São Paulo, October 9, 2014

PARA / TO:
FIA Europe
2nd Floor
36-38 Botolph Lane
London EC3R 8DE

DE / FROM:
Tiago A. D. Themudo Lessa

E-MAIL:
tlessa@pn.com.br

PASTA / FILE:
2902.364571

REF.:
FIA Europe netting opinion issued in relation to the FOA Netting Agreement.

Dear Sirs,

You have asked us to give an opinion in respect of the laws of the Federative Republic of Brazil ("**this jurisdiction**") in respect of the enforceability and validity of the FOA Netting Provision contained in a FOA Netting Agreement or a Clearing Agreement.

We understand that your fundamental requirement is for the enforceability of the FOA Netting Provision to be substantiated by a written and reasoned opinion. Our opinions on the enforceability of the FOA Netting Provision is given in paragraph 3 of this opinion letter.

Further, this opinion letter covers the enforceability of the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Title Transfer Provisions.

1. TERMS OF REFERENCE AND DEFINITIONS

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

1.1.1 persons which are companies incorporated under the laws of the Federative Republic of Brazil as limited liability companies (*sociedades limitadas*) or corporations

(*sociedades anônimas*), under articles of association or bylaws, respectively;

1.1.2 banks/financial institutions incorporated under Brazilian Law No 4,595, of December 31, 1964, as amended;

1.1.3 branches in this jurisdiction of foreign banks and other corporations;

1.1.4 investment firms/broker dealers incorporated under Brazilian Law No. 4,595, of December 31, 1964, as amended;

1.1.5 partnerships (*associações civis*);

1.1.6 individuals; and

1.1.7 investment funds incorporated under Instruction No. 409, issued by the Brazilian Securities Commission on August 18, 2004, as amended.

1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the Schedule to this opinion applicable to that type of entity:

1.2.1 Sovereign and public sector entities (Schedule 2);

1.2.2 Insurance companies/providers (Schedule 3);

1.2.3 Pension entities (Schedule 4); and

1.2.4 Building Societies (Schedule 5).

1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the FOA Netting Agreement and the Clearing Agreement are expressed to be governed by English law.

1.4 This opinion covers all types of Transactions.

1.5 This opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision.

1.6 A person incorporated or organised in this jurisdiction may be a Party to a Clearing Agreement only in the capacity of "Client" (as defined in the FOA Clearing Module or the ISDA/FOA Clearing Addendum). Our opinion does not apply in respect of a person incorporated or organised in this jurisdiction who is Party to a Clearing Agreement as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum).

1.7 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.8 A reference in this opinion to a Transaction is a reference, in relation to the FOA Netting Agreement to a Transaction (as defined therein) and, in relation to FOA Clearing Module and ISDA/FOA Clearing Addendum to a Client Transaction (as defined therein).

1.9 **Definitions**

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the FOA Netting Agreement or the Clearing Agreement, unless the context specifies otherwise. Where, in a FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term bears the same

meaning as a term defined in a FOA Published Form Agreement or this opinion letter, this opinion letter may be read as if terms used herein were the terms as so changed.

1.9.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;

1.9.2 "**Insolvency Representative**" means a liquidator, administrator, receiver or analogous or equivalent official in this jurisdiction; and

1.9.3 A reference to a "**paragraph**" is to a paragraph of this opinion letter.

Annex 3 contains further definitions of terms relating to the FOA Netting Agreement and the Clearing Agreement.

2. ASSUMPTIONS

We assume the following:

2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose unless the alteration has been set out by us in Section 5 of Annex 5. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 would or would not constitute a material alteration.

2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions or, as the case may be the Firm/CCP Transactions and CM/CCP Transactions are legal, valid, binding and enforceable against both Parties under their governing laws.

2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

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

2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any insolvency proceedings under the laws of any jurisdiction against either Party.

2.6 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.

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

2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.

2.9 That each Party, when transferring Margin pursuant to the Title Transfer Provisions, has full legal title to such Margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).

2.10 That all Margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of Margin pursuant to the Title Transfer Provisions will have been effectively carried out.

2.11 That any cash provided as Margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

3. OPINION

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

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction are the following: for the entities referred to in (i) item 1.1.1 above, bankruptcy, judicial or out-of-court reorganization, pursuant to Brazilian Law 11.101, of February 9, 2005 (the "**Bankruptcy Law**"); (ii) items 1.1.2 and 1.1.3, intervention and extrajudicial liquidation, pursuant to Brazilian Law No. 6,024, of March 13, 1974, as amended, and *Regime Especial de Administração Temporária* pursuant to article 4 of Brazilian

Law No. 9,447, of March 14, 1997, as amended; and (iii) items 1.1.4, 1.1.5, 1.1.6 and 1.1.7, civil insolvency proceeding in accordance with Article 955 *et seq.* of the Brazilian Civil Code and Article 748 *et seq.* of the Brazilian Code of Civil Procedure.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions. Nonetheless, by request of the Client, the specific name of each Event of Default as described in Brazilian legislation could be added, even though there is no specific need for such.

3.2 **Recognition of choice of law**

3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.

3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law, as appropriate, as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the contractual validity of the (i) FOA Netting Provision and the FOA Set-Off Provisions or, as the case may be, of the Clearing Module Set-Off Provision, and (ii) the Title Transfer Provisions.

3.3 **Enforceability of FOA Netting Provision**

In relation to a FOA Netting Agreement and in relation to a Clearing Agreement where the Client is a Defaulting Party, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following an Event of Default, including as a result of the opening of any Insolvency Proceedings:

(a) the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and

(b) the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because of the legal basis described in Schedule "1" to this opinion.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party.

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3 to apply.

3.4 **Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision**

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. In a case where a Party, who would (but for the use of the FOA Clearing Module or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the question as to whether the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision would be determined under the governing law of the Clearing Agreement.

3.5 **Enforceability of the FOA Set-Off Provisions**

3.5.1 In relation to a FOA Netting Agreement which includes the FOA Set-Off Provisions, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default, the Non-Defaulting Party would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

(a) where the FOA Set-Off Provisions include the General Set-Off Clause:

(i) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such Liquidation Amount is owed by the Defaulting Party); or

(ii) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such Liquidation Amount is owed by the Non-Defaulting Party); or

(b) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because of the legal basis described in Schedule "1" to this opinion.

No amendments to the General Set-Off Clause or the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.5.1 to apply.

3.5.2 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision (and in which the FOA Set-Off Provisions are not Disapplied Set-Off Provisions), the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default in respect of the Client, the Firm or, as the case may be, the Clearing Member would (to the extent that set-off is not already covered by the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision) be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

(a) where the FOA Set-Off Provisions includes the General Set-Off Clause:

(i) the value of any cash balance owed by the Firm or, as the case may be, the Clearing Member to the Client would be set off against the Liquidation Amount (where such Liquidation Amount is owed by the Client); or

(ii) the value of any cash balance owed by the Client to the Firm or, as the case may be, the Clearing Member would be set off against the Liquidation Amount (where such Liquidation Amount is owed by the Firm or, as the case may be, the Clearing Member); or

(b) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm or, as the case may be, the Clearing Member to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because of the legal basis described in Schedule "1" to this opinion.

No amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.5.2 to apply.

3.6 **Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision**

In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions are Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, if there has been an Event of Default in respect of the Client or a CCP Default, so that the value of any cash balance owed by one Party to the other would be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance, insofar as not already brought into account as part of the Relevant Collateral Value.

We are of this opinion because of the legal basis described in Schedule "1" to this opinion.

No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.6 to apply.

3.7 **Enforceability of the Title Transfer Provisions**

3.7.1 In relation to a FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) would be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.

3.7.2 The questions in relation to the FOA Netting Agreement (with Title Transfer Provisions) or a Clearing Agreement which includes the Title Transfer Provisions, (x) whether Transfers of Margin would be characterised as outright transfers of title or creating a security or other interest, and (y) whether Margin Transferred may be used without restriction, would, under the conflicts of laws rules of this jurisdiction, be determined by reference to the governing law of the FOA Netting Agreement (with Title Transfer Provisions) and a Clearing Agreement which includes the Title Transfer Provisions, and/or by reference to the governing law of the place where the Margin is located.

3.7.3 In relation to Margin located in this jurisdiction, the courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of a FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest.

