9 October 2012

Dear Sirs,

Re: Validity and Enforceability of the 1992 and 2002 ISDA Master Agreements Governed by Maltese Law

We have been instructed to give an opinion on the validity and enforceability of the netting provisions of the 1992 ISDA Master Agreements (both (i) the Multicurrency Cross-Border and (ii) the Single Currency – Local Jurisdiction forms) (the “1992 ISDA Master Agreements”) and the 2002 ISDA Master Agreement (the “2002 ISDA Master Agreement” and together with the 1992 ISDA Master Agreements, the “ISDA Master Agreements”) when governed by Maltese law, including Maltese insolvency laws, and when amended in accordance with the elections suggested in Annex B.

Unless we indicate otherwise, when we use the term ISDA Master Agreement, our opinion applies equally to all the forms of ISDA Master Agreements referred to above. Terms defined in the ISDA Master Agreement have the same meaning in this opinion in relation to that ISDA Master Agreement.

This opinion is given in respect of ISDA Master Agreements where both parties are the following entities, namely:

(a) a limited liability company (a societe anonyme), whether constituted as a public limited company or a private limited company, established under or regulated by the Companies Act, 1995 (Chap. 386 of the Laws of Malta) (the “Companies Act”) (a “Limited Liability Company”);
(b) a financial institution organized as a Limited Liability Company and licensed under the Financial Institutions Act (Chap. 376 of the Laws of Malta) (the “Financial Institutions Act”);
(c) a credit institution organized as a Limited Liability Company and licensed under the Banking Act (Chap. 371 of the Laws of Malta) (the “Banking Act”);
(d) an investment firm organized as a Limited Liability Company and licensed under the Investment Services Act (Chap. 370 of the Laws of Malta) (the “Investment Services Act”);

(e) an insurance or reinsurance undertaking organized as a Limited Liability Company and licensed under the Insurance Business Act (Chap. 403 of the Laws of Malta) (the “Insurance Business Act”);

(f) an investment fund organized as an investment company with variable share capital (SICAV), whether constituted as a multi-fund or multi-class investment company, and whether constituted as a public limited company or a private limited company, established under or regulated by the Companies Act and licensed as a collective investment scheme under the Investment Services Act;

(g) a protected cell company (“PCC”) constituted in terms of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations (S.L. 386.10) (the “PCC Regulations”), and whether registered as a public limited company or a private limited company under the Companies Act and licensed as an insurance or reinsurance undertaking under the Insurance Business Act;

(h) the Central Bank of Malta (“CBM”) established by the Central Bank of Malta Act (Chapter 204 of the Laws of Malta) (the “CBM Act”), and

(i) a company established under or regulated by the Merchant Shipping (Shipping Organisations – Private Companies), Regulations, 2004 (S.L. 234.42) and qualifying as a shipping organisation in terms of article 84Z of the Merchant Shipping Act (Chap. 234 of the Laws of Malta),

(together referred to as the “Parties”).

For the purposes of this opinion, we have not analysed:

(a) any other entity which is subject to a special insolvency regime;
(b) any other type of collective investment scheme which is not organised as a SICAV under the Companies Act or any SICAV which is organized as an incorporated cell company;
(c) branches located in Malta of entities set up under foreign laws; and
(d) any other entity other than those set out in the list of entities in (a) to (i) above.

Other than our comments contained in clause 2.10 of this opinion, no opinion is being given on taxation matters and this opinion is not being delivered to you in connection with any specific transaction.

1. ASSUMPTIONS

We have assumed that:
(a) two Parties have entered into an ISDA Master Agreement and the Parties have selected Maltese law to govern the ISDA Master Agreement;

(b) no provisions of the ISDA Master Agreement that are crucial to this opinion have been altered in any material respect other than in accordance with the elections suggested in Annex B. In our view, no selection contemplated by Sections 5 and 6 of the ISDA Master Agreement and made in a Schedule to that ISDA Master Agreement or in a Confirmation of a Transaction under that ISDA Master Agreement would be considered a material alteration;

(c) on the basis of the terms and conditions of the ISDA Master Agreement and other relevant factors, acting in a manner consistent with the intentions stated in the ISDA Master Agreement, the parties over time enter into a number of Transactions that are intended to be governed by the ISDA Master Agreement. The transactions entered into include any or all of the Transactions described in Annex A to this opinion;

(d) some of the Transactions provide for an exchange of cash by both parties and others provide for the physical delivery of shares, bonds or commodities in exchange for cash;

(e) after entering into these Transactions and prior to the maturity thereof, one of the Parties becomes the subject of Insolvency Proceedings (as defined below) under Maltese law and, subsequent to the commencement of the insolvency, the liquidator seeks to assume the Confirmations representing profitable Transactions for the insolvent party and to reject the Confirmations representing unprofitable Transactions for the insolvent party;

(f) in relation to the 1992 ISDA Master Agreement, the Parties have elected Second Method to apply;

(g) each Party is able lawfully to enter into and has all requisite capacity and corporate power to execute, deliver and perform its obligations under the ISDA Master Agreement and each Party has taken all necessary steps to authorise, execute, deliver and perform the ISDA Master Agreement and all Transactions carried out under the ISDA Master Agreement;

(h) neither Party is prohibited or restricted by applicable regulatory laws or regulations from entering into an ISDA Master Agreement or Transactions thereunder;

(i) no Party to an ISDA Master Agreement has taken or will take any action in relation to an ISDA Master Agreement which for the purposes of the Investment Services Act constitutes the provision of an investment services in or from within Malta unless in possession of a valid investment services licence or is otherwise exempted under the Investment Services Act;

(j) the ISDA Master Agreement has been entered into at arms’ length by each of the Parties;
(k) the ISDA Master Agreement and all Transactions carried out under the ISDA Master Agreement are entered into prior to the formal commencement of Insolvency Proceedings against either Party; and

(l) at the time at which each Party enters into the ISDA Master Agreement and each Transaction, neither party has actual notice of the insolvency of the other party.

2. **OPINION**

Subject to the above and the qualifications set out below, we are of the opinion that under the laws of Malta:

2.1 **General Opinion**

When governed by the laws of Malta, the provisions of the ISDA Master Agreement constitute the legal, valid and binding obligations of the parties thereto enforceable in accordance with their respective terms under the laws, including insolvency laws, of Malta.

2.2 **Validity of the Termination and Close-Out Netting Provisions of the Master Agreement**

The provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a counterparty are valid and enforceable under the laws of Malta by virtue of the provisions of the Set-off and Netting on Insolvency Act, 2003 (Chap. 459 of the Laws of Malta) (the “Set-Off Act”). The Set-Off Act provides that close-out netting provisions, such as those contained in the ISDA Master Agreement, are valid and enforceable under Maltese law, whether such close-out netting takes place before or after bankruptcy provided that such mutual debts, mutual credits or mutual dealings have arisen or occurred before the bankruptcy of one of the parties. The Set-Off Act defines a “close-out netting provision” as:

“a provision of a contract under which on the occurrence of a specified event, whether through the operation of netting or set-off or otherwise –

(a) the benefit of time for the performance of relevant obligations by the debtor may no longer be claimed and, or the relevant obligations become immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount, and, or

(b) any obligation of a party to deliver property to the other is immediately performable notwithstanding any benefit of time granted to the debtor and expressed as an obligation to pay an amount representing its estimated current
value or replacement value or is terminated and replaced by an obligation to pay such an amount, and

c) an account is taken of what is due from each party to the other in respect of such obligations and those obligations fall to be discharged by the payment of an aggregate net sum equal to the balance of account by the party from whom the larger amount is due.”

The Set-Off Act does not set out any restrictions as to the type of legal person that can enter into such close out netting provisions nor does it set out any restriction as to the type of contracts or transactions to which it can relate. Accordingly, it is our view that close-out-netting should be enforceable in relation to all the transactions as set out in Annex A to this opinion.

