31 MARCH 2018

ICMA/ISLA

LEGAL OPINION UPDATE 2018

SCOTLAND

CONTENTS

[1] Access to the GMRA portion of the industry netting opinion covering the GMRA 1995, GMRA 2000, and GMRA 2011 contained in Appendix 1, is provided by the International Capital Market Association, (ICMA) to its members.

For any questions relating to access to the opinions, or new membership enquiries, please contact Lisa Cleary, Executive Counsel at ICMA - Lisa.Cleary@icmagroup.org

To: International Capital Market Association (**ICMA**)
International Securities Lending Association (**ISLA**)

31 March, 2018

Dear Sirs

Global Master Repurchase Agreement (1995, 2000 and 2011 versions)
Global Master Securities Lending Agreement (2000 version)
Global Master Securities Lending Agreement (2009 version)
Global Master Securities Lending Agreement (2010 version)
Overseas Securities Lender's Agreement (October 1994 version)
Overseas Securities Lender's Agreement (December 1995 version)
Master Gilt Edged Stock Lending Agreement (1996 and April 1996 versions)

CORE OPINION

This opinion consists of a Core Opinion, Appendices 1 and 2.

We have been instructed to give our opinion as to the validity under the laws of Scotland of:

(i) the 1995 version of the PSA/ISMA Global Master Repurchase Agreement (the **GMRA 1995**);

(ii) the 2000 version of the TBMA/ISMA Global Master Repurchase Agreement (the **GMRA 2000**); and

(iii) the 2011 version of the ICMA/SIFMA Global Master Repurchase Agreement (the **GMRA 2011**),

(the GMRA 1995, the GMRA 2000 and the GMRA 2011 together the **GMRA**) and the annexes to the GMRA 1995, GMRA 2000 and GMRA 2011 listed in Appendix 1, Part I to this opinion, comprising the Core Opinion and Appendix 1 only; and

(ii)

a.

i. the May 2000 version of the Global Master Securities Lending Agreement (the **GMSLA 2000**);

ii. the July 2009 version of the Global Master Securities Lending Agreement (the **GMSLA 2009**);

iii. the January 2010 version of the Global Master Securities Lending Agreement (the **GMSLA 2010**),

the GMSLA 2000, the GMSLA 2009 and the GMSLA 2010 (together the **GMSLA**),

b. the October 1994 version of the Overseas Securities Lender's Agreement (the **OSLA 1994**);

c. the December 1995 version of the Overseas Securities Lender's Agreement (the **OSLA 1995**)

(the OSLA 1994 and the OSLA 1995 together the **OSLA**);

d. the 1996 versions of the Master Gilt Edged Stock Lending Agreement (together the **GESLA**),

the GMSLA, the OSLA and the GESLA together the **Securities Lending Agreements,** and the Agency Annex and the Addendum for Pooled Principal Agency Loans to each of the GMSLA 2009 and GMSLA 2010 listed in Appendix 2 Part I.B to this opinion, comprising the Core Opinion and Appendix 2 only.

The GMRA and the Securities Lending Agreements are together referred to as the **Agreements**, and each an **Agreement.**

Subject to our assumption in paragraph (i)(A) below, the term GMRA 2000 and the substance of our opinion in relation to the GMRA 2000 shall apply to both the GMRA 2000 and the GMRA 1995 as amended by entry by the parties into the amendment agreement (the **Amendment Agreement**) in the form published by ICMA and the Securities Industry Financial Markets Association (**SIFMA**).

Subject to our assumption in paragraph (j) below, the term GMRA 2011 and the substance of our opinion in relation to the GMRA 2011 shall apply to: (i) the GMRA 2011, (ii) the GMRA 1995 as amended by the parties by signing up to the 2011 Global Master Repurchase Agreement Protocol (Revised) in the form published by ICMA (the **GMRA 2011 Protocol**); (iii) the GMRA 2000 as amended by the parties by signing up to the GMRA 2011 Protocol and (iv) the GMRA 2011 as amended by the GMRA 2011 Protocol.

Subject to the assumption in paragraph (i)(B) below the term GMSLA 2009 and the substance of our opinion in relation to the GMSLA 2009 shall apply to (i) the GMSLA 2009; and (ii) the GMSLA 2000 (as amended by the parties signing up to the ISLA 2009 Protocol (the **ISLA 2009 Protocol**).

Subject also to our assumption in paragraph (i)(B) below, the terms of OSLA and GESLA shall apply to the OSLA and GESLA respectively as amended by the parties signing up to the ISLA 2009 Protocol.

Terms defined in an Agreement have the same meaning in this opinion in relation to that Agreement.

This opinion is given in respect of parties, which are[2]:

(a) Companies incorporated under the Companies Act 2006 (or its predecessors) (**Companies**);

(b) Banks having permission under Part IV of the Financial Services Act 2000 (**FSMA**) to carry on the regulated activity of accepting deposits (**Banks**);

(c) securities dealers having permission under Part IV of FSMA to carry on the regulated activity of dealing in investments as principal, dealing in investments as agent and/or managing investments (**Securities Dealers**);

(d) insurers (as defined in article 2 of the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (**Insurers**) incorporated as a company under the Companies Act 2006 (or its predecessors);

(e) corporate trustees of an authorised unit trust scheme (as defined in section 237(1) of FSMA) (**Trustees**);

(f) open-ended investment companies incorporated or formed in Scotland (**OEICs**) as defined in the Open-Ended Investment Companies Regulations (2001) (the **OEIC Regulations**);

(g) building societies incorporated in Scotland under the Building Societies Act 1986 (as amended) (**Building Societies**); and

(h) in relation to (e) and (f) above, this Opinion covers those OEIC's and Trustees of an authorised unit trust scheme (**AUT**), both to which the provisions of the Council Directive of 20 December 1985 on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities ("**UCITS**") (No 85/611/EEC) as amended (the "**UCITS Directive**") do and do not apply and which are both "**UCITS Schemes**" and "**non- UCITS Schemes**" for the purposes of the COLL Sourcebook produced by the Financial Conduct Authority (**FCA**) and the Prudential Regulatory Authority (**PRA**);

in each case incorporated, organised, established or formed under Scots law and branches established or located in Scotland of entities of the type referred to in (a) to (h) above which are incorporated, organised or formed outside Scotland,

each of the parties specified in (a) to (h) above and such branches being a "Relevant Entity".

This opinion is confined to matters of Scots law and we express no opinion with regard to any system of law other than the laws of Scotland.

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[2] Please refer to Appendix 2, Part I for any additional counterparty coverage in respect of the Securities Lending Agreements, which will be a Relevant Entity also for the purpose of this opinion.

We have assumed that:

(a) each party to the Agreement is duly incorporated in its jurisdiction, validly existing and in good standing under the laws of such jurisdiction, has all requisite capacity and corporate power to execute, deliver and perform its obligations under the Agreement and each party has taken all necessary steps to execute, deliver and perform the Agreement and all transactions entered into under the Agreement;

(b) the Agreement has been duly authorised, executed and delivered by each party in accordance with all applicable laws and in accordance with their memorandum and articles of association or other relevant constitutional documents;

(c) other than by the annexes to the GMRA 1995, the GMRA 2000 and the GMRA 2011 listed in Appendix 1, Part I, the Cross-Product Master Agreement (February 2000 and June 2003 versions) (the **CPMA**), in the forms published by SIFMA, ISLA 2009 Protocol, the Agency Annex and Addendum for Pooled Principal Agency Loans to each of the GMSLA 2009 and GMSLA 2010, the GMRA 2011 Protocol or as stated in this opinion, none of the terms of the Agreement has been varied, waived or discharged in any material respects and transactions have been entered into as specified in the Agreement;

(d) the Agreement are legal, valid, binding and enforceable under English law;

(e) the Agreement have been entered into at arm's length by each of the parties;

(f) the Agreement and all transactions entered into under the Agreement are entered into prior to the formal commencement of insolvency proceedings against either party;

(g) at the time at which a transaction is entered into under the Agreement, neither party is aware of, or should be aware of, or has actual notice of the insolvency of the other party;

(h) the requirements of all necessary laws governing the transfer of Securities, Margin, Collateral, Equivalent Securities, Equivalent Margin, Equivalent Margin Securities and Equivalent Collateral are complied with;

(i) (A) where the parties to a GMRA 1995 have subsequently executed an Amendment Agreement, the effect of such Amendment Agreement will be to amend the terms of the GMRA 1995 to conform the GMRA 1995 to the GMRA 2000;

(B)

i. where the parties to a GMSLA 2000 have subsequently adhered to and agreed to be bound by the terms of the ISLA 2009 Protocol in respect of that GMSLA 2000, the effect of such adherence and agreement will,

under all applicable laws, be to amend the terms of paragraphs 2.4 and 10 of the GMSLA 2000 as set out in Annex 5 of that Protocol;

ii. where the parties to an OSLA 1994 have subsequently adhered to and agreed to be bound by the terms of the ISLA 2009 Protocol in respect of that OSLA 1994, the effect of such adherence and agreement will, under all applicable laws, be to amend the terms of paragraphs 1(A) and (D), and 8 of the OSLA 1994 as set out in Annex 1 of that Protocol;

iii. where the parties to an OSLA 1995 have subsequently adhered to and agreed to be bound by the terms of the ISLA 2009 Protocol in respect of that OSLA 1995, the effect of such adherence and agreement will, under all applicable laws, be to amend the terms of paragraphs 1.1 and 1.4, and 8 of the OSLA 1995 as set out in Annex 2 of that Protocol;

iv. where the parties to a GESLA have subsequently adhered to and agreed to be bound by the terms of the ISLA 2009 Protocol in respect of that GESLA, the effect of such adherence and agreement will, under all applicable laws, be to amend the terms of paragraphs 1 and 9 of the GESLA as set out in Annex 4 of that Protocol; and further, the reference in the first paragraph of the ISLA 2009 Protocol to '1995 Master Gilt Edged Stock Lending Agreement' refers to the Master Gilt Edged Stock Lending Agreement 1996 and April 1996 versions, in this opinion defined above as GESLA;

(j) where the parties to a GMRA have subsequently adhered to and agreed to be bound by the terms of the GMRA 2011 Protocol, the effect of such adherence and agreement will, under all applicable laws, be to effect the relevant amendment(s) to each GMRA between them, in each case on the terms and subject to the conditions of the GMRA 2011 Protocol and the relevant adherence letter;

(k) (i) each party (and where a person is a Principal under the Agency Annex, the Principal) is the sole obligor in respect of obligations owed by it and the sole beneficial owner in respect of all rights owed to it under the Agreement and each Transaction thereunder and no such rights are subject to any mortgage, charge, pledge, lien, encumbrance or other security interest and no creditor of a party has effected diligence attached, executed, levied execution or otherwise exercised a creditor's process in respect of such party's rights under the Agreement; and

(ii) neither party has entered into the Agreement or any transaction thereunder in its capacity as trustee (other than a trustee of an AUT), nor is any cash or any Securities, whether Purchased Securities, Margin, Collateral, Equivalent Securities, Equivalent Margin Securities or Equivalent Collateral, held by it in relation to the Agreement or any transaction thereunder held by it in such capacity;

(l) all consents, approvals, permissions, authorisations, notices, filings, recordations, publications and registrations which are necessary under any applicable law or regulation in order to permit the execution, delivery or performance of the Agreement or any transactions thereunder have been made or will be made or obtained within the period permitted by such laws or regulations;

(m) the Agreement, transactions entered into thereunder and transfers pursuant thereto (a) have been entered into (i) otherwise than as a gratuitous alienation within section 242 of the Insolvency Act 1986 and (ii) otherwise than with a view to giving an unfair preference to any person within section 243 of the Insolvency Act 1986, and (b) are not an extortionate credit transaction within section 244 of the Insolvency Act 1986;

(n) no party has taken any action or entered into any agreement, document or arrangement (other than the Agreement) which is inconsistent with any transfer of Securities or Margin being an outright transfer;

(o) where a party enters into an Agency Transaction or Agency Loan governed by the Agreement in accordance with the Agency Annex for the GMSLA 2009 and GMSLA 2010 and the Agreement for the OSLA 1995 and GESLA, that party is duly authorised to do so on behalf of each of the Principals (as defined in the Agreement) and each of the assumptions in (a) to (n) above apply to each of the Principals as if it were a party to the Agreement;

(p) all Agency Transactions entered into under the Agreement in accordance with the Agency Annex are validly allocated to the relevant Principals by the party acting as Agent in respect thereof;

(q) where the parties have entered into a CPMA, we repeat our assumptions in (a)-(p) above in relation to such CPMA and, in addition, have assumed, without further investigation, that such CPMA constitutes a valid and binding agreement between the parties under all applicable laws,

Subject to the above, we are of the opinion that under the laws of Scotland:

1. **INSOLVENCY PROCEEDINGS**

1.1 The reorganisation, liquidation or other insolvency proceedings to which Relevant Entity would be subject in Scotland, and which we consider relevant for the purposes of the Agreement, are those set out in section 899 of the Companies Act 2006 and in the Insolvency Act 1986 (as amended), namely:

(a) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, the approval of a voluntary arrangement pursuant to Part I of the Insolvency Act

1986 and such proceedings are subject to the Insolvency (Scotland) Rules 1986 and (other than Banks or Insurers) the Cross-Border Insolvency Regulations; [3]

(b) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, the making of an administration order pursuant to Schedule B1 of the Insolvency Act 1986 and such proceedings are subject to the Insolvency (Scotland) Rules 1986 and (other than Banks or Insurers) the Cross-Border Insolvency Regulations;

(c) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, the appointment of a receiver pursuant to a floating charge under the terms of Section 51 of the Insolvency Act and such proceedings are subject to the Insolvency (Scotland) Rules 1986 (other than Banks or Insurers) and the Cross-Border Insolvency Regulations;

(d) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, the appointment of an administrative receiver of the whole (or substantially the whole) of a company's property by or on behalf of the holders of a floating charge granted in connection with one of the excepted arrangements detailed in Sections 72B to 72GA of the Insolvency Act 1986 such proceedings are subject to and the Insolvency (Scotland) Rules 1986 and (other than Banks or Insurers) the Cross-Border Insolvency Regulations;

(e) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, the voluntary winding up of a company pursuant to Part IV of the Insolvency Act 1986 and such proceedings are subject to the Insolvency (Scotland) Rules 1986 and (other than Banks and Insurers) the Cross-Border Insolvency Regulations;

(f) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, the compulsory winding up of a company pursuant to Part IV of the Insolvency Act 1986 such proceedings are subject to and the Insolvency (Scotland) Rules 1986 and (other than Banks and Insurers) the Cross-Border Insolvency Regulations;

(g) in relation to Companies, Banks incorporated as Companies, Securities Dealers incorporated as Companies and Insurers incorporated as Companies, a scheme of arrangement approved by the Scottish courts under section 899 of the Companies Act 2006;

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[3] The Cross-Border Insolvency Regulations 2006 (SI 2006/1030) gives effect in Scotland to the Model Law on cross-border insolvency adopted on 30 May 1997 (UNICTRAL) by the United Nations Commission on International Trade and deals with (i) assistance being sought in Scotland by a foreign court or foreign insolvency representative in connection with a foreign insolvency proceeding; (ii) assistance being sought in a foreign jurisdiction in respect of a Scottish insolvency proceeding; (iii) assistance between Scottish and foreign courts in respect of insolvency proceedings.

(h) in the case of a Bank, the entry by it into bank insolvency or bank administration under the Banking Act 2009 and the operation of the Bank Insolvency (Scotland) Rules 2009 and the Bank Administration (Scotland) Rules 2009;

(i) the sequestration and appointment of a trustee in bankruptcy in respect of a trustee, trust, a partnership or a limited partnership pursuant to Section 6 of the Bankruptcy (Scotland) Act 2016;

(j) the voluntary winding-up of an OEIC pursuant to the OEIC Regulations;

(k) the winding up of an OEIC pursuant to Part V of the Insolvency Act 1986;

(l) the winding-up of a Scottish Building Society pursuant to Section 86(1) of the Building Societies Act 1986 (as amended) (the **BSA**);

(m) the appointment of an administrator of a Scottish Building Society pursuant to Section 90A of the BSA;

(n) the winding-up of a Scottish Building Society by HM Treasury pursuant to Section 90B of the BSA;

(o) an order by the Pension Regulator in respect of a trust which is a UK occupational pension scheme; and

(p) the winding up of a trust in terms of the trust deed establishing such trust deed,

(the above are together called **Insolvency Proceedings**).

1.2 Insolvency Proceedings commence, in the case of (e) (voluntary winding up of a company), at the time of the passing of the resolution by the company for voluntary winding up and, in the case of (f), at the time of presentation of the petition for winding up.

1.3 We confirm that all of the Insolvency Proceedings would be adequately covered by the definition of Act of Insolvency in the Agreements. In our view, the resolution measures introduced by the Banking Act 2009 (as amended) would not constitute an Act of Insolvency on the basis that it is not possible to terminate Transactions on the basis of a resolution measure alone (we refer you to paragraph 10 for further analysis of the resolution measures).

2. LOCATION OF SECURITIES

2.1 The substance of our opinion on the Agreement would not be affected if Securities, Purchased Securities, Loaned Securities, Margin Securities, or Collateral or Margin comprising of Securities, are held outside Scotland. Under Scots law, the location of Securities would be determined by (i) the place of incorporation of the company in respect of which shares are issued, or (ii) the governing law of the relevant agreement or deed creating the securities or under which rights to securities are held.

2.2 Under the laws of Scotland, if the transfer of Securities, Purchased Securities, Loaned Securities, Margin Securities, or Collateral or Margin comprising of Securities, is made in accordance with the formalities required under the laws of Scotland, the transfer would be respected as an outright transfer and would not be recharacterised. To the extent that Securities are governed by Scots law, a formal transfer of such Securities is required whereby the transferee or its nominee is registered as the holder of the Securities.