3.7.4 In relation to Margin located in this jurisdiction, a Party would be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of a FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion because Article 8 of the Decree-law No. 4,657, of September 4, 1942, known as the "**Law of Introduction to the Rules of Brazilian Law**" sets forth that "the law of the country wherein assets are located shall be applicable for purposes of qualifying such assets and governing the relationships related to them". Thus, issues relating to the creation, perfection and enforcement of collateral (e.g., movable assets or real estate) shall be governed by the laws of the country wherein such assets are located.

As a result, a Brazilian court would recognize the validity of the Title Transfer Provisions, provided that (i) the Title Transfer Provisions is valid under English law; and (ii) English law conforms to Brazilian public policy and morality and does not encroach on questions of national sovereignty.

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.7 to apply.

3.8 **Use of security interest margin not detrimental to Title Transfer Provisions**

In relation to a FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions, the opinions expressed above in paragraph 3.7 (*Enforceability of the Title Transfer Provisions*) in relation to the Title Transfer Provisions are not affected by the use of the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause, provided always that:

3.8.1 the agreement unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and

3.8.2 the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

3.9 **Single Agreement**

Under the laws of this jurisdiction it is not necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision to be enforceable. In our view, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions are part of a single agreement.

3.10 **Automatic Termination**

It is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision to ensure the effectiveness of netting under the FOA Netting Agreement in the event of bankruptcy, liquidation, or other similar circumstances.

However, we strongly recommend that the entities in 1.1.1 agree to an early termination clause (either optional or automatic) upon Insolvency Proceedings commencing.

The Brazilian Civil Code provides for the automatic early termination of all transactions with a Brazilian entity that enters into insolvency regimes, such as the reorganization (Articles 333 and 362). The Bankruptcy Law

does not explicitly allow for automatic termination upon reorganization but does explicitly allow for such automatic termination under bankruptcy. There is uncertainty as to whether a Brazilian judge applying the Civil Code would enforce early termination provisions of a Single Agreement in the case of reorganization.

3.11 **Multibranch Parties**

We do not consider that the use of the FOA Netting Agreement or, as the case may be, the Clearing Agreement by a Party with branches in a number of different jurisdictions, including some where netting may not be enforceable, would jeopardise the enforceability of the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Title Transfer Provisions insofar as the laws of this jurisdiction are concerned.

3.12 **Insolvency of Foreign Parties**

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default occurs in respect of such Party (a "**Foreign Defaulting Party"** there can be no separate Insolvency Proceedings in this jurisdiction in relation to the Foreign Defaulting Party and the authorities in this jurisdiction would defer to the proceedings in the Foreign Defaulting Party's home jurisdiction, except with respect to the Branches of the Counterparties referred to in items 1.1.2 and 1.1.3 hereto.

Branches of foreign banks in Brazil are deemed by Brazilian regulation to be participants of the National Financial System and, as a consequence, are subject to regulation and supervision by the Central Bank to the same extent as the Counterparties referred to in items 1.1.2 hereto. As entities located and operating within the Brazilian territory, they are also subject to Brazilian law, especially to the insolvency regimes 3.1 item (ii) above.

3.13 **Special legal provisions for market contracts**

There are no special provisions of law which would affect the opinions given in this paragraph 3 which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back to back with a Transaction entered into on an exchange (in this or another jurisdiction), or is cleared at, or is back-to-back with a transaction to be cleared by a central counterparty.

4. **QUALIFICATIONS**

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

4.1 **General qualifications**

4.1.1 in the remote scenario that the FOA Netting Agreement and the Clearing Agreement are brought before Brazilian courts, to ensure the enforceability and admissibility in evidence in Brazilian courts of the FOA Netting Agreement and the Clearing Agreement or any such other document that is not governed by Brazilian Law: (a) the signatures of the parties who have signed the agreement abroad shall have been notarised by a notary public licensed as such under the law of the place of signing and the signature of such notary public shall have been authenticated by a Brazilian Consulate; (b) the agreement shall have been translated into Portuguese by a certified translator; and (c) the agreement, together with their respective certified translations into the Portuguese language, shall have been duly registered with the appropriate Registry of Deeds and Documents, which registration can be made at any time before judicial enforcement in Brazil.

4.1.2 any judgment against each of the Parties in a foreign court with jurisdiction to hear the case will be enforceable in the courts of Brazil if previously confirmed (*homologado*) by the Federal

Superior Court of Justice of Brazil (*Superior Tribunal de Justiça*). Confirmation shall only occur if such judgment: (i) fulfils all formalities required for its enforceability under the laws of the country in which it was issued; (ii) is issued by a competent court after due service of process on the parties; (iii) is not subject to appeal; (iv) is authenticated by a Brazilian consulate in the country in which it was issued and is accompanied by a certified translation into Portuguese; and (v) is not contrary to Brazilian sovereignty, public policy and local usages (principles of good morals).

4.1.3 in relation to our opinion in paragraph 3.2, foreign law may be admitted as the governing law in Brazil provided that all obligations under the FOA Netting Agreement and the Clearing Agreement are not contrary to Brazilian national sovereignty, public order or morality, as provided in Article 17 of the Law of Introduction to the Rules of Brazilian Law.

4.1.4 if the obligations assumed under the FOA Netting Agreement or, as the case may be, the Clearing Agreement are not 'mutual' between the parties thereto, they may not be eligible for inclusion in a netting or set-off pursuant to the FOA Netting Provision, the FOA Set-Off Provision. For these purposes, under the laws of this jurisdiction, obligations would be regarded as "mutual" if the parties are each personally and solely liable with regards to obligations owing by it and solely entitled to the benefit of obligations owed to it. However, the inclusion of amounts in respect of non-mutual obligations would not impair the effective of the netting under the FOA Netting Provisions, or a set-off under the FOA Set-Off Provisions or the Clearing Module Set-Off Provisions, in respect of amounts due in respect of Transactions which are "mutual".

4.1.5 in relation to our opinion in paragraph 3.8, a Brazilian court would only recognize the validity of the Title Transfer Provisions,

provided that (i) the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause is valid under English law; and (ii) English law conforms to Brazilian public policy and morality and does not encroach on questions of national sovereignty.

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

This opinion is given for the sole benefit of FIA Europe and members of FIA Europe (other than associate members) and their affiliates which have subscribed to FIA Europe's opinions library and whose terms of subscription give them access to this opinion (as evidenced by the records maintained by FIA Europe and each a "**subscribing member**").

This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

a) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings;

b) the officers, employees, auditors and professional advisers of any addressee or any subscribing member; and

c) any competent authority supervising a subscribing member in connection with their compliance with their obligations under prudential regulation,

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made and in preparing this opinion we have not had regard to the interests of any such person.

We accept responsibility to FIA Europe and the subscribing members in relation to the matters opined on in this opinion. However, the provision of this opinion is not to be taken as implying that we assume any other duty or liability to the subscribing members. The provision of this opinion does not create or give rise to any client relationship between this firm and the subscribing members.

Yours faithfully,

Tiago A.D. Themudo Lessa

SCHEDULE 1

I - THE CONCEPT AND LEGALITY OF THE EARLY TERMINATION CLAUSES UNDER BRAZILIAN CIVIL AND INSOLVENCY LAWS

1. An assurance as to the enforceability of clauses known worldwide as "close-out netting" is pivotal to the development of the derivatives market in Brazil, since such clauses represent an important tool for the parties to assess their respective credit risks in light of the counterparty's insolvency status.

2. Such clauses may be compared, under Brazilian law, to early termination clauses providing for prompt netting of debts and credits. Consequently it is of the essence of the present opinion to analyze fully of the efficacy and enforceability of such clauses in derivative agreements.

3. Usually, a financial institution is engaged in a series of financial and derivatives transactions with each client, each of which is considered a "bilateral agreement[1]".

4. Derivative agreements generally include an early termination clause. Such type of clause establishes that upon the occurrence of an insolvency situation (bankruptcy, debt reorganization, intervention, judicial or extrajudicial liquidation), all of the obligations of each party may be considered ascertained, due and terminated. As a consequence of such early termination, netting will generally be automatically carried out.

5. Additionally, it is quite common to establish in agreements certain obligations and conditions to be complied with by the parties during the term of such agreement. Failure by any counterparty to comply with or perform any agreement or obligation, other than an obligation which shall cause the occurrence of an insolvency situation, may be considered an event of default and shall as well cause the early termination of the agreement.