The above opinion on the validity of the provisions of the ISDA Master Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a counterparty is subject to the following:

(a) the netting of termination values to determine a single lump-sum termination amount can only take into account mutual debts, mutual credits or mutual dealings which have arisen or occurred before the insolvency of the counterparty. This involves two elements: (i) the debts, credits and dealings must have arisen or occurred before the bankruptcy or insolvency of one of the parties, and (ii) the element of mutuality. In terms of the Set-Off Act, set-off and netting can only take place in respect of mutual claims. Accordingly, each Party to the ISDA Master Agreement must be personally liable for its obligations under the ISDA Master Agreement and each Transaction and must in addition be the sole beneficial holder of any rights it has under the ISDA Master Agreement and each Transaction;

(b) the rules on claw-backs as described below in paragraph 2.5.4 of this opinion;

(c) when, in the 1992 ISDA Master Agreement, the method of valuation is calculated by reference to Market Quotation or Loss, the Non-defaulting Party must do so in good faith and in a commercially reasonable manner;

(d) when determining the Close-Out Amount in terms of Section 6(e) of the 2002 ISDA Master Agreement, the Non-defaulting Party must do so in good faith and in a commercially reasonable manner; and

(e) the Set-Off Act also lays down the following exceptions to the validity and enforceability of a close-out netting provision:

(i) any close-out netting agreement entered into at a time at which the other party knew or ought to have known that an application for the dissolution and
winding-up of the company (or analogous provisions in the case of other commercial partnerships) by reason of the insolvency was pending, or that the company has taken formal steps under any applicable law to bring about its dissolution and winding-up by reason of insolvency (see Art. 3(4) of the Set-Off Act); and

(ii) fraud or any similar ground (see Art. 3(7) of the Set-Off Act).

It is further noted that a liquidator cannot assume the profitable Transactions and reject the non-profitable ones (a process commonly referred to as "cherry-picking"), since the ISDA Master Agreement contains wording which makes the ISDA Master Agreement (including all Transactions) a single agreement and therefore contractually only a single net claim is due under Section 6(e). Article 4(c) of the Set-Off Act also provides that it is lawful for parties to a contract to agree that any transactions or other dealings carried out pursuant to any contract, whether identified specifically or by reference to a type or class of transactions or dealings, shall be treated as a single transaction or dealing for the purpose of the set-off or netting provisions in the contract.

For the avoidance of doubt, to the extent that, following the netting of termination values for determining a single lump-sum termination amount as per the ISDA Master Agreements, it results that there are any sums due by the insolvent counterparty to the non-defaulting Party, the latter would have to rank for the payment of such amount together with the other unsecured and unsubordinated creditors in the insolvency of the other counterparty, unless such a claim is otherwise secured.

2.3 Flawed Asset Analysis

We now pass on to examine the so-called "flawed asset" analysis of the ISDA Master Agreement. Under the ISDA Master Agreement, a payment on early termination can be viewed as consisting of the following three components:

(i) payments for obligations which became payable or deliverable but which were not paid or delivered prior to the Early Termination Date;
(ii) payments for obligations which would have been payable or deliverable prior to the Early Termination Date if all conditions to payment or delivery had been satisfied or if the Early Termination Date had not been designated; and
(iii) payment for the future value of the Terminated Transactions.

The amounts referred to in (i) and (ii) above are included within the definition of "Unpaid Amounts" in the ISDA Master Agreement.

We are of the view that the provisions of Sections 2(a)(iii) and 6(c) of the ISDA Master Agreement, which make performance of payment and delivery obligations in respect of individual Transactions conditional upon the fact that an Early Termination Date has not
occurred or been effectively designated, are valid and enforceable, provided no unjustified enrichment occurs. We are of the view that no unjustified enrichment should occur since any Unpaid Amount is taken into consideration for the purpose of determining the amounts owing by one party to another.

In either case, therefore, the effect of the designation of an Early Termination Date under the ISDA Master Agreement is that no further payments or deliveries will be required to be made in respect of the Terminated Transactions and the obligation to pay or deliver in respect of a Transaction is never anything more than a conditional obligation. Accordingly, Section 6(e) of the ISDA Master Agreement, which provides for payments to be made on an Early Termination, may be viewed, except to the extent that it relates to Unpaid Amounts, as a mere accounting exercise between the parties which does not involve set-off, as the obligations never materialise. The insolvency set-off regime would still however be applicable for the Unpaid Amounts.

The provisions of Sections 2(a)(iii) and 6(c) of the ISDA Master Agreement should in our view be classified as obligations subject to a suspensive condition. Article 1063 of the Civil Code of Malta (Chapter 16 of the Laws of Malta) (the “Civil Code”) defines a suspensive condition as that which makes the existence of the obligation dependent upon a future and uncertain event. The Civil Code also provides that an obligation under a suspensive condition does not exist before the event happens.

Although to our knowledge there are no Maltese judgements on the matter, the courts of various jurisdictions have recently had the opportunity to consider section 2(a)(iii) of the ISDA Master Agreements. As a result of, inter alia, the decisions and rulings of such courts on the applicability and enforcement of and the interpretation given to section 2(a)(iii), ISDA issued a consultation memorandum (dated 8 April 2011 and entitled “Consultation with Members of the International Swaps and Derivatives Association, Inc”, hereafter referred to as the ISDA Consultation Document) to identify the main issues facing members in connection with section 2(a)(iii) and to present proposals to address these. The Malta Bankers’ Association and its members are directed to the ISDA Consultation Document for an explanation of the issues and proposed amendments, and are invited to follow this development in connection with section 2(a)(iii) of the ISDA Master Agreements so that they may be in a position to include or exclude such amendments as may be required.

2.4 Automatic Early Termination

Under the ISDA Master Agreement, if Automatic Early Termination applies and certain insolvency events in Section 5(a)(vii) occur, an Early Termination Date will occur automatically for all outstanding Transactions, so that no notice is required.

We perceive no advantage of opting for Automatic Early Termination, since under Maltese law it is clear that the exercise of close-out netting and set-off provisions are valid whether before or after insolvency of a party.
The Set-Off Act, in its definition of a close-out netting provision, refers to the occurrence of a specified event, and makes no distinction between whether notice is sent to the other party or otherwise. Accordingly, in terms of the strict wording of the law, no notice is required. If Automatic Early Termination is selected, it is, from a practical perspective, advisable for the non-defaulting party not to act in a manner which conflicts with the Early Termination for purposes of avoiding any argument as to whether there has been any waiver or otherwise of any rights under the ISDA Master Agreement.

2.5 Selected Insolvency Issues

2.5.1 Definition of Insolvency Proceedings

For the purposes of this opinion, “Insolvency Proceedings” means:

(i) Dissolution and consequential winding-up in terms of Article 214 et seq. of the Companies Act. This can either take the form of a Winding-up by the Court or a Voluntary Winding-Up;

(ii) Company Recovery Procedure in terms of Article 329B et seq. of the Companies Act;

(iii) Company Reconstruction in terms of Article 327 et seq. of the Companies Act; and

(iv) The provisions analogous to those set out above in paragraphs (i) to (iii) in the Merchant Shipping (Shipping Organisations – Private Companies), Regulations, 2004 (Legal Notice 223 of 2004).

2.5.2 Debts, Credits or Dealings to have arisen or occurred prior to Insolvency

As noted above, under the Set-Off Act, the netting of termination values to determine a single lump-sum termination amount can only take into account mutual debts, mutual credits or mutual dealings which have arisen or occurred before the ‘bankruptcy’ or ‘insolvency’ of one of the parties.