3. **CPMA**

Entry by the parties into a CPMA will not affect the substance of our opinion on the provisions of the Agreement and their effect under Scots law, nor will it affect the substance of our opinion on the validity of the Agreement as a whole under Scots law.

4. **CROSS-AGREEMENT SET-OFF**

4.1 The inclusion of a cross-agreement set-off provision in (i) the GMRA 1995 or GMRA 2000 both as amended by Annex 3 of the GMRA 2011 Protocol; (ii) paragraph 10(n) of the GMRA 2011, (iii) sub-clause 8(H) of the OSLA 1994, sub-clause 8.8 of the OSLA 1995, sub-clause 9.8 of the GESLA or sub-clause 10.8 of the GMSLA each as amended by the ISLA 2009 Protocol or (iv) sub-clause 11.8 of the GMSLA 2009 or GMSLA 2010 (together the **Cross-Agreement Set-Off Provisions**), does not affect the substance of our opinion on the enforceability of the GMRA Netting Provisions or Securities Lending Agreement Netting Provisions (as defined in Appendix 1, Part III and Appendix 2, Part III respectively), as applicable.

5. **LEGAL FORM AND CAPACITY OF CERTAIN COUNTERPARTIES AND MODIFICATIONS IN APPLICATION OF OPINION**

Legal form

5.1 5.1.1. Scottish Insurance companies may take the form of both mutual companies and companies incorporated under the Companies Act 2006 (and its predecessor). For the purposes of this opinion, however, we consider that any Insurer will be a company incorporated under the Companies Act 2006 (and its predecessor).

5.1.2 Mutual funds are likely to be either an OEIC or (acting through Trustees) an authorised unit trust scheme (**AUT**). It is possible that a mutual fund could be constituted by a limited partnership or an LLP. See Appendix II Part 1 for a discussion of limited partnerships and LLPs.

5.1.3 We are not aware of any hedge funds operating in Scotland but if they were to operate in Scotland, they would be likely to be OEICs or AUTs.

Power to enter into transactions and investment restrictions

5.2 **Insurance companies**

The opinions set out in this letter apply to Insurers, subject to the following modifications:

5.2.1 **Insolvency Proceedings**

A. In addition to the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001, Insurers are subject to the Insurers (Winding up) (Scotland) Rules 2001, the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, the Insurers (Reorganisation and Winding Up) Regulations 2004 (the **Insurers Winding Up Regulations**), the General Prudential Sourcebook (**GENPRU**) and Prudential Sourcebook for Insurers (**INSPRU**) (each as amended or modified up to the date hereof).

B. All of the Insolvency Proceedings specified in section 1.1(a) to (g) apply to Insurers.

5.2.2 **Specific Qualifications for Insurers**

PRA Rules

A. Insurers are required to be authorised by the PRA for the purpose of carrying on insurance business. Insurers are subject to a number of regulatory rules imposed by the authority including rules contained in GENPRU and INSPRU (as amended).

B. GENPRU imposes a prohibition on Insurers carrying on any commercial business other than insurance business and activities directly arising from that business. Insurers are required to make deductions from their regulatory capital in respect of assets which are inadmissible and/or which exceed various "concentration limits" specified in GENPRU (which impose limits on Insurers' exposure to particular categories of assets and to particular counterparties). They are also required to hold admissible assets of a value at least equal to the amount of their technical provisions. A transaction entered into in breach of the asset admissibility rules will affect the value which an Insurer may attribute to the transaction for solvency purposes. Insurers carrying on "long term insurance business" (as defined in GENPRU) are required to maintain a separate account in respect of the long term business. They are also required to ensure that (subject to certain qualifications) long term insurance business assets are applied only for the purposes of the Insurer's long term business. In relation to linked long term contracts of insurance, there are restrictions under INSPRU on the types of asset or index by reference to which benefits may be determined.

C. Where an Insurer enters into a Transaction in breach of any PRA rules (including those in INSPRU and GENPRU), this would not affect the validity or enforceability of Transactions against the Insurer as section 151 of FSMA provides that contravention of PRA rules does not make any transaction void or unenforceable.

Insurers Winding Up Regulations

D. The Insurers Winding Up Regulations require that, in the case of the winding up of a long term insurer or a general insurer or a composite insurer (each as defined in regulations 17 and 21(1)(c) of the Insurers Winding Up Regulations) where the long term business of that insurer has been or is to be transferred as a going concern, debts must be paid in the following order of priority: preferential debts, insurance debts then all other debts. The Insurers Winding Up Regulations require that preferential debts will rank equally among themselves (after the expenses of the winding up) and must be paid in full, unless the assets are insufficient to meet them in which case they will abate in equal proportions. Likewise, insurance debts will rank equally among themselves and must be paid in full, unless the assets after the payment of preferential debts are insufficient to meet them, in which case they abate in equal proportions. To the extent that the assets available are insufficient to meet preferential debts, those debts (and those debts only) have priority over claims of debentures secured by, or holders of, any floating charge and must be paid out of any property comprised in or subject to that charge.

E. The Insurers Winding Up Regulations make separate provisions for non-transferring composite insurers (as defined in regulation 17 of the Insurers Winding Up Regulations). In particular, the Insurers Winding Up Regulations provide for the separate application of long term business assets and general business assets (each as further defined in regulation 17 of the Insurers Winding Up Regulations), with long term business assets being applied in discharge of long term business preferential debts (as further defined in regulations 22(9) and 23(1)) and general business assets being applied in discharge of general business preferential debts (as further defined in regulations 22(9) and 24(1)). Where long term business assets exceed the long term business preferential debts and the general business assets are insufficient to meet the general business preferential debts, the long term business assets representing that excess must be applied in discharge of the outstanding general business preferential debts and vice versa where the general business assets exceed the general business preferential debts and the long term business assets are insufficient to meet the long term business preferential debts. Regulations 23 and 24 specify that the order of priority of payment of debts of a non-transferring composite insurer in respect of its long term business and its general business respectively shall be as the order specified in Regulations 21 and 25.

F. The Insurers Winding Up Regulations state that relevant reorganisations and winding ups shall not affect the rights of creditors to demand the set-off of their claims against the claims of the Included Insurer or relevant third country insurer, where such a set-off is permitted by the law of the relevant European Economic Area state which is applicable to the claim of the Included Insurer or relevant third country insurer.

G. The Insurers Winding Up Regulations would not affect the operation of the close-out and netting provisions of the Agreement. As indicated above, the Insurers Winding Up Regulations recognise and uphold creditors' rights to demand set-off of their claims against Included Insurers (as defined in such Regulations) where such set-off is permitted by the applicable EEA law (defined as the law applicable to the claim of the insurer). Accordingly, in relation to insolvency proceedings against Included Insurers which are commenced in the UK and are subject to Scots law and in respect of which the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions thereof fall to be considered, set-off would be recognised under the terms of the Insurers Winding Up Regulations to the extent that it is recognised as a matter of English law (being the governing law of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions). Similarly, in relation to Excluded Insurers (as defined in such Regulation), set-off should be recognised in any proceedings which are subject to English law in accordance with the terms of the Recast Insolvency Regulations. If the operation of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions results in a net sum payable by the Insurer to its counterparty, the counterparty's claim for this sum would rank behind the expenses of the winding up, preferential debts and insurance debts.

H. If the analysis as to the availability of set-off in insolvency in the context of the Insurers Winding Up Regulations is incorrect, we think that the general law of Scotland in relation to the availability of set-off in insolvency will apply.

Section 377 FSMA

I. Where an Insurer has been proved unable to pay its debts, section 377 of FSMA provides that the Scottish Courts may, if it thinks fit, reduce the value of one or more of the Insurer's contracts instead of making a winding up order. Any such reduction will be on such terms and subject to such conditions (if any) as the court thinks fit. The court is given the power to reduce "the value of the contracts of the company" under section 377 of FSMA. This is derived from section 58 of the Insurance Companies Act 1982 (**ICA**), which enables the court to reduce the "amount", rather than the "value" of the contracts.

J. In a case considering the effect of section 58 of ICA[4], it was held that the reference to "contracts" related to contracts of insurance only. On the basis

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[4] In re Capital Annuities Ltd. [1979] 1 WLR 170.

that section 377 of FSMA is given an equivalent interpretation to its predecessor provision (and it seems to us that the better view is that it should be so interpreted), it would not apply to transactions entered into by Insurers under the Agreement (and would not therefore affect the operation of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions).

Mutual funds

5.3 Subject to the following modifications, the opinions set out in this letter will apply in respect of parties which are Trustees of AUTs (as described in paragraphs (e) and (h) on page 6)[5].

5.3.1. **Netting**

Insolvency of Trustee

A. As discussed at paragraph 7 of this Opinion, the Scottish common law rules of set-off on insolvency require that both parties to the set-off must be debtor and creditor to each other in the same legal capacity (*concursus debiti et crediti*)[6]. Accordingly, whilst it is clear that a trustee may not set-off a debt owed to him qua trustee against a debt owed by him in his personal capacity (or *vice versa*), there is no doubt in Scots law that a trustee may set-off a debt owed to him qua trustee against a debt owed by him qua trustee (or *vice versa*). The only circumstance in which this principle might be prejudiced is where it is not clear from the face of the Agreement that the trustee has entered into the Agreement qua trustee. In these circumstances, it is possible that the trustee may incur personal liability under the Agreement or a Securities Lending Agreement and the resultant lack of *concursus debiti et crediti* may prejudice the availability of set-off under the Agreement or Securities Lending Agreement. We therefore recommend that, when concluding an Agreement with a Trustee, it should be made clear on the face of the Agreement that the Trustee is acting in its capacity as trustee of the unit trust scheme and not in its personal capacity.

Insolvency of Unit trust scheme

B. A unit trust scheme, as a trust, would be wound up in Scotland by the appointment of a trustee in bankruptcy pursuant to section 6 of the Bankruptcy (Scotland) Act 2016[7]. The winding up would be referred to as a sequestration. We consider that, on the insolvency and subsequent sequestration of a unit trust scheme, the Scottish common

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5 Unauthorised unit trust schemes are not covered by this Opinion and are not Relevant Entities on the basis that they are not active entities in the derivatives market.

6 *Chamber's Judicial Factor v Vertue* (1893) 20 R 257; *Tait v Wallace* (1894) 2 SLT 136; *McPhail v Lothian Regional Council* 1981 SC 119.

7 Note that, pursuant to section 6(3) of the Bankruptcy (Scotland) Act 2016, the sequestration of a trust estate shall be on the petition of (a) a majority of the trustees, with the concurrence of a qualified creditor (a creditor of the trust estate who is owed not less than £750 by the trust estate) or qualified creditors (creditors of the trust estate who are owed in aggregate not less than £750 by the trust estate) or (b) a qualified creditor or qualified creditors, if the trustees as such are apparently insolvent.

law rules of set-off in insolvency as discussed in paragraph 7 of this Opinion would apply. The Insolvency Proceedings specified in section 1.1(i) only apply to authorised unit trust schemes.

5.3.2 **Specific Qualification**

Restrictions on investment powers of AUTs

Collective Investment Scheme Sourcebook (**COLL**) imposes restrictions on the investment powers of AUTs. These include restrictions on borrowing and lending and on the entry into derivative and forward transactions.

5.4 Subject to the following modifications, the opinions set out in this letter will apply in respect of parties which are OEICs.

5.4.1 **Insolvency Proceedings**

A. The following insolvency proceedings are applicable to OEICs:-

(a) an OEIC may be wound up under Part V of the Insolvency Act 1986 as an unregistered company, subject to certain procedural modifications set out in regulation 31 of the OEIC Regulations; and

(b) an OEIC may be wound up voluntarily, provided it is solvent and that the steps required by regulation 21 of the OEIC Regulations and the procedures set out in chapter 7.3 of COLL are satisfied. The OEIC must obtain consent from the FCA to the winding up in accordance with regulation 21 of the OEIC Regulations.

B. There are no other Insolvency Proceedings which may be applied to OEICs.

5.4.2 **Specific Qualifications**

COLL imposes restrictions on the investment powers of OEICs. These include restrictions on borrowing and lending and on the entry into derivative and forward transactions.

In accordance with CIS 14.2.11R and COLL 7.3.12R (as applicable), liabilities of an umbrella OEIC (defined as a collective investment scheme under which the contributions of the participants in the scheme and the profits or income out of which payments are to be made to them are pooled separately in relation to separate parts of the scheme property) attributable, or allocated to a particular sub-fund must be met first out of the scheme property attributable or allocated to such a sub-fund. If the liabilities to be met out of a particular sub-fund of an umbrella OEIC are greater than the proceeds of the realisation of the scheme property attributable or allocated to that sub-fund, the deficit must be met out of the scheme property attributable or allocated to the solvent sub-funds of that umbrella OEIC in which the proceeds of realisation exceed liabilities and divided between those sub-funds in a manner that is fair to the shareholders in those solvent sub-funds.

5.5 **Building Societies**

Subject to the following modifications, the opinions set out in this letter will apply to Building Societies:-

5.5.1 A Scottish Building Society is a body corporate formed under the BSA; instead of shareholders it has members comprising certain borrowers from, or depositers with, the Building Society. A Scottish Building Society is not registered at Companies House in Edinburgh but, in terms of Section 106 of the BSA, the PRA is obliged to maintain a public file in respect of certain documentation pertaining to a Building Society; it should be noted that the BSA does not distinguish between Scottish and English building societies but, in our opinion, a Scottish Building Society is a building society with a principal place of business in Scotland.

5.5.2 **Insolvency Proceedings**

A Scottish Building Society may be wound up voluntarily with the consent of its members or by a Scottish Court pursuant to Section 86(1) of the BSA. In terms of Section 90 of the BSA, the winding-up of a Scottish Building Society will be governed (with limited amendments) by the same provisions of the Insolvency Act 1986 that apply to Scottish Companies. The BSA specifies also that insolvency rules may be made for application to Scottish Building Societies but to date no such rules have been promulgated. In the absence of such rules, the same Scottish insolvency set-off rules will apply to Scottish Building Societies as apply to Scottish Companies. In our opinion, our conclusions in paragraph 7 will apply equally to Scottish Building Societies.

Section 90A of the BSA provides that an administrator may be appointed to a Scottish Building Society in the same manner as a Scottish company and our opinion on netting the application of the Scottish common rules of insolvency set-off on the administration of a Scottish Company would apply equally to a Scottish Building Society.

Section 90(B) of the BSA (which was inserted by the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007), empowers HM Treasury to make an Order which would have the effect that, on a winding up of a society, most shareholding members will rank equally with creditors of the society (other than subordinated or preferential creditors). If such an Order is passed by HM Treasury, shareholding members will benefit from the change of ranking.

5.5.3 **Investment Powers**

The BSA imposes express limitations on the power of a Building Society to enter into derivative transactions. However, Section 9(1)(A) of the BSA provides that any breach of this restriction does not void any transaction.

5.6 **Central Bank/Monetary Authority**

The central bank and monetary authority for Scotland is the Bank of England which performs such functions for all of the United Kingdom. The Bank of England is located in London and, in our view, the Scottish courts would consider any questions as to the existence and operation of the Bank of England as being a matter of English law and is not covered by this opinion.

5.7 **Branches**

5.7.1 If an entity which, if incorporated in Scotland would be a Relevant Entity, is incorporated or organised under the laws of a foreign jurisdiction (a **Foreign Entity**) but has a branch in Scotland (a **Scottish Branch**) would the Scottish Courts permit Insolvency Proceedings against such a Scottish Branch to be instituted in Scotland?

5.7.2 Subject to paragraph 5.7.3, where the Foreign Entity has its centre of main interest (COMI) in Scotland, then pursuant to European Insolvency Regulation (Recast) (No. 848/2015) (the **Recast Insolvency Regulations**) the main insolvency proceedings in respect of the Foreign Entity and the Scottish Branch will be brought in Scotland regardless of the fact that the Foreign Entity is incorporated or otherwise organised elsewhere. Accordingly, on the insolvency of the Foreign Entity, it must be wound-up in Scotland, whether or not there are winding-up proceedings with regard to any "establishment" of the Foreign Entity in another member state of the European Economic Area (a **Member State**). Indeed, the Recast Insolvency Regulations dictate that all other Member States must recognise the main insolvency proceedings in Scotland and that such proceedings should produce the same effects in all other Member States as under the law of Scotland.

It should be noted that there is no case law in Scotland as to the circumstances in which a Scottish Court will determine that a company incorporated in another jurisdiction has its COMI in Scotland. However, there have been several cases in English law on the matter. Cases decided in the English Courts will be persuasive in Scots law and it is likely that the Scottish Courts would follow them. In the case of BRAC Rent-a-car International Inc [2003] 2 All ER 201, an English Court determined that a Delaware corporation had its COMI in England and Wales on the basis that:

(a) it never traded from its US address;

(b) its operations were conducted almost entirely in England;

(c) it had no employees in the US;

(d) almost all its employees worked in England under contracts of employment governed by English law; and

(e) its trading activities were carried out by way of contracts with subsidiaries and franchises, all governed by English law.

Following this decision and having regard to the general law of insolvency in Scotland, we take the view that if the Foreign Entity has the majority of its operations in Scotland with a large number of assets and liabilities and a number of creditors in Scotland under contracts governed by Scots law, although much would depend on the actual circumstances involved, it is likely that a Scottish Court would determine that the Foreign Entity's COMI is in Scotland and would therefore make a liquidation order in respect of the Foreign Entity if asked to do so. The winding-up of the Foreign Entity would, prima facie, be governed exclusively by Scots law and the provisions of the Insolvency Act 1986 and the Scottish common law rules on set-off in insolvency, which are procedural rules, would be considered (as analysed in paragraph 7). A liquidator may apply to the Court for guidance on the conduct of the winding-up proceedings, particularly if they involve a non-Scottish element. Under Scots law, the Foreign Entity, including all of its branches in foreign jurisdictions, would be considered a single legal entity. Therefore, all of its assets (subject to collection) and liabilities, whether or not acquired or incurred in Scotland, will be subject, as far as Scots law is concerned, to the winding-up of the Foreign Entity in Scotland. Of course, this does not mean that foreign law will not be relevant to the determination of the nature and/or other aspects of an asset located or liability owed outside Scotland.