6. It is therefore perfectly possible for the parties to establish in the agreement that upon the occurrence of certain events the agreement shall be

---

[1] According to law commentator Maria Helena Diniz, "Bilateral contract (contrato sinalagmático) is an arrangement in which each of the contracting parties is simultaneously and reciprocally, creditor and debtor of each other, as it provides for rights and obligations for both parties, the main feature of which is the reciprocal obligations towards each other".

terminated and, as a consequence of such early termination, netting be automatically carried out. As an example, events such as the transfer of counterparty's control, as well as a judicial order regarding the seizure of a substantial part of counterparty's property are usually included in the agreements as events of default in order to guarantee the safe development of the transaction.

7. The conclusion is that, if it is the intention of the parties to elect to have early termination clauses, the will of the parties shall be observed, i.e. the clause will be deemed to be legal and binding upon the parties and their successors.

INSOLVENCY SCENARIO

8. Since derivative agreements are to be considered "bilateral agreements" under Brazilian law – mainly due to the fact that they stipulate reciprocity of obligations - the efficacy of early termination clauses, should therefore, be examined in insolvency scenarios *vis-à-vis* the Article 117 of the Brazilian Bankruptcy Law and other insolvency legislation, i.e. insolvency provisions set out in the Civil Procedure Code and the extrajudicial liquidation of a financial institution provided for in Law No. 6024 of March 13, 1974.

(a) Bankruptcy

9. Article 117 of the Bankruptcy Law establishes that bilateral agreements are not terminated by the declaration of bankruptcy, and may be fulfilled by the Judicial Administrator (trustee of the bankruptcy estate) should the fulfillment of this agreement reduce or avoid the increase of the liabilities of the bankrupt estate or it is necessary for the maintenance and preservation of the bankrupt estate's assets, all of which are subject to the creditors' committee approval. This risk is normally referred to abroad as the Insolvency Representative's possibility of "cherry picking".

10. In essence, the Insolvency Representative succeeds the representatives of the bankrupt company, which means that the bankrupt estate, thereafter represented by the Insolvency Representative, remains obliged for the same obligations assumed by the former representatives and is bound by the manifestation of will of the parties as provided for in the agreement. Theoretically, the Insolvency Representative could attempt to challenge the validity of the early termination provision under the argument that the non-

continuation of agreements would be damaging to the bankrupt estate due to the fact that the bankrupt estate would not be entitled to the remuneration it would receive if no early termination had occurred.

(a.1) Limitations to the Insolvency Representative's power

11. The powers granted to the Insolvency Representative to choose to continue the bilateral agreements entered into by the bankrupt company are not, in our opinion, unlimited and unconditional and should apply, generally speaking, to agreements related to the continuity of the business of the company during the insolvency situation, and not to financial agreements like the Agreement as we will further demonstrate.

12. In the specific case of financial institutions, we understand that the powers granted to the Insolvency Representative would be applicable to those transactions considered as primary operations of financial institutions, i.e. "passive" and "active" operations, such as fund raising through deposits and other borrowing methods, and the granting of loans and financing, respectively. Therefore, a Transaction, or a derivative operation, should not be considered as a primary transaction of a financial institution but rather an ancillary transaction.

13. Our understanding on the limitations of the Insolvency Representative's powers is based on the following main issues:

(i) as mentioned, early termination clauses, are legal, valid and binding in Brazil and can be perfectly included in agreements in order to early mature the Transaction in the event of an insolvency scenario; and

(ii) the Brazilian Civil Code contains certain provisions that expressly allow one party to declare an early maturity or termination of a contract in situations in which one party is in a difficult financial condition. As an example, we can mention article 333, which establishes that the creditor shall have the right to require early maturity of a debt in case the debtor is in bankruptcy or in a civil insolvency proceeding in accordance with Article 955 *et seq.* of the Brazilian Civil Code and Article 748 *et seq.* of the Brazilian Code of Civil Procedure; and

(iii) the Bankruptcy Law in article 77 determines the early termination of all debts of the bankrupt estate upon the declaration of its bankruptcy.

14. In theory, the Judicial Administrator's decision to cherry-pick part of the derivative Transaction for performance could be challenged by the aggrieved parties, which will have grounds to oppose any decision in this respect, which accords with common sense — after all, it does not seem proper that a Judicial Administrator may treat similar situations differently, at its sole and exclusive discretion.

15. Our opinion is also supported by the prevailing doctrine, Wilson de Souza Campos Batalha and Silvia Marina Labate Batalha[2] who, when commenting on the provisions of Article 43[3] of the former Brazilian Bankruptcy Law, mention the lessons of the Professor Carvalho de Mendonça, who in his turn stated the following:

> *"Nothing prevents the parties from providing for early termination of an agreement, in the event of bankruptcy. This procedure entails no offense to principles of public policy. The rights of the bankrupt estate, in its capacity as representative of the bankrupt, are commensurate with the rights of the latter. As a result, the agreement will not continue with the bankrupt estate. The pact is thus valid, and the bankruptcy decree operates as a resolutory condition for the agreement, whose underlying legal relations will not outlive the bankruptcy; hence, the trustee will not succeed the bankrupt in execution proceedings."*

16. Enhancing our opinion, Professor Rubens Requião[4] also states that the validity of early termination clauses, in the event of bankruptcy, is generally accepted by jurists. Furthermore, our opinion is not only supported by lessons of jurists, but also from court decisions that have already stated the possibility and validity of early termination clauses. The following court decisions issued by appeal courts demonstrate the above:

> *"A clause providing for early termination of a lease agreement by operation of law, if bankruptcy of the lessee is decreed,* ***is not illegal****. As stipulated in the agreement, a resolutory condition shall be deemed to have occurred upon the bankruptcy decree, whereupon the subject matter of the agreement cannot be incorporated into the bankruptcy estate."*[5]

---

2 In Falências e Concordatas. ed. LTR, São Paulo, 2ª ed., p. 376

3 Article 43 of the former Brazilian Bankruptcy Law established similar provisions as article 117 of the Bankruptcy Law.

4 In Curso de Direito Falimentar. ed. Saraiva, vol. 1, p. 158.

5 Revista Forense 62/243.

> *"The insurance contract is bilateral and eligible for succession, and is not terminated by a bankruptcy event,* ***unless otherwise stated in a special clause to this effect****"*[6]

17. Still on the limitation of the Insolvency Representative's power, another court decision also confirmed our opinion, such as the one given by the Appeal Court of the State of Paraná[7] in a case where the judge accepted the occurrence of netting to extinguish an obligation arising from an exchange contract during the extrajudicial liquidation of a financial institution, as follows:

> *"The expected behaviour of the contracting parties in keeping with generally acceptable standards of conduct in terms of loyalty and honesty is not only germane to consumer relations; quite the contrary, it is extensive to all contracts, whether the parties are involved in horizontal and vertical relations, as an ethical imperative supported by the Federal Constitution.*
>
> *A bona-fide behaviour is construed as an act that is not detrimental to the other contracting party, which is intended to save the latter from unnecessary damage and risks. This principle entails the prohibition against all types of unethical, inequitable or unreasonable conducts.*
>
> *For argument's sake, if netting was not possible, the appellant could--even being a debtor to the appellee and having to honor its debt sooner or later--file a protest claim against the currency exchange contract, causing irreparable losses to it. And the unfairness would lie in this exact point, namely, in the abuse of a legal status, without any regard to the debtor, which is also its creditor. This could be conceivably defensible on the basis of the rule dolo facti qui petit quod redditurus est.*
>
> *(...)*
>
> *In accordance with the known Paulus formula, a malicious act or practice is committed by whoever claims what he will (soon) have to return -- because his right is defeased by another obligation, even if related to his right. This maxim was important in Ancient Rome, due to the essentially formalist nature of its civil and procedural law."*

18. In reading the court decision mentioned in the preceding paragraph, we can infer that the judge when making his decision took into consideration the

---

6 Revista Forense 42/509.

7 Interlocutory Appeal No. 112.657-2, 14th Civil Court, Appeal Court of Paraná

requirements of netting only, without too much concern on whether such credits and debts arose from the same contractual relationship or not.

