesgesetz über die kollektiven Kapitalanlagen (KAG), SR 951.31.

7 Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVG), SR 831.40.

(ix) a Swiss branch (*Zweigniederlassung*) of a foreign corporation established in Switzerland (a "**Swiss Branch**"); or 12

(x) a Swiss branch of a foreign bank, a foreign securities dealer or a foreign insurance company (an "**Insurance Branch**") established and duly licensed in Switzerland under the Banking Act or, as the case may be, the SESTA (a "**Special Insolvency Regime Branch**"). 13

Excluded from the scope of this legal opinion are certain other Swiss parties, in particular: 14

(i) Cantonal banks within the meaning of Art. 3a of the Banking Act, organized under private or public law; 15

(ii) trusts (except Pension Funds)[8]; and 16

(iii) entities subject to public law, including, but not limited to, the Swiss confederation, cantons, municipalities, any subdivisions thereof, public utility companies and similar institutions. 17

II. Definitions

For the purposes of this legal opinion, unless otherwise specified, whereby Annex 1 contains further definitions of terms relating to the Agreement: 18

(i) Capitalized terms used and not otherwise defined herein shall the meanings ascribed to them in the Agreement; 19

(ii) "**Collateral**" means margin in the form of cash and Securities which are subject to the Security Interest Provisions, with or without the Rehypothecation Clause and/or the Title Transfer Provisions; 20

(iii) "**Collateral Provider**" means the Swiss Party which provides Collateral under the Security Interest Provisions, the Rehypothecation Clause and/or the Title Transfer 21

[8] Switzerland has ratified the Hague Convention on the Law applicable to Trusts and on their Recognition (entering into effect as of July 1, 2007, together with certain amendments of the Swiss Federal Act on Private International Law ("**PILA**") and the SDEBA).

Provisions in relation to which the "**Collateral Taker**" means the other Party to such Agreement;

(iv) "**Core Provisions**" means the Security Interest Provisions, the Rehypothecation Clause and the Title Transfer Provisions, in each case as applicable, together with any defined terms required properly to construe such provisions; 22

(v) "**Equivalent Agreement**" means an agreement: 23

a) which is governed by the law of England and Wales; 24

b) which has the same function to any of the Professional Client Agreements, Retail Client Agreements or Eligible Counterparty Agreements; 25

c) which contains the Core Provisions (with no amendments except Non-material Amendments as per Annex 3 hereto); and 26

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. 27

References to the "**Agreement**" in this legal opinion (other than specific cross references to clauses in such Agreement) shall be deemed to also apply to an Equivalent Agreement; 28

(vi) "**Insolvency**" and "**Insolvency Proceedings**" shall be a reference to a Swiss law bankruptcy (*Konkurs*) and the adjudication thereof (*Konkurseröffnung*) under the SDEBA or the grant of a moratorium (*Nachlassstundung*) with the view of entering into a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) or the special liquidation proceedings in respect of Special Insolvency Regime Entities, Branches and Special Insolvency Regime Branches (all as discussed in further detail under n 148 et seq. below) and the term "**Insolvent**" shall be understood accordingly; 29

(vii) "**Intermediated Securities**" refers to certificated or uncertificated securities held with an intermediary and qualifying as intermediated securities for purposes of the Hague Convention on the Law Applicable to Certain Rights in respect of Securities 30

held with an Intermediary ("**Hague Convention**") and Art. 108 (a)-(d) Swiss Federal Act on Private International Law ("**PILA**")[9] (as discussed under n. 271-283 below);

(viii) "**Party**" means a party to the Agreement; 31

(ix) "**Provisions**" means the Security Interest Provisions, the Rehypothecation Clause and the Title Transfer Provisions; 32

(x) "**Rehypothecation Clause**" means: 33

a) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***); 34

b) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***); 35

c) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); and 36

d) in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 34 to 36 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; 37

(xi) "**Securities**" has the meaning and is subject to the assumptions set forth under (see n. 127-130 below); 38

(xii) "**Security Interest**" refers to the English law security interest provided for under the Security Interest Clause; 39

(xiii) "**Security Interest Provisions**" means: 40

a) the "**Security Interest Clause**", being: 41

a. in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (***Security interest***); 42

[9] Bundesgesetz über das Internationale Privatrecht (IPRG), SR 291.

b. in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (***Security interest***); 43

c. in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (***Security interest***); 44

d. in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (***Security interest***); 45

e. in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (***Security interest***); 46

f. in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (***Security interest***); 47

g. in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (***Security interest***); 48

h. in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (***Security interest***); 49

i. in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (***Security interest***); and 50

j. in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 42 to 50 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; 51

b) the "**Power to Charge Clause**", being: 52

a. in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (***Power to charge***); 53

b. in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (***Power to charge***); 54

c. in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (***Power to charge***); 55

d. in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (***Power to charge***); 56

e. in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (***Power to charge***); 57

f. in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (***Power to charge***); 58

g. in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (***Power to charge***); 59

h. in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (***Power to charge***); 60

i. in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (***Power to charge***); and 61

j. in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 53 to 61 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; 62

c) the "**Power of Sale Clause**", being: 63

a. in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***); 64

b. in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***); 65

c. in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***); 66

d. in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***); 67

e. in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***); 68

f. in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***); 69

g. in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***); 70

h. in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***); 71

i. in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***); and 72

j. in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 64 to 72 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; 73

d) the "**Power of Appropriation Clause**", being: 74

a. in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (***Power of appropriation***); 75

b. in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (***Power of appropriation***); 76

c. in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (***Power of appropriation***); 77

d. in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (***Power of appropriation***); 78

e. in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (***Power of appropriation***); 79

f. in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (***Power of appropriation***); 80

g. in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (***Power of appropriation***); 81

h. in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (***Power of appropriation***); 82

i. in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (***Power of appropriation***); and 83

j. in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 75 to 83 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; 84

e) the "**Lien Clause**", being: 85

a. in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (***General lien***); 86

b. in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (***General lien***); 87

c. in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (***General lien***); 88

d. in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (***General lien***); 89

e. in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (***General lien***); 90

f. in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (***General lien***); 91

g. in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (***General lien***); 92

h. in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (***General lien***); 93

i. in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (***General lien***); and 94

j. in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 86 to 94 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; and 95

f) the "**Client Money Additional Security Clause**", being: 96

a. 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); 97

b. 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); 98

c. 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); 99

d. 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); 100

e. 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); 101

f. 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); 102

g. 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); 103

h. 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); 104

i. 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 105

j. in relation to an Equivalent Agreement, such clause that is identical to a Clause or sub-Clauses (taken as a whole) referred to in any of one the foregoing paragraphs 97 to 105 of this definition (except for any cross-referencing) and is thereby constitutive of such agreement qualifying as Equivalent Agreement; 106

(xiv) "**Title Transfer Provisions**" means in the case of Agreements (with Title Transfer Provisions), clauses that are identically the same in form and language as clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (except in so far as variations may be required for internal cross-referencing purposes); and 107

(xv) "**Transactions**" means the types of transactions listed in Annex 2 to this legal opinion and "**Transaction**" means any of them. 108

III. Assumptions and Limitations

For the purposes of this legal opinion, we have made the following assumptions: 109

110

(i) The Agreement is entered into by and between two legal entities (including any individual as referred to under n. 5), at least one of which is a Swiss Party, each having determined that it expects to enter into certain derivative transactions with the other Party over a period of time.

(ii) The Parties will either (a) enter into the Agreement (not being an Equivalent Agreement) without amending the printed terms thereof other than by making the elections specifically provided for in the Agreement including the Two Way Clauses for the equivalent terms of such printed terms or substituting the Title Transfer Provisions for Module G of such printed terms or (b) enter into an Equivalent Agreement. 111

(iii) On the basis of the terms and conditions of the Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Agreement, the Parties over time may enter into a number of Transactions that are intended to be governed by the Agreement. 112

(iv) Each Party when entering into the Agreement and each Transaction, has the legal capacity and power to do so and has received all consents, approvals, permits and resolutions (corporate and otherwise) necessary in order to duly authorize the entering into, execution and delivery of, and performance under the Agreement. 113

(v) Each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licenses and consents required under all laws of any applicable jurisdictions (including Switzerland) to enable it to lawfully enter into and perform its obligations under the Agreement and each Transaction and to ensure the legality, validity and admissibility in evidence or enforceability thereof. 114

(vi) The entering into the Agreement and each Transaction, and the execution and delivery of, and performance thereunder, does not violate any Party's constitutive documents. 115

(vii) Each Party is duly incorporated or, as the case may be, has been duly organized under the laws of its jurisdiction or the jurisdiction of its place of business, and each Party (i) when entering into the Agreement initially and (ii) solely with respect to the opinions as they relate to a particular Transaction or the providing of Collateral, as of the date of the conclusion of such Transaction or providing of such Collateral, is neither insolvent (*zahlungsunfähig*) nor overindebted (*überschuldet*) (i.e., in terms of the balance sheet, the liabilities (exclusive of equity) are higher 116

than its assets) within the meaning of Swiss law or any other law applicable to such Party.

(viii) The Agreement constitutes legal, valid and binding obligations enforceable against each Party under all applicable laws (other than Swiss law), and in particular the laws of England and Wales as the law chosen to govern the Agreement. 117

(ix) The Transactions, under their governing laws, are capable of being terminated and liquidated in accordance with the Provisions. 118

(x) No provision of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidates the effectiveness of the Provisions under applicable law. 119

(xi) There is no other agreement, instrument or other arrangement between the Parties which modifies or supersedes the Agreement in such a way as to affect the operation of the Provisions. 120

(xii) Compliance by all relevant parties with the terms of the Agreement and that the Agreement has been negotiated and concluded in good faith by the parties thereto and at arm's length terms. 121

(xiii) The Agreement accurately reflects the true intentions of each Party. 122

(xiv) Each Party when providing and/or transferring Collateral, will have full legal title to such Collateral at the time of providing and/or transfer such Collateral, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all Securities in a relevant clearance or settlement system). 123

(xv) The Collateral transferred pursuant to the Title Transfer Provisions is freely transferable and all acts or things required by the laws applicable to be done to ensure the validity of each transfer of Collateral pursuant to the Title Transfer Provisions will have been effectively carried out. 124

(xvi) Any Collateral which is to be made subject to the Security Interest can be pledged or assigned without consent or other act of any person (other than any consent or act specifically required under the Security Interest Provisions) and is freely transferable and can be subjected to such Security Interest and all acts or things 125

required by the laws applicable to be done to ensure the validity and effectiveness of such Security Interest pursuant to the Security Interest Provisions will have been effectively carried out.

(xvii) Cash is in the form of cash credited to an account (as opposed to physical notes or coins) and in a currency that is freely convertible under all applicable laws. 126

(xviii) Non-cash collateral is held in the form of fungible securities ("**Securities**"), whereby: 127

- the Securities qualify as *securities*, i.e. financial instruments capable of being credited to a securities account with an intermediary within the meaning of Art. 1 (a) of the Hague Convention; 128

- the Securities are indirectly held through an intermediary and booked into a securities account outside of Switzerland within the meaning of Art. 1 (b) of the Hague Convention ("**Securities Account**") with an intermediary that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity under Art. 1 (c) of the Hague Convention ("**Qualifying Intermediary**"); and 129

- in the context of the Security Interest Provisions and the Title Transfer Provisions such Securities are securities held in a Securities Account held with a Qualifying Intermediary. 130

(xix) Without derogation to the specific limitations and qualifications set forth herein, this legal opinion is subject to the following general limitations: 131

(a) This legal opinion is limited to Swiss law as in force and interpreted at the date hereof. 132

(b) This legal opinion is given in respect of the Provisions when the Agreement is expressed to be governed by the laws of England and Wales. 133

(c) The meaning and sense of certain concepts of Swiss law and expressions which are used herein and on which this legal opinion is based do not 134

necessarily equal the meaning and sense of concepts and expressions in the reader's jurisdiction. It is assumed by us that all words and expressions in the Agreement are to be understood in accordance with their plain meaning and without regard of any import they may have under any other applicable laws and in particular the laws of England and Wales.