With regard to assets located outside Scotland, there will, of course, be practical limitations, as well as limitations arising under principles of private international law, on the ability of the Scottish liquidator to recover such assets. Liabilities owed by the Foreign Entity outside Scotland will be included within the scope of, and therefore subject to, the Scottish winding-up.

Where the Foreign Entity has its COMI in another state (the **Home Jurisdiction**) and the Home Jurisdiction is a Member State, the main insolvency proceedings in respect of the Foreign Entity must be brought in the Home Jurisdiction. The Recast Insolvency Regulations will operate so that the Scottish Courts and Scots law generally must recognise the main insolvency proceedings brought in Home Jurisdiction and such proceedings must produce the same effects in Scotland under Scots law as under the law of the Home Jurisdiction. In these circumstances, the Scottish Branch may be regarded as an "establishment" for the purposes of the Recast Insolvency Regulations so that secondary insolvency proceedings may be brought in Scotland. In our opinion and in accordance with the Recast Insolvency Regulations, any such secondary insolvency proceedings brought in Scotland would be limited to a winding-up of the Scottish Branch and its effects would be restricted to the assets of the Foreign Entity held in Scotland or governed by Scots law.

5.7.3 Our analysis does not apply to a Foreign Entity which is a credit institution within the meaning of the Credit Institutions (Regulation and Winding Up)

Regulations 2004 (the **Credit Institution Regulations**) (a **Credit Institution**). Such Credit Institutions include banks, insurance companies and mutual funds and, accordingly, we consider the entities specified in paragraphs (b) and (d) to (h) (inclusive) of the list of entities covered by this opinion as being Credit Institutions and as such do not fall within the operation of the Recast Insolvency Regulations. We refer you to paragraph 5.7.5 for an analysis of the winding-up of Credit Institutions.

5.7.4 Where the Foreign Entity is not a Credit Institution and the Home Jurisdiction is not a Member State, it is not clear that the Scottish Courts could found jurisdiction to wind-up the Foreign Entity in Scotland either as main insolvency proceedings (on the basis that the Foreign Entity has its COMI in Scotland) or as secondary insolvency proceedings (on the basis that the Scottish Branch is an "establishment" in Scotland). There is no case law in Scotland on the matter. However, the English Courts have considered the point in relation to an administration order made in respect of a Delaware-incorporated company in the BRAC Rent-a-car International case. Accordingly, the principle has been established in English law that it is possible to put a company that is not incorporated in a Member State into administration on the basis that the company has its COMI in England and Wales in terms of the Recast Insolvency Regulations. In our opinion, such reasoning, if correct, would apply equally by analogy to a winding-up order.

The BRAC Rent-a-car International case would be persuasive in Scots law and it is likely that a Scottish Court would follow the decision if it was unable to distinguish the facts of the case before it. If this analysis is correct, it follows that:

(a) where the Foreign Entity has its COMI in Scotland, the Scottish Courts will make a winding-up order as the main insolvency proceedings in respect of the Foreign Entity; and

(b) where the Scottish Branch is an "establishment" in Scotland, the Scottish Courts will open secondary insolvency proceedings in respect of the Scottish Branch, which will be winding-up proceedings and which will be restricted to assets located in Scotland or governed by Scots law,

in each case regardless of the fact that the Home Jurisdiction is not a Member State. The difficulty here is that the recognition provisions of the Recast Insolvency Regulations only apply to Member States and it is therefore possible that the Courts of the Home Jurisdiction may refuse to recognise any such proceedings brought in Scotland under Scots law in terms of the Recast Insolvency Regulations or may recognise them, but determine that the effects of such proceedings are different in Home Jurisdiction than they are in Scotland.

5.7.5 Where the Foreign Entity is a Credit Institution, it will be subject to the winding-up and reorganisation regimes of the Member State in which it is

organised and regulated. Accordingly, the Scottish Courts will not have jurisdiction to put a Credit Institution into liquidation, provisional liquidation or administration in the United Kingdom (regulation 3 of the Credit Institutions Regulations). By virtue of regulation 5 of the Credit Institutions Regulations, an insolvency measure taken in respect of a Credit Institution in the Member State in which it is organised and regulated will have effect in the United Kingdom in relation to:

(a) any branch of that Credit Institution (i.e., the Scottish Branch);

(b) any property or other assets of that Credit Institution; and

(c) any debt or liability of that Credit Institution,

as if it were part of the general law of insolvency of the United Kingdom.

Regulation 28 of the Credit Institutions Regulations will apply to a branch of a Credit Institution in Scotland such that its reorganisation or winding-up shall not affect the right of its creditors to demand the set-off of their claims against the claims of the affected Credit Institution where such a claim of set-off is permitted by the law applicable to the Credit Institution's claim. The Scottish Courts will look to English law as the governing law of the contract to determine whether the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions can be enforced by creditors against a Credit Institution that is in the process of being wound-up or otherwise reorganised.

By virtue of regulation 4 of the Credit Institutions Regulations, a Scottish Court may make an order in relation to a voluntary scheme of arrangement under Part 26 of the Companies Act 2006 in respect of a Credit Institution.

The Credit Institutions Regulations and the Credit Institutions Directive do not apply to administrative receivership or receivership in respect of the assets and undertaking of a Credit Institution.

Therefore, other than as specified in this paragraph 5.7.5, there will be no separate Scottish Insolvency Proceedings for a branch of a Credit Institution.

5.7.6 Where the Foreign Entity is a Credit Institution and the Home Jurisdiction is not a Member State, such a credit institution (a **Third Country Credit Institution**) will not be subject to the Recast Insolvency Regulations nor will it be subject to the Credit Institutions Regulations (save that a reorganisation measure or a winding up proceeding taken in a Member State must be notified to the relevant authority in the third country). Accordingly, the jurisdiction of the Scottish Courts to wind-up a Third Country Credit Institution will be determined by the general law of Scotland disregarding the impact of the Recast Insolvency Regulations and the Credit Institutions Regulations.

The Scottish Courts have wide jurisdiction under Sections 221 and 225 of the Insolvency Act 1986 to wind up companies with assets and/or business operations in Scotland even though not incorporated in Scotland. Section 221(1) takes effect so that an "unregistered company" may be wound-up under the Insolvency Act 1986 and all the provisions of the Insolvency Act 1986 about winding-up apply to such an "unregistered company". In terms of Section 222 of the Insolvency Act 1986, an "unregistered company" includes any company other than a company incorporated in the United Kingdom under the Companies Act 2006. Accordingly, prima facie, the Court of Session has jurisdiction to wind-up the Foreign Entity where the Foreign Entity is a Third Country Credit Institution on the basis that the Foreign Entity is, in these circumstances, an "unregistered company".

However, generally speaking, Scots law would regard the law of the country in which the Third Country Credit Institution was incorporated or organised as the appropriate law to conduct the primary liquidation or other proceedings of the Third Country Credit Institution. The Scottish Courts may simply recognise the authority of a foreign liquidator (or similar official) of the Third Country Credit Institution to recover the Scottish assets of the Third Country Credit Institution, and that recognition may, in some cases, be sufficient for the purposes of the Scottish aspects of the insolvency proceedings. Accordingly, in that case, those proceedings would operate in accordance with the rules and procedures applicable in the Home Jurisdiction and there would be no separate Scottish proceedings (of course, the application of the law of the Home Jurisdiction may lead to the application of English law as the governing law of the Agreement in order to determine, as a contractual matter, whether the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions are valid). Scottish creditors would then claim in the proceedings in the Home Jurisdiction and an issue in those proceedings may accordingly arise as to whether the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions are effective under the law of the Home Jurisdiction.

As discussed above, the Scottish Courts have a prima facie jurisdiction to order the winding-up of a Third Country Credit Institution under Scots law, including appointing a Scottish liquidator, by virtue of Sections 221 and 225 of the Insolvency Act 1986. This is so even where there are separate insolvency proceedings in the Home Jurisdiction. In deciding how to exercise its discretion as to whether it actually takes such jurisdiction, a Scottish Court would consider a number of factors particular to the case before it and would exercise its discretion under Sections 221 and 225 (which are widely drafted) so as not to interfere with matters properly before Courts in other countries, including the Home Jurisdiction. If the Scottish Branch of the Third Country Credit Institution has extensive operations, with a large number of assets and liabilities and a number of creditors, in Scotland, although much would depend on the actual circumstances involved, it is likely that a Scottish Court would make a liquidation order if asked to do so. The winding-up of the Third Country

Credit Institution would, prima facie, be governed exclusively by Scots law and the provisions of the Insolvency Act 1986 and the Scottish common law rules on set-off in insolvency, which are procedural rules, would be considered. A liquidator may apply to the Court for guidance on the conduct of the winding-up proceedings, particularly if they involve a non-Scottish element.

Where there are insolvency or similar proceedings under way in respect of a Third Country Credit Institution in the Home Jurisdiction, and on the basis that those proceedings are the main ones in respect of the Third Country Credit Institution, then the Scottish winding-up proceedings would normally be viewed as supplemental or ancillary to those proceedings in the Home Jurisdiction. Accordingly, an ancillary winding-up would often in practice concentrate on the collection of (primarily Scottish) assets and settling a list of creditors whose claims the liquidator is made aware of.

Assuming that Scottish creditors would be treated pari passu in the main insolvency proceedings in the Home Jurisdiction with creditors in the Home Jurisdiction, the Scottish liquidator would then remit to the liquidator or other relevant official in the Home Jurisdiction the assets of the Third Country Credit Institution collected in Scotland, after deduction for payments to preferential creditors and the costs of the Scottish proceedings.

The policy underlying the institution of ancillary proceedings is that the Scottish Courts will seek the most appropriate means of ensuring substantial equality between the creditors of an insolvent company in different countries. This means that where there are proceedings in the Home Jurisdiction, the Scottish Court will generally view the Home Jurisdiction as the most appropriate forum and will therefore require the Scottish liquidator to remit the net Scottish assets to the Home Jurisdiction liquidator so that the claims of all the creditors of the insolvent company may, as far as possible, be dealt with in a single set of proceedings.

5.7.7 Where the Foreign Entity is not a Credit Institution, the Recast Insolvency Regulations and the decisions in the BRAC Rent-a-car International and Crisscross Telecommunications cases will apply such that, in our opinion, it will be possible for the Foreign Entity to be put into administration in Scotland where its COMI is in Scotland. This applies regardless of whether the Home Jurisdiction is a Member State of the EEA or not.

As discussed above, where the Foreign Entity is a Credit Institution or a branch of a Credit Institution, it may not be put into administration in the United Kingdom.

The position differs where the Foreign Entity is a Third Country Credit Institution and falls to be determined on the interpretation of the term "company" in the Insolvency Act 1986. The term "company" is defined for the purposes of administration in paragraph 111 of Schedule B1 of the Insolvency Act 1986 to include a company which is not incorporated in a Member State

but has a “centre of main interests” in a Member State other than Denmark. The definition of "centre of main interest" is as defined in the earlier EU Insolvency Regulations (1346/2000) but the substance is the same as in the Recast Insolvency Regulations and would not extend to a credit institution. In our opinion it is not possible to put a Third Country Credit Institution or any Scottish branch of such entity into administration in Scotland.

5.7.8 The Recast Insolvency Regulations and the Credit Institutions Regulations specifically do not apply to receivership or administrative receivership. Accordingly, it is necessary to look at the circumstances in which the holder of a floating charge granted by the Foreign Entity could enforce that floating charge by appointing a receiver or an administrative receiver to the Foreign Entity's assets located in Scotland or governed by Scots law.

In terms of Section 462(1) of the Companies Act 1985, it is competent for an incorporated company (whether a company within the meaning of the Companies Act 2006 or not) to create in favour of its creditor a floating charge over all or any part of its property and undertaking.

In terms of Section 51(1) of the Insolvency Act 1986, it is competent under the law of Scotland for the holder of a floating charge over all or any part of the property of a company (whether a company within the meaning of the Companies Act 2006 or not) which the Court of Session in Edinburgh has jurisdiction to wind-up, to appoint a receiver over all or any part of the property of the company as is subject to the floating charge. As discussed above, where the Foreign Entity is not a Credit Institution, the Court of Session will have jurisdiction under Section 221 of the Insolvency Act 1986 and the Recast Insolvency Regulations to wind-up the Foreign Entity in circumstances where the Foreign Entity has its COMI or an "establishment" in Scotland. In such circumstances, it will also be competent for a creditor who holds a floating charge granted by the Foreign Entity to appoint an administrative receiver or a receiver in respect of the Foreign Entity, although we think it doubtful that an administrative receiver could be appointed where the Foreign Entity only has an "establishment" in Scotland.

As the Court of Session does not have jurisdiction to wind up a Credit Institution incorporated outside Scotland, the effect of Section 51(1) of the Insolvency Act 1986 and the Credit Institutions Regulations is that an administrative receiver or a receiver may not be appointed to a Credit Institution in Scotland.

However the Court of Session has a prima facie jurisdiction to wind-up the Foreign Entity where the Foreign Entity is a Third Country Credit Institution. Accordingly, prima facie, it is competent under the laws of Scotland for an administrative receiver to be appointed to a Third Country Credit Institution pursuant to any floating charge granted by that third party credit institution.

We express no opinion as to whether any such administrative receiver or receiver will be recognised, and/or entitled to receive the assets of the Foreign Entity, in any jurisdiction other than Scotland. This will be a matter for the law of the jurisdiction or jurisdictions in which any such assets are located.

5.7.9 In summary, where a Scottish branch exists and the entity does not have a COMI in Scotland, any Insolvency Proceedings would likely to be limited to secondary winding-up proceedings to assist an insolvency official in the Home Jurisdiction although if the entity is a Credit Institution with a Home Jurisdiction in the European Union, there would be no separate Insolvency Proceedings in Scotland. An exception to this generality is that is competent to seek to appoint an administrative receiver or receiver or to seek the sanction of a voluntary arrangement in respect of the entity.

6. OTHER MATTERS

6.1 On the assumption that under English law the unenforceability or illegality of a provision of the Agreements would not undermine the efficacy of the remainder of the Agreements generally or of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions in particular, the unenforceability or illegality of any provision of the Agreement would not undermine the efficacy of the remainder of the Agreement generally or of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions in particular under Scots law.

6.2 The GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions would be enforceable in all Insolvency Proceedings including non-liquidation insolvency. We refer to paragraph 11 for further analysis.

6.3 There is no necessity for the set-off effected under the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions to be reflected in the records of the parties for it to be effective and no other action is required including, without limitation, any filing or registration, for the set-off to be effective.

6.4 Under the laws of Scotland it is necessary for the efficacy of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions that all transactions should be treated as a single agreement. We refer you to paragraph 11(b) for analysis of this issue.

6.5 In the case of a separate Insolvency Proceeding against a local branch Relevant Entity, the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions would be enforceable in accordance with their terms, providing for a complete net position subject to the analysis in paragraph 9.7.

6.6 The use of the Agreements with branches of a Relevant Entity in a number of jurisdictions, including one where the legal basis for set-off is not clear or where the close-out netting may be unenforceable, would not jeopardise the validity of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions in respect of a Relevant Entity.

6.7 The GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions would be enforceable in Scotland notwithstanding that actions may be taken by insolvency officials in other jurisdictions.

6.8 With the exception of an Event of Default which is the presentation of a petition for winding-up or any analogous proceeding, or the appointment of a liquidator or any analogous officer of the Defaulting Party, the close-out and set-off provisions of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions are at the option of the non-defaulting party. We do not consider that the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions would be more likely to be upheld if their operation were automatic. The discretion and flexibility given to the non-defaulting party under the Provisions do not affect the validity of the close out and set-off provisions of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions.

6.9 In relation to any provision of the Agreements providing for the jurisdiction of the English courts:

(a) Under the provisions of the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (as amended, supplemented or replaced from time to time) (the **Coventions**), to which the United Kingdom is a party and to which effect was originally given in Scots law by the Civil Jurisdiction and Judgments Act 1982 (as amended, supplemented or replaced from time to time) (the **1982 Act**) (or as otherwise provided for in the Rome Convention on the Law Applicable to Contractual Obligations 1980 (**Rome I**) and Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations (**Rome II**) (as effected by UK legislation from time to time)) the Scottish Courts in the circumstances set out therein may be required to or may decline jurisdiction. Under section 34 of the 1982 Act the Scottish Court has no jurisdiction to entertain proceedings on a cause of action in respect of which a judgment has been given by a Court outside Scotland unless that judgment is not enforceable or entitled to recognition in Scotland. Where proceedings on the same cause of action have been commenced other than in Scotland and the special provisions of the said Conventions do not apply, the Scottish Court may on grounds of *lis pendens* stay an action brought before it. Where it is shown in a case to which the said Conventions do not apply that notwithstanding the express jurisdictional submission in the Agreements there is another Court outside Scotland, having competent jurisdiction, which is more appropriate for the trial of the action on the basis that the case can be more suitable for the interests of all the parties and the ends of justice be tried there, the Scottish Court may in exceptional circumstances stay an action brought in Scotland in order that it may be heard in that other Court.