19. Moreover, in another part of the decision the judge stated that netting is expressly provided in the Bankruptcy Law and, therefore, it could not be viewed as a detriment to the bankrupt estate, since netting, in fact, benefits the bankrupt estate by avoiding the disbursement of funds for payment of creditors.

20. Finally, we should point out that the powers of the Insolvency Representative shall indeed prevail when the relevant transaction is **not duly matured** at the time of occurrence of the insolvency scenario (for instance, if the Agreement does not have an automatic early termination clause for Transactions upon the declaration of bankruptcy, or if the non-bankrupt party does not exercise its rights under an optional early termination clause), since in this situation the Insolvency Representative has the discretion to cherry pick the bilateral agreement in accordance with the Brazilian Bankruptcy Law.

21. Legal commentator Rubens Requião states that the declaration of the Insolvency Representative to continue or not an agreement is like a unilateral agreement, which does not require the manifestation of the other party nor its consent.

22. In this regard, we understand that this opinion from Requião also enhances our position, since with the early termination of an agreement, the Insolvency Representative would not be able to decide whether particular Transactions would continue or not, since such transactions will be automatically terminated at the occurrence of the insolvency situation.

(a.2) Netting Agreements provided in Article 119, item VIII

23. The validity of early termination clauses of cross-border transactions should also be analyzed in view of the provisions of Article 119, item VIII of the Bankruptcy Law.

24. In accordance with such provision, netting agreements entered within the National Financial System (the "**NFS**") shall not be subject to the "cherry picking" right of the Judicial Administrator provided in article 117. In accordance with Law 4595 of December 31, 1964, Brazilian financial institutions are banks, securities dealerships, brokerage houses, consumer financing entities (*financeiras*) and

leasing companies. Even though the fact that for all legal purposes and effects, the head office of a Brazilian financial institution and its branch are one and single legal entity, the branch ends up having a separate life and may have independent activities, may also have its own assets and obligations. Accordingly, it is debatable whether the activities of the branch are going to be deemed as "carried out within the NFS" and may not be covered by the legal provision in discussion.

25. The provision of article 119, item VIII of the Bankruptcy Law arises from the provisions of Provisional Measure No. 2192-70 dated August 24, 2001 and Resolution No. 3263 of February 24, 2005 (the "**Netting Agreement Regulations**").

26. The Netting Agreement Regulations set forth that Brazilian financial institutions are authorized, by the National Monetary Council, to enter into netting agreements (*acordos de compensação*) with their clients providing for the netting of any and all financial transactions entered into between the financial institution and its client. We note that such netting agreement may also comprehend other financial transactions other than derivative transactions, provided that the transactions subject to the netting provisions are clearly referenced by the netting agreement.

27. The Netting Agreement Regulations provides that only transactions that are contracted within the NFS may be subject to its provisions. It is controversial the conclusion whether cross-border transactions are considered within the NFS or not.

28. In light of such provisions, the question that may arise is whether cross-border transactions may benefit from the provisions of article 119, item VIII.

29. We are of the opinion that the provisions of article 119, item VIII are only applicable to financial transactions entered into by Brazilian financial institutions and their clients. However, such fact, in our opinion, does not affect the validity of either domestic or cross border early termination clauses or netting.

30. The provisions of article 119, item VIII are supplemental to the provisions of article 122 (which provides for netting under bankruptcy – as discussed below). As a result, the existence or not of netting agreements, entered into between the parties under the Netting Agreement Regulations, does not affect or

invalidate close out netting provisions of other agreements entered into by the bankrupt estate.

31. Furthermore, in accordance with article 126 of the Bankruptcy Law, creditors holding the same privilege may not be treated differently, as follows:

> *"Article 126. In patrimonial relations not expressly regulated herein, the judge shall decide the case with a view to unity, universality of claims and equal treatment of creditors, with due regard for the provisions of article 75 hereof."*

32. In light of the above, we are of the opinion that even if foreign counterparties and their Brazilian clients do not fall within the scope of the Netting Agreement Regulations that will not invalidate or jeopardize the validity of close out netting provisions in cross-border transactions.

(a.3) Legal Term

33. The efficacy of early termination clauses should be examined vis-à-vis other effects of the declaration of bankruptcy such as those set forth in Articles 129 and 130 of the Bankruptcy Law. Article 99 of the Bankruptcy Law, establish that in the decision whereby the judge declares the bankruptcy, he shall also establish the legal term of bankruptcy (statutory period of bankruptcy). The judge cannot make such period retroactive for more than ninety (90) days as from the petition in bankruptcy, the judicial reorganization petition or the first (1st) protest for lack of payment, excluding for such purpose any cancelled protests.

34. In accordance with article 129 of the Bankruptcy Law, certain acts practiced during the aforementioned legal term shall not produce effects against the bankrupt estate, whether or not the parties were aware of the economic situation of the debtor or had the intention of defrauding creditors. These acts are: (a) the payment of unmatured obligations; (b) the payment of matured obligations by means other than those foreseen in the respective agreements; and (c) the creation of *in rem* guarantees with respect to previously existing obligations.

35. Additionally, article 130 of the Bankruptcy Law provides that acts performed with the intent to injure creditors are revocable, whenever it is proven

that there was a fraudulent collusion between the debtor and the third party contracting with him and actual loss is suffered by the bankruptcy estate.

36. In our opinion, the early termination clause, such as the FOA Netting Provisions, FOA Set-Off Provisions and Clearing Module Set-Off Provisions, would not, in principle, fall into the situations described in article 129 and 130 of the Bankruptcy Law.

(b) Judicial or Out-of-court Reorganization Proceedings

37. For the analysis of the validity of early termination clauses in judicial or out-of-court reorganization proceedings, it is essential to ascertain the time when a credit is created in bilateral agreements for periodic performance.

38. The reason for such a determination resides on the fact that article 49 of the Bankruptcy Law establishes that all credits existing on the date the judicial reorganization is requested shall be subject to such debt reorganization proceeding even if not yet due.

39. The question that may arise is whether upon the filing of request for judicial reorganization the relevant agreements providing for netting obligations would be subject to such judicial reorganization. Moreover, in an agreement in which several transactions are subject to such netting provisions, the invalidity of said netting provisions would cause all transactions to be submitted to the judicial reorganization proceeding.

40. In such extreme scenario, all transactions in which the Non-Defaulting Party is a creditor would be submitted to new conditions set forth in the reorganization plan and all transactions in which the Non-Defaulting Party is a debtor would remain unaltered, as a result of the request for judicial reorganization.

41. It is also worth making some comments on the concept of a master agreement in which all transactions contracted thereby comprehend one single contract between the parties.

42. Under such type of agreements, it is not reasonable to argue that some transactions would be subject to the judicial reorganization proceedings (i.e.

those transactions in which the Defaulting Party is a debtor) and others (i.e. those Transactions in which the Defaulting Party is a creditor) would be set aside.

43. All in all, we are of the opinion that an early termination clause, providing for the early termination of a derivatives transaction upon the occurrence of any reorganization proceedings should be considered as legal, valid and binding under Brazilian law, as stated in item 3.10.

44. Furthermore, as it will be demonstrated below, for purposes of determining the position of creditor or debtor of each of the parties in the agreement, it should also be considered that netting and set off must necessarily be applied to the Transactions subject to the agreement in order to clearly establish the exact amount of credit or debt that such derivative agreement represents for the defaulting party.

45. It is worth noting that any outstanding balance resulting from the netting provisions will be subject to the relevant reorganization proceeding but close out and set-off will not be affected.

46. Therefore, we are of the opinion that early termination clauses are perfectly legal provisions that can be inserted in a bilateral agreement both in an insolvency and in a non-insolvency scenario. In line with such opinion, we also understand that, even though there are no identical precedents in Brazilian courts related to derivatives transactions, the attempt by the Insolvency Representative to invalidate the early termination and set-off of a certain agreement or a series of derivative agreements would not prevail in a judicial discussion.

II. - NETTING IN BRAZIL

47. As mentioned above, the enforceability of clauses allowing netting between debts and credits of the parties of a Transaction is a key element to determine the associated risks. It is therefore extremely important that the relevant bankruptcy or insolvency laws do not give to the Insolvency Representative the ability to maintain financial agreements which should be terminated upon the occurrence of an event which causes early termination.