(d) This legal opinion is limited to matters of law and does neither address any factual circumstances or statements of the Parties to the Agreement, whether contained in representations or warranties of the Parties thereunder or otherwise, nor any tax matters, including without limitation any tax, regulatory or accounting consequences of the entering into, execution and delivery of, and performance under the Agreement. 135

(e) This legal opinion assumes that no law other than Swiss law would affect or qualify the opinions expressed herein. 136

IV. Executive Summary

This executive summary highlights those issues identified in this legal opinion which we, in our discretion, consider to be material in the context of the Agreement. It does not purport to be exhaustive and reading this executive summary is not a substitute for reading this legal opinion in its entirety. The executive summary is in all respects subject to the in-depth discussion and the limitations as set out in this legal opinion. 137

A. Security Interest Provisions

Based on and subject to the assumptions, qualifications and discussions contained in this legal opinion (see, in particular, n. 284 through 303), the non-defaulting Party as Collateral Taker would be entitled to enforce the Security Interest in respect of the Collateral following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings. 138

Except in respect of a Bank or a Securities Dealer (see n. 196) and/or where the Security Interest is qualified as a regular pledge (see n. 284 and n. 158), there is no rule under Swiss 139

law which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the non-defaulting Party as Collateral Taker to enforce the Security Interest in respect of the Collateral.

Based and subject to the discussions herein with respect to the realization of collateral (see n. 157 through 160) and with respect to the enforcement of the Security Interest (see n. 297 through 303), the firm's (as Collateral Taker's) rights in respect of the proceeds of realisation of the Collateral would rank ahead of the interests of the Swiss counterparty as Collateral Provider and any other person in such Collateral following the respective exercise of the firm's (as Collateral Taker's) rights under the Security Interest Provisions. 140

Except where the Collateral would be qualified as regular pledge and would be part of the bankruptcy estate of the Insolvent (not being a Bank or a Securities Dealer, see n. 300) as Collateral Provider (see n. 158 and 300), no further acts, conditions or things would be required under Swiss law to be done, fulfilled or performed in order to enable the non-defaulting Party as Collateral Taker to enforce the Security Interest in respect of the Collateral. 141

B. Title Transfer Provisions

Based on and subject to the assumptions, qualifications and discussions contained in this legal opinion (see, in particular, n. 304 trough 320): 142

(i) The Collateral Taker would be entitled to enforce the security interest in respect of the Collateral following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings; 143

(ii) there are no further acts required under Swiss law in order to enable the Collateral Taker to enforce the security interest in respect of the Collateral; 144

(iii) the right of a Party to use or invest for its own benefit, without restriction except for the obligation to return Equivalent Margin, any Transferred Margin transferred to it pursuant to the Title Transfer Provisions is legal, valid, binding and enforceable against a Swiss counterparty; and 145

(iv) following the specification or deemed occurrence of a Liquidation Date, the non-defaulting Party would be immediately (and without fulfilment of any further conditions) entitled to exercise its rights under the Title Transfer Provisions, so that 146

where the firm is the non-defaulting Party, the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be treated as a gain for the purposes of calculating the Liquidation Amount pursuant to the Agreement.

V. Legal Framework

147 The following summary description of debt enforcement and insolvency proceedings under the laws of Switzerland (see n. 148 through 259 below), collateralization under Swiss substantive law (see n. 260 through 267 below), and conflict of laws issues (see n. 268 through 283 below) does not purport to provide a comprehensive summary of the respective fields of law, but rather to facilitate the understanding of the answers that follow under Sections VI. and VII. of this legal opinion.

1. Description of Insolvency Proceedings

a) Insolvency

148 Enforcement of contractual obligations is generally subject to limitations in case of insolvency procedures being instituted against a Swiss Party under applicable Swiss law. In a nutshell, the various insolvency procedures against a Swiss Party and their main impact on the Swiss Party's faculty to abide by its obligations under the Agreement can be summarized as follows[10]:

b) Bankruptcy

Proceedings

149 The enforcement of claims and the questions relating to insolvency and bankruptcy are in general dealt with by the SDEBA. Special rules are applicable to Special Insolvency Regime Entities and Special Insolvency Regime Branches (see the discussion under n. 192 et seq. below). Swiss Branches are also subject to the SDEBA, but on the liability side only with respect to debts and obligations incurred and entered into by the Swiss Branch

[10] The rules applicable to Special Insolvency Regime Entities and Special Insolvency Regime Branches are summarized under n. 192 et seq. below and the rules applicable to Swiss Branches are summarized under n. 253 et seq. below.

and on the assets side only with respect to assets located in Switzerland or to which Swiss authorities have access (see the discussion under n. 253 et seq. below).

The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against Swiss Parties (other than Special Insolvency Regime Entities and Special Insolvency Regime Branches) have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs*) and, hence, a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special enforcement proceeding limited to the liquidation of the relevant collateral (*Betreibung auf Pfandverwertung*). However, if bankruptcy is declared while such a proceeding is pending, the proceeding is ceased and the creditor participates with the other creditors in the bankruptcy proceedings. 150

A bankruptcy is declared by the court either on the initiative of a creditor or on the debtor's request. It is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of declaration of bankruptcy, and all assets acquired or received subsequently, form together the bankruptcy estate, which after deduction of costs and certain other expenses, is to satisfy proportionally the creditors. The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the receiver in bankruptcy. 151

As a rule, the declaration of bankruptcy by the competent court needs to be preceded by a prior debt enforcement proceeding. Any creditor or purported creditor may apply for the commencement of debt enforcement proceedings against a debtor. Upon a creditor's request, in which the creditor need not evidence its claim, the competent debt enforcement authority will issue a payment summons. The debtor may object to the payment summons by simple declaration. If the debtor does so object, the creditor needs to lift such objection by a court procedure. If the creditor has a written debt acknowledgement of the debtor, it can start a special summary procedure. Otherwise, full fledged litigation on the merits may need to be commenced. If the creditor prevails in the special summary procedure, but the debtor still wants to contest the claim, it is up to the debtor to commence full fledged litigation on the merits. If the creditor prevails, the payment summons comes into effect and the creditor may request the continuation of enforcement proceedings and the competent debt enforcement authority would then notify the debtor that bankruptcy proceedings will be opened by the court upon a respective request of the creditor unless payment of the debt will be performed within 20 days. After the lapse of such deadline without payment of the debtor, the creditor may request that the competent court open bankruptcy proceedings. 152

The competent court may declare a debtor bankrupt without prior debt enforcement proceedings under the following circumstances: at the request of the debtor if (i) the debtor's board of directors declares that the debtor is overindebted (*überschuldet*) within the meaning of Art. 725 para. 2 CO or (ii) if the debtor declares to be insolvent (*zahlungsunfähig*), and at the request of a creditor if (i) the debtor commits certain acts to the detriment of its creditors or (ii) ceases to make payments (*Zahlungseinstellung*) or if certain events happen during composition proceedings. 153

The bankrupt party loses its capacity to dispose of its assets and any mandate or power of attorney by the bankrupt party is automatically deemed revoked with the declaration of bankruptcy. 154

A set-off in a bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where the debtor of the bankrupt party willing to set-off a claim has become the creditor of the bankrupt entity prior to the declaration of bankruptcy and even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors. These provisions are further supplemented by the general avoidance actions provided for in the SDEBA (see n. 171 et seq. below). 155

For the final distribution there is a ranking of creditors in three classes. The first and the second class, which are privileged, comprise claims under e.g. employment contracts, accident insurance, pension plans and family law. Certain privileges can further result for the government and its subdivisions based on specific provisions of federal law. All other creditors are treated equally in the third class. 156

Realization of Collateral

The important distinction between the effects of a regular pledge and an irregular pledge is discussed in more detail below (see n. 263 and n. 264 through 266 below). 157

Assets over which a Swiss Party has created a regular pledge remain its property and would in case of its bankruptcy be part of its bankruptcy estate. As a rule, a secured party is under an obligation to remit the pledged assets to the bankruptcy estate. The assets are liquidated by the receiver in bankruptcy in the same manner as the other assets of the bankruptcy 158

estate, but the secured party retains its privilege to be satisfied from the proceeds of the liquidation of the assets pledged to it with priority over the unsecured creditors.

Assets to which ownership has been transferred to the secured party under an irregular pledge (see n. 264 et seq. below) or on a fiduciary basis (see n. 267 et seq. below) would not form part of the bankruptcy estate of a Swiss Party and the sale of such assets would not be effected through the receiver in bankruptcy. The secured party would realize the collateral outside official realization proceedings through private sale (*Privatverwertung*) but needs to account for the sales proceeds and remit any excess sales proceeds to the receiver in bankruptcy (*Abrechnungspflicht*). 159

Where the bankrupt Swiss Party is a Bank or a Securities Dealer (see n. 192 through 208 below), and where the parties have agreed on a private sale in the context of a regular pledge, such right to a private sale may pursuant to Art. 27 para. 3 Banking Act and Art. 18 of the new Ordinance of the Swiss Financial Market Supervisory Authority on the Insolvency of Banks and Securities Dealers ("**IO-FINMA**")[11] still be exercised by the secured party, where the collateral consists of securities for which a representative market (*repräsentativer Markt*) exists. The secured party has to inform the receiver in bankruptcy that it holds collateral, though, and must evidence its right to a private sale, which typically will be done by providing a copy of the respective security undertaking providing for such right. 160

c) Reorganization

The SDEBA also provides for reorganization procedures by composition with the debtor's creditors. Reorganization is initiated by a request with the competent court for a stay (*Nachlassstundung*) pending negotiation of the composition agreement with the creditors and confirmation of such agreement by the competent court. A distinction is made between a composition agreement providing for the assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) which leads to a private liquidation and in many instances has effects analogous to a bankruptcy, and a dividend composition (*Dividenden-Vergleich*) providing for the payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further, there is the possibility of a composition in the form of a mere payment term extension (*Stundungsvergleich*). 161

The grant of a moratorium has, *inter alia*, the following effects: 162

[11] Verordnung der Eidgenössischen Finanzmarktaufsicht über die Insolvenz von Banken und Effektenhändlern (BIV-FINMA), SR 952.05.