(b) In certain circumstances set out in the 1982 Act, or, if the 1982 Act and the choice of English law do not apply, in the common law of Scotland, the submission by a Relevant Entity to the jurisdiction of the English Courts may be

overridden by the jurisdiction of another court. Examples of the circumstances where this may occur are where the litigation relates to the insolvency of a Relevant Entity (jurisdiction is conferred on the Scottish Courts and the Insolvency Proceedings will be operated in accordance with Scots law), a trust (exclusive jurisdiction is conferred on the courts specified in the trust deed), immovable property (exclusive jurisdiction is generally conferred on the courts of the country where the property is situated), the validity of the constitution, nullity or dissolution of a company or other legal person (jurisdiction is conferred on the courts of the country in which the company or person has its principal place of business, centre of main interests or an establishment) or insurance (in relation to which a choice of jurisdictions is presented). If the 1982 Act does not apply, the common law of Scotland will apply. The common law offers less certainty than the 1982 Act in this area, although we consider it unlikely that the Scottish Courts would under the common law of Scotland override the consent of the Relevant Entity to the jurisdiction of the English Courts.

7. NETTING

7.1 Without prejudice to our opinions in Appendix 1 and 2 and to support our opinions in Parts III of Appendices 1 and 2 if an Event of Default has occurred either because of an Act of Insolvency in respect of a Relevant Entity or following any other default by that Relevant Entity, the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions (subject as follows) be effective and would create an obligation on the part of one of the parties to pay a single net amount in the Base Currency to the other party in respect of all transactions entered into under the Agreement between the parties.

(a) Netting and set-off under contract law

Outside the context of insolvency the question which arises in Scots law is whether a Scottish Court would refer the effectiveness of the provisions to the proper law of the transactions covered by the Agreement or Scots law as the *lex fori*.

If we were concerned with questions of set-off under the general law, the Scottish Courts would apply the rules of Scots law, rather than the governing law of the Agreement. This is because the rules of set-off are regarded by the Scottish Courts as procedural rather than substantive.

For the purposes of transactions covered by the Agreement, however, we are concerned with set-off rights created by agreement rather than the general law. The efficacy of these contractual set-offs would be treated by a Scottish Court as governed by the law of the contract creating the set-off. There is no judicial authority in Scotland on this point, but it is consistent with the normal rules of the conflict of laws (Philip R Wood, *English & International Set-off*, Sweet & Maxwell, 1989, para 23-27).

Accordingly, in our view the Scottish Courts will consider the enforceability of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions as

being a matter for determination under English law being the governing law of the Agreement and the transactions entered into thereunder. Assuming those provisions were effective under English law, they would also be applied in Scotland. For this purpose, it might be necessary in Scottish proceedings to have expert evidence presented as to the validity of the provisions under the governing law.

(b) Netting and set-off in insolvency

A transaction (provided that the Purchased Securities have been delivered by the Seller to the Buyer or Lender to Borrower and that the Purchased Securities or Securities comprise financial instruments) will be a financial collateral arrangement and the provisions of paragraph 10 of the Agreement will be a close-out netting provision for the purposes of the Financial Collateral Arrangements (No. 2) Regulations 2003 (the **Financial Collateral Regulations**) (as to which see paragraph 17 below). On this basis, the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions will be effective by virtue of Regulation 12 of the Financial Collateral Regulations, which provides that a close-out netting provision shall take effect in accordance with its terms notwithstanding that either party to the arrangement is subject to winding-up proceedings or reorganisation measures.

If a transaction is not a financial collateral arrangement, it is necessary to consider whether the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions will be effective in the context of an Act of Insolvency involving a liquidation and in the context of an Act of Insolvency involving an administration. Receivership, voluntary arrangements and schemes of arrangement are discussed hereafter.

In our view, in an insolvency scenario the Scottish Courts will look to English law as the governing law of the Agreement and the transactions entered into thereunder to establish the efficacy and enforceability of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions of the Agreement. However, it is possible that the Scottish Courts may look to Scots law as the *lex fori*. The Scottish insolvency set-off rules are common law and not statutory. Like the English rules (which are largely statutory), however, the Scottish rules are probably mandatory, and any attempt to enlarge the set-off rights is probably void. On the insolvency of a Relevant Entity, a Scottish Court will consider these rules and we believe will give effect to the contractual set-off provisions in so far as these are not inconsistent with the Scottish set-off rules on insolvency. These rules must be pled however and do not operate *ipso jure*.

The Scottish common law set-off rules on insolvency are fairly wide. They allow an illiquid claim (i.e. a claim which is not actually due or ascertainable) to be set-off against a liquid claim; but the illiquid claim must be capable of ascertainment almost immediately and must arise out of the same contract. A claim arising after insolvency cannot be set off against a pre-insolvency debt. Both parties to the set-off must be debtor and creditor in the same capacity (*concursus debiti et crediti*).

In our view, the GMRA Netting Provisions and the Securities Lending Netting Provisions are broadly consistent with the Scottish common law rules of off-set on insolvency.

Winding-up

In a liquidation, there are two legal issues concerning the enforceability of the provisions concerning cessation of scheduled payments and the calculation of amounts payable on an early termination of the Agreement. First, could the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions be struck down as penalties? Secondly, what scope is there for the liquidator to choose to continue profitable transactions while terminating loss-making transactions, thereby leaving the solvent party obligated on the former with only a claim for damages on the latter?

There is minimal risk of two-way payment arrangements being characterised as an unenforceable penalty, in that the insolvent party is not deprived of gains on terminated contracts. The arrangements could still be struck down, however, if the calculation of the payments due was not a genuine pre-estimate of loss, judged as at the time of the making of the contract. We express no opinion on this point, as the answer depends on the facts of market practice.

In respect of the second issue, any difficulties under Scots law are likely to arise in relation to liquidators. Under Scots law, a liquidator can, within a reasonable time of his appointment, elect to take over or disclaim contracts to which the company is a party. If, therefore, each of the transactions is a separate contract, there would be scope for "cherry picking" by a liquidator. Paragraph 13 of the GMRA, paragraphs 17 of the OSLA, the GESLA, the GMSLA 2009 and the GMSLA 2010 and paragraph 18 of the GMSLA 2000 provide, however, that those agreements and all transactions thereunder constitute a single business and contractual relationship and are made in consideration of each other. If this provision is valid, the scope for cherry-picking is eliminated, as a liquidator cannot disclaim only part of a contract. There is no case law in Scotland on the validity of an indivisibility provision of this type. If, however, there was a genuine connection between the transactions and this connection was in practice relied upon by participants, we believe it is likely that an indivisibility clause would be upheld. If there is no indivisibility clause or the clause is governed by English law, the Scottish Courts would look to English law to determine whether the relevant transactions are covered by a single agreement and to the extent that Scots law is relevant, the Scottish Courts would look to the intentions and actions of the parties.

If the liquidator successfully disclaimed onerous contracts, it might be possible to apply to the Courts for rescission of the other contracts under Section 186 of the Insolvency Act 1986. The Court's power of rescission is discretionary, but the connection between the contracts disclaimed by the liquidator and those which he was seeking to uphold would, in our view, assist the Court towards granting rescission.

Administration

The terms of contracts made by a company are not altered by the fact that the company has gone into administration (although the contract may be subject to adjustment on the grounds that it is a gratuitous alienation or an unfair preference as aforesaid), and the administrator is not entitled to repudiate or choose not to perform the contracts of the insolvent party. Although it has not yet been judicially determined in Scotland whether administration *per se* amounts to insolvency, we consider that, except in very exceptional circumstances, an administration will be equivalent to insolvency. Accordingly, it is thought that the Scottish Courts will consider the Scottish rules on set-off in insolvency as discussed above in relation to a winding-up as being applicable in administration.

7.2 Section 426(4) and (5) of the Insolvency At 1986 provide that a Scottish Court may, if requested by a court in any other part of the United Kingdom or in certain territories designated by statutory instrument[8], apply, in relation to matters specified in the request, the insolvency law which is applicable by either Court in relation to the comparable matter falling within its jurisdiction. There would seem to be no authority, in the context of the Agreement or set-off generally, as to whether a Scottish Court would accede to a request under section 426(4) and (5) of the Insolvency Act 1986 not to apply the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions in circumstances where those provisions were not effective in such overseas jurisdiction. The purpose of section 426(4) and (5) of the Insolvency Act 1986 is to enable office-holders from designated territories to obtain the assistance of the Scottish Courts in matters of insolvency law. The assistance which may be granted must be the application of the **insolvency law** (a term defined in section 426(10)(a) of the Insolvency Act 1986 by reference to specified legislation) of either court in relation to comparable matters.

8. QUALIFICATIONS

Our opinion is subject to the following qualifications:

8.1 The choice of English law as the governing law of the Agreement would be upheld as a valid choice by the Scottish Courts except that:

(a) the choice may not be upheld as a valid choice by the Scottish courts if any contractual obligation arising is outside the scope of Rome I;

(b) where all the other elements relevant to the situation at the time of the choice are located in a single country other than England and Wales, the choice of English law will not prejudice the application of any provisions of the law of that other country which cannot be derogated from by agreement;

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[8] These latter are: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei-Darussalam, Canada, Cayman Islands, Channel Islands, Falkland Islands, Gibraltar, Hong Kong, Isle of Man, Ireland, Malaysia, Montserrat, New Zealand, Republic of South Africa, St Helena, Turks & Caicos Islands, Tuvalu and British Virgin Islands.

(c) effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the Agreement have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the Agreement unlawful;

(d) where the application of a provision of English law is manifestly incompatible with the public policy of Scotland although on the basis of our understanding of the current application of public policy by the Scottish Courts, we do not believe that the provisions of the Agreements are incompatible with the public policy of Scotland; and

(e) in relation to the manner of performance and the steps to be taken in the event of defective performance, the Scottish Courts will have regard to the law of the country in which performance takes place.

8.2 Enforcement of a foreign judgement in Scotland in respect of the GMRA and each of the Securities Lending Agreements, which is expressed to be governed by English law, will require either (i) enforcement of a judgement of the Courts of England under the procedures set out in the 1982 Act (and applicable subordinate legislation or rules of court) or (ii) if the 1982 Act does not apply, enforcement of such a judgement through an action of decree-conform under common law in the Court of Session in Scotland, in circumstances where (1) the court which issued the judgement had jurisdiction and acted judicially with no element of unfairness, (2) such judgement was final, not obtained by fraud, or a revenue action, remained capable of enforcement in the place it was pronounced and was not contrary to natural justice and (3) enforcement of the judgement is not contrary to Scottish public policy or (iii) the obtaining of a judgement of the Scottish Courts after establishing the obligations as valid and binding according to their proper law by proof through appropriate expert evidence. We refer you to paragraph 10.11 for information on recognition of jurisdiction.

8.3 Scottish courts can give judgments in currencies other than Sterling if, subject to the terms of the contract, it is the currency which most fairly expresses the pursuer's loss but such judgments may be required to be converted into Sterling for enforcement purposes.

8.4 Under the rules of procedure applicable, a Scottish court may, in certain circumstances, order a claimant in an action to provide caution for costs.

8.5 A determination, designation, calculation or certificate of any party to any matter provided for in the Agreement might, in certain circumstances, be held by a Scottish court not to be final, conclusive and binding (for example, if it could be shown to have an unreasonable or arbitrary basis or not to have been reached in good faith) notwithstanding the provisions of the Agreement.

8.6 Any undertaking or indemnities in relation to United Kingdom stamp duties given by a party may be void under the provisions of Section 117 of the Stamp Act 1891.

8.7 Any provision of any Agreement purporting to charge default interest would be unenforceable if the provisions of this paragraph were held to constitute a penalty and not a genuine and reasonable pre-estimate of the loss likely to be suffered as a result of the default in payment of the amount in question.

8.8 In some circumstances a Scottish Court would not give effect to paragraph 15 (Entire Agreements; Severability) of the GMRA, paragraph 18 (Severance) of the GMSLA 2009 and the GMSLA 2010 and paragraph 19 (Severance) of the GMSLA 2000, in particular if to do so would not accord with public-policy (although on the basis of our understanding of the current application of public policy by the Scottish Courts, we do not believe that the provisions of the Agreements are incompatible with the public policy of Scotland) or would involve the court in making a new contract for the parties.

8.9 A Scottish Court may refuse to give effect to any provision in an agreement (i) for the payment of expenses in respect of the costs of enforcement (actual or contemplated) or of unsuccessful litigation brought before a Scottish Court or where the court has itself made an order for costs or (ii) which would involve the enforcement of foreign revenue or penal laws.

8.10 Certain remedies, such as an order for specific implement or the grant of an interim interdict, may be available only at the discretion of the Scottish Courts. The remedy of specific implement will not be granted in respect of an obligation to pay money, or where performance is impossible or is not capable of enforcement by the Scottish Courts, or if it might otherwise lead to injustice.

8.11 Claims of a creditor in an obligation may be or become subject to the operation of rules of prescription or (without prejudice to paragraph 11 of this opinion) to defences of counterclaim or balancing of accounts in bankruptcy or to pleas of retention, set-off or compensation.

8.12 The enforceability of any provision of the Agreement is subject to the doctrines of *rei interventus* as statutorily re-enacted in the Requirements of Writing (Scotland) Act 1995. *Rei interventus* is an example of personal bar and operates where one party to a purported agreement has been permitted to act in such a way by the other party so that the actions of the former party may be enough to bind the latter party to the agreement, even if the agreement turns out to be defective in some way.

8.13 Any provision of the Agreement stating that a failure or delay on the part of any party to the Agreement in exercising any right or remedy shall not operate as a waiver of such right or remedy may not be effective.

8.14 To the extent that any matter is expressly to be determined by future agreement or negotiation in the Agreement, the relevant provision may be unenforceable or void for uncertainty.

8.15 The parties to the Agreement may be able to amend the Agreement by oral agreement despite any provision to the contrary.

8.16 A Scottish Court may stay proceedings if concurrent proceedings are brought elsewhere.

8.17 If a party to the Agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or UK sanctions implemented or effective in the United Kingdom under the United Nations Act 1946, the Emergency Laws (Re-enactments and Repeals) Act 1964 or the Anti-terrorism, Crime and Security Act 2001, or under the Treaty establishing the European Community or the Terrorism Asset Freezing Act 2010, or is otherwise the target of any such sanctions, then the obligations of the other party to the Agreement to that party may be unenforceable or void.

8.18 The expression **enforceable** used above means that the obligations contained within the Agreement are of a type that the Scottish Courts enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms.

8.19 Other than the opinions in paragraphs 1 to 7, this opinion is subject to all laws affecting creditors generally, including those limiting or modifying rights and obligations on bankruptcy, insolvency, liquidation, administration, reorganisation or otherwise, and whether under statute or the general law. Paragraphs 1 to 7 are subject to the qualifications and observations in paragraphs 8 to 14.

8.20 By giving this opinion, we do not assume any obligation to notify you of future changes in law which may affect the opinions expressed in this opinion, or otherwise to update this opinion in any respect.

9. QUALIFICATIONS RELATING TO INSOLVENCY PROCEEDINGS

9.1 The following is a brief summary of certain provisions of the Companies Act 2006 and the Insolvency Act 1986 which may affect the effectiveness of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions in certain Insolvency Proceedings.

9.2 Gratuitous alienations

The Scots law concept of gratuitous alienations is similar, but not identical to the English concept of transactions at an undervalue. In Scots law, under Section 242 of the Insolvency Act 1986, if, within two years of the transfer of any part of a company's property or the discharge or renunciation of any claim or right of the company (an **Alienation**) (or five years if the transfer, discharge or renunciation is to an associate of the company) (and an **associate** for these purposes means (a) a person which is under the same control as the company or (b) a director or other officer of the company), a liquidation of the company commences or the company goes into administration, the Alienation may be challenged by a creditor (in the case of a liquidation only), the liquidator or the administrator of the company, unless:

(a) immediately, or at any other time after the Alienation, the company's assets were greater than its liabilities; or

(b) the Alienation was made for adequate consideration.

On a successful challenge being brought, the Scottish Court will make such decree of reduction or for restoration of property or other redress as may be appropriate.

The test of adequate consideration is an objective one: the consideration must be that which could reasonably be expected in the circumstances between parties acting in good faith and at arm's length.

9.3 **Unfair preferences**

The Scots law concept of unfair preferences is similar, but not identical to the English concept of preferences. In Scots law, under Section 243 of the 1986 Act, if a transaction entered into by a company has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors of the company, and within 6 months of that transaction a winding up of the company commences or the company goes into administration, it may be challenged by a creditor (in the case of a liquidation only), the liquidator or the administrator of the Company, unless it was:

(a) a transaction in the ordinary course of business; or

(b) a payment in cash for a debt which when it was paid had become payable, and the transaction was not collusive with the purpose of prejudicing the general body of creditors of the Company; or

(c) a transaction whereby the Company and the counterparty undertook reciprocal obligations and the transaction was not collusive as above.

As with gratuitous alienations, on a successful challenge of an unfair preference being brought, the Scottish Court will make such decree of reduction or for restoration of property or other redress as may be appropriate.

9.4 **Common law**

Gratuitous alienations and unfair preferences can also be challenged under common law, where the time limits set out above do not apply. However in each case the burden of proof is on the challenger, rather than the company making the alleged voidable transaction. For this reason and since the elements necessary to establish a common law gratuitous alienation or unfair preference are generally difficult to prove, the common law is seldom used in this area. The vast majority of challenges are made under the Insolvency Act 1986.

9.5 **Extortionate credit transaction**

Section 244 of the Insolvency Act 1986 provides that a court may make an order setting aside or varying a transaction which was entered into within three years ending with the day the administration order is made or the company went into liquidation if the transaction is or was extortionate and involved the provision of credit to that company. The term **credit** is not defined. Even assuming that a transaction under the Agreement involved the provision of credit, the transaction would be extortionate only if, having regard to the risk accepted by the person providing the credit to the company, the terms of it require grossly exorbitant payments to be made in respect of the provision of the credit or otherwise contravene ordinary principles of fair dealing.