48. Accordingly, the validity of netting provisions under Brazilian laws, as well as the possibility of application of netting as a legal accepted form of liquidation

of all outstanding Transactions between the Non-Defaulting Party and the Defaulting Party is a key element, i.e. whether Brazilian laws acknowledge the netting mechanism as a means to discharge the Defaulting Party's debts. Below you will find a description of Brazilian legislation concerning netting and also, more specifically, netting in insolvency scenarios.

49. Under the Brazilian civil law, netting stands for an indirect discharge of obligations. Article 368 of the Brazilian Civil Code reads as follows:

> *"Article 368. If two persons are creditor and debtor to each other at the same time, the two obligations are discharged to the extent of their offsetting."*

50. A general concept of netting is also accorded in a decision handed down by the Second Civil Chamber of the São Paulo Court of Justice:

> *'Netting is a means of discharging reciprocal obligations, either voluntarily or by statutory provision. The statutory offsetting, as in the case at issue, occurs by operation of law and regardless of the creditors' will, whereupon two debts are reciprocally discharged as from the exact moment in which they coexist, provided that they are duly vested with the legal requirements therefore.*
> *(...)*
> *The word netting, or compensation, stands for pensare cum (weigh in two distinct things and check whether their weight is the same), and is dependent upon the equal nature of the things weighted, thus imparting the true meaning of such mechanism.[8]'*

51. It can thus be seen that netting is the rule, and is to apply automatically, that is, the parties do not need to expressly agree on the adoption of such mechanism; it only suffices that the basic requirements spelled out in the Brazilian Civil Code are present so that the offsetting mechanism can be triggered.

52. In order to qualify for its discharge by netting, a debt must necessarily be: (i) certain, (ii) matured, and (iii) comparable.

---

[8] In Rep. de Jurisp. do Cód. Com., Darcy A. Miranda Jr., vol. 3, title I, No. 338.

53. The first legal requirement refers to the certainty of a debt as regards its existence and object. A debt is *certain* when its nature, quality and quantity can be clearly expressed and determined.

54. As a second requirement, the debt must have matured, so that "each of the creditors, at the time of netting, has the right to demand the respective payment from the other party, there being no permanent or temporary barrier to exercise of such right."[9] Accordingly, the ordinary or early maturity of an obligation must have already occurred.

55. As for the comparability requirement, netting obligations must have the same nature; distinct, non-homogeneous obligations are not eligible for offsetting under the law. Furthermore, such obligations must be fungible between them, e.g. money is only offsettable with money, coffee bags with coffee bags, and so forth. For example, monetary obligations such as the obligations arising from transactions subject to the netting provisions would be offsettable.

56. Netting may be full or partial. Full offsetting occurs when the two obligations involved have the same value. A scientific principle applies in this case: two equal and opposing forces annul each other. Partial netting, in turn, occurs when the value of the obligations are different. In this case, the obligations are discharged to the extent of the concurring amount, and the outstanding debt is enforceable on the debtor.

57. Orlando Gomes[10] points out that netting is not valid only in two cases: (i) if the parties expressly state that the credits between them are not eligible for offsetting; and (ii) if there is an express provision against the use of this mechanism for indirect discharge of obligations, however such cases shall not be considered herein since swap agreements do not contain such statements.

58. In Brazil, there is no real difference between the terms "netting" and "set-off". Therefore, the terms are deemed as synonymous and may be used interchangeably. In this sense, although paragraphs 47 to 57 refer solely to netting, the same reasoning would apply to set-off.

---

[9] Idem, ibidem.

[10] In Obrigações, 9th edition rev. and exp., ed. Forense, Rio de Janeiro, 1994.

INSOLVENCY SCENARIO

59. In order to apply netting upon the occurrence of an insolvency scenario, it is necessary to check whether the debts to be netted have already matured. In this respect, as mentioned above, we understand that early maturity clauses are legal, valid and enforceable in Brazil irrespective of the Judicial Administrator's or other creditors' will. Upon early maturity of the obligations, they will be netted as stated in article 122 of the Brazilian Bankruptcy Law:

> *"Article 122. Debts of the debtor falling due by the date of the decree of bankruptcy qualify for offsetting, with preference over all other creditors, whether or not maturity arises from the bankruptcy decision, with due regard for the requirements of civil law."*

60. In this regard, Orlando Gomes [11] states that "*the right to demand payment must have already existed for the parties interested in netting*." Moreover, Professor Amador Paes de Almeida[12] points out that "*the debt to be netted must have already matured and, as such, be enforceable, even if its maturity elicits from a bankruptcy decree, which—as already known—gives rise to early maturity of the bankrupt party's debts.*"

61. Several legal commentators, including Rubens Requião,[13] argue that the bankrupt debts to its creditors are automatically netted. Requião explains that, if there is an outstanding debt after netting, the creditor will have to pay it to the bankruptcy estate. Conversely, if there is an outstanding balance, the creditor must file a claim as unsecured creditor to recover such credit.

62. Legal commentator José da Silva Pacheco [14] endorses the opinion of Miranda Valverde, who is also a supporter of the automatic netting of credits and debts in the event of bankruptcy. Valverde[15] states that a bona-fide creditor may

---

[11] In Obrigações, 9th edition, revised and expanded, Ed. Forense, Rio de Janeiro, 1994.

[12] In Curso de Falência e Concordata, p. 201, Ed. Saraiva, 4th edition, revised and expanded, 1983.

[13] In Curso de Direito Falimentar, vol. 1, No. 160, Ed. Saraiva, São Paulo, 1995.

[14] In Processo de Falência e Concordata, No. 521-I, Ed. Forense, Rio de Janeiro, 1997.

[15] In Comentários à Lei de Falências, vol. 1, No. 3329, 1st edition.

have an outstanding credit or debt as a result of netting. If he is a debtor, he must promptly pay its debt to the bankrupt estate; if he is still a creditor, then he must file a claim as unsecured creditor in the bankruptcy proceedings.

63. In this respect, Décio Policastro[16] notes that every creditor that is also a debtor to the bankrupt estate actually has a quasi-guarantee, based on privileges and such person's rights and privileges may be exercised. Policastro refers to the lessons of Carvalho de Mendonça,[17] who states that whoever has an asset owned by the debtor (e.g., a credit) may retain it until the debt is fully settled. Accordingly, the debtor—if also a creditor—may refrain from paying his debt, and then trigger the offsetting mechanism even if there is no connection between the reciprocal debts (e.g., a debt originated from a purchase and sale transaction, and another resulting from a financing).

64. It should be pointed out that our stand is based, as noted above, on legal writing from leading and renowned sources. In an opinion published in *Revista de Direito Civil*, Arnoldo Wald[18] states that *"the offsetting mechanism is also intended to streamline the actions to be taken by the trustee or liquidator, in that such means of discharging obligations will give rise to full payment of the debts to the bankrupt estate, immediately and without risks. Otherwise, the trustee would have to file for collection of such debts through the courts, which is a time-consuming, expensive and not always successful procedure. Besides, there is one less creditor to be satisfied and thus to interfere with the bankruptcy proceedings, which translates into undeniable advantages to the bankrupt estate."*

65. In addition, a few remarks should be made in relation to article 1009 of the Brazilian Civil Code, which also supports the stand taken in this work. As per the lessons of Carvalho de Mendonça[19], *if the debtor is also a creditor, he may abstain from paying*. In our opinion, this assertion confirms article 1092 of the Brazilian Civil Code, according to which "*in bilateral agreements, none of the parties, until the respective obligation is fulfilled, may demand that the other party's obligations be fulfilled"*.

---

[16] In A Compensação de dívidas no direito falimentar, RT 563;267, Sept. 1982.

[17] In Tratado de Dir. Com. Bras., vol. VII, No. 395, p. 402.

[18] In Revista de Direito Civil, year 18, January-March/1994, 67, Ed. Revista dos Tribunais, São Paulo.

[19] In Inst. de Dir. Civil, Rio de Janeiro, 1907, vol. I, p. III, ¢ 16.

66. Professor J.M. de Carvalho Santos[20] reiterates the opinion exposed by Carvalho de Mendonça, who supports the fact that the law cannot enable either party (whose obligation is to be performed first) to seek enforcement of the other party's obligation without first having complied with its own. Professor Carvalho Santos further states that even when obligations must be concurrently fulfilled, as in the case of the swap contracts, either party may refuse to comply with its respective obligation until the other party does so.