(i) *Stay of Debt Collection Proceedings*: No debt collection proceedings can be initiated for the duration of the moratorium and pending proceedings are stayed. Procedural steps taken before the moratorium, however, remain in effect until a decision is taken on a composition agreement, except for: (i) collection proceedings for claims of employees arisen in the course of the last six months and certain claims based on social security laws and family law (so-called first class claims); (ii) collection proceedings for debt secured by real property; and (iii) collection proceedings for new debt arising out of the permitted continuation of the debtor's business. Further permitted are sequestration and other measures of securing assets for creditors. The moratorium does not preclude initiating lawsuits and continuing pending litigations. 163

(ii) During the moratorium, the debtor's power to dispose of its assets and to manage its affairs is restricted. While the debtor may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as any instructions of the administrator are observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law to: (i) dispose of or pledge any fixed assets (such as holdings in other companies or real property); (ii) create new security interests; (iii) issue guarantees, and (iv) enter into transactions which are not at arm's length. Such acts performed without court approval are invalid. If the debtor has entered into such a transaction, the counterparty is not entitled to any dividend or liquidation proceeds resulting for the creditors. The third party's claims for rescission of the contract must be recorded, and will be treated just like any other creditors' claims, thus receive a dividend or a share in the liquidation proceeds only. 164

In case of a regular pledge (see n. 263 below), the secured party is, furthermore, not entitled to proceed with a private liquidation until the confirmation of the settlement by the competent court. The private liquidation may also be stayed for a further period. In case of an irregular pledge (see n. 264 through 266 below), however, the sale of the pledged assets may take place without delay. A secured creditor participates in the settlement only for the amount of its claim not covered by the collateral. 165

(iii) *Interest*: Unsecured debts become non-interest bearing as of the date the moratorium is granted. If the moratorium is withdrawn at a later time, the interest period will be deemed to have run during the moratorium. 166

(iv) *Due Dates*: The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). Should the moratorium proceedings end in a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) for the benefit of creditors, then all debt will fall due to allow a general liquidation. 167

(v) *Set-off*: Set-off is allowed, subject to the same limitations as in a bankruptcy (see n. 155 above), whereby the date of the publication of the grant of the moratorium is relevant for determining which claims qualify for set-off. 168

The moratorium aims at facilitating the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the court. With the judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent that the collateral proves to be insufficient to cover the secured claims. 169

d) Emergency moratorium

The SDEBA further confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's request if the debtor's inability to pay its debts is temporary and due to extraordinary circumstances of general implication (e.g. a general economic crisis). The competent authority can order that the grant of a security interest during such stay be subject to its prior approval. This so-called emergency moratorium (*Notstundung*) is an exceptional remedy, which has been applied rarely only in the past. 170

2. Avoidance of Transactions

The receiver in bankruptcy and certain creditors may, by means of an appropriate lawsuit (*actio pauliana*), challenge certain arrangements or dispositions made by the insolvent during a period (suspect period) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögens-abtretung*), the grant of the moratorium. This possible challenge relates to (i) gifts and other gratuitous transactions (*Schenkungspauliana*), (ii) certain acts of a debtor, undertaken at such time as the debtor was overindebted (*Überschuldungspauliana*), and (iii) dispositions made by the debtor with the intent to disadvantage its creditors or to prefer 171

certain of its creditors to the detriment of other creditors (*Absichtspauliana*) (all as discussed below).

a) Avoidance of Gifts and Gratuitous Transactions

Under Art. 286 SDEBA gifts and other gratuitous transactions (and other transactions which are not relevant here) which the debtor has made within a suspect period of 12 months prior to the declaration of bankruptcy or the grant of a moratorium may be challenged. Transactions where the obligations of the parties are disproportionate and to the detriment of the bankrupt debtor are to the extent of the disproportion and for the purposes of Art. 286 SDEBA also treated as gratuitous transactions. 172

Any such gratuitous transaction can be challenged based on the objective elements of (i) the gratuitous nature of such transaction and (ii) established damages resulting therefrom for other creditors of the debtor. 173

b) Avoidance due to Over-Indebtedness

Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the debtor being declared bankrupt or the grant of a moratorium, where the debtor, as an additional objective prerequisite, was already overindebted (*überschuldet*) at the time the relevant act was undertaken by the debtor. The term overindebted refers to the fact that the debtor's assets do not cover its liabilities. The existence of such over-indebtedness at the time of the relevant transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof. 174

The targeted acts are specifically acts that prefer one creditor over the others in the light of such over-indebtedness. Such acts include (i) the posting of collateral for an existing unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means, and (iii) the settlement of claims prior to their stated maturity. 175

Art. 287 has been amended in connection with the entry into force of the Swiss Federal Act on Book-Entry Securities ("**BESA**")[12] by a new para. 3 specifying that no challenge is permissible in case that the collateral consists of securities, Book-entry Securities or other financial instruments traded on a representative market (*repräsentativer Markt*) and if the collateral provider had agreed earlier to provide additional collateral in case of a 176

[12] Bundesgesetz über Bucheffekten (BEG), SR 957.1.

diminution of the collateral value or an increase of the obligation to be secured or had reserved the right to substitute other collateral.

These acts must result in damages to the creditors. Such damages are presumed in the context of avoidance where the creditors have suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges an act. It is then up to the defendant to prove that the challenged act did not lead to such damages. 177

There is a subjective element also, in that the debtor's counterparty to the challenged transaction or act may avoid a challenge of the transaction or act if it can prove that it did not and, being diligent, could not know about the debtor's over-indebtedness. While, as mentioned above, the over-indebtedness as such needs to be proven by the challenging party, once established, the counterparty to the transaction or act is, subject to the proof of the contrary, presumed to have been aware thereof. This proof will certainly fail if the over-indebtedness was reflected in financial statements made available to such counterparty. It would in our view also fail, if the counterparty did not specifically ask for financial statements despite that due diligence warranted to ask for financial statements in the light of the nature and the magnitude of the transaction contemplated, and if the financial statements would indeed have revealed the over-indebtedness. 178

c) Avoidance for Intent

Art. 288 SDEBA subjects any act of a debtor within the suspect period of 5 years prior to its being declared bankrupt or being granted a moratorium to challenge to the extent that such act was made with the bankrupt debtor's intent to prefer certain creditors over others or to disadvantage certain of its creditors and if this intention was, or exercising the requisite diligence, must have been known to the counterparty. 179

As for the other avoidance actions, in terms of objective prerequisites, the act of the debtor must have led to damages to creditors. While the SDEBA does not specifically mention this prerequisite, it nevertheless follows from the nature and aim of an avoidance action.[13] Pursuant to Swiss jurisprudence, such damages are presumed in the context of the avoidance for intent, where the challenging creditor has suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges an act. It is then up to the defendant to prove that the challenged act did not in the case at hand lead to such damages.[14] The term "act" must be read in a very broad sense. It is not 180

[13] BGE 101 III 94; 99 III 26 et seq.
[14] BGE 99 III 27.

limited to the conclusion of contracts, but includes any act of the debtor, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA.

In terms of subjective elements, avoidance for intent calls for intent to prefer or to disadvantage creditors on the debtor's side and such intent must have been recognizable to the counterparty of the relevant act. 181

The intent on the debtor's side is presumed where the debtor could and must have recognized that the challenged act would prefer or disadvantage creditors.[15] It is sufficient, though, that the debtor, while not directly aiming at such preference or disadvantage by its act, merely accepts such preference or disadvantage as a possible consequence of the act. 182

Jurisprudence holds that such intent is recognizable to a counterparty if it, using the requisite diligence, should have foreseen a disadvantage to the other creditors as the consequence of the act of the debtor. If there are signs of a potential disadvantage to other creditors, then the counterparty has to interrogate the debtor and make the necessary further inquiries. 183

As far as banks are concerned, doctrine holds, that the suspicion of a bank that a debtor when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the debtor's intent. Furthermore, pursuant to such scholarly opinions, the intent is deemed recognizable not only if a bank knows about the distressed financial situation of the debtor, but also if there are indications of a distressed financial situation. 184

While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements. 185

It is to be noted that (as is the case for Art. 286 SDEBA, but contrary to Art. 287 SDEBA) an actual over-indebtedness at the very moment when the act is undertaken, does not generally constitute a prerequisite for a challenge of the relevant act. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only very generically 186

[15] Swiss Federal Supreme Court 5C.29/2000, September 19, 2000, E.3.a).

addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios:

Under the first scenario, there is no sufficient indication of financial difficulties when the debtor acts. In such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to certain creditors if and when the debtor should be declared bankrupt or granted a moratorium (e.g. posting of collateral only concurrently or immediately preceding the declaration of bankruptcy, so that in fact the intention is that the counterparty should only be granted a preferential right over an asset if and when the debtor is declared bankrupt, but with no intent to treat the counterparty as a secured party other than in bankruptcy or an artificial creation of an overstated claim upon such declaration of bankruptcy in order to achieve a higher basis for a bankruptcy dividend or the like). 187

In the second scenario, though, where the debtor is in financial difficulties, the scope of acts that can be challenged becomes significantly broader and on the verge of a bankruptcy eventually would also include the payment of a matured claim, if the counterparty must have recognized that the debtor would have had to file for bankruptcy and by making such payment outside the bankruptcy (which ensures proportional satisfaction of claims of the same class) prefers such counterparty over other creditors who will end up with a dividend that will not cover their full claims and who thereby are not getting the same *pro rata* share as the counterparty. 188

3. Jurisdiction / Arbitration Clauses and Insolvency Actions

Note that, under Swiss law, jurisdiction clauses have no effect on SDEBA actions, i.e. actions relating to bankruptcy rather than to contractual law issues. These actions must be brought before the court at the place of the Insolvency Proceeding. Accordingly, the jurisdiction clauses provided for in the Agreement in favor of the courts of England would not be effective with respect to such SDEBA actions. The same holding true for arbitration clauses, the arbitration clauses provided for in the Agreement in favor of the Arbitration Rules of the London Court of International Arbitration (LCIA) and the arbitration seat being in London, England, would not be effective with respect to such SEDBA actions. 189

With respect to avoidance actions (see n. 171 et seq. above), it seems noteworthy in this context that, contrary to earlier precedents, recent precedents hold that the forum provided for in Art. 289 SDEBA (place of defendant) can be disposed of, but only after the adjudication of Insolvency by an agreement entered into by the non-defaulting party with either the administrator or the creditors. 190

4. Seizure and Attachments of Assets

Assets located in Switzerland (either physically or, in case of claims, if the debtor of the claim is located in Switzerland) can be seized or attached as a provisional measure by a third party notwithstanding the fact that such assets are subject to a regular pledge (see n. 263 below). This, however, does not hold true for an irregular pledge (see n. 264 set seq. below) or an outright transfer or assignment (see n. 267 et seq. below). In case of seizure or attachment, the secured party loses its right to private liquidation, unless it is obvious that such assets do not cover the claims of the secured party in full, and hence, no excess value would be available to such third party. In case of liquidation by the competent authority the secured party retains its right to be satisfied from the proceeds of the liquidation of the assets pledged in its favor with priority over all other unsecured creditors. 191

5. Rules applicable to Banks and Securities Dealers

Special bankruptcy and insolvency rules are applicable to banks and savings banks and branches of foreign banks established in Switzerland. Pursuant to Art. 36a SESTA, the same rules apply to securities dealers and to branches of foreign securities dealers established in Switzerland. The rules are set out in the Banking Act and in the IO-FINMA. The SDEBA rules are applicable (only) to the extent that the Banking Act and the IO-FINMA do not provide for special rules. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to banks and securities dealers. 192

It should be noted further that the Swiss Financial Market Supervisory Authority ("**FINMA**")[16] may deviate from the rules of the SDEBA where it deems it appropriate. Yet, according to the explanatory message accompanying the 2004 amendment of the Banking Act (the "**Message**")[17] and gathering from the IO-FINMA, such derogation is mostly of a formal nature. 193

The Banking Act grants broad powers to the FINMA which is entitled to handle most of 194

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[16] With effect from January 1, 2009, the former Swiss Federal Banking Commission (*Eidgenössische Bankenkommission (EBK)*) was merged into the Swiss Financial Market Supervisory Authority (*Eidgenössische Finanzmarktaufsicht (FINMA)*) in accordance with the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) (Bundesgesetz über die Eidgenössische Finanzmarktaufsicht (FINMAG), SR 956.1).

[17] Botschaft zur Änderung des Bundesgesetzes über die Banken und Sparkassen vom 20. November 2002, BBl 2002.

the insolvency proceedings against banks and securities dealers. In particular, the FINMA has the authority to implement (i) protective measures (*Schutzmassnahmen*) in case of justified concern of insolvency, (ii) reorganization proceedings (*Sanierungsmassnahmen*), or (iii) solvent or insolvent liquidation proceedings relating to banks (*Bankenkonkurs*).