The Set-Off Act does not contain a definition of ‘bankruptcy’ or ‘insolvency’ and the terms must therefore be afforded their ordinary meaning. Neither does the Companies Act contain a definition of ‘insolvency’ although it is submitted that the definition of ‘unable to pay its debts’ does provide some assistance in this regard. There is some uncertainty as to whether a Court may back date the time when a company is deemed to be insolvent. It is submitted that under Maltese law, due to the need for certainty, a company should not be deemed to be insolvent for the purposes of the Set-Off Act as at a date which is prior to the deemed date of dissolution as per Article 223 of the Companies Act (Article 223 establishes the deemed date of dissolution for companies). In addition, it is also submitted, in the absence of pronouncements on the matter by the Maltese Courts, that the deemed date of dissolution under Article 223 of the Companies Act should be treated as a jure et de jure presumption rather than a rebuttable juris
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**ADVOCATES**

tantum presumption. The wording used in Article 3(4) of the Set-Off Act which prohibits the entering into a close-out netting agreement “at a time at which the other party knew or ought to have known that an application for the dissolution and winding-up of the company by reason of insolvency was pending, or that the company has taken formal steps under any applicable law to bring about its dissolution and winding-up by reason of insolvency” strengthens the view that the cut-off point for allowing mutual dealings is either knowledge or deemed knowledge that: (a) a Court application has been filed or (b) the company has taken some other formal steps (such as the passing of an extraordinary resolution), to bring about its dissolution and winding-up.

2.5.3 Moratoria and Stays

In the case of a company recovery procedure, there is an automatic general moratorium for the duration of the procedure (i.e. up to 12 months, which can be extended by another 12 months), during which generally creditors cannot take actions against a Maltese counterparty. Such stays are also applicable to secured creditors. The law does not contemplate any stay or moratorium in connection with company restructurings, but since such a compromise / arrangement contemplates a court sanctioning, effectively the compromise / arrangement could impose such a stay or moratorium.

Article 3(6) of the Set-Off Act provides that nothing shall limit or delay the application of any provision of any contract providing for or relating to set-off or netting which would otherwise be enforceable and no order of or any court nor any warrant or injunction or similar order issued by a court or otherwise and no proceedings of whatever nature shall have any effect in relation thereto. In addition, Article 3(1)(c) of the Set-Off Act states that the close-out netting provision is enforceable in accordance with its terms against the liquidator, receiver, curator, controller, special controller or other similar officer of either party to the contract. Accordingly, on the basis of the said provisions of the Set-Off Act, it is our view that no stay or moratorium should block the enforcement of the close-out netting provision.

2.5.4 Claw-Backs

**Fraudulent Preference Regime**

Article 303 of the Companies Act broadly provides that any obligation incurred by a company within six months before the dissolution of the company is void, if it constitutes a “transaction at an undervalue” or if a “preference” is given.

A company enters into a transaction at an undervalue if:

- the company makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no consideration; or
- the company enters into a transaction for a consideration the value of which, in money or money’s worth, is significantly less than the value in money or money’s worth of the consideration provided by the company.

A company gives a preference to a person if:

- that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities; and
- the company does anything or suffers anything to be done which, in either case, has the effect of putting that person into a position which, in the event of the company going into insolvency winding-up, will be better than the position he would had been had that act or omission not occurred.

The only exception to this so-called fraudulent preference rule is where the other party proves that it did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency. In its turn Article 3(8) of the Set-Off Act lays down that the said Article 303 of the Companies Act shall only be applicable in relation to a close-out netting provision where there is fraud on the part of the party to the agreement not being the insolvent party. Effectively, therefore, the Set-Off Act has laid down an additional test which needs to be satisfied before a close-out netting provision can be declared void on the basis of the six month fraudulent preference rule.

It must be pointed out that there is some uncertainty as to whether the fraudulent preference rules referred to above under Article 303 of the Companies Act are also applicable or otherwise to companies established under or regulated by the Merchant Shipping (Shipping Organisations – Private Companies), Regulations, 2004, although it must be added that the Maltese Courts would always retain a general remedy to annul actions which are tainted with fraud.

**Actio Pauliana**

There is also another general rule found in the Civil Code which is applicable across the board. This rule, called the *actio pauliana*, basically establishes that it is competent to any creditor to impeach any act made by the debtor in fraud of his claims;

**Controlled Companies Act**

In the case of credit institutions in respect of which the Malta Financial Services Authority (the “MFSA”) has appointed a controller to assume control under the Banking Act, the provisions of the Controlled Companies (Procedure for Liquidation) Act, 1995 (Chap. 383 of the Laws of Malta) (the “Controlled Companies Act”) are also relevant. ¹ The Controlled Companies Act

¹ The Controlled Companies Act makes provision for the liquidation and the distribution of assets belonging to controlled banks.
makes the provisions of Article 485 of the Commercial Code (Chap. 13 of the Laws of Malta) applicable to such credit institutions. In substance, Article 485 lays down that:

(i) every act transferring property, whether corporeal or incorporeal, and every obligation incurred or other act made by the bankrupt under a gratuitous title for the purpose of defrauding his creditors is null and void as regards the body of creditors, of whatever kind they may be, even though the interested parties be in good faith; and

(ii) every act of the same kind and every obligation, act or payment made or incurred under an onerous title (a term which broadly speaking means against consideration) can be annulled if there was also fraud on the part of the interested party. Any such acquisition, obligation, act or payment shall be deemed to be fraudulent as regards the interested party, if it is proved that such party knew of the bankruptcy or of the existence of circumstances giving rise to a declaration of bankruptcy.

In addition, in terms of the Controlled Companies Act, where any act has been made or omitted to be made by a so-called ‘controlled asset’ (being either a credit institution or asset/s thereof which have been placed under ‘control’ pursuant to the Banking Act) or by the owner, director or manager of such ‘controlled asset’ which results in the “fraudulent deprivation of the rights of the creditors of such a controlled asset”; the Controller appointed pursuant to the Banking Act is entitled “to ignore the act so made or to deem the act as having been made despite the omission to make such act”.

2.5.5 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings

As of 1st May, 2004, the date when Malta became a full member of the European Union, one must also take into consideration the overriding provisions of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the “Insolvency Regulation”). The Insolvency Regulation has had a significant effect on Maltese insolvency laws, in so far as private international laws relating to insolvency are concerned. The Insolvency Regulation provides in substance that the courts with jurisdiction to open insolvency proceedings are those of the Member State where the debtor has its “centre of main interests”. Denmark (pursuant to recital 33 of the Insolvency Regulation) is not participating in the adoption of the Insolvency Regulation and is therefore neither bound by it nor subject to its application. The Insolvency Regulation limits the instances when secondary proceedings in another Member State can be opened. In addition, the Insolvency Regulation provides that, unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (the lex concursus) to a series of issues as outlined in the Insolvency Regulation. In virtue of the “centre of main interests” rule, the fact that a company is incorporated or governed by the laws of Malta does

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not mean that Maltese insolvency laws would automatically apply, since Malta may not be the
centre of main interests of such a company. In addition, the centre of main interests may
change from time to time and all this has a bearing on the applicable conflict of laws rule.

It must be noted that the Insolvency Regulation does not apply to insolvency proceedings
concerning insurance undertakings, credit institutions, investment undertakings which provide
services involving the holding of funds or securities for third parties, or to collective investment
undertakings.

One of the exceptions to the general rule of the lex concursus which is relevant to this opinion
is set out in Article 6 of the Insolvency Regulation which reads as follows:

"1. The opening of insolvency proceedings shall not affect the right of creditors to
demand the set-off of their claims against the claims of the debtor, where such a set-off
is permitted by the law applicable to the insolvent debtor’s claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability
as referred to in Article 4(2)(m)."

Article 6 effectively provides that where set-off is not permitted under the lex concursus,
creditors may rely on the provisions of the law applicable to the debtor’s claim, if the latter law
allows such set-off. Accordingly, this exception will only be of relevance if the lex concursus
does not permit such a set-off. As we have seen above, Maltese law allows set-off within the
context of the ISDA Master Agreements, and accordingly creditors of a company whose centre
of main interests is in Malta should have no need to refer to the law applicable to the insolvent
debtor’s claim to enforce their set-off claim.