9.6 **Liquidation - Rescission of Contracts**

Under Scots common law, if a company is being wound up, the liquidator may terminate any contract which is in his opinion not beneficial to the company. In such circumstances, the liquidator will simply terminate the contract and the counterparty or counterparties will only be able to rank for damages for breach of contract. The liquidator must intimate within a reasonable time whether he intends to adopt a contract. If he does not intimate within that period, he is held to have abandoned it.

Under statute, Section 186 of the Insolvency Act 1986 provides that, if a company goes into liquidation, any person who is entitled to the benefit or subject to the burden of a contract with the company may apply to the Scottish Courts for an order rescinding the contract on such terms as to payment by either party to the contract of damages for non-performance, or otherwise as the Court thinks just. Any damages payable under the order to such a person may be provided by him as debt in the winding up.

As the liquidator may only cancel all, but not part, of a contract it is therefore important that the transactions under an Agreement constitute a single agreement. We refer you to our analysis in paragraph 7.1(b) in relation to this point.

9.7 **Liquidation - Dispositions of Property Post-insolvency**

Where a winding up of a company is started by the presentation of a petition for winding up, any disposition of the company's property made after the presentation of the petition is void, unless the Court otherwise orders. This may affect a transaction made under the Agreement by such a company at that time. However, case law suggests that the Courts are inclined to uphold transactions in such circumstances, when made in good faith, in the ordinary course of business and where the parties did not have notice of the presentation of the petition at the time the transaction was entered into or the payment was made.

9.8 **Receivership**

Where a company goes into receivership in Scotland, in most circumstances the receiver (and the insolvent party prior to the appointment of the receiver) cannot be

compelled to perform existing contracts, or be prevented from repudiating them where damages would be an adequate remedy (unless the repudiation would adversely affect the realisation of assets or the insolvent party's trading prospects). Such repudiation may therefore have the same effect as repudiation by a liquidator, described above.

9.9 **Schemes of arrangement and company voluntary arrangements**

Section 899 of the Companies Act 2006 and Part I of the Insolvency Act 1986 provide for, respectively, schemes of arrangement and voluntary arrangements between, *inter alia*, a company and its creditors. The convening of any meeting of a party's creditors for the purposes of considering a voluntary arrangement as referred to in section 3 of the Insolvency Act 1986 (or any analogous proceeding) is an **Act of Insolvency** within the definition of **Act of Insolvency** of the Agreement and accordingly the affected counterparty could serve a Default Notice on the counterparty convening such a meeting, which would give rise to an Event of Default under either paragraph 10(a)(iv) of GMRA 1995 or paragraph 10(a)(vi) of GMRA 2000 or GMRA 2011 or paragraphs 10.1(d) of GMSLA 2010 or paragraph 12(A) of OSLA 1994 or OSLA 1995 or paragraph 14.1(v) of GMSLA 2000, or paragraph 13(D) of the GESLA, as the case may be. If the Event of Default occurs and the provisions of either paragraph 10(a)(iv) of GMRA 1995 or paragraph 10(a)(vi) of GMRA 2000 or GMRA 2011 or paragraphs 10.1(d) of GMSLA 2010 or paragraph 12(A) of OSLA 1994 or OSLA 1995 or paragraph 14.1(v) of GMSLA 2000, or paragraph 13(D) of the GESLA, as the case may be, are effected prior to the approval of the scheme of arrangement or voluntary arrangement, the netting would not be affected by the subsequent approval of the proposal, though the amount of any net claim payable by the party subject to the scheme of arrangement or voluntary arrangement may be affected by it. Failure to effect netting prior to the approval may result in the set-off rights being adversely affected. With regard to schemes of arrangement within section 899 of the Companies Act, reasonable efforts are required to be made to notify creditors whose rights would be affected by the scheme of arrangement.

9.10 **Administration**

A company that has gone into administration will be protected from certain proceedings at all times while the company is in administration (i.e. at all times while the appointment of an administrator has effect) and during the period between the presentation of any administration application or the filing of a copy notice of intention to appoint an administrator with the Court and the coming into effect of the administration. In particular, no proceedings and no diligence, execution or other legal process (which, in our opinion, does not prevent contractual close-out as in our opinion, legal process does not extend to the application of netting or set-off provisions) may be commenced or continued against the insolvent party or its property, except with the leave of the court or with the consent of the administrator. Thus the enforcement of any claim of the other party to the Agreement against a Relevant Party that is in administration in Scotland would be restricted in these circumstances.

9.11 **Settlement Finality Regulations**

To the extent that the Agreement or a transaction under it is or gives rise to either (a) a **transfer order** effected through a designated system or action taken under the rules of a designated system or (b) constitutes **collateral security**, the general law of insolvency has effect subject to the provisions of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (the **Settlement Finality Regulations**).

A **transfer order** is, broadly, an instruction by a direct or indirect participant (being, broadly, a person responsible for discharging financial obligations arising under transfer orders which are effected through a designated system or a person which carries out any combination of the functions of a central counterparty, a settlement agent or a clearing house with respect to a designated system) to pay money by means of entry on the accounts of a credit institution, a central bank or a settlement agent or to discharge a payment obligation as defined by the rules of a designated system or to transfer title to or an interest in securities. **Collateral security** includes, broadly, realisable assets provided under a repurchase agreement (i) for the purpose of securing rights and obligations in connection with a designated system or (ii) to a central bank for the purpose of securing rights and obligations in connection with its operations in carrying out its functions as a central bank. A **designated system** is a system designated for the purposes of the Settlement Finality Regulations.

The purpose of the Settlement Finality Regulations is to preserve the validity of certain instructions (transfer orders) and to enable collateral security to be realised in priority to the application of certain insolvency laws, including set off.

No opinion is given to the extent that the Agreement or any Transaction gives rise to a transfer order or collateral security (in each case as defined for the purposes of the Settlement Finality Regulations).

9.12 **Arrestment**

Where a debt which is owed by one party (**Party A**) to the other party (**Party B**) pursuant to the terms of the Agreement becomes subject to an arrestment (which only applies to monetary amounts owed) and subsequent action of furthcoming then any person benefiting from such arrestment and subsequent action of furthcoming (the **arrester**) will normally take the benefit of such debt subject to Party A's set-off rights. This will be the case provided that any claim which Party A seeks to set-off against Party B's claim for such debt was payable before the date of such arrestment and subsequent action of furthcoming and neither party, nor arrester, is subject to Insolvency Proceedings.

The position is unclear where Insolvency Proceedings have been commenced against any of Party A, Party B or the arrester. No opinion is given in respect of arrestment or its effects before or after the commencement of Insolvency Proceedings against any of Party A, Party B or the arrester.

10. EU BANK RECOVERY AND RESOLUTION DIRECTIVE AND THE BANKING ACT 2009[9]

10.1 The EU Bank Recovery and Resolution Directive (2014/59/EU) (the **BRRD Directive**) sets out certain tools that EU Member States may utilise to deal with unsound or failing credit institutions. The UK already had state intervention powers in respect of banks and certain other institutions following the implementation of the Banking Act 2009 (the **Banking Act**) but the BRRD Directive seeks to provide a minimum harmonisation regime for all Member States.

The tools set out in the BRRD Directive include the preparation of recovery and resolutions plans by institutions and their relevant regulatory authorities but also includes a set of resolution tools which will be available to the relevant Member State regulators. The resolution tools in the BRRD Directive include sale and bridging powers similar to those available to the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority under the Banking Act but also include a detailed "bail-in" tool whereby debt and equity may be written down by the regulator (the **Bail-in Tool**).

10.2 The Banking Act 2009 (the **Banking Act**) was in force prior to the BRRD Directive becoming effective and introduced a special resolution regime for UK incorporated Banks and Building Societies. The Banking Act established statutory powers to resolve a failing UK incorporated Bank or Building Society (and, after the implementation of the BRRD Directive, certain significant investment firms) and the Banking Act has been updated to comply with the requirements of BRRD pursuant to, inter alia, the Financial Services (Banking Reform) Act 2013 and the Bank Recovery and Resolution Order 2014. The updated statutory powers (the **SRR Tools**) include a power of statutory transfer of some or all of the assets and liabilities of a UK incorporated Bank or Building Society either to a private purchaser, a bridge bank owned and controlled by the Bank of England, an asset management vehicle or to a nominee of, or a company wholly owned by, HM Treasury (together the **Transfer Tool**) as well as provisions creating the Bail-in Tool. Before the SRR tools can be exercised, the Prudential Regulation Authority must be satisfied that: (i) the relevant Bank or Building Society is failing, or likely to fail, its regulatory threshold conditions for authorisation under FSMA; and (ii) (in the view of the Bank of England) it is not reasonably likely, having regard to timing and other relevant circumstances, that action will be taken that can enable such Bank or Building Society to satisfy the threshold conditions. Subject to the safeguards contained in the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (as amended by the Banking Recovery and Resolution Order 2014 and the Banking Act 2009 (Resolution of Special Bail-in Provisions etc) Order 2014) (the **Safeguards Order**), the Transfer Tool can override contractual restrictions on transfer and override also default provisions (including termination rights) that would otherwise be triggered by the transfer. The Transfer Tool can override contractual clauses in the Agreements that would trigger an Event of Default upon a

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[9] On 7 February 2017 the European Commission adopted a delegated Regulation on classes of arrangement to be protected in a partial property transfer under Article 76 of the BRRD. Based on our analysis of the text as adopted by the European Commission, this delegated Regulation does not affect our analysis in paragraph 10.

transfer but do not affect any right to terminate arising from other existing circumstances. The Transfer Tool can also provide for a partial transfer of some, but not all, of a UK Bank or Building Society's assets and liabilities and the Banking Act includes wide-ranging powers to ensure the continuity of operations between the transferor and transferee. These provisions have the potential to disrupt the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions, subject as follows.

10.3 Prior to the implementation of BRRD, the Transfer Tool was subject to the protections afforded to the enforceability of financial collateral arrangements under the Collateral Directive[10], in accordance with the principle of the supremacy of Community law[11]. However, pursuant to BRRD the Banking Act and the Safeguards Order now prevail over the protections afforded by the Collateral Directive although Article 76(2) of the BRRD Directive does require Member States to ensure that there is "appropriate protection" for title transfer financial collateral arrangements and set-off and netting arrangements (each a **Protected Arrangement**) to prevent a partial transfer of some but not all of the rights and liabilities which are subject to the relevant Protected Arrangement.

10.4 The "appropriate protections" in relation to a Protected Arrangement are implemented by article 3(1) of the Safeguards Order which prevents the transfer of some, but not all, of the protected rights and liabilities between a person and a banking institution (as defined in the Safeguards Order) under certain set-off arrangements, netting arrangements (which include a "close-out netting provision" as defined in the Financial Collateral Arrangements (No. 2) Regulations (the **Financial Collateral Regulations**)) and title transfer collateral arrangements under a partial property transfer to which the Safeguards Order applies. "Protected rights and liabilities" are rights and liabilities between such a person and banking institution which either is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer financial collateral arrangement so long as they are not excluded rights or liabilities (as to which see below). Article 3(2) of the Safeguards Order prevents the inclusion in a partial property transfer to which the Safeguards Order applies, of a provision under the continuity powers in the Banking Act which terminates or modifies the protected rights or liabilities between such a person and a banking institution.

10.5 The protections described in paragraph 10.3 and 10.4 do not apply in the case of "excluded rights [or liabilities]". Notably the following are included within the definition of excluded rights or liabilities: "rights [and liabilities]..which relate to a contract which was entered into by or on behalf of a banking institution otherwise than in the course of carrying on of an activity which relates solely to relevant financial

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10 Council Directive 2002/47/EC

11 Under the further principle of consistent interpretation, the Banking Act and Transfers Order should be read consistently with the Collateral Directive and, in the case of inconsistency, the Collateral Directive should prevail.

instruments[12].” Therefore to the extent the Purchased Securities or Margin (in the case of GMRA), or the Loaned Securities or Collateral (in the case of other Agreements), are not relevant financial instruments, rights and liabilities under an Agreement will not benefit from the protection of article 3 of the Transfers Order but, in our opinion, this is unlikely to be the case.

10.6 In summary, the Transfer Tool would not affect the operation of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions to the extent they fell within the scope of the application of the protections in the Safeguards Order which, in our opinion, they should.

10.7 The BRRD Directive also contains “stay” provisions whereby termination and close-out netting rights and certain payment or delivery obligations may be suspended by the Bank of England; these suspension powers are implemented in Scotland by sections 70A to 70D (inclusive) of the Banking Act. In addition, section 48Z(6) of the Banking Act states that a termination right which arises directly from the exercise of a stabilisation power shall be disregarded so that, for instance, a termination right arising from the exercise of a Transfer Tool will be disapplied. The suspension powers under sections 70A to 70D could apply to the early termination, set-off and netting and title transfer provisions of a Protected Arrangement and, if exercised by the Bank of England, would last initially from the publication of the notice of suspension to close of business on the next business day provided that such early termination, close-out netting etc rights have not arisen solely due to the exercise of the stabilisation or suspension powers. Such suspension powers can only be exercised by way of provision in an instrument implementing an SRR Tool (or its equivalent for a Third Country Credit Institution (see paragraph 10.9)) which should be protected by section 48Z(6). In terms of the interaction between Section 70A (Suspension of obligations) and 70C (Suspension of termination rights) of the Banking Act, whilst we are not aware of any precedent or guidance, in our view there is no reason why the powers to suspend obligations and termination rights cannot be exercised simultaneously. On that basis, if a power to suspend obligations is exercised under Section 70A but not a power to suspend termination rights, then such suspension should not give rise to a right to terminate by virtue of section 48Z(6) subject to such obligations being met at the end of the suspension period although this can be clarified in the relevant instrument specifying the suspension powers. If there is a suspension of termination rights but not a suspension of obligations, then in our view, after the end of such suspension of termination rights, if there has been any failure to perform obligations this could trigger a termination right provided that such failure has not arisen as a result of the stabilisation power.

10.8 As mentioned in paragraph 10.1, the BRRD Directive introduced the Bail-in Tool which has been implemented in Scotland by the Financial Services (Banking Reform) Act 2013 and the Banking Resolution and Recovery Order 2014. There are liabilities that

[12] A “relevant financial instrument” is defined to include (i) any instrument listed Section C of Annex 1 to Directive 2004/39/EC (MiFID), read with Chapter VI of Commission Regulation 1287/2006/EC; (ii) a deposit; (iii) a loan; or (iv) an instrument within article 77 of the FSMA (Regulated Activities Order) 2001 (disregarding the exclusions in article 77(2)(b) to (d)).

are excluded from the Bail-in Tool including liabilities that are secured or collateralised but only to the value of such security or collateral. However, certain protections are provided to "financial contracts" by The Banking Act 2009 (Restriction of Special Bail-in Provision, etc.) Order 2014 (the **Bail-in Safeguards Order**). "Financial contracts" include (a) a contract for the sale, purchase, transfer or loan of transferable securities and (b) a repurchase or reverse repurchase transaction in respect of transferable securities. For the purposes of Bail-in Safeguards Order, Agreements would be "financial contracts" and liabilities arising under Transactions would be protected liabilities for the purposes of set-off or netting. The protections provide that a liability owed by the failing financial institution which is subject to set-off or netting arrangements under, inter alia, a financial contract is "protected" insofar as it may not be bailed-in until it has set-off or netted to produce a single netted amount although the Bank of England may perform such set-off or netting in order to effect bail-in. Potentially, whilst the Bail-in Safeguards Order protects netting and the cancellation of a single netted amount under the Agreements, the resulting net sum could be reduced by the special bail-in provisions.

10.9 In respect of a Foreign Entity which is a Third Country Credit Institution, where such Third Country Credit Institution is subject to a resolution procedure in a non-Member State jurisdiction (**Third Country Resolution Procedure**) then the Bank of England may choose to recognise such Third Country Resolution Procedure by making a statutory instrument pursuant to Section 89H of the Banking Act. The relevant statutory instrument may specify the exercise of a stabilisation power in respect of the Third Country Credit Institution but only where such powers may be exercised in respect of a similar entity in the United Kingdom. It should be noted that Article 96 of the BRRD provides that such measures should be extended to Third Country Credit Institutions where there are no Third Country Resolution Procedures being exercised or the Bank of England does not wish to recognise such Third Country Resolution Procedure.

11. EU RECAST INSOLVENCY REGULATION

11.1 The objective of the Recast Insolvency Regulations is to establish common rules on cross-border insolvency proceedings, based on principles of mutual recognition and co-operation. The Recast Insolvency Regulations apply to a range of insolvency proceedings (but not to receivership, administrative receivership or company voluntary arrangements) and the Recast Insolvency Regulations lists the relevant insolvency proceedings to which it applies in each Member State in Annex A thereto (the insolvency proceeding to which the Recast Insolvency Regulations apply are referred to below as **EU Regulation Insolvency Provisions**). These are not identical to the Insolvency Proceedings referred to at paragraph 1.1 of this opinion. Certain types of entity are specifically excluded from its operation (for example credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings (Article 1(2)) and certain third party rights in rem are not affected by the opening of insolvency proceedings (Article 8)).

11.2 Broadly, the Recast Insolvency Regulations serves to grant the courts of the Member State (other than Denmark) of the European Union (a **Member State**) within the territory of which the centre of a debtor's main interests are located jurisdiction to open EU Regulation Insolvency Proceedings in respect of such debtor. These proceedings are, with regards to other Member States, international in scope, are to be governed by the law of the Member State where proceedings are opened and are to be effective in all Member States, unless secondary proceedings are opened in another Member State. In the case of companies, the place of the registered office of such company is presumed to be the centre of the company's main interests in the absence of proof to the contrary (Article 3(1)).