Protective measures may include a broad variety of measures such as, in particular, a bank moratorium (*Stundung*) or a maturity postponement (*Fälligkeitsaufschub*) and may be ordered by the FINMA either on a stand-alone basis or in connection with reorganization or liquidation proceedings. Such measures are largely handled by the FINMA. 195

Under the 2011 amendment of the Banking Act, the FINMA further has the power, by ordering reorganization proceedings, to order the transfer of all or part of the business with assets, liabilities and contracts to another existing bank or a newly established bridge bank, whereby such transfer will become effective upon the ratification of the reorganization plan by FINMA. Pursuant to Art. 57 of the IO-FINMA, this transfer could be coupled with a temporary stay of any contractual termination right of a counterparty with respect to finance contracts (*Finanzverträge*) for up to 48 hours if such contractual termination right would otherwise be triggered by officially ordered restructuring or protective measures. 196

We note that such power granted to the FINMA pursuant to the BIO-FINMA as a mere implementing ordinance may contradict Art. 27 para. 3 of the Banking Act in that the temporary stay could affect netting under the netting arrangements while said Art. 27 para. 3 of the Banking Act provides that netting arrangements shall not be affected by protective measures, reorganization measures and liquidation procedures. 197

Art. 57 of the IO-FINMA provides that the temporary stay: 198

- may only be ordered by the FINMA for finance contracts which provide for early termination rights in case of reorganisation proceedings (*Sanierungsmassnahmen*) or protective measures (*Schutzmassnahmen*) ordered by an official authority; 199

- is limited to a maximum of 48 hours; and that 200

- the rights of the counterparty to terminate the relevant finance contracts remains unaffected if the acting of the Insolvent triggers another Event of Default or Termination Event before, during or after the transfer, or if the transferee bank triggers an independent Event of Default or Termination Event after such transfer which is not linked to the protective measures or the reorganisation proceedings ordered by FINMA. 201

The termination rights affected by a temporary stay ordered by the FINMA can be exercised immediately upon the expiration of the relevant 48 hours period (or, if the Agreement is not transferred, as soon as the counterparty becomes aware that the Agreement remains with the Insolvent). 202

For completeness sake, we note that no precedents are available as of the date hereof with respect to the application of Art. 57 para. 2 of the IO-FINMA. 203

The reorganization plan can also provide for a debt equity swap. Where a reorganization plan affects creditors' rights, the FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) that represent more than 50 per cent of the amounts of third class claims in the books of the bank reject such plan, then the reorganization plan has failed an the FINMA has to order the bankruptcy[18]. 204

According to the Message, the rules regarding the insolvency proceedings of banks are not meant to affect netting arrangements and, in particular, in a liquidation proceeding ordered by the FINMA, the relevant provisions of the SDEBA governing netting arrangements shall remain applicable. Art. 27 para. 3 Banking Act provides that netting arrangements shall not be affected by protective measures, reorganization measures and liquidation procedures. For completeness sake, we note that no precedents are available as of the date hereof. 205

It is further noteworthy that the prerequisites for actions for the avoidance of transactions are somewhat different from the respective SDEBA rules (see n. 171 et seq. above) in that such actions can also be brought in case of a reorganization of a bank or a securities dealer. Further, in the first instance, the bank or the securities dealer itself is competent to challenge these arrangements or dispositions once the reorganization plan has been approved by the FINMA. If the reorganization plan does not provide for the challenge of these actions by the bank or the securities dealer itself, the creditors of the bank or the securities dealer may initiate these actions. 206

Finally, under the 2011 amendment of the Banking Act, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal or the country of its effective seat) and to put assets located in Switzerland at the 207

[18] Pursuant to an amendment of the Banking Act in 2012, the reorganization plan cannot be rejected by the creditors with respect to a systemic bank.

disposition of a foreign insolvency estate without having to open a separate Swiss insolvency proceeding pursuant to Art. 166 et seq. PILA, subject to the foreign insolvency proceeding (i) ascertaining equal treatment to Swiss secured or privileged creditors, and (ii) providing for adequate consideration of other claims of Swiss creditors.

For a discussion of the realization of Collateral in bankruptcy of a bank or securities dealer see n. 160 above. 208

6. Rules applicable to Insurance Companies

As from January 1, 2006, the regulatory legal framework for Insurance Companies, which used to consist of several separate acts and ordinances, has been merged into the SIL and the implementing ordinance thereto ("**AVO**")[19]. The regulatory treatment of the various business lines of Insurance Companies has thereby been largely harmonized. 209

The SIL and the new Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Insurance Companies[20] ("**IBO-FINMA**") that has come into force on January 1, 2013 provide for a special bankruptcy and insolvency regime applicable to Insurance Companies. In relation to Insurance Companies, the SDEBA only applies to the extent that there are no special rules pursuant to the SIL or IBO-FINMA applicable. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Insurance Companies. In addition, the FINMA is granted the competence to deviate from the SDEBA rules where it deems it appropriate.[21] 210

Pursuant to the SIL, bankruptcy is declared and made public by the FINMA if it has reasonable grounds of concern that an Insurance Company is over-indebted *(Begründete Besorgnis der Überschuldung*) and there is no prospect of restructuring the Insurance 211

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19 Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen (AVO), SR 961.011.

20 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von Versicherungsunternehmen (Versicherungskonkursverordnung-FINMA, VKV-FINMA, SR 961.015.2.

21 Note in particular that the draft IBO-FINMA grants the power to challenge certain arrangements or dispositions to the liquidator appointed by the FINMA (*Konkursliquidator*). The liquidator has to examine *ex officio* whether certain arrangements or dispositions made by the insolvent may be subject to challenge. For the determination of the suspect period, the duration of a preceding reorganization (*Sanierung*) or of preceding reorganization measures (*Sanierungsmassnahmen*) as per Art. 51 SIL shall be ignored. If the liquidator concludes that certain arrangements or dispositions may be subject to challenge, the liquidator requires the approval of the FINMA in order to initiate the respective court proceedings. In case the FINMA would refuse to approve or the liquidator would not initiate such proceedings, the respective claims are to be offered to the creditors for assignment, all in accordance with Art. 260 SDEBA.

Company (*Aussicht auf Sanierung*). The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator which is to be appointed by the FINMA (*Konkursliquidator*).

The SIL further provides for comprehensive rights of the FINMA to order or take precautionary measures in case an Insurance Company does not comply with the (new and improved) solvency requirements or if it seems otherwise warranted in the circumstances to safeguard the interests of the insured persons. 212

Pursuant to Art. 51 SIL, the FINMA can, *inter alia*, take the following measures, which are of interest in the context discussed herein: 213

- limit the right of an Insurance Company to dispose of its assets, order a freezing of assets or order that such assets be deposited with a third party (freezing); 214
- order that an insurance portfolio be transferred to another insurance company together with the pertaining Allocated Assets (as defined below) (transfer of assets) ; 215
- order the liquidation of a pool of Allocated Assets (as defined below) (liquidation of allocated assets); 216
- take any other measures it deems necessary in order to safeguard the interests of insured persons. 217

In the case of a life insurance company, the FINMA can further order a moratorium for premiums payable to the life insurance company and for claims against such life insurance company (*Stundung*)[22]. 218

[22] This moratorium corresponds to the moratorium under the old regulatory framework for Swiss life insurance companies. It should be noted that with regard to the claims against the life insurance company, the wording of the provision is not clear as to whether it addresses insurance claims only or all claims generally. Moreover, the law is silent on the meaning of such moratorium. Art. 26 of the Banking Act uses the same terminology and provides that the moratorium has the effects set forth in Art. 297 SDEBA, save where the FINMA orders otherwise with respect to the accrual of interest. According to that provision, a set-off of claims having already existed at the time of the declaration of the moratorium is basically possible even in case of a moratorium, but there are the same restrictions as in case of bankruptcy. In the absence of any evidence to the contrary, it seems reasonable to believe that the same principles would also apply to Swiss life insurance companies.

Finally, with regard to the recognition of foreign insolvency decisions, Art. 54d SIL refers to the relevant provision of the Banking Act (see n. 207 above). 219

An Insurance Company must at all times allocate qualifying assets to a segregated pool of assets in order to cover insurance claims (Art. 17 SIL). While in the past the rules on the security fund of a Swiss life insurance and on the allocated assets (*gebundenes Vermögen*) of a Swiss casualty insurance were not totally identical, the rules applicable to, and the designation as allocated assets (*gebundenes Vermögen*) (the "**Allocated Assets**") have now in respect of the issues relevant in this context, been harmonized for all insurance categories. An Insurance Company has to form separate pools of Allocated Assets in respect of certain business lines (Art. 77 AVO) and we understand from the regulator (prior to January 2009, the Swiss Federal Office of Private Insurance, merged into the FINMA with effect as from January 2009), that an Insurance Company is also free to voluntarily further sub-divide its insurance portfolio and create separate pools of Allocated Assets for each such sub-divided insurance portfolio. Hence, an Insurance Company may have several pools of Allocated Assets. Any assets, which are not so segregated in a particular pool of Allocated Assets, are referred to herein as "**Free Assets**". 220

Due to the particular function of the Allocated Assets as security for insurance claims, only assets which are unencumbered and which are not subject to any right of set-off may as a rule be part of the Allocated Assets (Art. 84 para. 2 AVO)[23]. However, Art. 91 para. 3 AVO explicitly reserves netting in respect of financial derivatives, which form part of one and the same pool of Allocated Assets. While the AVO is not very clear on the point, it was the aim throughout the preparatory work on the AVO that collateral required to secure financial derivatives under a master agreement may also be provided out of the particular pool of Allocated Assets without need to replace such encumbered assets in the Allocated Assets. Pursuant to the FINMA, the above netting exception is, hence, to be read in a broader sense and also allows for collateral for such financial derivatives to be provided from the respective Allocated Assets. The FINMA has confirmed this view in its investment guidelines for Allocated Assets, as last amended November 20, 2008 ("**IGA**")[24]. IGA note 506 et seq. permit the use of Allocated Assets as collateral for 221

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[23] Art. 84 para. 2 AVO literally stipulates that liabilities which do not form part of Allocated Assets may not be set-off against assets of the Allocated Assets. There are some doubts, though, that such a prohibition to set-off in a mere ordinance is a sufficient legal basis. So it is more likely to be interpreted as a prerequisite for an asset to qualify for the Allocated Assets that it indeed is not exposed to a right of set-off. The FINMA, therefore, also requests that the parties to a master agreement clearly exclude a set-off of claims under a master agreement for Allocated Assets with claims outside such master agreement and that this waiver is meant to be applicable prior and after insolvency of a party (IGA note 495).

[24] FINMA Rundschreiben 2008/18 (Anlagerichtlinien Versicherer).

derivative transactions forming part of the same pool of Allocated Assets entered into under a qualifying master documentation. A series of documentation requirements have to be met, though.[25]

Furthermore, IGA note 506 provides that if the parties agree on collateral, care be taken that such arrangement be bilateral. Finally, IGA note 499 stipulates that in case of a foreign counterparty, an Insurance Company has to request that such foreign counterparty provide collateral for derivative transactions, if such derivative transactions are to be part of a pool of Allocated Assets. 222

To the extent that the pools of Allocated Assets are not being transferred to another insurance company together with the respective insurance portfolio, but rather liquidated, the proceeds of such liquidation are to be utilized in first priority to discharge the insurance claims secured by such pools of Allocated Assets. As for a bankruptcy (see below), we are of the view, that the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such Allocated Assets and not from its Free Assets only. 223

Such measures could affect the Insurance Company's ability to provide collateral, irrespective of whether the underlying security agreement is to be qualified as an unconditional transfer of title in the assets or as an irregular or regular pledge. 224

The Allocated Assets are also liquidated in the context of the bankruptcy. As mentioned above, though, the proceeds from the liquidation of the Allocated Assets are first to be used to cover the insurance claims secured by the particular Allocated Assets (Art. 54 and 17 SIL) and only the excess becomes part of the bankruptcy estate.[26] 225

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[25] Thresholds and minimal transfer amounts need to be kept low and need to take into account the counterparty's rating (IGA note 508-510). Collateral needs to be deposited either in Switzerland or in a foreign jurisdiction that the FINMA has approved for such purposes on the basis of such jurisdiction respecting the particular allocation of Allocated Assets in case of an insolvency of an Insurance Company (for the time being Luxembourg and Belgium) (IGA note 133). Collateral posted by an Insurance Company from its Allocated Assets is still accounted for as part of the Allocated Assets and a credit support document needs to specifically address the fact that the claim for a return of collateral which is part of a pool of Allocated Assets belongs to such pool of Allocated Assets (IGA note 495). Collateral posted by the counterparty is legally attributed to the Allocated Assets and IGA note 513 requires that this be made evident for third parties, but no value may be allocated to it as it constitutes a mere security. Finally, there is a need to keep the various Allocated Assets separate. Hence, the collateral needs to be put up for and from a clearly identified pool of Allocated Assets under a separate master agreement which is specific to such Allocated Assets.