A reading of Article 6 of the Insolvency Regulation raises legal doubts as to whether close-out
netting is fully included within the parameters of Article 6 of the Insolvency Regulation or
otherwise. The process of close-out netting involves elements in addition to set-off, such as
early termination and acceleration of claims, and therefore is a doubt as to whether the early
termination mechanisms and the acceleration of claims are covered or otherwise by the
exception to set-off in the Insolvency Regulation. Although this lack of clarity may raise
doubts as to the applicable conflict of laws rule relating to close-out netting, it would appear
that the provisions of the Insolvency Regulation do not adversely affect the validity of close-out
netting under Maltese law. If Maltese law is applicable, then close-out netting is valid, whereas
if Maltese conflict of laws rules defer to the law applicable to the insolvent debtor’s claim, then
it is the law of the debtor’s claim which must determine whether such close-out netting is valid
or otherwise.
2.5.6 Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, 2004

In the case of insurance undertakings, regard must be paid to the Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, 2004 (the “Insurance Undertakings Regulations”), which transpose the provisions of Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings (“Insurance Undertakings Winding-Up Directive”). The Insurance Undertakings Regulations apply to member states of the European Union (“Member States”) and to countries within the European Economic Area (“EEA”), namely Norway, Iceland and Liechtenstein (the EEA States together with the Member States shall hereinafter be referred to as the “Applicable States”).

The Insurance Undertakings Regulations broadly provide that it is the home Applicable State of an insurance undertaking which will have exclusive jurisdiction to open winding-up proceedings and reorganisation measures in relation to an insurance undertaking (and their branches set up in host Applicable States). All the winding-up proceedings will be governed by the insolvency law of the home Applicable State (the lex concursus), subject to specified exceptions. In contrast to the provisions of the Insolvency Regulation, which allows the opening of secondary insolvency proceedings in certain circumstances, it is not possible for Applicable States where the insurance undertaking has a branch to open any local secondary insolvency proceedings in relation to the insolvent insurance undertaking.

One of the exceptions to the rule of the lex concursus is that set out in Regulation 24(1) which lays down that the commencement of reorganisation measures or winding-up proceedings does not affect the rights of creditors to demand the set-off of their claims against the claims of the Maltese insurance undertaking, “where such a set-off is permitted by the law of the Member State or EEA State which is applicable to the claim of the Maltese insurance undertaking.” Regulation 24(2) however does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Regulation 24(1) of the Insurance Undertakings Regulations is limited in its scope of application to the law of an Applicable State. In parallel with Article 6(1) of the Insolvency Regulation, Regulation 24(1) effectively provides that where set-off is not permitted under the lex concursus, creditors may rely on the provisions of the law applicable to the debtor’s claim, if the latter law allows such set-off. Accordingly, this exception will only be relevant if the lex concursus does not permit such a set-off. As noted above, Maltese law allows set-off within the context of the ISDA Master Agreements.

2.5.7 Credit Institutions (Reorganisation and Winding Up) Regulations, 2004

Directive 2001/24/EC on the reorganisation and winding-up of credit institutions (“Credit Institutions Winding-Up Directive”) has been transposed in Malta by virtue of the Credit Institutions (Reorganisation and Winding Up) Regulations, 2004 (the “Credit Institutions Winding-Up Regulations”). The Credit Institutions Regulations apply in relation to Applicable States (see definition above).
The Credit Institutions Winding-Up Regulations broadly provide that it is the home Applicable State of a credit institution which will have exclusive jurisdiction to open winding-up proceedings and reorganisation measures in relation to the credit institution (and their branches set up in host Applicable States). All the winding-up proceedings will be governed by the insolvency law of the home Applicable State (the *lex concursus*), subject to specified exceptions. In contrast to the provisions of the Insolvency Regulation, it is not possible for Applicable States where the credit institution has a branch to open any local secondary insolvency proceedings in relation to the insolvent credit institution.

The Credit Institutions Winding-Up Regulations also apply to credit institutions not having a head office within a Applicable State, where such institution has branches in at least two Applicable States. The said regulations imply that each such branch would be treated individually, although there must be co-operation between the respective authorities of each Applicable State where a branch is located.

Regulation 25(1) of the Credit Institutions Winding-Up Regulations provides that “the adoption of reorganisation measures or the opening of winding-up proceedings shall not affect the rights of creditors to demand the set-off of their claims against the claims of the Maltese credit institution where such a set-off is permitted by the law of the Member State or EEA State which is applicable to the claim of the Maltese credit institution.” Regulation 25(2) however does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to all the creditors. Regulation 25(1) of the Credit Institutions Winding-Up Regulations is limited in its scope of application to the law of an Applicable State.

In addition, Regulation 27 of the said regulations provides that: “Pursuant to the provisions of the Set-Off and Netting on Insolvency Act, netting agreements shall be governed by the law of the contract which governs such agreements.” The reference in Regulation 27 to the provisions of the Set-Off Act adds nothing to this clause, since in fact the Set-Off Act contains no such conflict of laws rule. However, this does not detract anything from the conflict of laws rule that netting agreements are to be governed by the law of the contract which governs such agreements.

We believe that the ISDA Master Agreement falls within the meaning of ‘a netting agreement’. Effectively therefore the practical effect of Article 27 is that, on an Insolvency Proceeding of a Maltese bank, under Maltese conflict of laws rules, the validity and enforceability of an ISDA Master Agreement (including the provisions on close-out netting on insolvency) will be governed by the governing law of the Agreement. Regulation 27 of the Credit Institutions Winding-Up Regulations is not limited in its scope of application to the law of an Applicable State.
2.5.8 Private International Law rules on Claw Backs

In terms of Article 4(2)(m) of the Insolvency Regulation, Regulation 11(2)(l) of the Credit Institutions Winding-Up Regulations and Regulation 10(3)(m) of the Insurance Undertakings Winding-Up Regulations, rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (such as those discussed in relation to ‘fraudulent preferences’ under Article 303 of the Companies Act above) are governed by the law of the Member State of the opening of the proceedings.

However, Article 13 of the Insolvency Regulation lays down that where the person who benefited from an act detrimental to all the creditors (the “Detrimental Act”) provides proof that:

- the Detrimental Act is subject to the law of a Member State of the European Union other than that of the state of the opening of the proceedings; and

- that law does not allow any means of challenging the Detrimental Act in the relevant case,

then the laws on claw backs in the Member State of the opening of the proceedings will not apply. The same rule finds reflection in Regulation 31 of the Credit Institutions Winding-Up Regulations and Regulation 26 of the Insurance Undertakings Winding-Up Regulations, with the difference that under the latter two Regulations, the Detrimental Act may be governed by the laws of an Applicable State (rather than just that of a Member State of the European Union).

2.6 Investment Company with Variable Share Capital (SICAV) constituted as a Multi-Fund Company

The Companies Act (Investment Companies with Variable Share Capital) Regulations (S.L.386.02) govern multi-fund companies in Malta. A multi-fund company is an investment company with variable share capital (SICAV) which elects to have the assets and liabilities of each sub-fund comprised in that company treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of the other sub-funds of such company. The multi-fund company is obliged to keep assets and liabilities of each sub-fund segregated from the other.

The Regulations (Regulation 9(2)) provide that save for such proportions of the liabilities of a multi-fund company which by virtue of the memorandum of association of the company or by virtue of the terms of issue of the shares constituting a sub-fund are, or are to be attributable to, one or more sub-funds in the proportion established therein, the liabilities incurred in respect of each sub-fund shall be paid out of the assets forming part of its patrimony and the creditors in respect thereof shall have no claim or right of action against the other assets of the company.
In addition, the Regulations also lay down that:

(a) proceedings in relation to the multi-fund company must respect the legal status of each sub-fund as a patrimony separate from the assets and liabilities of each other sub-fund of the company; and

(b) proceedings under the Companies Act, 1995 relating to insolvency proceedings of a company shall apply *mutatis mutandis* to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a company; and any proceedings in relation to one sub-fund shall not have any effect on the assets of any other sub-fund of the company or of the company itself.

