Dear Sirs,

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

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

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

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

1. TERMS OF REFERENCE AND DEFINITIONS

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

1.1.1 persons which are companies incorporated under the Companies Act 1965 ("Companies Act");

1.1.2 banks incorporated under the Financial Services Act 2013 ("FSA"); and

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

1.2.1 Companies licensed under section 61 of the Capital Markets and Services Act 2007 (“CMSA”) to carry on business as broker dealers (Schedule 1);

1.2.2 Partnerships governed under the Partnership Act 1961 (“Partnership Act”) (Schedule 2);

1.2.3 Insurance companies incorporated under the Companies Act and licensed under the FSA (Schedule 3);

1.2.4 Individuals who are residents for foreign exchange administration purposes and subject to Malaysian bankruptcy laws under the Bankruptcy Act 1967 (“Bankruptcy Act”) (Schedule 4);

1.2.5 Government of Malaysia and statutory bodies established under a Malaysian statute (Schedule 5);

1.2.6 Companies incorporated under the Companies Act acting as trustees of Trusts (including unit trust schemes) (Schedule 6); and

1.2.7 Labuan companies incorporated under the Labuan Companies Act 1990 (“LCA”) under the Labuan International Business and Financial Centre framework (Schedule 7).

The scope of this opinion excludes charitable trusts, as trust companies are assumed to be incorporated under the Companies Act 1965.

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

1.4 This opinion covers all types of Transactions1 that may be lawfully entered into by a Company, Bank and Financial Institution, Broker-Dealer, Partnership, Insurance and Takaful Company, Individual, the Government of Malaysia and statutory body, Trust Company, and Labuan Company under the Malaysian regulatory laws that each is respectfully subject to, the detailed analysis of which is beyond the scope of this Opinion.

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1 We cannot say with certainty what specific types of Transactions may be entered into by any counterparty, as this would depend on the applicable foreign exchange administration requirements and the regulatory requirements to which such counterparty is subject. The foreign exchange administration requirement may limit certain Transaction, depending on the applicable facts. In addition, the regulatory requirements imposed on the entities covered are largely not publicly available.
1.5 This opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision.

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

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

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

1.9 Definitions

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

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

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

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

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

We assume:

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

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

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

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

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

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

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

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

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

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

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

3. OPINION

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

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction are the following:

3.1.1 Winding up under the Companies Act, the Companies Regulations, 1966 and the Companies (Winding-Up) Rules, 1972 which applies to a Company and to a Foreign Company, read with the Bankruptcy Act 1967 and the Bankruptcy Rules made there under;

3.1.2 The appointment of a Special Administrator under Part VI of the Pengurusan Danaharta Nasional Berhad Act 1998 (“Danaharta Act”);

3.1.3 The appointment of a Conservator on an ‘affected person’ under Chapter 2, Part XI of the Malaysia Deposit Insurance Corporation Act 2011 (“MDICA”);

3.1.4 The assumption of control provisions / appointment of a receiver and manager over a ‘member institution’ under Chapter 1 of Part VII of the MDICA;
3.1.5 The exercise of the powers of the Central Bank of Malaysia ("BNM") pursuant to sections 38 and 77 of the Central Bank of Malaysia Act 2009 ("CBMA");

3.1.6 The issuance of directives by the Securities Commission ("SC") pursuant to section 346C of the CMSA, and

3.1.7 The assumption of control provisions / appointment of a receiver and manager under Sub-Division 2 of Division 2, Part XIII of the FSA.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as set out in Section 1 of Annex 5.

3.2 Recognition of choice of law

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

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

3.3 Enforceability of FOA Netting Provision

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

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

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

We are of this opinion because under Malaysian law, the Parties to the relevant FOA Netting Agreement or a Clearing Agreement are free to decide on the terms that they wish to be bound by, subject to a construction of the full scope of the terms under the agreements, and provided that that there are no contrary statutory provisions that
would override such terms. In this regard, the relevant statutory provisions listed at paragraph 4 below may operate so as to qualify the enforceability of the FOA Netting Provision.

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

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

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

3.5 Enforceability of the FOA Set-Off Provisions

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

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

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

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

We are of this opinion because under Malaysian law, the Parties to the relevant FOA Netting Agreement are free to decide on the terms that they wish to be bound by, subject to a construction of the full scope of the terms under the agreements, and provided that that there are no contrary statutory provisions that would override such terms. In this regard, the relevant statutory provisions listed at paragraph 4 below may operate so as to qualify the enforceability of the FOA Set-Off Provisions.

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

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

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

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

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

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

We are of this opinion because under Malaysian law, the Parties to the relevant Clearing Agreement are free to decide on the terms that they wish to be bound by, subject to a construction of the full scope of the terms under the agreements, and provided that that there are no contrary statutory provisions that would override such terms. In this regard, the relevant statutory provisions listed at paragraph 4 below may operate so as to qualify the enforceability of the FOA Set-Off Provisions.