[26] Where an Insurance Company has more than one pool of Allocated Assets, the FINMA has in an

By allowing that financial derivatives directly form part of a certain pool of Allocated Assets, the new regulatory framework implicitly also allows that there are claims derived from such financial derivatives against the Allocated Assets. This is in particular recognized in Art. 91 para. 3 AVO dealing with netting of derivatives in that it requires that any negative amount be deducted from the value of the Allocated Assets. Hence, in our view the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such pool's Allocated Assets and recovery therefore is in our view possible from both the specific Allocated Assets on a *pari passu* basis with the respective policyholders and if insufficient from the Free Assets which form part of the bankruptcy estate *pari passu* with all other unsecured and unprivileged creditors of the Insurance Company. 226

The regime applicable to the Allocated Assets of an Insurance Branch is different in that the SIL stipulates that the insurance takers that are to be secured by a particular pool of Allocated Assets have an outright pledge at law on such Allocated Assets in accordance with Art. 57 SIL. Any insurance taker or policy holder that wishes to enforce its insurance claim against an Insurance Branch has to prosecute any debt collection proceedings initiated against such Insurance Branch by means of the particular proceeding for the realization of a pledge (*Betreibung auf Pfandverwertung*) and if not paid within an applicable grace period the FINMA will decide as to what assets of the Allocated Assets shall be realized to cover such claim. 227

The exact nature of this right of pledge is not addressed in the SIL and it seems to be a pledge that would include any and all assets of the Allocated Assets. One author holds that the pledge should best be qualified as a public law legal lien (*gesetzliches Pfandrecht des öffentlichen Rechts*). As a general rule, legal liens take precedence over any other third party rights. 228

At the same time, though, the investment guidelines with respect to Allocated Assets as per the SIL, the AVO and the IGA, and which allow the use of derivatives and collateralization of any resulting obligations of a particular pool of Allocated Assets with assets of such particular pool of Allocated Assets, do not make any distinction between the Allocated 229

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informal conversation taken the preliminary view that the excess of one pool of Allocated Assets would need to be used to cover a shortfall in another pool of Allocated Assets, and only the excess thereafter would be at the disposition of the general creditors. We doubt, however, that unless a timely advance allocation of a potential excess to another pool of Allocated Assets has been made, such a use of excess would be permitted.

Assets of an Insurance Company other than an Insurance Branch and an Insurance Branch in this respect. The rationale being the same, it would indeed make sense to treat both Allocated Assets alike. This would then, however, presuppose that one accept that the pledge in favour of the insurance taker or policy holder be deemed as a pledge on the net assets of such pool of Allocated Assets, i.e. leaving precedence to claims of a derivative counterparty of such Allocated Assets and respecting any security interest in favour of such derivative counterparty. In other words, there are good reasons to argue that the general pledge of Art. 57 SIL should not render ineffective any security interest that the Insurance Branch may grant in the context of Transactions and Collateral as contemplated by the Security Interest Provisions prior to an enforcement action as described above.

In the absence of any discussion in Swiss legal doctrine or precedents, though, and against the background of the general rule that legal liens rank ahead of any other third party rights, we cannot rule out that the FINMA and eventually a court could take another view and leave precedence to the general pledge and thereby frustrate the intended security interest under the Security Interest Provisions to the extent the Collateral provided by the Insurance Branch is part of a pool of Allocated Assets. 230

Otherwise, the insolvency procedure as such is governed by the general rules of the SDEBA. 231

7. Rules applicable to Collective Investment Schemes

Pursuant to the 2011 amendment to the CISA, and in particular Art. 137 CISA, the FINMA declares the bankruptcy of any person licensed under Art. 13 CISA (which, *inter alios*, includes Collective Investment Vehicles and fund management companies of contractual funds as discussed below) in case there are reasonable concerns (*begründete Besorgnis*) that such person is overindebted (*überschuldet*) or has serious liquidity problems (*ernsthafte Liquiditätsprobleme*) and if a mere reorganization (*Sanierung*) is not viable or has failed. As for the Insolvency Proceedings, the respective rules applicable to Banks and Securities Dealers pursuant to Art. 33 to 37g Banking Act apply by analogy (Art. 137 para. 3 CISA), and the SDEBA rules regarding moratorium (*Nachlassstundung*) pursuant to Art. 293-336 SDEBA are expressly disapplied altogether (Art. 137 para. 2 CISA). 232

The FINMA has recently issued a first draft of the Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Collective Investment Vehicles 233

("**CIVBO-FINMA**")[27] which provides for a more detailed legal framework in respect of insolvency proceedings of Collective Investment Vehicles. Having said this, the IO-FINMA adapts the general insolvency regime set by the SDEBA to the particularities of Collective Investment Vehicles. FINMA is expected to publish the final IO-FINMA later this year with a view to have it become effective as of January 1, 2013.

SICAVs are, based on the 2011 amendment of the CISA, subject to the particular insolvency regime of the CISA. 234

A Contractual Fund is a mere so-called separate asset pool. It does, as such, not have legal capacity to act but is being represented by a Swiss fund management company according to Art. 28 et seq. CISA (the "**Fund Management Company**"). A Fund Management Company must be organized as a joint stock corporation (*Aktiengesellschaft*) and is, based on the 2011 amendment of the CISA, subject to the particular insolvency regime of the CISA. The Contractual Fund's assets are being held by the Fund Management Company on behalf of the Contractual Fund's investors on a fiduciary basis. Art. 35 CISA accordingly provides that, in case of a bankruptcy of the Fund Management Company, the Contractual Fund's assets are being segregated from the Fund Management Company's bankruptcy estate, any claim that the fund management company has acquired in the due performance of its duties with respect to a particular fund remaining reserved.[28] Whether or not Insolvency proceedings can be initiated against the Contractual Fund as such (as opposed to Insolvency proceedings against the Fund Management Company) is not discussed in Swiss legal doctrine and we are not aware of any precedents. As a general rule under Swiss law, Insolvency proceedings with respect to entities lacking the legal capacity to act are to be sought against the legal entity representing the entity. An exception is made for certain of those entities, however, and Insolvency proceedings can be instituted directly against them (e.g. against the undistributed descendant's estate). It is common to all those exceptions though that the law explicitly provides that such entities are (deemed to be) vested with legal capacity to act. This is not the case for a Contractual Fund. We, therefore, believe that Insolvency proceedings sought against a Contractual Fund directly would have to be rejected by the FINMA. Note that the question is of no relevance if, and we recommend that, the documentation for transactions with such counterparties is drafted such that an event of default is triggered both if the relevant event arises either with respect to the Contractual Fund as such or with respect to the Fund Management Company running 235

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27 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von kollektiven Kapitalanlagen (Kollektivanlagen-Konkursverordnung-FINMA, KAKV-FINMA), AS 2012.

28 The proposed CIVBO-FINMA provides for the possibility to transfer a contractual investment vehicle to a solvent fund management company.

it (e.g. by making the Fund Management Company a Specified Entity in relation to the Contractual Fund).

The CISA further provides for an array of supervisory instruments that seem noteworthy in the context of Transactions entered into with Collective Investment Vehicles. 236

The FINMA, as the supervisory authority, has the general right to provide measures necessary to address any irregularities of Collective Investment Vehicles with a view to restore the proper state of affairs (*Wiederherstellung des ordnungsgemässen Zustandes*). While the law does not provide for a catalogue of possible measures it does provide that the FINMA can, in the sense of an *ultima ratio* measure, withdraw authorizations and approvals and can order the dissolution (e.g. if the minimum assets fall below the required amount). 237

The FINMA can further appoint an administrative receiver (*Sachwalter*) for licensees no longer able to operate (*Geschäftsunfähigkeit*).[29] Such receiver, in a first step, has to make a recommendation to the FINMA that either measures be taken to restore the proper state of affairs or that the licensee be dissolved. In case of a solvent liquidation (e.g. as a result of a withdrawal of approval), it is the receiver that is in charge of such liquidation. The FINMA, as the regular debt enforcement authority, however, is in charge of an insolvent liquidation. 238

Further note that according to the CISO[30], the FINMA may, in case of a dissolution of a Contractual Fund or of a SICAV respectively (e.g. as a result of a withdrawal of approval), order the transfer of the fund contract to a suitable new Fund Management Company or custodian bank or the transfer of the assets to a suitable SICAV, respectively. 239

While, as mentioned above, no precedents are available as of the date hereof with respect to the supervisory instruments available under the CISA, we believe that the FINMA will largely continue the practice developed under the predecessor law. In particular, the general administrative law principles (e.g. principle of proportionality) must be adhered to and, most importantly, we do not believe that the CISA provides for a legal basis that would warrant the authorities' ignoring of agreements otherwise valid and enforceable. 240

It, finally, seems noteworthy that umbrella fund structures are possible under the CISA. As 241

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29 The term "licensees" includes, among others, Swiss Collective Investment Vehicles, fund management companies and custodian banks.

30 Verordnung über die kollektiven Kapitalanlagen (KKV), SR 951.311.

a rule, each subfund is liable only for its own liabilities under such structure. Note, however, that in the case of a SICAV such limitation is disregarded, though, if the fact of such limited liability was not disclosed when entering into the respective obligation. In such scenario, the SICAV is liable with its entire assets.[31]

The CISA delegates the power to set rules on the granting of collateral by a Collective Investment Vehicle to the Federal Council, who has adopted certain quantitative limitations in the CISO: 242

Collective Investment Vehicles qualifying (i) as securities funds (*Effektenfonds / fonds en valeurs mobilières*) may provide collateral up to 25% of their net assets (Art. 77 para. 1 (b) CISO), (ii) as other funds for traditional investments (*Übrige Fonds für traditionelle Anlagen / les autres fonds en placements traditionnels*) up to 60% of their net assets (Art. 100 para. 1 (b) CISO) and (iii) as other funds for alternative investments (*Übrige Fonds für alternative Anlagen / les autres fonds en placements alternatifs*) up to 100% of their net assets (Art. 100 para. 2 (b) CISO). These provisions contemplate both a security interest in the form of a pledge or a transfer of title. In case of umbrella fund structures, i.e. in case of a subdivision in several sub-funds, these rules apply to each sub-fund and the collateral must be provided out of the respective sub-fund and more generally, the respective Master Agreement and the pertaining addendum need to be concluded in respect of each particular sub-fund. 243

These limitations are to be seen with the respective limitations applicable to each of the above funds on short term borrowings that such funds can take up, i.e. in the case of Collective Investment Vehicles qualifying (i) as securities funds (*Effektenfonds / fonds en valeurs mobilières*) may provide collateral up to 10% of their net assets (Art. 77 para. 2 CISO), (ii) as other funds for traditional investments (*Übrige Fonds für traditionelle Anlagen / les autres fonds en placements traditionnels*) up to 25% of their net assets (Art. 100 para. 1 (a) CISO) and (iii) as other funds for alternative investments (*Übrige Fonds für alternative Anlagen / les autres fonds en placements alternatifs*) up to 50% of their net assets (Art. 100 para. 2 (a) CISO). They do not, however, take into account any net obligations that a Collective Investment Vehicle may have under financial derivatives with a counterparty and that may request such obligations to be collateralized. To the extent that such obligations are permitted under the applicable legal framework, though, it must in our view also be permissible to collateralize such obligations. This view has been confirmed in 244

[31] We note that no precedents and doctrine is available yet as of the date hereof with respect to the effects negative net assets of one sub-fund have on other sub-fund and on the Collective Investment Vehicle as such, in particular with respect to insolvency law issues.

an informal discussion with the FINMA provided that any such posted collateral needs to be counted against the overall collateral limits referred to under n. 243 above.