Individual sub-funds do not have separate legal personality *per se* and therefore they need to enter into contracts through the legal personality of their multi-fund company, for instance XYZ SICAV Limited in respect of 123 Sub-Fund. If a Party proposes to enter into the Agreement with more than one sub-fund, then the said Party should enter into separate Agreements with each and every sub-fund.

Moreover, for clarity's sake, you might wish to consider adding the following clause in the ISDA Schedule in relation to the definition of "Bankruptcy":

“For the avoidance of doubt, Section 5(a)(vii) shall also apply *mutatis mutandis* to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a company.”

### 2.7 Protected Cell Companies

For the sake of completeness, Maltese law also allows insurance companies to be constituted as or converted into a Protected Cell Company ("PCC") which although sharing a number of features with the multi-fund companies described above merit their own treatment. In terms of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations (SL.386.10), a cell company may create within itself one or more cells for the purpose of segregating and protecting cellular assets, that is assets attributable to a particular cell. PCCs will also have a core or non-cellular fund which is comprised of assets of the PCC not attributable to a particular cell. The directors of a PCC are obliged to keep (i) cellular assets separate and separately identifiable from non-cellular assets, (ii) cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells, as well as to (iii) keep separate records, accounts, statements and other documents as may be necessary to evidence the assets and liabilities of each cell as distinct and separate from the assets and liabilities of other cells in the same company.

In terms of the Regulations, where any liabilities of a PCC are incurred in respect of a particular cell then:
i. the cellular assets attributable to that cell shall be primarily used to satisfy the liability;

ii. the company’s non-cellular assets shall be secondarily used to satisfy the liability, provided that the cellular assets attributable to the relevant cell have been exhausted; and

iii. any cellular assets not attributable to the relevant cell shall not be used to satisfy the liability.

Liabilities incurred by a PCC which are not attributable to a particular cell are in terms of Regulation 14(2) to be a liability solely of the PCC’s non-cellular assets or core.

The secondary recourse to the core described in paragraph ii. above may only be derogated in certain limited instances and even in such cases only by means of a specific written agreement with a creditor. The prohibition in paragraph iii. above is further reinforced by Regulation 12 which provides that in every transaction entered into by a PCC, the following terms are to be implied:

i. no party shall seek, whether in any proceedings or by any other means whatsoever, to make or attempt to use any cellular assets attributable to any cell of the company to satisfy a liability not attributable to that cell; and

ii. if any party succeeds by any means whatsoever in using any cellular assets attributable to any cell of the company to satisfy a liability not attributable to that cell, that party shall be liable to the company to pay a sum equal to the value of the benefit thereby obtained by him.

Accordingly, in the light of the above, contracts with PCCs need to either identify the cell in respect of which they are transacting (e.g. XYZ PCC Limited in respect of ABC Cell) or if no such cell is identified then the contract will be attributable to the non-cellular assets of the PCC. As regards bankruptcy of cells, other than the rules described above regarding secondary recourse and non-recourse to non-related cells, the regulations do not amend the general rules contained in the Companies Act and the Insurance Undertakings Regulations described elsewhere herein.

You might wish to consider adding the following clause in the ISDA Schedule in relation to the definition of “Bankruptcy”:

“For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis mutandis to the cell as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the cell is not a company.”

2.8 Derivative Transactions

2.8.1 Gaming and Betting
Article 1717A of the Civil Code provides that no debt or other obligation arising under any contract of differences, interest cap agreement, swap, foreign currency exchange or other similar agreement the purpose or intended purpose of which is to secure a profit or avoid a loss (by reference to fluctuations in the value or price of property of any description or in an index or other factor designated for such purpose in the contract) shall be void or unenforceable by reason of any Maltese law on gaming and betting.

Accordingly, subject to the following paragraph, any limitation imposed by Maltese laws on gaming and betting should have no effect on the validity and enforceability of any Transaction.

Having regard to the intention of the legislator to cover all such contracts of differences and derivatives and to the drafting of the particular Article of the law, we are of the view that the parameters of Article 1717A of the Civil Code should be wide enough to cover all Transactions set out in Annex A.

2.8.2 Insurance

We are aware of the debate as to whether certain derivative transactions may be recharacterised as an insurance contract. This could possibly have two major implications: (a) any person carrying on the business of insurance in or from Malta needs to be authorised by the Malta Financial Services Authority (as the Competent Authority); and (b) such a derivative may have to comply with the requisites of an insurance contract under Maltese law. Maltese law does not throw any light as to whether a derivative contract entered into in breach of the above Maltese insurance laws would still be enforceable or otherwise by the ‘insured’, but it does state that no contract of insurance is void or voidable by an ‘insurer’ by reason only that there has been a breach of Maltese insurance regulatory laws. Derivative transactions such as credit derivatives and weather derivatives are still rather uncommon in Malta and accordingly this debate as to their real nature under Maltese law is still in its infancy. If the matter were ever to be determined by the Malta Financial Services Authority or by the Maltese Courts, regard will be paid to the interpretation and usage in foreign jurisdictions, particularly the United Kingdom, Italy and France, in order to determine whether a particular derivative contract should be recharacterised as an insurance contract or otherwise. Although no opinion is expressed in this regard, with reference to Credit Default Swaps, on the basis of communications with the Insurance Business Unit of the Malta Financial Services Authority, we are of the view that the better interpretation should be that when there is no contractual or other legal requirement for either party to such a derivative to suffer a loss in respect of any obligation of the reference entity in a Transaction, such derivatives entered into pursuant to the ISDA Master Agreement should not be recharacterised as contracts of insurance. Furthermore, by virtue of the fact that derivatives are defined as a “financial instrument” in terms of the Markets in Financial Instruments Directive 2004/39/EC as amended from time to time (“MIFID”), there may be less scope to argue that a derivative is to be deemed to be an insurance contract. We express no opinion as to whether a derivative transaction could be recharacterised as an insurance contract.
2.9 Submission to Jurisdiction of Maltese Courts

The submission by the Parties in the ISDA Master Agreements to the jurisdiction of the courts of Malta is valid and binding and will be given effect to by the courts of Malta.

Save in circumstances where it is required to exercise jurisdiction under the EC Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the “European Judgments Regulation”) or the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on the 30th October 2007 between the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Federation (the “Lugano Convention”), where a foreign court has a concurrent jurisdiction, the courts of Malta have a discretion to declare a defendant non-suited or to stay proceedings in Malta on the ground that if the action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.

The Maltese courts may also be required to decline jurisdiction, in relation to matters falling within the scope of the European Judgements Regulation or the Lugano Convention, where the courts of another Member State as defined in the European Judgements Regulation or the Lugano Convention are first seised of the matter or have exclusive or mandatory jurisdiction; in matters not falling within the scope of the European Judgements Regulation or the Lugano Convention, the jurisdiction of the courts of Malta is not excluded by the fact that a foreign court is seized with the same cause of action or with a cause connected with it.

2.10 Tax representations

With reference to the 1992 Multicurrency Cross-Border ISDA Master Agreement and the 2002 ISDA Master Agreement we recommend that the Parties do not elect any of the tax related representations and warranties. All of these tax representations and warranties are drafted for an international cross-border scenario. Since the scope of this opinion is limited to transactions between two Maltese entities, such representations and warranties are not relevant. It is outside the scope of this opinion to address or recommend any additional tax related representations or provisions for inclusion. The Parties should seek tax advice on a case by case basis.

2.11 Central Bank of Malta

Although in our assumptions to this opinion, we have assumed that each party is able lawfully to enter into and has all requisite capacity and power to enter into the Agreements, we have herein made a brief analysis on the powers of the CBM to enter into derivative transactions. The CBM is established by Article 3 of the CBM Act. The CBM is a body corporate established by law, has a distinct legal personality and forms an integral part of the European System of Central Banks as established under the Treaty of Rome establishing the European Community, as subsequently amended (the “Treaty”). In accordance with the Treaty and the Protocol on the Statute of the European System of Central Banks and of the European Central
Bank annexed to the Treaty (the “Statute”), the primary objective of the CBM is to maintain price stability.