11.3 Even if the centre of a debtor's main interests are in a Member State, the courts of another Member State may open secondary proceedings in the event that such debtor possesses an establishment (being any place of operations where the debtor carries out a non-transitory economic activity with human goods and means) in the territory of such other Member State (Article 3(2)). The applicable law will be the law of that other Member State. However, secondary proceedings are territorial in scope and so will not extend beyond the Member State where they are opened, save in respect of creditors who have given their consent. Generally they will be opened following the opening of the main proceedings, but there are exceptions to this principle.

11.4 The provisions of the Recast Insolvency Regulations dealing with set-off and those dealing with the interaction between primary and secondary proceedings are not clear. The following is a summary of how we consider a Scottish court would apply the Regulation with regard to set-off. No opinion is given on how any court other than a Scottish court would apply the Recast Insolvency Regulation.

Article 4(1) provides that, save as otherwise provided in the Recast Insolvency Regulations, the law applicable to EU Regulation Insolvency Proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.

The Regulation specifically states that "the opening of [EU Regulation Insolvency Proceedings] shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim" (Article 9(1)).

Article 7(2)(d) provides that any set-off is subject to the conditions under which set-offs may be invoked imposed by the law of the Member State where the EU Regulation Insolvency Proceedings are opened, but this would seem to be subject to Article 9 (as set-off would seem to be otherwise provided for in Article 9).

Article 7(2)(m) provides that the laws of the Member State of the opening of proceedings shall determine "the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors".

Article 9(2) provides that Article 9(1) shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 7(2)(m).

While the interaction between Articles 9 and 7(2)(m) is not clear, the position would seem to be as follows:

(a) to the extent set-off is permitted in the jurisdiction of the Member State in which the relevant EU Regulation Insolvency Proceedings are opened, set-off should not be affected;

(b) to the extent that set-off is not permitted in the jurisdiction of the Member State in which the relevant EU Regulation Insolvency Proceedings are opened it may nevertheless be permitted if (i) it is permitted by the law applicable to the insolvent debtor's claim under the conflict of laws principles of the jurisdiction of the Member State in which the relevant EU Regulation Insolvency Proceedings are opened, unless (ii) permitting the set-off would be regarded, under the laws of that jurisdiction, as contravening rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (i.e. within Article 7(2)(m)).

11.5 The precise interaction between main and secondary proceedings in the event of conflicting legal systems' approach on insolvency is unclear. Although the Recast Insolvency Regulations allows the secondary proceedings to be stayed at the request of the liquidator in the main proceedings, any such request being very difficult to refuse, this remains subject to such liquidator taking any suitable measure to guarantee the interests of the creditors in the secondary proceedings. It is unclear what result would follow were set-off applied by operation of law in the Member State where secondary proceedings are opened but not permitted by the applicable law in the main proceedings.

12. CREDIT INSTITUTIONS (REORGANISATION AND WINDING UP) REGULATIONS 2004

12.1 Directive 2001/24/EC of the European Council and Parliament on the reorganisation and winding up of credit institutions (the **Credit Institutions Directive**) was implemented into Scots law by the Credit Institutions (Reorganisation and Winding up) Regulations 2004 (the **Credit Institutions Regulations**) with effect from 5 May 2004. Broadly, the Credit Institutions Regulations serve to grant the administrative or judicial authorities of the Member State in which a credit institution is authorised in accordance with Directive 2001/12/EC jurisdiction to implement reorganisation measures or winding-up proceedings in respect of that credit institution. These proceedings are, with regards to other Member States, international in scope, are to be governed by the law of the Member State where proceedings are opened and are to be effective in all Member States.

12.2 Regulation 28(1) of the Credit Institutions Regulations states that a reorganisation or winding up of a credit institution "shall not affect the right of creditors to demand the set-off of their claims against the claims of the affected credit institution, where such a set-off is permitted by the law applicable to the affected credit institution's claim"[13].

[13] Note that regulation 28(1) is subject to regulation 28(2), which states that any such set-off rights will be subject to actions for voidness, voidability or unenforceability of legal acts detrimental to creditors under the general law of insolvency of the United Kingdom". Please see paragraphs 12.1 to 12.5 of this opinion for an analysis of Scots law in this regard.

In the context of the Agreement, the set-off GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions will apply to all transactions entered into thereunder. In our view, the Scottish Courts will regard English law as the law applicable to the affected credit institution's claim on the basis that English law is the governing law of the Agreement. As such, we take the view that, on the commencement of a reorganisation measure or a winding up in respect of a credit institution, the Scottish Courts will look to English law as the governing law of the Agreement to establish whether the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions are enforceable against the affected credit institution in respect of all outstanding transactions.

12.3 Regulation 34 of the Credit Institutions Regulations states that the effects of a reorganisation or a winding up in respect of a credit institution "on a netting arrangement shall be determined in accordance with the law applicable to the agreement". This provides further support to our view that the Scottish Courts will look to English law as the governing law of the GMRA Netting Provisions and the Securities Lending Agreement Netting Provisions to determine whether those provisions are enforceable in these circumstances.

12.4 Regulation 35 of the Credit Institutions Regulations states that the effects of a reorganisation or a winding up in respect of a credit institution "on a repurchase agreement shall be determined in accordance with the law applicable to the agreement". We take the view that the GMRA is a **repurchase agreement** for the purposes of regulation 35.

12.5 The Credit Institutions Directive is amended by the BRRD Directive to expand the definition of reorganisation measures to include the exercise of resolution tools under the BRRD Directive. The Bank Recovery and Resolution Order 2014 states that Regulations 34 and 35 of the Credit Institutions Regulations shall not affect the application of the suspension of termination rights and obligations to pay or deliver (as discussed in paragraph 10.6 above) so that the statement in paragraphs 12.3 and 12.4 above that English law will used to determine the effect of a reorganisation measure on a netting arrangement or repurchase agreement is subject to the caveat that the use of English law will be subject to the application of the suspension rights under the BRRD Directive.

13. FINANCIAL COLLATERAL ARRANGEMENTS (NO. 2) REGULATIONS 2003

13.1 The Financial Collateral Regulations came into force on 26 December 2003. The Financial Collateral Regulations implement the European Parliament and Council Directive 2002/47/EC on financial collateral arrangements. The Financial Collateral Regulations apply to cash or financial instruments provided as collateral (**financial collateral arrangements**) by way of **title transfer** or **security interest**. The effect of the Financial Collateral Regulations is to confirm the effectiveness of such arrangements notwithstanding certain provisions of law applicable on insolvency which could otherwise restrict their enforceability or provide for them to be set aside.

A **title transfer financial collateral arrangement** is, broadly, an agreement, including a repurchase agreement, evidenced in writing, where:

(a) the purpose of the agreement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker;

(b) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral-provider; and

(c) the collateral-provider and the collateral-taker are both non-natural persons.

13.2 Regulation 12(1) provides that a **close-out netting provision** shall take effect in accordance with its terms. Regulation 12(2) provides that Regulation 12(1) shall not apply if at the time that a party to a financial collateral arrangement entered into such an arrangement or at the time that the relevant financial obligations came into existence:

(a) that party was aware or should have been aware that winding-up proceedings or re-organisation measures had commended in relation to the other party;

(b) that party had notice that a meeting of creditors of the other party had been summoned under section 98 of the Insolvency Act 1986 or that a petition for the winding-up of that party was pending;

(c) that party had notice that an application for an administration order was pending or that any person had given notice of an intention to appoint an administrator;

(d) that party had notice that an application for an administration order was pending or that any person had given notice of an intention to appoint an administrator and liquidation of the other party to the financial collateral arrangement was immediately preceded by an administration of that party.

A **close-out netting provision** is defined as "a term of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or any legislative provision under which on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise:

(a) the obligations of the parties are accelerated to become immediately due and expressed as an obligation to pay an amount representing the original obligation's estimated current value or replacement cost, or are terminated and replaced by an obligation to pay such an amount; or

(b) an account is taken of what is due from each party to the other in respect of such obligations and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party".

Regulation 12(2) does not make clear the effect of the non-Defaulting Party having notice of a kind specified in paragraphs (a) to (d). On its face, Regulation 12(2) appears to provide that the close-out netting provision does not take effect at all. However, in our opinion a Scottish Court would be unlikely to reach such a conclusion and would hold that the relevant financial obligation in respect of which the non-Defaulting Party had notice of the kind specified in paragraphs (a) to (d) should be left out of account under the close-out netting provision.

13.3 The effect of the Financial Collateral Regulations on arrangements entered into before the Financial Collateral Regulations came into force is not clear. In any event, even if the Financial Collateral Regulations do not apply, the position will be as described in paragraph 4 of this opinion in relation to Transactions in respect of which the Financial Collateral Arrangements do not apply.

13.4 As discussed in paragraph 10.3 above, certain of the protections contained in the Collateral Directive will not prevail where there is an exercise of the Transfer Tool.

There are no other material issues relevant to the issues raised by this Opinion that we wish to draw to your attention.

14. RELIANCE

14.1 The Core Opinion and Appendix 1 only are given for the sole benefit of ICMA and its members (including branches of those members or, where the member is itself a branch, the head office) excluding associate members. A copy of the Core Opinion and Appendix 1 may be provided to ICMA's associate members but they may not rely upon it.

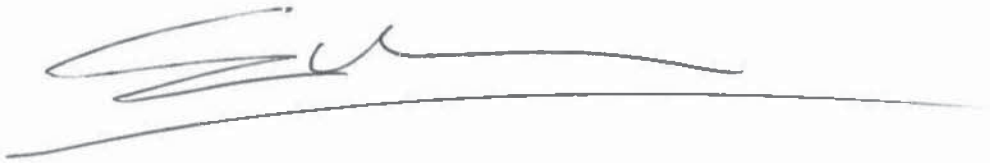
We hereby consent to the publication of the Core Opinion and Appendix 1 on ICMA's website (www.icmagroup.org).

The Core Opinion and Appendix 2 only are given for the sole benefit of ISLA and members of the ISLA Netting Opinions Subscriber Group (including branches and subsidiaries of those subscribers or, where the subscriber is itself a branch or subsidiary, the head office or parent company or any subsidiary of such parent company, as applicable) excluding associate members of the ISLA Netting Opinions Subscriber Group. A copy of the Core Opinion and Appendix 2 may be provided to associate members of the ISLA Netting Opinions Subscriber Group, but they may not rely upon it.

Access to the Core Opinion and Appendix 2 will be via the aosphere LLP website (www.aoslogin.com) (the **Website**) and we hereby consent to the publication of the Core Opinion and Appendix 2 on the Website and a link to CMS Cameron McKenna LLP's homepage on the Website.

14.2 The Core Opinion and Appendices 1 and 2 may not be relied upon by any other person without our prior written consent. Without limiting the foregoing, you may provide a copy of this opinion to any competent regulatory authority including the Prudential Regulation Authority, Financial Conduct Authority and the German Bundesanstalt für Finanzdienstleistungsaufsicht; however this opinion is not addressed to such regulatory authority and may not be relied upon by them.

Yours faithfully



Partner, for and on behalf of CMS Cameron McKenna Nabarro Olswang LLP

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APPENDIX 1

GMRA

Part I

List of annexes to the GMRA

GMRA 1995	GMRA 2000	GMRA 2011
• Buy/Sell Back Annex • Agency Annex • Bills of exchange Annex • EMU Annex • Equities Annex • Gilts Annex • Net paying securities Annex • Italian Annex • Japanese Securities Annex	• Buy/Sell Back Annex • Agency Annex • Bills of exchange Annex • Equities Annex • Gilts Annex • Italian Annex • Japanese Securities Annex • Canadian Annex	• Buy/Sell Back Annex • Bills Annex • Equities Annex • Gilts Annex • Agency Annex • Russian Annex • Canadian Annex • Italian Annex • Japanese Annex

Part II

Validity of the GMRA

1 The GMRA will be legal, valid, binding and enforceable under the laws of Scotland and will take effect in accordance with its terms.

2 On the basis of our analysis in paragraph 6.9 of the Core Opinion and subject to paragraphs 8.1 and 8.2 of the Core Opinion a court in Scotland would uphold the choice of English law and the submission by the parties to the English courts.

3 Transactions entered into under the GMRA (whether a Repurchase Transaction or a Buy/Sell Back Transaction) will take effect as a transfer of absolute title in the Purchased Securities from the Seller to the Buyer, and the Buyer will have only a contractual obligation to transfer Equivalent Securities on the Repurchase Date.

In our opinion, a court in Scotland would not recharacterise the arrangements and would honour the terms of the GMRA. The Scottish Courts would look to English law as the governing law to determine the effect of the relevant provisions. Whilst this is a matter which has not come before the Scottish Courts, to the extent that the *lex situs* of the Purchased Securities or Equivalent Securities is Scots Law, the attitude of the courts is likely to turn on the intentions of the parties, as expressed in the terms of the GMRA and on the manner in which the transactions subject to the GMRA are conducted and managed. Any evidence that it is not the intention of the parties to effect an absolute transfer may lead to an implication that security arrangements have been created. However, the GMRA is structured in a manner which is inconsistent with the requirements for the creation of a security interest under Scots law insofar as it is not required to transfer back specific Securities but only Equivalent Securities, which strengthens the argument against recharacterisation.

4 Similarly, the transfer of Cash Margin and Margin Securities by way of margin pursuant to paragraph 4 of the GMRA would be recognised by a court in Scotland as a transfer of absolute title in the assets transferred with an obligation on the transferee to repay Cash Margin or deliver Equivalent Margin Securities, as appropriate. A court in Scotland would not upset or recharacterise transfers made pursuant to paragraph 4 of the GMRA for the reasons stated in paragraph 3 above.

5 A court in Scotland would uphold the alternative margin methods provided for in paragraphs 4(i), (j), (k) and (l) of the GMRA. The Scottish Courts would take the view that the validity of such methods is a matter for English law as the governing law of the GMRA.

Part III

GMRA Netting Provisions

1 The central provisions of the GMRA which provide for set off following an Event of Default are contained in paragraph 10 (Event of Default), and in particular (i) sub paragraphs 10(b) to 10(c) of the GMRA 1995; (ii) sub-paragraphs 10(aA) to 10(cB) of the GMRA 1995 as amended by the GMRA 2011 Protocol; (iii) sub-paragraphs 10(b) to 10(e) of the GMRA 2000; (iv) sub-paragraphs 10(aA) to 10(e) of the GMRA 2000 as amended by the GMRA 2011 Protocol; and (v) sub-paragraphs 10(b) to 10(f) of the GMRA 2011 excluding the Cross-Agreement Set-Off Provisions, together the **GMRA Netting Provisions**.

2 On the basis of our analysis in paragraph 7 of the Core Opinion if an Event of Default has occurred, either because of an Act of Insolvency in respect of a Relevant Entity or following any other default by that party, the GMRA Netting Provisions would be effective and the effect of those provisions would be that one party would be under a single obligation to pay a net amount in the Base Currency to the other party.

3 In the case of an Agency Transaction entered into (i) with respect to the GMRA 1995, as specified in Annex IV thereto; or (ii) with respect to the GMRA 2000 or GMRA 2011, as specified in the Agency Annex thereto, the GMRA Netting Provisions will apply so that the netting is effected between the principal and the other party. The GMRA Netting Provisions will be effective as between the Agent in its capacity as agent for each Principal and the other party and will create an obligation on the part of the other party and the Principal to pay a single net amount in the Base Currency in respect of all Transactions entered into under the Agreement between the other party and the Agent acting as agent for that Principal in isolation from other transactions between the other party and the Agent.

4

4.1 The conversion of any cash payment obligation into the Base Currency would be valid under the laws of Scotland and such a provision is not inconsistent with the public policy of Scotland although reference is made to paragraph 8.3 of the Core Opinion.

4.2 Rule 4.17 of the Insolvency (Scotland) Rules 1986 allows a creditor to state a claim in a liquidation in a foreign currency in certain circumstances. Where such a claim is stated, rule 4.17 applies so that the claim shall be converted into Sterling at the rate of exchange for that other currency at the mean of the buying and selling spot rates prevailing in the London market at close of business on the date of the commencement of the winding-up. Conversion under the close-out procedures of the Agreement will not necessarily take place on this date, but will take place at the relevant valuation time. We do not consider it likely that this would be challenged (although there is some doubt about the position) since currency conversion is simply part of arriving at a net debt which may be expressed in Sterling, if so elected by the non-

Defaulting party (in which case proof will be made without resort to Rule 4.17) or in US Dollars or another foreign currency, in which case Rule 4.17 will apply to require conversion of the net debt into Sterling. If, contrary to our view, it were held that the use of the currency conversion in the Agreement was in conflict with Rule 4.17, the currency conversion prescribed by Rule 4.17 would be required to be used and the net balance resulting from close-out would be recalculated accordingly. However, where a transaction is a financial collateral arrangement, Regulation 15 of the Financial Collateral Regulations provides that Rule 4.17 does not apply where the collateral provider or the collateral taker under a financial collateral arrangement goes into administration or liquidation unless the arrangement provides for an unreasonable exchange rate or the collateral-taker uses the mechanism provided under the arrangement to impose an unreasonable exchange rate. In such circumstances, claims can be proved in such Insolvency Proceedings without conversion into the local currency.

5 Subject to any application of the Scottish common law insolvency set-off rules as set out in paragraph 7, the GMRA Netting Provisions would be upheld notwithstanding that the Default Market Value may be calculated (i) with respect to the GMRA 1995, as late as close of business on the second dealing day in the appropriate market after the day of the relevant Event of Default; (ii) with respect to the GMRA 2000, as late as close of business on the fifth dealing day in the appropriate market after the day of the relevant Event of Default (or the date on which the non-Defaulting Party became aware of the Event of Default) or, in certain circumstances, at some time thereafter; or (iii) with respect to the GMRA 2011 on or at any time as soon as reasonably practicable after the Early Termination Date.