8. Rules applicable to Pension Funds

As mentioned under n. 11 above, this legal opinion covers pension funds registered pursuant to the OBPA as a foundation (*Stiftung*) subject to Art. 80 et seq. CC or as a cooperative (*Genossenschaft*) subject to Art. 828 et seq. CO. It does not cover pension funds established under Swiss Federal or Cantonal public law (see n. 17). 245

The OBPA and the OBPO 2[32] do not provide for a special insolvency regime with respect to Pension Funds under the OBPA. Hence, in principle, the rules set forth in the SDEBA are applicable to insolvency proceedings against a Pension Fund which pursuant to Art. 39 SDEBA are subject to bankruptcy (*Konkurs*) or a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*). The following seems noteworthy, though, in the context of this legal opinion. 246

Broadly speaking, the OBPA and the implementing ordinances provide for a number of measures to be taken in case of underfunding (*Unterdeckung*) (i.e. net asset coverage of actual and estimated liabilities to beneficiaries). 247

With respect to foundations, it is to be noted that the foundation's supervisory authority (*Stiftungsaufsicht*) has, in case of over-indebtedness or insolvency, (i) the right to order remedial measures (such as to amend the foundation's purposes or to reduce the foundation's administration), and (ii) to move for insolvency proceedings against the foundation, if necessary (Art. 84a CC). Further, its consent is required where the foundation declares itself insolvent (*Insolvenzerklärung*). 248

The measures addressed under n. 247 or n. 248 above do, however, in our view not affect the conclusions reached in this legal opinion. 249

The permissibility of the grant of collateral by a Pension Fund is not addressed in either the OBPA, the OBPO 2 or any publicly available guidelines issued by the Federal Social Insurance Office for non real estate assets. 250

In that Art. 56a OBPO 2 allows the use of derivatives it also allows a Pension Fund to incur 251

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[32] Verordnung vom 18. April 1984 über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVV2), SR 831.441.1.

liabilities. In guidelines and explanatory notes (in particular, the Derivatives Recommendations[33]) it is made clear, though, that such use should not result in a leverage of the Pension Fund's overall assets. Hence any position of the Pension Fund needs to be covered (either by respective assets or liquidity in case of mere monetary obligations). This also implies a general prohibition to leverage a Pension Fund's assets, including the leveraged financing of investments.

In the context of permitted liabilities, though, and in the absence of an explicit prohibition or limitation to post collateral from a Pension Fund's assets, we do not see any reason under Swiss law, why a Pension Fund would not be allowed to post collateral for liabilities lawfully incurred under derivative transactions. This view has been confirmed in an informal discussion with the Federal Social Insurance Office.[34] 252

9. Rules applicable to Swiss Branches

Two proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs*) pursuant to Art. 50 para. 1 SDEBA (see n. 254 below) and (ii) the ancillary insolvency (*Hilfskonkurs*) pursuant to Art. 166 et seq. PILA (see n. 255 et seq. below). 253

If a foreign debtor has a branch (*Zweigniederlassung*) in Switzerland, claims against this debtor can, to the extent they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). Note that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to, the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, agreements entered into by the principal office in accordance with applicable law are binding also on the branch. 254

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33 Fachempfehlung zum Einsatz und zur Darstellung der derivativen Finanzinstrumente (Art. 56a BVV 2) vom 15. Oktober 1996).

34 Please note that the Federal Social Insurance Office is the supervisory authority for certain pension funds only (in particular, pension funds of national and international relevance, pension funds of certain public law entities, and pension funds that are subject to the Swiss Federal Act on Insurance Supervision). The remainder of pension funds is supervised by cantonal authorities. We have not discussed the interpretation summarized under n. 246 et seq. above with the cantonal supervisory authorities.

Art. 166 et seq. PILA, on the other hand, provide for the ancillary insolvency (*Hilfskonkurs*) pursuant to which a foreign bankruptcy decree is recognized in Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor, (ii) it is enforceable in the state where it was rendered, (iii) there is no ground to deny recognition based on formal and material principles of Swiss public policy (*ordre public*), and (iv) if the state where the decision was rendered grants reciprocity. The same conditions apply to the recognition of a foreign composition agreement (Art. 175 PILA).

If the above requirements are met, on application of the foreign receiver in bankruptcy or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding all assets located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss insolvency law, including the provisions on avoidance actions (Art. 285 et seq. SDEBA) or limitations on abusive set-off (Art. 213 and 214 SDEBA) as discussed herein (see n. 155 above). 256

While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral forming part of the ancillary insolvency estate covers such claims, and (ii) Swiss privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA) may directly file claims in such ancillary insolvency. If there is an excess, then such excess would be made available to the foreign receiver or the creditor having requested the recognition. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss creditors. 257

A branch insolvency can be opened after an ancillary insolvency has been declared, but only until the ancillary insolvency reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*), and if opened would then take precedent over the ancillary insolvency, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding. 258

If the Swiss branch is a Special Insolvency Regime Branch, the special rules discussed under n. 192 et seq. or, in case of Insurance Branches n. 210 above are applicable. 259

10. Collateralization under Swiss substantive law

The following is a summary overview of the main forms of taking collateral under Swiss substantive law, the main forms being the pledge approach (see n. 263 below), the irregular pledge approach (see n. 264 through 266 below) and the transfer of title approach (see n. 267 below). To the extent that a foreign law refers to Swiss substantive law, or where the collateral is located in Switzerland, the rules discussed in n. 261 through 267 below apply irrespective of whether the counterparty is a Swiss Party located in Switzerland. 260

a) Security undertaking, creation of security interest and perfection

Under Swiss substantive law one has to distinguish (i) the agreement to grant a security interest (*Verpflichtungsgeschäft*) (the security undertaking) and (ii) the actual creation of the relevant security interest agreed under the contractual undertaking (*Verfügungsgeschäft*) (the act of disposition). Both are required in order to create a legal, valid and binding security interest. In addition, the security provider must, in principle, have the right to dispose of the proposed collateral. Further acts might be necessary in order to ascertain that a security interest is effective as against third parties, which can in relation to such third parties be described as *perfection* of such security interest. 261

It is in the security undertaking that the parties determine which of the security interests described in some more detail below they wish to create. The creation of the security interest as such then depends on the underlying asset. 262

b) Pledge – limited right approach

Under the pledge approach (*reguläres Pfandrecht*), a limited right *in rem* (*beschränktes dingliches Recht*) is conferred to the pledgee. The pledgor retains ownership in the pledged assets and the secured party must return the same assets upon discharge of the secured obligation. Typically, this means that the pledgee is not entitled to use, rehypothecate or transfer the asset to third parties. The pledge approach is laid down in the CC and is applicable to certificated securities and uncertificated securities whether or not directly or indirectly held. 263

c) Irregular pledge – full right approach

Under the irregular pledge approach *(irreguläres Pfandrecht)*, the security undertaking provides that the pledgor transfers fungible assets to the irregular pledgee with the understanding that the irregular pledgee return the same kind and quantity as opposed to 264

the original assets, in each case to secure the repayment of an underlying obligation. As a consequence, the pledgee is typically allowed to use, rehypothecate or transfer the collateral to third parties.

The irregular pledge results, under Swiss substantive law, in an outright transfer of full ownership as opposed to the regular pledge which confers a limited right *in rem* only. In addition, the irregular pledgee is, as mentioned above, only to return fungible assets of the same kind and quantity once the secured obligation has been discharged. By contrast, in the case of a fiduciary transfer or assignment for security purposes (see n. 267 below) the secured party is obligated to return the original collateral. 265

Although the irregular pledge is not dealt with specifically in the CC, its admissibility is not disputed and, given its proximity to the pledge, it is generally held in doctrine that the rules with respect to a pledge apply by analogy where suitable. 266

d) Transfer of title approach (fiduciary transfer for security purposes and fiduciary assignment for security purposes)

Under the transfer of title approach, the full rights in the collateral are transferred to the secured party. As under the irregular pledge approach, the secured party does not merely receive a limited right *in rem*, but full ownership. In contrast to the irregular pledge approach, though, the secured party is under an obligation to return the original collateral upon discharge of the secured obligation. Hence, although the secured party, based on the full ownership transfer, disposes of the collateral, it is under a fiduciary obligation not to do so other than for purposes of foreclosure. 267

11. Conflict of laws issues

a) Preliminary Remark

Under applicable Swiss law, conflict of laws issues are mainly governed by the PILA if such issues arise in an international context (*internationales Verhältnis*). 268

In line with the analysis under Swiss substantive law, several elements to a collateral transaction need to be addressed for purposes of determining the applicable law(s) under the PILA. First, the contractual aspect, addressing the parties' obligation to provide collateral, i.e. the security undertaking, secondly the act of disposition, i.e. the creation of the rights in the collateral and, thirdly, one may again address enforceability as against third parties as the perfection of a security interest 269

b) Security Undertaking

Pursuant to Art. 116 PILA, the parties are free to choose the law applicable to the security undertaking and in the context of collateral discussed herein, irrespective of the security interest that the parties agree to create as per such security undertaking. 270

c) Creation of a security interest

With effect as from January 1, 2010 Switzerland has implemented the Hague Convention by adding Art. 108(a) through (d) PILA.[35] 271

Art. 108 (a) PILA defines Intermediated Securities as securities that are held with an intermediary within the meaning of the Hague Convention and Art. 108 (c) stipulates that the Hague Convention applies as to the law applicable to Intermediated Securities. 272

Pursuant to the Hague Convention any securities, such as any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein, which are held with an intermediary qualify as Intermediated Securities under the Hague Convention. The Hague Convention defines Intermediated Securities (*"securities held with an intermediary"*) as the rights of an account holder resulting from the credit of securities to a securities account. 273

The Hague Convention and thereby Art. 108 (a)-(d) PILA solely deal with the creation of a security interest (act of disposition) in Intermediated Securities not the security undertaking, which remains governed by Art. 116 PILA. Where security collateral consists of Intermediated Securities, Art. 108 (a)-(d) PILA are applicable to the exclusion of the other provisions of the PILA dealing with the creation of security interests in security collateral other than Intermediated Securities. 274

Hence, for purposes of the conflicts of law analysis, the first question is whether the security collateral consists of Intermediated Securities: 275

Art. 108 (c) PILA states that the law applicable to Intermediated Securities is determined in accordance with the Hague Convention. 276

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[35] Until the Hague Convention comes into force, the provisions that are incorporated into the PILA by reference constitute autonomous Swiss private law conflict rules.