Article 17 of the CBM Act lays down the principal business and powers of the CBM. We note the following general powers of the CBM:

Art. 17(2): “In managing and maintaining the reserve assets, the Bank may, in accordance with the guidelines and instructions of the European Central Bank, carry out any transactions that it deems suitable, and in particular it may:

(a) hold, manage, acquire and sell, spot and forward, all types of external assets and precious metals; and

(b) carry out any type of financial transaction with domestic or foreign institutions or with international organisations, including borrowing and lending operations.”

Art. 17(5): “Subject to any other provisions of this Act, the Bank may generally conduct business as a bank, and do all things as are incidental to or consequential upon the exercise of its powers or the discharge of its duties under this Act.”

In light of the above considerations, we are of the view that the CBM Act does not contain any provision which makes it unlawful, or ultra vires the law, for the CBM to enter into the Agreements or the transactions contemplated thereunder. The only caveat is that all such transactions as contemplated by the Agreements must be entered into in accordance with the Treaty, the Statute, the guidelines and instructions of the European Central Bank and also that such transactions can only be entered into to enable the CBM to achieve its objectives and to carry out its tasks as laid down by law. Furthermore, there are no registration or filing requirements which are specific to the CBM.

It must be noted that in terms of Article 17(6) of the CBM Act, the CBM enjoys a special privilege (under Maltese law special privileges grant priority rights to creditors) over any funds held in its accounts, as well as any securities, precious metals or any other assets belonging to its debtors and deposited with it, as well as any other funds or other assets pledged in its favour by its debtors or by third parties to guarantee the obligations of its debtors. The CBM may, subsequent to prior notification to the debtor, apply any such funds or assets in satisfaction of the debts due to it without the necessity of any authorisation or sanction by any court or other authority, and may also, for such purpose, dispose of any such assets so held by it or pledged in its favour and apply the proceeds from such disposal directly to satisfy its claims.

Article 15 of the CBM Act also provides that the CBM and its directors, officers or servants thereof, and any other person appointed to perform a function under the CBM Act, or under any rules or regulations made thereunder, shall not be liable in damages for anything done or omitted to be done in the discharge or purported discharge of any functions under the CBM.
Act, or any rules or regulations aforesaid, unless the act or omission is shown to have been done or omitted to be done in bad faith. The said exemption from liability also applies to the CBM and to any of its directors, officers or servants thereof and to any other person appointed by the CBM, in the performance or purported performance of any function assigned to the CBM or to any director, officer, servant or other person under any other law.

3. QUALIFICATIONS

This opinion is subject to the qualifications outlined below:

3.1 The enforceability of the rights and remedies provided for in the ISDA Master Agreements are limited by and subject to the plea of prescription.

3.2 Money judgements awarded by the courts of Malta, as well as any precautionary and executive warrants, are denominated in the lawful currency for the time being of Malta. In cases involving a foreign currency, the established principle is that the courts of Malta order that payment be made in the currency which is legal tender in Malta and that the rate of exchange be that obtaining at the time when the obligation was due and not that obtaining at the time of delivery of the judgment. There have been instances however where the courts of Malta have ordered that payment be made using the rate of exchange obtaining at the time of the delivery of the judgement.

3.3 Exchange control limitations have been abolished in Malta and Maltese persons may enter into foreign currency transactions without limitation. In the event however that for any reason a party needs to prove / claim in a Maltese liquidation, the solvent party’s claim must be expressed in Euro.

3.4 The waiver by any of the Parties of certain procedural rights and remedies in the ISDA Master Agreement, such as those contained in section 13(d), may not be valid due to the fact that all procedural laws are treated as rules of public policy.

3.5 With reference to sections in the ISDA Master Agreements which seek to regulate post-judgement relations (see for instance, sections 2(e), 8 (b) and (c) of the 1992 ISDA Master Agreement and sections 8(b) and (c) and section 9(h) of the 2002 ISDA Master Agreement), a judgement at law may amount to a novation of the debt and so, to the extent, if at all, that the judgement provides, such provision will not be effective.  

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2 There are two exceptions to this rule relating to (i) exceptional circumstances, namely a sudden crisis in Malta’s balance of payments or serious difficulties for the stability of the financial system; and (ii) powers under the National Interest (Enabling Powers) Act (Cap. 365 of the Laws of Malta);

4 This is a very technical point on which there is no consensus.
3.6 We bring to your attention that as a general rule under the Civil Code, interest can only be charged up to 8% per annum. In addition, the general rule is that the compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures prescribed in the Civil Code are followed. Unless the Parties fall within one of the exemptions set out by law, certain provisions in the ISDA Master Agreement which run counter to such rules will not be enforceable as a matter of Maltese law.

In virtue of the Interest Rate (Exemption) Regulations, 2009 (Legal Notice 142 of 2009), issued under the Civil Code, a number of transactions were liberalised. In particular, where the interest rate or the compounding of interest rates arises in relation to debts and other obligations from so-called “financial transactions” and where one of the parties is a “designated entity”, the said limitations have been completely liberalised. The definition of “financial transaction” includes: contracts for differences, derivative contracts including options, forwards, swaps, foreign currency exchange contracts and similar agreements, securities lending transactions, sale and buy back agreements, repurchase and reverse repurchase agreements and similar agreements, as well as any pledges, hypothec and other charges and any other collateral agreements, whether by way of title transfer or otherwise, which are entered into for the purpose or in connection with any of the foregoing transactions.

The definition of “designated entity” includes amongst others:

(i) a credit institution licensed under the Banking Act or a credit institution within the meaning of Article 4 of Directive 2006/48/EC;

(ii) an investment services licence holder under the Investment Services Act or an investment firm within the meaning of Article 4 of Council Directive 2004/39/EC; and

(iii) a financial institution licensed in terms of the Financial Institutions Act or a financial institution within the meaning of Article 4 of Directive 2006/48/EC.

Accordingly, on the assumption that one of the Parties to the ISDA Master Agreement qualifies as a “designated entity” under the said Regulations and on the basis that obligations arising under the ISDA Master Agreements should, in our view, qualify as obligations arising under a “financial transaction”, no limitation arises under Maltese law in connection with interest rates or the compounding thereof within this context. This exemption will not however apply when one or more of the Parties to the ISDA Master Agreement is a natural person.

3.7 There is some doubt in legal circles whether the exemptions set out in the Interest Rate (Exemption) Regulations 2009 (see foregoing paragraph) should also extend to the case where a debtor no longer enjoys the benefit of time for the payment of an obligation,
since the Civil Code states that the damages arising from the delay in payment of a determinate sum may only consist in the interests on the sum due at the rate of eight per cent. per annum. We do not subscribe to this view since the Interest Rate (Exemption) Regulations specifically disapply the provisions of Title IV and Title XVII of Part II of Book Second of the Civil Code insofar as they limit or restrict the charging of interest and the compounding of interest in the case of a transaction falling within the above exemption.

3.8 Under our Civil Code, the general rule is that mandate is of its nature revocable. Furthermore, mandate is terminated by virtue of a declaration of bankruptcy of either the mandator or the mandatary. However, by virtue of Article 3(3) of the Set-Off Act, a mandate in a contract to implement any close-out netting provision is not revoked by a declaration of bankruptcy or insolvency of any party to such a contract.