Part IV

Annexes

1 The use by the parties of any of the annexes to the GMRA 1995, GMRA 2000 and GMRA 2011 specified in Appendix 1 to this opinion will not affect the substance of our opinion on GMRA Netting Provisions and their effect under Scots law, nor will it affect the substance of our opinion on the validity of the GMRA 1995, GMRA 2000 or GMRA 2011 as a whole under Scots law.

Part V

Core Provisions of the GMRA

1(a) We have been asked to identify any provisions of the GMRA that we regard as so essential to the GMRA that a material alteration thereof could affect the conclusions reached in this opinion (each such provision a **Core Provision** and together the **Core Provisions**).

(b) We have also been asked to confirm that any modification to any provision of the GMRA that is not a Core Provision (each such provision a **Modifiable Provision** and together the **Modifiable Provisions**) would not affect the conclusions reached in this opinion.

(c) We have also been asked to confirm that the conclusions reached in this opinion would not change as a result of the inclusion of additional provisions (**Additional Provisions**) in a schedule provided by an annex to the GMRA. For the purposes of this paragraph 1(c) and paragraph 4, we assume that none of the Additional Provisions included would have the effect of modifying or affecting the operation or implementation of any Core Provision.

(d) We have also been asked to confirm that the alterations set forth in Appendix 1, Part VII to this opinion to those provisions we have identified in paragraph 2 below as Core Provisions, of the GMRA 1995, the GMRA 2000 and the GMRA 2011 (the **Amendments to Core Provisions**), would not change the conclusions reached in this opinion.

2 We believe that the following provisions contained in the GMRA 1995 are Core Provisions:

(i) Paragraph 1(a);

(ii) Paragraphs 3(c) and (f);

(iii) Paragraphs 6(a), (e) and (f);

(iv) Paragraph 9(b);

(v) Paragraphs 10(a)(iv), (b) and (c);

(vi) Paragraph 13;

(vii) Paragraph 15;

(viii) Paragraph 16(a);

(ix) Paragraph 17; and

(x) The definitions relating to the foregoing in paragraph 2.

We believe that the following provisions of the GMRA 2000 are Core Provisions:

(i) Paragraph 1(a);

(ii) Paragraphs 3(c) and (f);

(iii) Paragraphs 6(a), (e) and (f);

(iv) Paragraph 9(b);

(v) Paragraph 10(a)(vi), (b), (c) and (d);

(vi) Paragraph 13;

(vii) Paragraph 15;

(viii) Paragraph 16(a);

(ix) Paragraph 17; and

(x) the definitions relating to the foregoing in paragraph 2.

We believe that the following provisions of the GMRA 2011 are Core Provisions:

(i) Paragraph 1(a);

(ii) Paragraphs 3(c) and (f);

(iii) Paragraph 4(h);

(iv) Paragraph 6(a);

(v) Paragraphs 6(e) and (f);

(vi) Paragraph 9(b);

(vii) Paragraph 10(a)(vi), (b), (c), (d) and (e);

(viii) Paragraph 13;

(ix) Paragraph 15;

(x) Paragraph 16(a);

(xi) Paragraph 17; and

(xii) the definitions relating to the foregoing in paragraph 2.

3 We believe that modifications to any Modifiable Provisions would not affect the conclusions reached in this opinion in relation to the GMRA so long as any such modification would not have the effect of modifying or affecting the operation or implementation of any Core Provision.

4 We believe that the conclusions reached in this opinion in relation to the GMRA would not change because of the inclusion of Additional Provisions in a Schedule provided by an annex to the GMRA subject to the assumption in paragraph 1(c).

5 We believe that the Amendments to Core Provisions or any similar alteration to a provision we have identified in paragraph 2 above as a Core Provision of the GMRA 1995, GMRA 2000 or GRMA 2011 would not change the conclusions reached in this opinion (for the avoidance of doubt we give no opinion as to the validity or enforceability of the items referred to in Appendix 1, Part VII and assume that none of the Amendments to Core Provisions invalidates or adversely affects the binding effect of any Core Provision).

Part VI

Transactions entered into as agent.

1 A court in Scotland would uphold the provisions of the Agency Annex in the GMRA 1995, GMRA 2000 and GMRA 2011 in accordance with their terms.

Part VII

Amendments to Core Provisions of the GMRA 1995

General Remark: Pursuant to the assumption of the legal opinion on the enforceability of the GMRA prepared for ICMA, modifications made by the Annexes (i.e., Buy/Sell Back Annex, Agency Annex, Bills of Exchange Annex, EMU Annex, Equities Annex, Net Paying Securities Annex and Italian Annex in the form published by ICMA , the Gilts Annex in the form published by the Bank of England, and the Japanese Securities Annex in the form published by the Japanese Securities Dealers Association) are covered by the opinion.

Paragraph 1(a)
any amendment to expand the applicability of the GMRA to transactions that have been effected before the date of the GMRA, irrespective of whether they have been entered into under a prior master agreement that has been superseded by the GMRA or not;
any amendment to expand the applicability of the GMRA to transactions in which one party agrees to sell to the other equities, U.S. Treasury Instruments or Net Paying Securities;
Paragraph 2
Definition of "Act of Insolvency": any change to cover additional cases under Paragraph 2(a);
Definition of "Act of Insolvency": any modification to Paragraph 2(a) more specifically describing the terms "trustee", "administrator" or "analogous officer" used in sub-clause (iii) or (v), e.g., adding any such officer;
Definition of "Act of Insolvency": any modification to Paragraph 2(a) more specifically describing a proceeding intended to be covered by the term "analogous proceeding" used in sub-clause (iv) or (vi), e.g., adding any such proceeding;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) deleting the third parenthetical in the sixth, seventh and eighth line;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) broadening the scope of the third parenthetical in the sixth, seventh and eighth line, e.g., by more specifically describing a proceeding intended to be covered by the term "analogous proceeding" or by adding any such proceeding;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) providing that certain acts or proceedings (e.g., without limitation, a permitted reorganization as defined under Section 93 of the United Kingdom Building Societies Act 1986) do not constitute an Act of Insolvency;
Definition of "Act of Insolvency": any modification of the 30 day period contained in sub-clauses (iv) of Paragraph 2(a);
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) inserting the words "provided that this definition shall not apply to any proceedings which are of a frivolous or vexatious nature" after the word "filing";
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) requiring that the presentation or filing of the petition must be made in good faith or a commercially reasonable manner;

Definition of “Equivalent Securities”: any change to Paragraph 2(o) broadening the scope of such definition to cover a conversion, subdivision or consolidation of Purchased Securities;
Definition of “equivalent to”: any change to Paragraph 2(p) pursuant to which Securities will be equivalent to other Securities notwithstanding that those Securities have been re-denominated in Euro or the nominal value of the Securities has changed in connection with such re-denomination;
Definition of “Pricing Rate”: any change to Paragraph 2(ee) broadening the scope of such definition to cover a negative percentage rate;
Paragraph 3(c)
any change to the effect that one party (e.g. the Buyer) has to perform its obligations first;
Paragraph 6(a)
any amendment modifying the enumeration of book entry systems (e.g., adding the book entry system of the Federal Reserve Bank of New York) in the second sentence under (ii);
any change providing that transfers pursuant to Paragraph 6(a) are to be effected in compliance with a particular Act (e.g., the U.S. Uniform Commercial Code) or the applicable provisions of a specified jurisdiction (which shall be deemed to include any method of transfer mutually agreed between the Seller and the Buyer) or the applicable requirements and procedures of a specified securities clearance system;
Paragraph 6(e)
(no amendments)
Paragraph 6(f)
(no amendments)
Paragraph 10(a) (other than Paragraph 10(a)(iv))
any modification adding further events that constitute an Event of Default as defined in Paragraph 10(a) (e.g., without limitation, the failure to deliver Purchased Securities or Equivalent Securities on the applicable date, 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), such change may or may not be coupled with a grace period or the serving of a Default Note on the Defaulting Party by the non-Defaulting Party;
any change broadening the scope of Paragraph 10(a)(i) to the effect that the failure by any party, whether Buyer or Seller, to make any payment under the GMRA constitute an Event of Default, such change may or may not be coupled with a grace period;
any deletion of, addition to or modification of the scope of the enumerated Events of Default contained in Paragraph 10(a)(vii);

the stipulation of a grace period or the modification of the grace period with respect to the Events of Default in Paragraph 10(a).
in a GMRA entered into between a Relevant Party subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(a) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(a);
Paragraph 10(a)(iv)
any change providing that certain acts or proceedings (e.g., without limitation, a permitted reorganization as defined under Section 93 of the United Kingdom Building Societies Act 1986) do not constitute an Event of Default;
any change to the effect that the serving of a Default Notice on the Defaulting Party by the non-Defaulting Party is required in the cases mentioned in the parenthetical, irrespective of whether this change applies to all or only one or more of such cases; such changes may or may not be coupled with other changes of Paragraph 10(a)(iv) or the definition “Act of Insolvency”;
any change eliminating the requirement that the non-Defaulting Party serves a Default Notice on the Defaulting Party, irrespective of whether this change applies to all or only one or more certain cases of an Act of Insolvency; such changes may or may not be coupled with other changes of Paragraph 10(a)(iv) or the definition “Act of Insolvency”;
any change to the effect that the serving of a Default Notice on the Defaulting Party by the non-Defaulting Party is required only if the relevant petition is presented or filed in a court or before an agency, or the relevant receiver, administrator, liquidator, trustee or analogous officer has been appointed by a court or agency in the jurisdiction where the Defaulting Party is incorporated, irrespective of whether this change applies to all or only one or more of the proceedings or officers specified in Paragraph 2(a)(iv) or (v); such changes may or may not by coupled with a change in Paragraph 2(a)(iv) or (v);
any change to the effect that the serving of a Default Notice on the Defaulting Party by the non-Defaulting Party is not required, if the Defaulting Party is governed by a legal system that does not permit termination to take place after certain cases of an Act of Insolvency have occurred;
any change to the effect that certain events are treated in the same way as an Act of Insolvency or as an Act of Insolvency, for which no Default Notice is required;
in an GMRA entered into between a Relevant Party subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(a)(iv) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(a)(iv);
Paragraph 10(b)
(no amendments)
Paragraph 10(c)
any change providing that the payment of an amount that is due as a result of the calculation described in Paragraph 10(c)(ii) may be set-off against certain other obligations;

any change providing that the Default Market Value and the amount of any Cash Margin to be transferred and the Repurchase Price to be paid shall be established in good faith and in a commercially reasonable manner;
any change providing for a separate netting of Transactions that, under applicable law, cannot be netted against one another in performing the calculations contemplated by Paragraph 10(c)(ii);
any amendment providing that the payment by the Non-Defaulting Party of an amount that is due as a result the calculation described in Paragraph 10(c)(ii) shall be subject to the Defaulting Party having satisfied all of its obligations (under the GMRA or otherwise) to the Non-Defaulting Party; these amendments may or may not include payments to, or obligations of, Affiliates of one party or of both parties;
any amendment to Paragraph 10(c) clarifying that the amount due as a result of the calculation described in Paragraph 10(c)(ii) represents a genuine pre-estimate of all losses and damages and/or that such amount is not a penalty;
Paragraph 10(e)
any deletion of, addition to or modification of Paragraph 10(e);
Paragraph 10(f)
any deletion of, addition to or modification of Paragraph 10(f);
Paragraph 10(g)
any deletion of Paragraph 10(g), or any modification to such provision e.g., establishing an obligation of the Defaulting Party to indemnify the other party against additional losses, damages, expenses etc.;
Paragraph 10(h)
any deletion of Paragraph 10(h) or any modification of such provision to the effect that either party can claim any sum, or certain components, of consequential loss or damage in the event of a failure by the other party to perform any of its obligations under the GMRA;
Paragraph 13
any amendment to expand the applicability of the GMRA to transactions that have been effected before the date of the GMRA, irrespective of whether they have been entered into under a prior master agreement that has been superseded by GMRA or not;
any amendment to add at the end of Paragraph 13 after the word "hereunder" and before the "," the following; ", and the obligations to make any such payments, deliveries and other transfers may be applied against each other and netted, and (iii) that each party shall be entitled to set off claims and apply property held by them in respect of any Transaction against obligations owing to them in respect of any other Transaction hereunder.";

Paragraph 15
any amendment to the first sentence providing that a particular existing agreement survives;
any amendment to the second sentence clarifying that each paragraph of an Annex to the GMRA shall be treated as separate from any other paragraph and shall be enforceable notwithstanding the unenforceability of any such other paragraph;
any amendment to the second sentence (i) clarifying that each paragraph of an Annex to the GMRA shall be treated as separate from any other paragraph and shall be enforceable notwithstanding the unenforceability of any such other paragraph and (ii) stipulating that the parties shall endeavour to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision;
any amendment to the second sentence the effect that circumstances such as an illegality, invalidity or unenforceability of a provision of the GMRA or any of the Annexes thereto shall not affect its remaining provisions except to the extent necessary to delete the illegal, invalid or unenforceable provision unless the deletion of such provision substantially impairs the benefits of the remaining portions of the GMRA; provided that, without limitation, the deletion of Paragraph 1, 2(a), 3, 6, 10 or 13 and any provisions of the Annexes, which correspond to such Paragraphs, would substantially impair the benefits of the remaining portions of the GMRA;
Paragraph 16(a)
any amendment to the effect that any purported assignment without prior consent by the other party shall be null and void;
Paragraph 17
any change providing that all terms and phrases which are used in the GMRA and which are expressly defined by reference to statutory provisions of a specified jurisdiction shall be governed by and/or construed in accordance with the laws of such jurisdiction (and without regard to its choice of law principles);
any change to the effect that the courts of England have exclusive jurisdiction, such changes may or may not provide that the exclusiveness of the courts of England apply to one party only and that the other party retains its right to take proceedings in the courts of any other country of competent jurisdiction;
in a GMRA entered into between a party incorporated, organised or resident in England (the "English Party") and a party which is not an English Party (the "Non-English Party"), any change to the effect that (i) the fourth sub-paragraph of Paragraph 17 applies to the English Party only and, with respect to the Non-English Party, the courts of England have exclusive jurisdiction, (ii) the English Party may in its absolute discretion take proceedings in the courts of any other country which may have jurisdiction, (iii) the Non-English Party irrevocably waives any objections to the jurisdiction of any court referred to in (i) and (ii) and irrevocably agrees that a judgement or order of any of such courts in connection with the GMRA or any Transaction is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction;
Additional provision
any amendment agreement or Schedule to the GMRA the effect of which is to conform such GMRA to the 2000 GMRA or the 2011 GMRA; such amendment agreement or Schedule may or may not (i) be limited to specific provisions only, (ii) assume the new provisions only substantially but not verbatim, or (iii) provide for further changes;

Amendments to Core Provisions of the GMRA 2000

General Remark: Pursuant to the assumption of the legal opinion on the enforceability of the GMRA prepared for ICMA, modifications made by the Annexes (i.e., Buy/Sell Back Annex, Agency Annex, Bills of Exchange Annex, Equities Annex, Canadian Annex and Italian Annex in the form published by ICMA, the Gilts Annex in the form published by the Bank of England, and the Japanese Securities Annex in the form published by the Japanese Securities Dealers Association) are covered by this opinion.

Paragraph 1(a)
any amendment to expand the applicability of the GMRA to transactions that have been effected before the date of the GMRA, irrespective of whether they have been entered into under a prior master agreement that has been superseded by the GMRA or not;
any amendment to expand the applicability of the GMRA to transactions in which one party agrees to sell to the other equities, U.S. Treasury Instruments or Net Paying Securities;
Paragraph 2
Definition of "Act of Insolvency": any change to cover additional cases under Paragraph 2(a);
Definition of "Act of Insolvency": any modification to Paragraph 2(a) more specifically describing the terms "trustee", "administrator" or "analogous officer" used in sub-clause (iii) or (v), e.g., adding any such officer;
Definition of "Act of Insolvency": any modification to Paragraph 2(a) more specifically describing a proceeding intended to be covered by the term "analogous proceeding" used in sub-clause (iv) or (vi), e.g., adding any such proceeding;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) deleting the third parenthetical in the seventh, eighth and ninth line;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) broadening the scope of the third parenthetical in the seventh, eighth and ninth line, e.g., by more specifically describing a proceeding intended to be covered by the term "analogous proceeding" or by adding any such proceeding;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) providing that certain acts or proceedings (e.g., without limitation, a permitted reorganization as defined under Section 93 of the United Kingdom Building Societies Act 1986) do not constitute an Act of Insolvency;
Definition of "Act of Insolvency": any modification of the 30 day period contained in sub-clauses (iv) of Paragraph 2(a);
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) inserting the words "provided that this definition shall not apply to any proceedings which are of a frivolous or vexatious nature" after the word "filing";
Definition of "Act of Insolvency": any change to Paragraph 2(a)(iv) requiring that the presentation or filing of the petition must be made in good faith or a commercially reasonable manner;