67. This opinion is supported by most legal commentators. Coelho da Rocha[21] teaches that the offsetting discharges an obligation for the *quantum* offset, *"for compelling a person to pay another what is payable by the last-named is a moot point."* Or, else, *"... if the creditor was required to promptly make full payment of its debt and then await until its credit were eventually settled ratably to other creditors, this would actually be inequitable. Evidently, this is not the purpose of the law."*[22]

68. Additionally, past court rulings state that "*... it would not be fair that a creditor which is also a debtor to the bankrupt estate would have to pay its debt and then run the risk of not receiving its credit at all, receiving less than its actual credit, or waiting a long time to receive it*."[23]

69. Notwithstanding the aforementioned, we have also found some decisions that do not allow the netting in the event of an insolvency situation. However, such decisions were always based on the fact that the requirements for netting were not fulfilled, e.g. the debts were not certain or matured, and none of them relate to invalidity of early termination clauses.[24]

---

[20] In Código Civil Brasileiro Interpretado, vol. XV, p. 238, 6th edition.

[21] In Inst. de Dir. Civil, Rio de Janeiro, 1907, vol. I, p. III, p. 164.

[22] Ag. 154-368, Capital, RT 377/195.

[23] RE 79.333-GB, reporting justice Leitão de Abreu, Jurisprudência Brasileira, 10/140.

[24] Al 493.342 – 10ª Câmara. Rel. Juiz Gomes Varjão J. 11.3.98, in JTA (LEX) 171/335

Ap., proc. 0771818-1, acórdão 30530, 9ª Câmara. Primeiro Tribunal da Alçada Civil de São Paulo. Juiz Relator José Luiz Gavião de Almaieda.

70. In light of the considerations presented above, we shall make a brief comparison between the codified and common law systems in order to demonstrate some differences in each framework regarding enforceability of contracts and the similarity regarding close-out netting dispositions.

71. Countries which have adopted the Common Law system are those in which the legal system is based on unwritten or non statute law. The system of common law is constantly updated and amended to reflect the precedents set by contemporary court decisions. On the other hand, countries which have adopted the codified systems are ruled by specific written laws, which are enacted by the legislative and in some cases by the executive in order to pre-empt and provide a solution for certain foreseen circumstances.

72. Accordingly, an agreement shall only be valid, legal, binding and enforceable in Brazil if its provisions are in line with the dispositions and principles which exist in the competent legislation in force. In Common Law systems, the basic principles of contract law which govern the enforceability of a contract (e.g. consideration to be provided, intention to create legal relations) have been formed by precedent as a result of court decisions through the centuries.

73. As a consequence, a contract, under Common Law, can be described as "*an agreement free from vitiating factors such as mistake or misrepresentation and constituted by the unconditional acceptance of an outstanding offer involving a reasonably precise set of terms between two or more contractually competent parties who intend to create mutual and reciprocal rights and duties that may be subject to judicial sanction if they are expressed in any required form, are free from the taint of illegality or immorality and are not subsequently discharged by law, by agreement, by breach or by sufficient supervening circumstances*"[25].

74. Netting was incorporated into Common Law as a consequence of the strong influence of the Ancient Roman Law[26], which considered the balance between existing credits and debts as a form of liquidation of the obligations between the parties. Additionally, netting was recognized as the application of the general principles of equity, i.e. those principles established in accordance with the general moral concepts of society.

---

[25] The Canadian Encyclopedic Digest

[26] In Rao, Vicente - O Direito e a Vida dos Direitos, p. 140, 5th edition.

75. As occurs in English law, American law recognizes the application by the courts of the ruling principles of equity as the most moral way to settle any dispute. Due to this fact, the application of netting by the courts in Common Law countries do not demand any written regulations.

76. In light of the above we may conclude that both legal systems are tending to provide expressly and doubtlessly for the occurrence of netting in financial transactions either in normal or in insolvency scenarios. As you know, in the United States of America, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) and the Federal Deposit Corporation Improvement Act of 1991 (FDCIA) provide for the application of netting in swap transactions. Also, in Brazil, in addition to the provision of the Civil Code (Article 1009), Law 10,214 is, as shown herein, acknowledging netting in financial transactions as a valid form of liquidation of obligations of counterparties in situations when one of them is under an insolvency scenario.

77. In summary, we can conclude that both legal systems provide for the application of netting in a similar way. Of course the development of Brazilian regulations is expected to occur in order to avoid certain concerns regarding insolvency scenarios.

SCHEDULE 2
Sovereign and Public Sector Entities

Subject to the modifications and additions set out in this Schedule 2 (*Sovereign and Public Sector Entities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are sovereign and public sector entities. For the purposes of this Schedule 2 (*Sovereign and Public Sector Entities*), "Sovereign and Public Sector Entities" means sovereign entities and public sector entities existing and incorporated in accordance with the Brazilian Federal Constitution of 1988.

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

1. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified or added to, by this Schedule), we are of the following opinion:

1.1 **Enforceability of the FOA Netting Provision, the FOA Set-Off Provisions or the Clearing Module Set-Off Provision**

The opinions at paragraphs 3.3 to 3.6 do not apply to an FOA Netting Agreement or, as the case may be, a Clearing Agreement under which the Party acting as Firm or, as the case may be, Clearing Member, is Sovereign and Public Sector Entities.

SCHEDULE 3
Insurance Companies/Providers

Subject to the modifications and additions set out in this Schedule 3 (*Insurance Companies/Providers*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are insurance companies/providers. For the purposes of this Schedule 3 (*Insurance Companies/Providers*), "Insurance Companies/Providers" means legal entities incorporated under Brazilian Decree Law No. 73, of November 21, 1966, as well as under Brazilian Decree Law No. 60.459, of 13 of March, 1967, Brazilian Law No. 6.404, of December 15, 1976 and further regulated by the National Private Insurance Council (*Conselho Nacional de Seguros Privados*).

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

1. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified or added to, by this Schedule), we are of the following opinion:

1.1 **Enforceability of the FOA Netting Provision, the FOA Set-Off Provisions or the Clearing Module Set-Off Provision**

The opinions at paragraphs 3.3 to 3.6 do not apply to an FOA Netting Agreement or, as the case may be, a Clearing Agreement under which the Party acting as Firm or, as the case may be, Clearing Member, is Insurance Companies/Providers.

SCHEDULE 4
Pension Entities

Subject to the modifications and additions set out in this Schedule 4 (*Pension Entities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are pension entities. For the purposes of this Schedule 4 (*Pension Entities*), "Pension Entities" means pension entities incorporated under Article 202 of the Brazilian Federal Constitution of 1988 and Brazilian Supplementary Law No. 109, of 29 of May, 2001.

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

1. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified or added to, by this Schedule), we are of the following opinion:

1.1 **Enforceability of the FOA Netting Provision, the FOA Set-Off Provisions or the Clearing Module Set-Off Provision**

The opinions at paragraphs 3.3 to 3.6 do not apply to an FOA Netting Agreement or, as the case may be, a Clearing Agreement under which the Party acting as Firm or, as the case may be, Clearing Member, is Pension Entities.

SCHEDULE 5
Building Societies

Subject to the modifications and additions set out in this Schedule 5 (*Building Societies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Building Societies. For the purposes of this Schedule 5 (*Building Societies*), "Building Societes" means entities operating in the real estate market and incorporated under Brazilian Law No. 10.406, of January 10, 2002, and Brazilian Law No. 6.404, of December 15, 1976.

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

1. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified or added to, by this Schedule), we are of the following opinion:

1.1 **Enforceability of the FOA Netting Provision, the FOA Set-Off Provisions or the Clearing Module Set-Off Provision**

The opinions at paragraphs 3.3 to 3.6 do not apply to an FOA Netting Agreement or, as the case may be, a Clearing Agreement under which the Party acting as Firm or, as the case may be, Clearing Member, is Building Societies.