The key provision of the Hague Convention is Art. 4 where it is stated that, in principle, if the accountholder and the intermediary have expressly agreed on a law in their account agreement, the chosen law governs all the issues that are covered by the Hague Convention, which is the law applicable to the creation of a security interest in intermediated securities.[36]

In both instances, though, such law only applies if at the time of such choice of law the intermediary has an office qualifying under the Hague Convention in the country of the chosen law (so-called *reality test*). For purposes of the Hague Convention, hence, the choice of law is limited and it is legally speaking a choice made between the accountholder and the intermediary, not between the parties to the security undertaking. 278

In the context of this legal opinion, the relevant account to be considered is the securities account of the Collateral Provider where the intermediated securities remain booked to the Collateral Provider's securities account, whereas it is the securities account of the Collateral Taker where the intermediated securities are transferred to the account of the Collateral Taker to create such security interest. 279

If no law has been chosen or if the chosen law does not satisfy the requirements of the Hague Convention (see n. 278 above) there is a cascade of laws that may apply in the following order: 280

- the law applicable at the place of the particular office through which the intermediary acted when entering into the account agreement; 281
- the law of the relevant intermediary's incorporation or organisation; 282
- the law of the relevant intermediary (principal) place of business (Art. 4 and 5 Hague Convention). 283

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[36] Art. 4 of the Hague Convention thereby applies a modified version of the place of relevant intermediary approach (PRIMA). Not the law of the state of the location of the securities account, which in practice often times can hardly be determined, but the law the accountholder and the intermediary have agreed on in the account agreement is the law applicable. Though probably of little practical relevance, according to this article, the accountholder and the intermediary could alternatively agree that a different law than the law agreed to govern the account agreement shall govern specifically all those issues that fall within the scope of the Hague Convention.

VI. Security Interest Provisions

1. Analysis of the Security Interest Provisions for conflicts of laws purposes

a) Collateral in the form of Securities under the Security Interest Provisions

Without Rehypothecation Clause

284 The creation of a security interest in the Securities would, under Swiss law concepts, be addressed as a regular pledge (limited right approach) (*reguläres Pfandrecht*) if under English law that governs the Security Interest the creation of such Security Interest by way of *first fixed security interest with full title guarantee* over the Securities in favour of the Collateral Taker (as we understand and have for purposes of this legal opinion assumed to be the case) does not result in the transfer of legal title to the Collateral Taker such that the Collateral Provider retains ownership in such pledged Securities and the Collateral Taker has no right to use, rehypothecate or transfer the Securities to third parties and, hence, has to return the Collateral initially provided to it.

With Rehypothecation Clause

285 Where the Collateral Taker has a right to use, rehypothecate or transfer the Securities to third parties or where its obligation to return the Securities is otherwise limited to the return of equivalent fungible assets, the Security Interest would be translated into an irregular pledge (full right approach) (*irreguläres Pfandrecht*) (see n. 264-266 above for a discussion of the conflict of laws issues)[37]. The latter is pursuant to the Rehypothecation Clause the case in that the Collateral Provider authorizes the Collateral Taker to borrow, lend, appropriate, dispose of or otherwise use for own purposes any Securities and upon such use any Securities will become absolute property of the Collateral Taker while the Collateral Provider thereupon will have a right against the Collateral Taker solely for delivery of Securities of an identical type, nominal value, description and amount to such rehypothecated Securities.

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[37] As mentioned above, the transfer of collateral under an irregular pledge leads to an outright transfer of legal title in the collateral and the obligation of the Collateral Taker once the pledge is discharged is thereby limited to the return of assets fungible with the assets transferred as collateral or, in case of enforcement and liquidation, the accounting for the value of the collateral liquidated and payment of any excess amount over to the pledgor.

b) Collateral in the form of cash under the Security Interest Provisions

Based on the assumption that cash will not be remitted physically (see n. 126), but that any disposition of cash will be conducted by way of wire-transfer from the Collateral Provider's bank account with its account bank to designated cash accounts of the Collateral Taker with its account bank (as contemplated under clause 1.11 of the Agreement, and in case of Eligible Counterparty Agreements in clause 1.8), neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the Security Interest Provisions does not consist of assigning or pledging a claim that the Collateral Provider holds as against its bank, but rather of a wire-transfer resulting in a debit on the Collateral Provider's bank account, i.e. in the discharge of the Collateral Provider's bank from paying the respective amount, and in a credit on the bank account of the Collateral Taker. Thus, in our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the Parties, only a claim that is governed by the Security Interest Provisions remains and the Collateral Taker's rights to claim the transfer of cash and to use the cash as collateral will be governed by English law as the law applicable to the Agreement and the Security Interest Provisions thereunder (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer). 286

2. Choice of Law and Jurisdiction/Arbitration

The choice of English law in respect of the security undertaking embedded in the Agreement is valid pursuant to Art. 116 PILA (see n. 270 above). 287

In respect of the creation of the Security Interest under the Security Interest Provisions one should note the limitations of such choice of law in respect of Intermediated Securities under the Hague Convention (see n. 277 and 278 above). 288

Under Swiss procedural laws the parties to a Transaction are free to submit to any jurisdiction mutually agreed upon. Thus, the submission to jurisdiction of the courts of England as expressed in the Agreement is binding on the Collateral Provider and the same holds true for the submission to the arbitral tribunal as expressed in the Agreement (see n. 189). 289

A final and binding judgment of an English court would be recognized and enforced in Switzerland subject to and in accordance with the Lugano Convention.[38] Further, a final award of an arbitral tribunal in respect of the Agreement would be recognized and enforced by Swiss courts pursuant to and to the extent provided by the New York Convention[39]. 290

We should emphasize that, under Swiss law, jurisdiction clauses have no effect on actions relating to, or in connection with insolvency procedures which, as a rule, must be brought before the court at the place of such insolvency procedure (*insolvenzrechtliches Territorialitätsprinzip*) (see n. 189 above). 291

3. Validity of Security Interest

a) Governing Law – Security Undertaking

Pursuant to Art. 116 PILA, the Parties are free to choose English law to govern the undertaking to create the Security Interest in Collateral to secure obligations of the Collateral Provider under the Agreement (security undertaking) and such choice of law is, therefore, valid and would be upheld by a Swiss court in respect of the contractual aspects. 292

b) Governing Law – Proprietary Aspects

We should emphasize that the following discussion is to be read in conjunction with the conclusions set forth under Section. V.11. (*Conflict of laws issues*) (n. 268-283 above). Therefore, in respect of the Securities a qualification is to be made whether the Securities are indirectly held and qualify as Intermediated Securities. 293

1. Securities

We note that if in line with the assumptions, the Securities are indirectly held (see n. 128 through n. 130 and n. 279) and qualify as *securities*, such Securities qualify as Intermediated Securities within the meaning of the Hague Convention. The creation of the security interest in Intermediated Securities is governed by Art. 108 (c) PILA. While the Parties to the Agreement may validly choose English law to govern the security undertaking embedded in the Security Interest Provisions, the Parties cannot freely choose the law applicable to the creation of the Security 294

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38 Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen (LugÜ), SR 0.275.11.

39 Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche, SR 0.277.12.

Interest. If in line with the assumptions, the Securities are to be transferred to a Securities Account and the Securities Account agreement is as per the assumption expressed to be governed by the laws applicable in the jurisdiction of the office of the intermediary at which the securities account is maintained, then such laws will govern the creation of the Security Interest.

2. Cash

See discussion under n. 286. 295

c) Recognition of Security Interest

A Swiss court would based on the above have to recognize the Security Interest in Collateral created under the Security Interest Provisions, provided that the Security Interest has been validly created and perfected pursuant to the Security Interest Provisions under English law, as referred to above. 296

d) Enforcement of Security Interest

Enforcement of Security Interest absent Insolvency

Prior to an Insolvency of the Collateral Provider, the Collateral Taker would in our view be free to foreclose on its security interest and to liquidate the Collateral as provided in the Security Interest Provisions. In particular the Collateral Taker would be based on the Power of Sale Clause free to sell the Collateral, including to itself to the extent a market value for such Collateral can be established (e.g. if it is of a type customarily sold on a recognized market), outside any statutory procedure and without need to obtain a prior court order to this end. There are no further formalities that apply and the procedures do not in the circumstances described above and as a matter of Swiss law differ depending on the type of Collateral. 297

Where the Collateral Taker is based on the above free to liquidate the Collateral prior to an Insolvency of the Collateral Provider, it is our view that the Collateral Taker would also be permitted to apply the proceeds of such liquidation in paying the costs of such liquidation and in or towards satisfaction of the Secured Obligations in accordance with the Power of Sale Clause. 298

Enforcement of Security Interest after Insolvency

The Collateral Taker is not to acquire legal title of the Securities under the Security Interest Provisions without a Rehypothecation Clause (see n. 284 and 285 above and n. 302 below) and, hence, the Security Interest would in such cases as outlined above if translated into Swiss law categories qualify as a regular pledge. 299

The Securities would thereby be part of the insolvency estate of the Collateral Provider. Where the Collateral Provider qualifies as Bank, the Collateral Taker would still be free to liquidate the Securities outside the Insolvency Proceedings subject to (1) the Securities satisfying the requirements of being traded on a representative market and (2) the private sale being notified to the FINMA pursuant to Art. 18 IO-FINMA and Art. 27 para. 3 of the Banking Act (see n. 160 above). In such circumstances it is our view that the appropriation of such Securities in accordance with the Power of Appropriation Clause would also be upheld in an Insolvency of the Collateral Provider which is a Bank. 300

Where the Collateral Taker is based on the above free to liquidate the Securities outside the Insolvency Proceedings, it is our view that the application of the proceeds of such liquidation in paying the costs of such liquidation and in or towards satisfaction of the Secured Obligations in accordance with the Power of Sale Clause would also be upheld in an Insolvency of the Collateral Provider. 301

Where the Collateral Taker is pursuant to the Rehypothecation Clause entitled to borrow, lend, appropriate, dispose of or otherwise use for own purposes any Securities and the Collateral Taker's obligation is limited to the delivery of Securities of an identical type, nominal value, description and amount to such rehypothecated Securities (see n. 285), the Collateral Taker is in our view secured by a security interest that should be treated in analogy to a Swiss law irregular pledge (see n. 264-266 above). As a result, in our view, the Collateral Taker's right to liquidate the Securities remains generally unaffected by the opening of an Insolvency Proceeding in respect of the Collateral Provider. In case of an Insolvency Proceeding in respect of the Collateral Provider, the Collateral Taker would remain free to liquidate the Securities outside the relevant proceedings. The Collateral Taker, however, has to account for excess proceeds received as a result of any such liquidation to the relevant administration and participates in such procedures to the extent of its exposure remaining unpaid after the liquidation of the Securities. 302

With respect to cash, the Collateral Taker would based on the Security Interest Provisions have a mere claim against the Collateral Provider to transfer such cash (see n. 286 above). On the basis of the cash having been credited to the Collateral Taker's account, the 303

Collateral Provider would thereby not any longer be the legal holder of such transferred cash. Accordingly such cash would not in our view constitute an asset which forms part of the insolvency estate of the Collateral Provider. As a result, in our view, the Collateral Taker's right to foreclose in the cash remains generally unaffected by the opening of an Insolvency Proceeding in respect of the Collateral Provider.

VII. Title Transfer Provisions

1. Analysis of the Title Transfer Provisions for conflicts of laws purposes

a) Collateral in the form of Securities under the Title Transfer Provisions

304 If a Swiss court or an administrative body would have to interpret and apply the Title Transfer Provisions under Swiss substantive law, the starting point of its legal analysis would have to be the principle of freedom of contracts (*Vertragsfreiheit*), which includes the freedom to conclude contracts of any kind and content, including contracts that are not specifically regulated, as long as the mandatory requirements of Swiss law are complied with. The Title Transfer Provisions would, therefore, primarily be interpreted and applied pursuant to its specific terms. If a Swiss court or administrative body were to draw an analogy to one of the security instruments known under Swiss substantive law in order to answer a question in connection with the Title Transfer Provisions, then the Title Transfer Provisions would with respect to Securities most probably be qualified as an irregular pledge (see discussion under n. 305 below).