3.9 Maltese judgements have confirmed (see Dr. Ann Fenech noe vs. Dr. Louis Cassar Pullicino et noe, Court of Appeal, 2 July, 2010) that Article 1357 of the Civil Code, which deals with a promise to sell, applies in the context of a promise to sell or buy of a movable thing (such as shares, which are deemed to be movable by operation of law). Consequently, without prejudice to the validity and enforceability of close-out netting provisions as set out in this opinion, to the extent that any transactions set out in Appendix A may be classified as a promise to purchase or promise to sell under the Civil Code of Malta (this is particularly relevant for options), then the following additional legal issues should be kept in mind:

(i) under Maltese law, in the absence of a period of validity of a promise of purchase or sale agreement, the said promise will be deemed to be valid for a period of three months only. Accordingly, it is advisable for a Confirmation documenting such a Transaction to clearly state that the Transaction is valid for a determinate period;

(ii) specific formalities apply for the preservation of rights and their enforcement. The formalities arise pursuant to Article 1357(2) of the Civil Code which states that: ‘the effect of such promise shall cease on the lapse of the time agreed between the parties for the purpose, or failing any such agreement, on the lapse of three months from the day on which the sale could be carried out, unless the promisee calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid.’

Failure to observe the said formalities within the strict time limits stated in the Civil Code will result in the loss, under Maltese Law, of the remedy of specific performance and possibly also the lapse of the right to damages for non-performance of the promise to re-sell.
3.10 It is pointed out that certain further consequences might arise if Maltese law is the governing law of the ISDA Master Agreement. There is an argument, backed by Maltese judgements (see for instance Vincent Albert Muscat vs. Rudolph Xuereb noe, Court of Appeal, 28 January 2000), that as a general rule it is only a Court of law which can declare a contract to be terminated, when termination is conditional on an event (in legal terminology, this is known as a ‘resolutive condition’), even if there is an express termination clause in the particular agreement. There is another school of thought, also backed by judgements, to the effect that when there is an express termination clause, this operates automatically, or on compliance with the express conditions in the contract, without the necessity of obtaining a judicial declaration to this effect (see for instance Calcedonio Ciantar vs. Francis Grech et, Court of Appeal (Civil Jurisdiction), 21 May 1965). We subscribe to the latter view although, as noted, we acknowledge that a string of Maltese Court judgements have said that only a Court of law can declare a contract to be terminated. Most of the Maltese judgements dealing with this aspect of termination related to the specific issue as to whether a debt constituted a debt, certain, liquidated and due for it to classify as an executive title for the purposes of the Code of Organisation and Civil Procedure (see Article 253(h) of Cap. 12 of the Laws of Malta).

We are of the view that any such interpretation of the Courts should not materially prejudice the operation of the close-out netting provisions under an ISDA Master Agreement. The Set-Off Act lays down in Article 3(6) that notwithstanding the provisions of any other law, nothing shall limit or delay the application of any provision of any contract providing for or relating to set-off or netting which would otherwise be enforceable and no order of any court nor any warrant or injunction or similar order issued by a court or otherwise and no proceedings of whatever nature shall have any effect in relation thereto. On the basis of the said Article 3(6), we are of the view that a termination clause and the consequential close-out netting provisions are enforceable automatically, or upon due notice according to the agreement, without the need of any court declaration. In this regard we recommend that whenever Maltese law is chosen as the governing law of the ISDA Master Agreement, a new Section 5(d) in the 1992 ISDA Master Agreement and a new Section 5(f) in the 2002 ISDA Master Agreement be introduced as follows:

“The right to terminate of a party pursuant to Section 6 of the ISDA Master Agreement following an Event of Default or a Termination Event shall occur strictly in accordance with the terms of the ISDA Master Agreement and this without the need of any authorisation from and/or confirmation by any competent court.”

3.11 Article 1134 of the Civil Code provides that the debtor shall not be liable for damages if he was prevented from giving or doing the thing he undertook to give or to do, or if he did the thing he was forbidden to do, in consequence of an irresistible force or a fortuitous event.
The 1992 Master Agreement does not contemplate *force majeure* and hence contains no exclusion, implicit or explicit, of the *force majeure* defence under article 1134 of the Civil Code. This means that there is a possibility that a party could successfully raise this defence before our courts to avoid liability for non-payment or non-performance of an obligation caused by *force majeure*. In contrast with the 1992 ISDA Master Agreement, the 2002 ISDA Master Agreement specifically caters for force majeure.

3.12 The competent authorities under applicable regulatory laws, such as the Banking Act, the Investment Services Act, the Insurance Business Act, the Controlled Companies Act and other such legislation, have very wide general powers vested in them by law. It must be noted that these regulatory powers are drafted in such a wide manner as to enable such regulatory authorities to take action which could run counter to some of the views expressed in this opinion. To our knowledge, however, to date such powers have not been exercised in a manner which conflicts with the views expressed in this opinion.

4. RELIANCE

4.1 The undersigned has been duly admitted by warrant granted under the public seal of Malta to practise the profession of advocate in Malta. This opinion is limited to the law of Malta as at the date hereof and is given on the basis of our knowledge of that law as of that date. We do not assume any obligation to advise any person entitled to rely on this opinion of any subsequent change in, or in the interpretation of, the law of Malta. We express no opinion on the law of any jurisdiction other than Malta.

4.2 This opinion is strictly limited to the matters stated in it and does not apply by implication or otherwise to any other matters.

4.3 This opinion is addressed to you and only for your benefit and that of your members; it may not, without our prior written consent, be relied upon by any other person other than yourselves and your members or otherwise disclosed or filed with any person or quoted or referred to in a public document.

4.4 Except in cases of fraud, wilful misconduct or gross negligence on our part, the aggregate liability of Ganado & Associates Advocates and its partners, lawyers, agents and employees or any of them (together referred to as the “Law-Firm”) for any damages or losses shall be limited to the extent of the Professional Indemnity insurance cover of the law-firm practising under the name of Ganado & Associates Advocates. No recourse can be taken against individual partners, lawyers, agents and employees of Ganado & Associates Advocates.

For the purposes of this opinion, damages and losses shall mean the aggregate of all losses or damages (including interest thereon, if any) and costs suffered or incurred by
you in connection with this opinion (as the same may be amended or varied), including as a result of breach of contract, breach of statutory duty, tort (including negligence), fault or other act or omission by the Law-Firm but excluding any such losses, damages or costs in respect of liabilities which cannot lawfully be limited or excluded. In order to limit the personal liability and exposure to litigation of our partners, lawyers, employees and agents, this opinion is addressed to you on the basis that you or any other party will not bring any claim for damages resulting from or in relation to this opinion against any of such persons personally.

This paragraph shall survive any termination of your engagement of Ganado & Associates Advocates.

4.5 This opinion and any non-contractual obligations arising out of or in connection with it are governed by Maltese law.

Yours faithfully,

[Signature]

Dr. Conrad Portanier
Partner
GANADO & ASSOCIATES
Valletta, Malta
Annex A - Transactions under ISDA Master Agreements

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a “spot” or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, “Bullion” means gold, silver, platinum or palladium and “Ounce” means, in the case of gold, a fine troy ounce, and in
the case of silver, platinum and palladium, a troy ounce (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index or floating commodity price payer on the floor.

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.
Credit Default Swap Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to enter into a Credit Default Swap.

Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a “Reference Obligation”) issued, guaranteed or otherwise entered into by a third party (the “Reference Entity”) upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations (“Deliverable Obligations”) by the other party. A Credit Default Swap may also refer to a “basket” (typically ten or less) or a “portfolio” (eleven or more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include “pay as you go” settlements, meaning that the credit protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated
on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

**Economic Statistic Transaction.** A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

**Emissions Allowance Transaction.** A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

**Equity Forward.** A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity and shares to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

**Equity Index Option.** A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

**Equity Option.** A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

**Equity Swap.** A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed or floating rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a
basket of shares of several issuers or an equity index, such as the Standard and Poor's 500 Index.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A deliverable or non-deliverable transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a “Fund Interest”), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement
occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

**Fund Swap Transaction.** A transaction a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency based on the redemption value of 1) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

**Interest Rate Option.** A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

**Interest Rate Swap.** A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London interbank offered rate; all calculations are based on a notional amount of the given currency.