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

1. Master Netting Agreement - One-Way (1997 version) (the "**One-Way Master Netting Agreement 1997**")

2. Master Netting Agreement - Two-Way (1997 version) (the "**Two-Way Master Netting Agreement 1997**")

3. Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Long-Form One-Way Clauses 2007**")

4. Short Form Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Short-Form One-Way Clauses 2007**")

5. Short Form Default, Netting and Termination Module (One-Way Netting) (2009 version) (the "**Short-Form One-Way Clauses 2009**")

6. Short Form Default, Netting and Termination Module (One-Way Netting) (2011 version) (the "**Short-Form One-Way Clauses 2011**")

7. Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Long-Form Two-Way Clauses 2007**")

8. Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Long-Form Two-Way Clauses 2009**")

9. Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Long-Form Two-Way Clauses 2011**")

10. Short Form Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Short-Form Two-Way Clauses 2007**")

11. Short Form Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Short-Form Two-Way Clauses 2009**")

12. Short Form Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Short-Form Two-Way Clauses 2011**")

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

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

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

16. Professional Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities

and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Where a FOA Published Form Agreement expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement), provided that any election made does not constitute an Adverse Amendment.

Each of the Agreements listed at items 13 to 30 of this Annex 1 may be deemed to include FOA Netting Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement, in which case references to the Insolvency Events of Default and FOA Netting Provision in respect of such FOA Netting Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.

ANNEX 2
List of Transactions

The following groups of Transactions may be entered into under the FOA Netting Agreements or Clearing Agreements:

(A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:

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

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

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

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

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

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

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

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

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

(E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

"**Addendum Netting Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

(a) Clause 8(b) (*Clearing Member Events*), 8(c) (CCP Default) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clauses.

"**Addendum Set-Off Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

(a) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clause.

"**Adverse Amendments**" means (a) any amendment to a Core Provision and/or (b) any other provision in an agreement that may invalidate, adversely affect, modify, amend, supersede, conflict or be inconsistent with, provide an alternative to, override, compromise or fetter the operation, implementation, enforceability or effectiveness of a Core Provision (in each case in (a) and (b) above, excepting any Non-material Amendment).

"**Clearing Agreement**" means an agreement:

(a) on the terms of the FOA Netting Agreement when used (i) in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or (ii) in conjunction with a Clearing Module Netting Provision and/or an Addendum Netting Provision and with or without a Clearing Module Set-Off Provision and/or an Addendum Set-Off Provision;

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

(c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

"**Clearing Module Netting Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

(a) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clauses.

"**Clearing Module Set-Off Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

(a) Clause 5.5 (*Set-Off*) of the FOA Clearing Module; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clause.

"**Client**" means, in relation to a FOA Netting Agreement or a Clearing Agreement, the Firm's or, as the case may be, Clearing Member's counterparty under the relevant FOA Netting Agreement or Clearing Agreement.

"**Client Money Additional Security Clause**" means:

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

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

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

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

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

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

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

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

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

(j) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Core Provision**" means those parts of the clauses or provisions specified below in relation to a paragraph of this opinion letter (and/or any equivalent paragraph in any Schedule to this opinion letter), which are highlighted in Annex 4:

(a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*) and 3.4 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;

(b) for the purposes of paragraph 3.5 (*Enforceability of the FOA Set-Off Provisions*), the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(c) for the purposes of paragraph 3.6 (*Set-Off under a Clearing Agreement with a Clearing Module Sett-Off Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Available Termination Amount", "Disapplied Set-Off Provisions", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provisions;

(d) for the purposes of paragraph 3.7.1, (i) in relation to a FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and

(e) for the purposes of paragraphs 3.7.3 and 3.7.4, the Title Transfer Provisions;

in each case, incorporated into a FOA Netting Agreement or a Clearing Agreement together with any defined terms required properly to construe such provisions, in such a way as to preserve the essential sense and effect of the highlighted parts.

References to "**Core Provisions**" include Core Provisions that have been modified by Non material Amendments and necessary amendments set out in Section 1 of Annex 5.

"**Defaulting Party**" includes, in relation to the One-Way Versions, the Party in respect of which an Event of Default entitles the Non-Defaulting Party to exercise rights under the FOA Netting Provision.

"**Eligible Counterparty Agreements**" means each of the Eligible Counterparty (with Security Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Security Provisions) Agreement 2009, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009, the Eligible Counterparty (with Security Provisions) Agreement 2011 or the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"**Firm**" means, in relation to a FOA Netting Agreement or a Clearing Agreement which includes a FOA Clearing Module, the Party providing the services under the relevant FOA Netting Agreement or Clearing Agreement which includes a FOA Clearing Module.

"**FOA Clearing Module**" means the FOA Client Cleared Derivatives Module as first published on 9 October 2013 or any subsequent published version up to the date of this opinion letter.

"**FOA Netting Agreement**" means an agreement:

(a) on the terms of the forms specified in Annex 1 to this opinion letter or which has broadly similar function to any of them, when not used in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;

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

(c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provisions, and with or without the Title Transfer Provisions, with no Adverse Amendments.

"**FOA Netting Agreements (with Title Transfer Provisions)**" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with

Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1) or a FOA Netting Agreement which has broadly similar function to any of the foregoing.

"**FOA Netting Provision**" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (***Liquidation Date***), Clause 2.4 (***Calculation of Liquidation Amount***) and Clause 2.5 (***Payer***);

(b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (***Liquidation Date***), Clause 2.3 (***Calculation of Liquidation Amount***) and Clause 2.4 (***Payer***);

(c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;

(d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (***Liquidation Date***), Clause 10.3 (***Calculation of Liquidation Amount***) and Clause 10.4 (***Payer***);

(e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***);

(f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***); or

(g) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"**FOA Published Form Agreement**" means a document listed at Annex 1 in the form published by FIA Europe on its website as at the date of this opinion.

"**FOA Set-Off Provisions**" means:

(a) the "**General Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (***Set-off***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (***Set-off***);

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (***Set-off***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (***Set-off***);

(vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);

(viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***); or

(ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

(b) the "**Margin Cash Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (***Set-off on default***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (***Set-off upon default or termination***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (***Set-off on default***),

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (***Set-off upon default or termination***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (***Set-off on default***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (***Set-off upon default or termination***); or

(vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"**Insolvency Events of Default Clause**" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) and (c) (inclusive);

(ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (b) and (c) (inclusive);

(iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (ii) and (iii) (inclusive);

(iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (b) and (c) (inclusive);

(v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(b) and (c) (inclusive); or

(vi) any modified version of such clauses provided that it includes at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow;

"**ISDA/FOA Clearing Addendum**" means the ISDA/FOA Client Cleared OTC Derivatives Addendum as first published on 11 June 2013, or any subsequent published versions up to the date of this opinion letter.

"**Long Form Two-Way Clauses**" means each of the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"**Margin**" means any cash collateral provided to a Party and any cash or non-cash collateral comprising Acceptable Margin provided to a Party pursuant to the Title Transfer Provisions which (in either case) has been credited to an account provided by the Party which is the transferee.

"**Master Netting Agreements**" means each of the One-Way Master Netting Agreement 1997 and the Two-Way Master Netting Agreement 1997 (each as listed and defined at Annex 1).

"**Non-Cash Security Interest Provisions**" means:

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

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

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

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

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

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

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

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

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

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and

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

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

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

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

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

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

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

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

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

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Non-Defaulting Party**" includes, in relation to the One-Way Versions, the Party entitled to exercise rights under the FOA Netting Provision and, in relation to the FOA Set-Off Provisions, the Party entitled to exercise rights under the FOA Set-Off Provisions.

"**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 4.

"**One-Way Versions**" means the Long Form One-Way Clauses 2007, the Short Form One-Way Clauses, the One-Way Master Netting Agreement 1997, and the FOA Netting Provision as published in the Retail Client Agreements and the Professional Client Agreements in each case in the form of a FOA Published Form Agreement.

"**Party**" means a party to a FOA Netting Agreement or a Clearing Agreement.

"**Professional Client Agreements**" means each of the Professional Client (with Security Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Security Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Security Provisions) Agreement 2011 or the Professional Client (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"**Rehypothecation Clause**" means:

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

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

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

any modified version of such clauses provided that it includes at least those parts of paragraph 4 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Retail Client Agreements**" means each of the Retail Client (with Security Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Security Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Security Provisions) Agreement 2011 or the Retail Client (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"**Short Form One Way-Clauses**" means each of the Short-Form One-Way Clauses 2007, the Short-Form One-Way Clauses 2009 and the Short-Form One-Way Clauses 2011 (each as listed and defined at Annex 1).