305 Where the Collateral Taker has a right to use, rehypothecate or transfer the Securities to third parties or where its obligation to return the Securities is otherwise limited to the return of equivalent fungible assets, the security interest would be translated into an irregular pledge (full right approach) (*irreguläres Pfandrecht*) (see n. 264-266 above for a discussion of the conflict of laws issues)[40]. The latter is pursuant to the Title Transfer Provisions the case in that the Collateral Provider authorizes the Collateral Taker to return Equivalent Margin, i.e. the Collateral Provider has the right against the Collateral Taker solely for delivery of Securities of the same type, nominal value, currency and amount as the Securities transferred to the Collateral Taker as Acceptable Margin.

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[40] As mentioned above, the transfer of collateral under an irregular pledge leads to an outright transfer of legal title in the collateral and the obligation of the Collateral Taker once the pledge is discharged is thereby limited to the return of assets fungible with the assets transferred as collateral or, in case of enforcement and liquidation, the accounting for the value of the collateral liquidated and payment of any excess amount over to the pledgor.

b) Collateral in the form of cash under the Title Transfer Provisions

306 Based on the assumption that cash will not be remitted physically (see n. 126), but that any disposition of cash will be conducted by way of wire-transfer from the Collateral Provider's bank account with its account bank to designated cash accounts of the Collateral Taker with its account bank (as contemplated under the definition of "Transfer" in the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version)), neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the Title Transfer Provisions does not consist of assigning or pledging a claim that the Collateral Provider holds as against its bank, but rather of a wire-transfer resulting in a debit on the Collateral Provider's bank account, i.e. in the discharge of the Collateral Provider's bank from paying the respective amount, and in a credit on the bank account of the Collateral Taker. Thus, in our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the Parties, only a claim that is governed by the Title Transfer Provisions remains and the Collateral Taker's rights to claim the transfer of cash and to use the cash as collateral will be governed by English law as the law applicable to the Agreement and the Title Transfer Provisions thereunder (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer).

2. Choice of Law and Jurisdiction

307 The choice of English law in respect of the transfer of title undertaking embedded in the Agreement is valid pursuant to Art. 116 PILA (see n. 270 above).

308 In respect of the transfer of title under the Transfer Title Provisions one should note the limitations of such choice of law in respect of Intermediated Securities under the Hague Convention (see n. 277 and 278 above).

309 Under Swiss procedural laws the parties to a Transaction are free to submit to any jurisdiction mutually agreed upon. Thus, the submission to jurisdiction of the courts of England as expressed in the Agreement is binding on the Collateral Provider and the same holds true for the submission to the arbitral tribunal as expressed in the Agreement (see n. 189).

310 A final and binding judgment of an English court would be recognized and enforced in Switzerland subject to and in accordance with the Lugano Convention. Further, a final

award of an arbitral tribunal in respect of the Agreement would be recognized and enforced by Swiss courts pursuant to and to the extent provided by the New York Convention.

We should emphasize that, under Swiss law, jurisdiction clauses have no effect on actions relating to, or in connection with insolvency procedures which, as a rule, must be brought before the court at the place of such insolvency procedure (*insolvenzrechtliches Territorialitätsprinzip*) (see n. 189 above). 311

3. Validity of transfer of title

a) Governing Law – Undertaking to transfer title

Pursuant to Art. 116 PILA, the Parties are free to choose English law to govern the undertaking to transfer title in Collateral to secure obligations of the Collateral Provider under the Agreement (transfer undertaking) and such choice of law is, therefore, valid and would be upheld by a Swiss court in respect of the contractual aspects. 312

b) Governing Law – Proprietary Aspects

We should emphasize that the following discussion is to be read in conjunction with the conclusions set forth under Section. V.11. (*Conflict of laws issues*) (n. 268-283 above). Therefore, in respect of the Securities a qualification is to be made whether the Securities are indirectly held and qualify as Intermediated Securities. 313

1. Securities

We note that if in line with the assumptions, the Securities are indirectly held (see n. 128 through n. 130 and n. 279) and qualify as *securities*, such Securities qualify as Intermediated Securities within the meaning of the Hague Convention. The creation of the security interest in Intermediated Securities is governed by Art. 108 (c) PILA. While the Parties to the Agreement may validly choose English law to govern the undertaking to transfer title embedded in the Title Transfer Provisions, the Parties cannot freely choose the law applicable to the transfer of title. If in line with the assumptions, the Securities are to be transferred to a Securities Account and the Securities Account agreement is as per the assumption expressed to be governed by the laws applicable in the jurisdiction of the office of the intermediary at which the securities account is maintained, then such laws will govern the transfer of title. 314

2. Cash

See discussion under n. 286. 315

c) Recognition of transfer of title

A Swiss court would based on the above have to recognize the transfer of title in Collateral under the Title Transfer Provisions, provided that the title in Collateral has been validly transferred pursuant to the Title Transfer Provisions under English law, as referred to above. 316

d) Foreclosure in Collateral transferred under the Title Transfer Provisions

Foreclosure in Collateral transferred under the Title Transfer Provisions absent Insolvency

Prior to an Insolvency of the Collateral Provider, the Collateral Taker would in our view be free to foreclose on the Collateral transferred under the Title Transfer Provisions and to liquidate such Collateral under the Title Transfer Provisions. In particular the Collateral Taker would be free to sell the Collateral, including to itself to the extent a market value for such Collateral can be established (e.g. if it is of a type customarily sold on a recognized market), outside any statutory procedure and without need to obtain a prior court order to this end. There are no further formalities that apply and the procedures do not in the circumstances described above and as a matter of Swiss law differ depending on the type of Collateral. 317

Where the Collateral Taker is based on the above free to liquidate the Collateral prior to an Insolvency of the Collateral Provider, it is our view that the Collateral Taker would also be permitted to take into account the Default Margin Amount as calculated pursuant to the terms of the Title Transfer Provisions when determining the Liquidation Amount under the Title Transfer Provisions. 318

Foreclosure in Collateral transferred under the Title Transfer Provisions after Insolvency

As the Collateral Taker is entitled to return Equivalent Margin and, hence, the Collateral Taker's obligation is limited to the delivery of Collateral of the same type, nominal value, currency and amount as the Securities transferred to the Collateral Taker as Acceptable Margin (see n. 305), the Collateral Taker is in our view secured by a security interest that 319

should be treated in analogy to a Swiss law irregular pledge (see n. 264-266 above). As a result, in our view, the Collateral Taker's right to liquidate the Collateral remains generally unaffected by the opening of an Insolvency Proceeding in respect of the Collateral Provider. In case of an Insolvency Proceeding in respect of the Collateral Provider, the Collateral Taker would remain free to liquidate the Collateral outside the relevant proceedings. The Collateral Taker, however, has to account for excess proceeds received as a result of any such liquidation to the relevant administration and participates in such procedures to the extent of its exposure remaining unpaid after the liquidation of the Collateral.

Where the Collateral Taker is based on the above free to liquidate the Collateral outside the Insolvency Proceedings, it is our view that the application of the Default Margin Amount as calculated pursuant to the terms of the Title Transfer Provisions would also be upheld in an Insolvency of the Collateral Provider. 320

This legal opinion is governed by and construed in accordance with Swiss law and shall be subject to the exclusive jurisdiction of the ordinary courts of Zurich, Canton of Zurich, Switzerland.

This legal opinion is addressed to and for the sole benefit of the Futures and Options Association and of its members which have subscribed to the Futures and Options Association's opinions library in that such members are entitled to have access to this legal opinion (excluding associate members). It may not be relied upon by any other person unless we specifically agree with that person in writing, although we consent to it being shown to such entitled Future and Options Association member's affiliates (being members of such person's groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such members and their affiliates in connection with the compliance of such members and affiliates with their obligations under prudential regulation, on the basis that we assume no responsibility to such parties or any other person as a result.

Yours faithfully,

LENZ & STAEHELIN

Patrick Hünerwadel

VIII. Annexes

Annex 1
Standard Forms

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

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

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

4. Professional Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")

5. Professional Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2009**")

6. Professional Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2011**")

7. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2007**")

8. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2009**")

9. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2011**")

10. Retail Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2007**")

11. Retail Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2009**")

12. Retail Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2011**")

13. Eligible Counterparty Agreement (2007 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2007**")

14. Eligible Counterparty Agreement (2009 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2009**")

15. Eligible Counterparty Agreement (2011 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2011**")

16. Eligible Counterparty Agreement (2007 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2007**")

17. Eligible Counterparty Agreement (2009 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2009**")

18. Eligible Counterparty Agreement (2011 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2011**")

19. Long-Form Two-Way Clauses (2007 version) (the "**Long-Form Two-Way Clauses 2007**")

20. Long-Form Two-Way Clauses (2009 version) (the "**Long-Form Two-Way Clauses 2009**")

21. Long-Form Two-Way Clauses (2011 version) (the "**Long-Form Two-Way Clauses 2011**")

22. Short-Form Two-Way Clauses (2007 version) (the "**Short-Form Two-Way Clauses 2007**")

23. Short-Form Two-Way Clauses (2009 version) (the "**Short-Form Two-Way Clauses 2009**")

24. Short-Form Two-Way Clauses (2011 version) (the "**Short-Form Two-Way Clauses 2011**")

"**Agreements (with Title Transfer Provisions)**" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined above) or an Equivalent Agreement which has broadly similar function to any of the foregoing.

"**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement (with Security Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Security Provisions) Agreement 2009, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2009, the Eligible Counterparty Agreement (with Security Provisions) Agreement 2011 or the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined above).

"**Long Form Two Way Clauses**" means each of the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011 (each as listed and defined above).

"**Professional Client Agreements**" means each of the Professional Client Agreement (with Security Provisions) Agreement 2007, the Professional Client Agreement (with Title Transfer Provisions) Agreement 2007, the Professional Client Agreement (with Security Provisions) Agreement 2009, the Professional Client Agreement (with Title Transfer Provisions) Agreement 2009, the Professional Client Agreement (with Security Provisions) Agreement 2011 or the Professional Client Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined above).

"**Retail Client Agreements**" means each of the Retail Client Agreement (with Security Provisions) Agreement 2007, the Retail Client Agreement (with Title Transfer Provisions) Agreement 2007, the Retail Client Agreement (with Security Provisions) Agreement 2009, the Retail Client Agreement (with Title Transfer Provisions) Agreement 2009, the Retail Client Agreement (with Security Provisions) Agreement 2011 or the Retail Client Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined above).

"**Short Form Two Way-Clauses**" means each of the Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009 and the Short-Form Two-Way Clauses 2011 (each as listed and defined above).

"**Two Way Clauses**" means each of the Long-Form Two Way Clauses and the Short-Form Two Way Clauses.

Annex 2
List of Transactions

The following groups of Transactions may be entered into under the Agreements:

(A) (Futures and options and other) Transactions as defined in the Agreements itemized under numbers 1. and 2. of Annex 1 to this legal opinion:

(i) a contract made on an exchange or pursuant to the rules of an exchange;

(ii) a contract subject to the rules of an exchange; or

(iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,

in any cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or

(iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or

(v) any other transaction which the parties agree to be a Transaction;

(B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;

(C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;

(D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.

Annex 3
Non-material Amendments

The Core Provisions may for purposes of our legal opinion only be amended as follows:

1. Any change to the numbering or order of a provision or provisions or 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) remain unchanged.

2. An addition which is not inconsistent with or question the applicability of any event of the list of events covered by the Events of Default to such list that constitutes 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.

3. 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, provided in each case that the insolvency events as defined under the Insolvency Event of Default Clause must not be changed.

4. 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, provided in each case that the insolvency events as defined under the Insolvency Event of Default Clause must not be changed.

5. 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.

6. Any change to an insolvency event of default replacing such event of default with a provision identical to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).

7. 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.

8. 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 provisions, provided that a waiver of notification may not be effective under Swiss law.