**Longevity/Mortality Transaction.** (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality-contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

**Physical Commodity Transaction.** A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

**Property Index Derivative Transaction.** A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

**Repurchase Transaction.** A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

**Securities Lending Transaction.** A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower’s obligation to replace the securities at a defined date with identical securities.
Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a “Reference Obligation”) issued, guaranteed or otherwise entered into by a third party (the “Reference Entity”), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.
Annex B – Suggested Elections to be made in the Schedule to the ISDA Master Agreements

Annex B is divided as follows:

- B.1 1992 ISDA Master Agreement (Local Currency- Single Jurisdiction)
- B.2 1992 ISDA Master Agreement (Multi Currency- Cross Border)
- B.3 2002 ISDA Master Agreement

B.1 1992 ISDA Master Agreement (Local Currency- Single Jurisdiction)

   (ii) The Second Method will apply.

   - (c) Governing law.
   *Replace by the following:*
   "This Agreement will be governed by and construed in accordance with Maltese law (without reference to choice of law doctrine)."

   - *Insert the following wording:*
   "Section 11 shall be replaced by the following:*
   **Section 11. Governing Law and Jurisdiction**
   (a) *Governing Law.* This Agreement will be governed by and construed in accordance with the law specified in the Schedule.
   (b) *Jurisdiction.* With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:-
      (i) submits to the non-exclusive jurisdiction of the Maltese courts;
      (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and
      (iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.
   (c) *Waiver of Immunities.* Each party irrevocably waives, to the extent permitted by applicable law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other
similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of
injunction or order for specific performance or recovery of property, (iv)
attachment of its assets (whether before or after judgement) and (v) execution or
enforcement of any judgement to which it or its revenues or assets might otherwise
be entitled in any Proceedings in the courts of any jurisdiction and irrevocably
agrees, to the extent permitted by applicable law, that it will not claim any such
immunity in any Proceedings.”

- Insert the following wording:
Section 5 is amended by adding a new Section 5(d) as follows:
“The right to terminate of a party pursuant to Section 6 of the ISDA Master Agreement
following an Event of Default or a Termination Event shall occur strictly in accordance
with the terms of the ISDA Master Agreement and this without the need of any
authorisation from and/or confirmation by any competent court.”

- Insert the following wording when one of the Parties is an Investment Company with
Variable Share Capital (SICAV) constituted as a Multi-fund Company
Section 5 is amended by adding a new Section 5(a)(vii)bis. as follows:
“(vii)(bis.) For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis
mutandis to the sub-fund as though it were a distinct legal entity and with such
modifications as are necessary to accommodate the fact that the sub-fund is not a
company.”

- Insert the following wording when one of the Parties is an insurance company
consituted or converted into a Protected Cell Company (“PCC”)
Section 5 is amended by adding a new Section 5(a)(vii)bis. as follows:
“(vii)(bis.) For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis
mutandis to the cell as though it were a distinct legal entity and with such
modifications as are necessary to accommodate the fact that the cell is not a company.”

B.2 1992 ISDA Master Agreement (Multi Currency- Cross Border)

1. Part 1.(f) Payments on Early Termination:
   - (ii) ‘The First Method’ should not be chosen.

2. Part 1.(g) “Termination Currency”
   Replace by the following:
   “Termination Currency” means ...................... if such currency is specified and
   freely available, and otherwise, euro.”

3. Part 2. Tax Representations:
   Delete

4. Part 4. Miscellaneous:
- (b) **Process Agent.**
  Delete.
- (h) **Governance Law.**
  Replace by the following:
  “This Agreement will be governed by and construed in accordance with Maltese law (without reference to choice of law doctrine).”

5. **Part 5. Other Provisions.**
- **Insert the following wording:**
  “Section 13 shall be replaced by the following:
  **Section 13. Governing Law and Jurisdiction**
  (a) **Governance Law.** This Agreement will be governed by and construed in accordance with the law specified in the Schedule.
  (b) **Jurisdiction.** With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:
  (iv) submits to the non-exclusive jurisdiction of the Maltese courts;
  (v) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and
  (vi) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.
  (c) **Waiver of Immunities.** Each party irrevocably waives, to the extent permitted by applicable law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of injunction or order for specific performance or recovery of property, (iv) attachment of its assets (whether before or after judgement) and (v) execution or enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by applicable law, that it will not claim any such immunity in any Proceeding.”

- **Insert the following wording:**
  Section 5 is amended by adding a new Section 5(d) as follows:
  “The right to terminate of a party pursuant to Section 6 of the ISDA Master Agreement following an Event of Default or a Termination Event shall occur strictly in accordance with the terms of the ISDA Master Agreement and this without the need of any authorisation from and/or confirmation by any competent court.”
- Insert the following wording when one of the Parties is an Investment Company with Variable Share Capital (SICAV) constituted as a Multi-fund Company
Section 5 is amended by adding a new Section 5(a)(vii)bis. as follows:
“(vii)bis. For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis
mutandis to the sub-fund as though it were a distinct legal entity and with such
modifications as are necessary to accommodate the fact that the sub-fund is not a
company.”

- Insert the following wording when one of the Parties is an insurance company
constituted or converted into a Protected Cell Company (“PCC”)
Section 5 is amended by adding a new Section 5(a)(vii)bis. as follows:
“(vii)bis. For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis
mutandis to the cell as though it were a distinct legal entity and with such
modifications as are necessary to accommodate the fact that the cell is not a company.”

B.3 2002 ISDA Master Agreement

1. Part 2. Tax Representations:
   Delete

   - Insert the following wording:
     “Section 13 shall be replaced by the following:
     Section 13. Governing Law and Jurisdiction
     (a) Governing Law. This Agreement will be governed by and construed in accordance
     with the law specified in the Schedule.
     (b) Jurisdiction. With respect to any suit, action or proceedings relating to any dispute
     arising out of or in connection with this Agreement (“Proceedings”), each party
     irrevocably:-
     (vii) submits to the non-exclusive jurisdiction of the Maltese courts;
     (viii) waives any objection which it may have at any time to the laying of
     venue of any Proceedings brought in any such court, waives any claim that
     such Proceedings have been brought in an inconvenient forum and waives
     the right to object, with respect to such Proceedings, that such court does
     not have any jurisdiction over such party; and
     (ix) agrees, to the extent permitted by applicable law, that the bringing of
     Proceedings in any one or more jurisdictions will not preclude the bringing
     of Proceedings in any other jurisdiction.
     (c) Waiver of Immunities. Each party irrevocably waives, to the extent permitted by
     applicable law, with respect to itself and its revenues and assets (irrespective of
     their use or intended use), all immunity on the grounds of sovereignty or other
     similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of
     injunction or order for specific performance or recovery of property, (iv)
     attachment of its assets (whether before or after judgement) and (v) execution or
enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by applicable law, that it will not claim any such immunity in any Proceedings.”

- **Insert the following wording:**
Section 5 is amended by adding a new Section 5(d) as follows:
“The right to terminate of a party pursuant to Section 6 of the ISDA Master Agreement following an Event of Default or a Termination Event shall occur strictly in accordance with the terms of the ISDA Master Agreement and this without the need of any authorisation from and/or confirmation by any competent court.”

- **Insert the following wording when one of the Parties is an Investment Company with Variable Share Capital (SICAV) constituted as a Multi-fund Company**
Section 5 is amended by adding a new Section 5(a)(vii)bis. as follows:
“(vii)bis. For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis mutandis to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a company.”

- **Insert the following wording when one of the Parties is an insurance company constituted or converted into a Protected Cell Company (“PCC”)**
Section 5 is amended by adding a new Section 5(a)(vii)bis. as follows:
“(vii)bis. For the avoidance of doubt, Section 5(a)(vii) shall also apply mutatis mutandis to the cell as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the cell is not a company.”

Section 14. **Definitions:**
- Delete definition of ‘**English Law**’
- Definition of ‘**Termination Currency**’

Replace by the following:
“**Termination Currency**” means (a) if a Termination Currency is specified in the Schedule and that currency is freely available, that currency, and (b) otherwise, euro.”