Definition of “Equivalent Securities”: any change to Paragraph 2(s) broadening the scope of such definition to cover a conversion, subdivision or consolidation of Purchased Securities;
Definition of “equivalent to”: any change to Paragraph 2(t) pursuant to which Securities will be equivalent to other Securities notwithstanding that those Securities have been re-denominated in Euro or the nominal value of the Securities has changed in connection with such re-denomination;
Definition of “Pricing Rate”: any change to Paragraph 2(jj) broadening the scope of such definition to cover a negative percentage rate;
Paragraph 3(c)
any change to the effect that one party (e.g. the Buyer) has to perform its obligations first;
Paragraph 6(a)
any amendment modifying the enumeration of book entry systems (e.g., adding the book entry system of the Federal Reserve Bank of New York) in the second sentence under (ii);
any change providing that transfers pursuant to Paragraph 6(a) are to be effected in compliance with a particular Act (e.g., the U.S. Uniform Commercial Code) or the applicable provisions of a specified jurisdiction (which shall be deemed to include any method of transfer mutually agreed between the Seller and the Buyer) or the applicable requirements and procedures of a specified securities clearance system;
Paragraph 6(e)
(no amendments)
Paragraph 6(f)
(no amendments)
Paragraph 10(a) (other than Paragraph 10(a)(vi))
any modification adding further events that constitute an Event of Default as defined in Paragraph 10(a) (e.g., without limitation, the failure to deliver Purchased Securities or Equivalent Securities on the applicable date, 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), such change may or may not be coupled with a grace period or the serving of a Default Note on the Defaulting Party by the non-Defaulting Party;
any change broadening the scope of Paragraph 10(a)(i) to the effect that the failure by any party, whether Buyer or Seller, to make any payment under the GMRA constitute an Event of Default, such change may or may not be coupled with a grace period;

any deletion of, addition to or modification of the scope of the enumerated Events of Default contained in Paragraph 10(a)(ix);
the stipulation of a grace period or the modification of the grace period with respect to the Events of Default in Paragraph 10(a).
in a GMRA entered into between a Relevant Party subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(a) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(a);
Paragraph 10(a)(vi)
any change providing that certain acts or proceedings (e.g., without limitation, a permitted reorganization as defined under Section 93 of the United Kingdom Building Societies Act 1986) do not constitute an Event of Default;
any change to the effect that the serving of a Default Notice on the Defaulting Party by the non-Defaulting Party is required in the cases mentioned in the parenthetical, irrespective of whether this change applies to all or only one or more of such cases; such changes may or may not be coupled with other changes of Paragraph 10(a)(vi) or the definition “Act of Insolvency”;
any change eliminating the requirement that the non-Defaulting Party serves a Default Notice on the Defaulting Party, irrespective of whether this change applies to all or only one or more certain cases of an Act of Insolvency; such changes may or may not be coupled with other changes of Paragraph 10(a)(vi) or the definition “Act of Insolvency”;
any change to the effect that the serving of a Default Notice on the Defaulting Party by the non-Defaulting Party is required only if the relevant petition is presented or filed in a court or before an agency, or the relevant receiver, administrator, liquidator, trustee or analogous officer has been appointed by a court or agency in the jurisdiction where the Defaulting Party is incorporated, irrespective of whether this change applies to all or only one or more of the proceedings or officers specified in Paragraph 2(a)(vi) or (vii); such changes may or may not by coupled with a change in Paragraph 2(a)(vi) or (vii);
any change to the effect that the serving of a Default Notice on the Defaulting Party by the non-Defaulting Party is not required, if the Defaulting Party is governed by a legal system that does not permit termination to take place after certain cases of an Act of Insolvency have occurred;
any change to the effect that certain events are treated in the same way as an Act of Insolvency or as an Act of Insolvency, for which no Default Notice is required;
in a GMRA entered into between a Relevant Party subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(a)(vi) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(a)(vi);
Paragraph 10(b)
(no amendments)

Paragraph 10(c)
any change providing that the payment of an amount that is due as a result of the calculation described in Paragraph 10(c)(ii) may be set-off against certain other obligations;
any change providing that the Default Market Value and the amount of any Cash Margin to be transferred and the Repurchase Price to be paid shall be established in good faith and in a commercially reasonable manner;
any change providing for a separate netting of Transactions that, under applicable law, cannot be netted against one another in performing the calculations contemplated by Paragraph 10(c)(ii);
any amendment providing that the payment by the Non-Defaulting Party of an amount that is due as a result the calculation described in Paragraph 10(c)(ii) shall be subject to the Defaulting Party having satisfied all of its obligations (under the GMRA or otherwise) to the Non-Defaulting Party; these amendments may or may not include payments to, or obligations of, Affiliates of one party or of both parties;
any amendment to Paragraph 10(c) clarifying that the amount due as a result of the calculation described in Paragraph 10(c)(ii) represents a genuine pre-estimate of all losses and damages and/or that such amount is not a penalty;
Paragraph 10(g)
any deletion of, addition to or modification of Paragraph 10(g);
Paragraph 10(h)
any deletion of, addition to or modification of Paragraph 10(h);
Paragraph 10(i)
any deletion of Paragraph 10(i) or modification to such provision e.g., establishing an obligation of the Defaulting Party to indemnify the other party against additional losses, damages, expenses, etc;
Paragraph 10(j)
any deletion of Paragraph 10(j) or modification to such provision to the effect that either party can claim any sum, or certain components, of consequential loss or damage in the event of a failure by the other party to perform any of its obligations under this Agreement;
Paragraph 13
any amendment to expand the applicability of the GMRA to transactions that have been effected before the date of the GMRA, irrespective of whether they have been entered into under a prior master agreement that has been superseded by GMRA or not;

any amendment to add at the end of Paragraph 13 after the word "hereunder" and before the "," the following; ", and the obligations to make any such payments, deliveries and other transfers may be applied against each other and netted, and (iii) that each party shall be entitled to set off claims and apply property held by them in respect of any Transaction against obligations owing to them in respect of any other Transaction hereunder.";
Paragraph 15
any amendment to the first sentence providing that a particular existing agreement survives;
any amendment to the second sentence clarifying that each paragraph of an Annex to the GMRA shall be treated as separate from any other paragraph and shall be enforceable notwithstanding the unenforceability of any such other paragraph;
any amendment to the second sentence (i) clarifying that each paragraph of an Annex to the GMRA shall be treated as separate from any other paragraph and shall be enforceable notwithstanding the unenforceability of any such other paragraph and (ii) stipulating that the parties shall endeavour to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision;
any amendment to the second sentence the effect that circumstances such as an illegality, invalidity or unenforceability of a provision of the GMRA or any of the Annexes thereto shall not affect its remaining provisions except to the extent necessary to delete the illegal, invalid or unenforceable provision unless the deletion of such provision substantially impairs the benefits of the remaining portions of the GMRA; provided that, without limitation, the deletion of Paragraph 1, 2(a), 3, 6, 10 or 13 and any provisions of the Annexes, which correspond to such Paragraphs, would substantially impair the benefits of the remaining portions of the GMRA;
Paragraph 16(a)
any amendment to the effect that any purported assignment without prior consent by the other party shall be null and void;
Paragraph 17
any change providing that all terms and phrases which are used in the GMRA and which are expressly defined by reference to statutory provisions of a specified jurisdiction shall be governed by and/or construed in accordance with the laws of such jurisdiction (and without regard to its choice of law principles);
any change to the effect that the courts of England have exclusive jurisdiction, such changes may or may not provide that the exclusiveness of the courts of England apply to one party only and that the other party retains its right to take proceedings in the courts of any other country of competent jurisdiction;
in a GMRA entered into between a party incorporated, organised or resident in England (the "English Party") and a party which is not an English Party (the "Non-English Party"), any change to the effect that (i) the fifth sub-paragraph of Paragraph 17 applies to the English Party only and, with respect to the Non-English Party, the courts of England have exclusive jurisdiction, (ii) the English Party may in its absolute discretion take proceedings in the courts of any other country which may have jurisdiction, (iii) the Non-English Party irrevocably waives any objections to the jurisdiction of any court referred to in (i) and (ii) and irrevocably agrees that a judgement or order of any of such courts in connection with the GMRA or any Transaction is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction;

Additional provision
any amendment agreement or Schedule to the GMRA the effect of which is to conform such GMRA to the 2000 GMRA or the 2011 GMRA; such amendment agreement or Schedule may or may not (i) be limited to specific provisions only, (ii) assume the new provisions only substantially but not verbatim, or (iii) provide for further changes;

Amendments to Core Provisions of the GMRA 2011

General Remark: Pursuant to the assumption of the legal opinion on the enforceability of the GMRA prepared for ICMA, modifications made by the Annexes (i.e., Buy/Sell Back Annex, Agency Annex, Bills Annex, Equities Annex, Gilts Annex, Canadian Annex, Italian Annex, Japanese Annex and Russian Annex in the form published by ICMA are covered by the opinion.

Paragraph 1(a)
any amendment to expand the applicability of the GMRA to transactions that have been effected before the date of the GMRA, irrespective of whether they have been entered into under a prior master agreement that has been superseded by the GMRA or not;
Paragraph 2
Definition of "Act of Insolvency": any change to cover additional cases under Paragraph 2(a);
Definition of "Act of Insolvency: any modification to Paragraph 2(a) more specifically describing "enforcement measures" used in sub-clause (ii), e.g., adding any such measure;
Definition of "Act of Insolvency": any modification to Paragraph 2(a) more specifically describing the terms "trustee", "administrator", "receiver", "liquidator", "conservator", "custodian" or "analogous officer" used in sub-clause (iv) or (vi), e.g., adding any such officer;
Definition of "Act of Insolvency": any modification to Paragraph 2(a) more specifically describing a proceeding intended to be covered by the term "analogous proceeding" used in sub-clause (v) or (vii), e.g., adding any such proceeding;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(v) deleting the third parenthetical in the eighth, ninth, tenth and eleventh lines;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(v) broadening the scope of the third parenthetical in the eighth, ninth, tenth and eleventh lines, e.g., by more specifically describing a proceeding intended to be covered by the term "analogous proceeding" or by adding any such proceeding;
Definition of "Act of Insolvency": any change to Paragraph 2(a)(v) providing that certain acts or proceedings (e.g., without limitation, a permitted reorganization as defined under Section 93 of the United Kingdom Building Societies Act 1986) do not constitute an Act of Insolvency;
Definition of "Act of Insolvency": any modification of the 15 day period contained in sub-clauses (ii) or (v) of Paragraph 2(a);
Definition of "Act of Insolvency": any change to Paragraph 2(a)(v) inserting the words "provided that this definition shall not apply to any proceedings which are of a frivolous or vexatious nature" after the word "filing";
Definition of "Act of Insolvency": any change to Paragraph 2(a)(v) requiring that the presentation or filing of the petition must be made in good faith or a commercially reasonable manner;
Definition of "Competent Authority": any change to Paragraph 2(i) to the effect that any regulator, supervisor or similar official with any insolvency, rehabilitative or regulatory jurisdiction over a party constitutes a "Competent Authority", such change may or may not be limited to certain specified jurisdictions or to those jurisdiction where the head office or any Designated Office is located;

Definition of “Competent Authority”: any change to Paragraph 2(i) to more specifically describing the term “any similar official”;
Definition of “Equivalent Securities”: any change to Paragraph 2(u) broadening the scope of such definition to cover a conversion, subdivision or consolidation of Purchased Securities;
Paragraph 3(c)
any change to the effect that one party (e.g. the Buyer) has to perform its obligations first;
Paragraph 4(h)
any modification to the two Business Days period contained in sub-clause (ii) of Paragraph 4(h);
Paragraph 6(a)
any change providing that transfers pursuant to Paragraph 6(a) are to be effected in compliance with a particular Act (e.g., the U.S. Uniform Commercial Code) or the applicable provisions of a specified jurisdiction (which shall be deemed to include any method of transfer mutually agreed between the Seller and the Buyer) or the applicable requirements and procedures of a specified securities clearance system;
Paragraph 6(e)
(no amendments)
Paragraph 6(f)
(no amendments)
Paragraph 10(a) (other than Paragraph 10(a)(vi))
any modification adding further events that constitute an Event of Default as defined in Paragraph 10(a) (e.g., without limitation, 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), such change may or may not be coupled with a grace period;
any change broadening the scope of Paragraph 10(a)(i) to the effect that the failure by any party, whether Buyer or Seller, to make any payment under the GMRA constitute an Event of Default, such change may or may not be coupled with a grace period;
any deletion of, addition to or modification of the scope of the enumerated Events of Default contained in Paragraph 10(a)(ix);
the stipulation of a grace period or the modification of the grace period with respect to the Events of Default in Paragraph 10(a).

in a GMRA entered into between a Relevant Entity subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(a) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(a);
Paragraph 10(a)(vi)
any change providing that certain acts or proceedings (e.g., without limitation, a permitted reorganization as defined under Section 93 of the United Kingdom Building Societies Act 1986) do not constitute an Event of Default;
in a GMRA entered into between a Relevant Entity subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(a)(vi) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(a)(vi);
Paragraph 10(b)
any deletion of, addition to or modification of the words “which is the presentation of a petition for winding-up or any analogous proceeding or the appointment of a liquidator or analogous officer of the Defaulting Party”;
any change to the second sentence providing for its application to events added to the GMRA as additional Events of Default;
any change to the second sentence to the effect that “Automatic Early Termination” shall only apply in respect of an Act of Insolvency if the relevant proceeding is instituted by, or the relevant petition is presented to a Competent Authority or in the jurisdiction of its head office; such changes may or may not by coupled with a change to Paragraph 2(a) or to Paragraph 2(i);
any change to the second sentence to the effect that, if “Automatic Early Termination” is specified in Annex I with respect to the Defaulting Party, certain events are treated in the same way as an Act of Insolvency;
any change to the second sentence to the effect that “Automatic Early Termination” shall apply if the Defaulting Party is governed by a legal system that does not permit termination to take place after an Act of Insolvency has occurred;
in a GMRA entered into between a Relevant Entity subject to the insolvency laws of Scotland (the "Scotland Party") and a party not subject to the insolvency laws of Scotland (the "Non-Scotland Party"), any change to Paragraph 10(b) that applies only with respect to the Non-Scotland Party, such changes may or may not be coupled with other changes of Paragraph 10(b);
Paragraph 10(d)
any change providing that the Default Market Value and the amount of any Cash Margin to be transferred and the Repurchase Price to be paid shall be established in good faith and in a commercially reasonable manner;
any change providing for a separate netting of Transactions that, under applicable law, cannot be netted against one another in performing the calculations contemplated by Paragraph 10(d)(ii);

any amendment providing that the payment by the Non-Defaulting Party of an amount that is due as a result the calculation described in Paragraph 10(d)(ii) shall be subject to the Defaulting Party having satisfied all of its obligations (under the GMRA or otherwise) to the Non-Defaulting Party; these amendments may or may not include payments to, or obligations of, Affiliates of one party or of both parties;
any amendment to Paragraph 10(d) clarifying that the amount due as a result of the calculation described in Paragraph 10(d)(ii) represents a genuine pre-estimate of all losses and damages and/or that such amount is not a penalty;
Paragraph 10(h)
any deletion of, addition to or modification of Paragraph 10(h);
Paragraph 10(i)
any deletion of, addition to or modification of Paragraph 10(i);
Paragraph 10(j)
any deletion of Paragraph 10(j), or any modification to such provision e.g., establishing an obligation of the Defaulting Party to indemnify the other party against additional losses, damages, expenses etc.;
Paragraph 10(k)
any deletion of Paragraph 10(k) or any modification of such provision to the effect that either party can claim any sum, or certain components, of consequential loss or damage in the event of a failure by the other party to perform any of its obligations under the GMRA;
Paragraph 10(n)
any change expanding or limiting the scope of or otherwise amending Paragraph 10(n);
Paragraph 13
any amendment to expand the applicability of the GMRA to transactions that have been effected before the date of the GMRA, irrespective of whether they have been entered into under a prior master agreement that has been superseded by GMRA or not;
any amendment to add at the end of Paragraph 13 after the word "hereunder" and before the "," the following; ", and the obligations to make any such payments, deliveries and other transfers may be applied against each other and netted, and (iii) that each party shall be entitled to set off claims and apply property held by them in respect of any Transaction against obligations owing to them in respect of any other Transaction hereunder.";

Paragraph 15
any amendment to the first sentence providing that a particular existing agreement survives;
any amendment to the second sentence clarifying that each paragraph of an Annex to the GMRA shall be treated as separate from any other paragraph and shall be enforceable notwithstanding the unenforceability of any such other paragraph;
any amendment to the second sentence (i) clarifying that each paragraph of an Annex to the GMRA shall be treated as separate from any other paragraph and shall be enforceable notwithstanding the unenforceability of any such other paragraph and (ii) stipulating that the parties shall endeavour to replace the invalid, illegal or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision;
any amendment to the second sentence the effect that circumstances such as an illegality, invalidity or unenforceability of a provision of the GMRA or any of the Annexes thereto shall not affect its remaining provisions except to the extent necessary to delete the illegal, invalid or unenforceable provision unless the deletion of such provision substantially impairs the benefits of the remaining portions of the GMRA; provided that, without limitation, the deletion of Paragraph 1, 2(a), 3, 6, 10 or 13 and any provisions of the Annexes, which correspond to such Paragraphs, would substantially impair the benefits of the remaining portions of the GMRA;
Paragraph 16(a)
any amendment to the first sentence of paragraph 16 (a) to the effect that the Non-Scotland Party may assign, charge or otherwise deal with its rights or obligations under the agreement or under any transaction;
any amendment to the effect that any purported assignment without prior consent by the other party shall be null and void;
Paragraph 17
any change providing that all terms and phrases which are used in the GMRA and which are expressly defined by reference to statutory provisions of a specified jurisdiction shall be governed by and/or construed in accordance with the laws of such jurisdiction (and without regard to its choice of law principles);
any change to the effect that the exclusiveness of the courts of England apply to one party only and that the other party retains its right to take proceedings in the courts of any other country of competent jurisdiction;
in a GMRA entered into between a party incorporated, organised or resident in England (the "English Party") and a party which is not an English Party (the "Non-English Party"), any change to the effect that (i) the English Party may in its absolute discretion take proceedings in the courts of any other country which may have jurisdiction, (ii) the Non-English Party irrevocably waives any objections to the jurisdiction of any court referred to in (i) and irrevocably agrees that a judgment or order of any of such courts in connection with the GMRA or any Transaction is conclusive and binding on it and may be enforced against it in the courts of any other jurisdiction;
any change to the second sub-paragraph of Paragraph 17 (beginning with "The English courts shall have …") deleting the word "exclusive" or replacing the words "exclusive jurisdiction" with "non-exclusive jurisdiction";