"**Short Form Two Way-Clauses**" means each of the Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009 and the Short-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"**Title Transfer Provisions**" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(a) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

ANNEX 4

PART 1
CORE PROVISIONS

For the purposes of the definition of Core Provisions in Annex 3, the wording highlighted in yellow below shall constitute the relevant Core Provision:

1. **FOA Netting Provision:**

a) "**Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the "**Non-Defaulting Party**") may, by notice to the party in default (the "**Defaulting Party**"), specify a date (the "**Liquidation Date**") for the termination and liquidation of Netting Transactions in accordance with this clause.

b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:

i. (neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;

ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (a), the total cost, loss or, as the case may be, gain, in each case expressed in the Base Currency specified by the Non-Defaulting Party as such in the Individually Agreed Terms Schedule as a result of the termination, pursuant to this Agreement, of each payment or delivery which would otherwise have been required to be made under such Netting Transaction; and

iii. the Non-Defaulting Party shall treat each such cost or loss to it as a positive amount and each such gain by it as a negative amount and aggregate all such amounts to produce a single, net positive or negative amount, denominated in the Non-Defaulting Party's Base Currency (the "**Liquidation Amount**").

c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting Party shall notify the Defaulting Party of the Liquidation Amount, and by which Party it is payable, immediately after the calculation of such amount."

2. **General Set-Off Clause:**

"**Set-off:** Without prejudice to any other rights to which we may be entitled, we may at any time and without notice to you set off any amount (whether actual or contingent, present or future) owed by you to us against any amount (whether actual or contingent, present or future) owed by us to you. For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained."

3. **Margin Cash Set-Off Clause:**

"**Set-off upon default or termination:** If there is an Event of Default or this Agreement terminates, we may set off the balance of cash margin owed by us to you against your Obligations (as reasonably valued by us) as they become due and payable to us and we shall be obliged to pay to you (or entitled to claim from you, as appropriate) only the net balance after all Obligations have been taken into account. [The net amount, if any, payable between us following such set-off, shall take into account the Liquidation Amount payable under the Netting Module of this Agreement.]"

4. **Insolvency Events of Default Clause:**

"The following shall constitute Events of Default:

i. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "**Custodian**") of it or any substantial part of its assets, or takes any corporate action to authorise any of the foregoing;

ii. an involuntary case or other procedure is commenced against a party seeking or proposing liquidation, reorganisation, or moratorium, or other similar relief with respect to it or its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a Custodian of it or any substantial part of its assets."

5. **Title Transfer Provisions:**

a) **Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date will be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "**Default Margin Amount**" means the amount, calculated in the Base Currency of the aggregate value as at the

relevant Liquidation Date (as determined by us) of the Transferred Margin.

b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

6. **Clearing Module Netting Provision / Addendum Netting Provision:**

a) [Firm Trigger Event/CM Trigger Event]

Upon the occurrence of a [Firm Trigger Event/CM Trigger Event], the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Core Provisions of the] relevant Rule Set, be dealt with as set out below:

(a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];

(b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a

[Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed] [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

(d) if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable in accordance with this [Module/Addendum].

b) CCP Default

Upon the occurrence of a CCP Default, the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise

stated in the [Core Provisions of the relevant] Rule Set, be dealt with as set out below:

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];

2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;

3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication, of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3)] [Sections 8(c)(iii)(1) to 8(c)(iii)(3)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount

is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);

4. if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable, in accordance with this [Module/Addendum].

c) Hierarchy of Events

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the clause pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

d) Definitions

"**Aggregate Transaction Value**" means, in respect of the termination of Client Transactions of a Cleared Transaction Set, an amount (which may be positive or negative or zero) equal to the aggregate of the [Firm/CM]/CCP Transaction Values for all Client Transactions in the relevant Cleared Transaction Set or, if there is just one [Firm/CM]/CCP Transaction Value in respect of all such Client Transactions, an amount (which may be positive or negative or zero) equal to such [Firm/CM]/CCP Transaction Value.

"**[Firm/CM]/CCP Transaction Value**" means, in respect of a terminated Client Transaction or a group of terminated Client Transactions, an amount equal to the value that is determined in

respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction or group of related [Firm/CM]/CCP Transactions in accordance with the relevant Rule Set following a [Firm/CM] Trigger Event or CCP Default (to the extent such Rule Set contemplates such a value in the relevant circumstance). If the value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set reflects a positive value for [Firm/Clearing Member] vis-à-vis the Agreed CCP, the value determined in respect of such terminated Client Transaction(s) will reflect a positive value for Client vis-à-vis [Firm/Clearing Member] (and will constitute a positive amount for any determination under this [Module/Addendum]) and, if the value determined in respect of the related terminated [Firm/CCP]/CCP Transaction(s), under the relevant Rule Set reflects a positive value for the relevant Agreed CCP vis-à-vis [Firm/Clearing Member], the value determined in respect of [or otherwise ascribed to] such terminated Client Transaction(s) will reflect a positive value for [Firm/Clearing Member] vis-à-vis Client (and will constitute a negative amount for any determination under this [Module/Addendum]). The value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set may be equal to zero.

"**Relevant Collateral Value**" means, in respect of the termination of Client Transactions in a Cleared Transaction Set, the value (without applying any "haircut" but otherwise as determined in accordance with the [Agreement/Collateral Agreement]) of all collateral that:

(a) is attributable to such Client Transactions;

(b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and

(c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

The Relevant Collateral Value will constitute a positive amount if the relevant collateral has been transferred by Client to [Firm/Clearing Member] and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement] and a negative amount if the relevant collateral has been transferred by [Firm/Clearing Member] to Client and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement].

7. **Clearing Module Set-Off Provision**

Firm may at any time and without notice to Client, set-off any Available Termination Amount against any amount (whether actual or contingent, present or future) owed by Firm to Client under the Clearing Agreement or otherwise. For these purposes, Firm may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.

This Clause shall apply to the exclusion of all Disapplied Set-off Provisions in so far as they relate to Client Transactions; provided that, nothing in this Clause shall prejudice or affect such Disapplied Set-off Provisions in so far as they relate to transactions other than Client Transactions under the Agreement.

8. **Addendum Set-Off Provision**

(i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("**CM Other Amounts**"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "**X**" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("**EP Other Amounts**" and together with CM Other Amounts, "**Other Amounts**"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

(ii) For the purposes of this Section 8(ii):

(A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;

(B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and

(C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.

PART 2
NON-MATERIAL AMENDMENTS

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

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

3. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect.

4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.

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

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

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

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

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

10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.

11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.

13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.

14. Any change to the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the use of currency conversion in case of cross-currency set-off, (iv) the application or disapplication of any grace period to set-off; or (b) allowing the combination of a Party's accounts.

15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.

16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.

17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).

18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

    - more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
    - more than one FOA Clearing Module or Clearing Module Netting Provision
    - one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

    provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that the agreement unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.

20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in a FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).

22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.

23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related

margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.

PART 3
SECURITY INTEREST PROVISIONS

1. **Security Interest Clause**

"As a continuing security for the performance of the Secured Obligations under or pursuant to this Agreement, you grant to us, with full title guarantee, a first fixed security interest in all non-cash margin now or in the future provided by you to us or to our order or under our direction or control or that of a Market or otherwise standing to the credit of your account under this Agreement or otherwise held by us or our Associates or our nominees on your behalf."

2 **Power of Sale Clause**

"If an Event of Default occurs, we may exercise the power to sell all or any part of the margin. The restrictions contained in Sections 93 and 103 of the Law of Property Act 1925 shall not apply to this Agreement or to any exercise by us of our rights to consolidate mortgages or our power of sale. We shall be entitled to apply the proceeds of sale or other disposal in paying the costs of such sale or other disposal and in or towards satisfaction of the Secured Obligations."

3. **Client Money Additional Security Clause**

"As a continuing security for the payment and discharge of the Secured Obligations you grant to us, with full title guarantee, a first fixed security interest in all your money that we may cease to treat as client money in accordance with the Client Money Rules. You agree that we shall be entitled to apply that money in or towards satisfaction of all or any part of the Secured Obligations which are due and payable to us but unpaid."

4. **Rehypothecation Clause**

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid.".

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. Necessary amendments

   None

2. Desirable amendments

   None

3. Additional wording to be treated as part of the Core Provisions

   None

4. Additional events for the purposes of paragraph 3.1:

   None

5. Alterations which constitute material alterations:

   None