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

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

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

We are of this opinion because under Malaysian law, the Parties to the relevant Clearing Agreement are free to decide on the terms that they wish to be bound by, subject to a construction of the full scope of the terms under the agreements, and provided that that there are no contrary statutory provisions that would override such terms. In this regard, the relevant statutory provisions listed at paragraph 4 below may operate so as to qualify the enforceability of the Clearing Module Set-Off Provision.

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

3.7 Enforceability of the Title Transfer Provisions

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

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

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

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

We are of this opinion because under Malaysian law, the Parties to the relevant FOA Netting Agreement or a Clearing Agreement are free to decide on the terms that they wish to be bound by, subject to a construction of the full scope of the terms under the agreements, and provided that that there are no contrary statutory provisions that would override such terms. In this regard, the relevant statutory provisions listed at paragraph 4 below may operate so as to qualify the enforceability of the Title Transfer Provisions.

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

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

The enforceability of the Title Transfer Provisions is not affected by the use of the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause, provided always that:
3.8.1 the agreement unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and

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

Our opinions expressed in this paragraph 3.8 is subject to the laws in paragraph 3.7 above.

3.9 Single Agreement

Under the laws of this jurisdiction it is necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision to be enforceable. In our view, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions, are part of a single agreement.

3.10 Automatic Termination

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

3.11 Multibranch Parties

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

3.12 Insolvency of Foreign Parties

3.12.1 Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default occurs in respect of such Party (a "Foreign Defaulting Party"), the Foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction.
3.12.2 **Winding up proceedings under the Companies Act**

3.12.2.1 The winding up proceedings against a Foreign Defaulting Party shall be governed by the same insolvency rules as a Company incorporated in this jurisdiction under the Companies Act, with the following adaptions:

(a) the principal place of business of the Foreign Defaulting Party in Malaysia shall for all the purposes of the winding up be the registered office of the company;

(b) no such Foreign Defaulting Party shall be wound up voluntarily; and

(c) the circumstances in which the Foreign Defaulting Party may be wound up are:

(i) if the Foreign Defaulting Party is disabled or has ceased to have a place of business in Malaysia or has a place of business in Malaysia only for the purpose of winding up its affairs or has ceased to carry on business in Malaysia;

(ii) if the Foreign Defaulting Party is unable to pay its debts; and

(iii) if the Court is of the opinion that it is just and equitable that the Foreign Defaulting Party be wound up.

If foreign insolvency proceedings are initiated against the Foreign Defaulting Party, the question that arises is whether a stay of execution that is consequential on a foreign winding-up order would extend to assets located in Malaysia such that Malaysian creditors would not be entitled to execute against or attach to these assets.

In this regard, a statutory moratorium on the commencement or continuation of legal proceedings triggered by a winding-up order does not generally have extra-territorial effect: see *In re Oriental Inland Steam Co* (1874) LR 9 Ch App 557. This is premised on the fundamentally territorial nature of jurisdiction.

As such, under the common law rules of recognition, a court would not recognise the jurisdiction of a foreign legislature to impose a stay on any proceedings in the forum court and so would not be bound by any such stay: see *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112.²

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² Section 315 of the Companies Act.
That being said, it remains open to the Malaysian courts to assist the foreign liquidation proceedings by exercising their inherent jurisdiction to stay proceedings by execution creditors: see Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Edn, 2011) at para 16-62. The ability of a court to grant such a stay is predicated (in the major textbooks) by reliance on the inherent jurisdiction of the High Court (this was also the position taken by the Singapore Court of Appeal in *Beluga Chartering GmbH v Beluga Projects* [2014] 2 SLR 815). However, ultimately, it is up to the Malaysian courts to decide whether they will accept that the inherent jurisdiction can be called in aid in this scenario; there is no decided case on point.

3.13 Special legal provisions for market contracts

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

4. QUALIFICATIONS

The opinions in this opinion letter are subject to a number of qualifications:

(a) The qualifications at paragraph 4.1 to 4.9, 17 and 4.13, 21 are in relation to the opinions at paragraph 3.3 to 3.8.

(b) The qualification at paragraph 4.10, 18 is in relation to the opinions at paragraph 3.7 and 3.8.

(c) The qualification at paragraph 4.4, 19 is in relation to the opinions at paragraph 3.9.

(d) The qualification at paragraph 4.12, 20 is in relation to the opinions at paragraph 3.2.

Our opinion is qualified in cases where both Parties have defaulted. If, at the time a Party proposes to exercise its rights under the FOA Netting Provision, an FOA Set-Off Provision, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions, an Insolvency Proceeding has been initiated in relation to that Party, additional considerations will apply which may affect the opinions given in paragraph 3 in respect of those Provisions.

Likewise, (in relation to a Clearing Agreement) if at the time a Firm Trigger Event or Clearing Member Trigger Event has occurred in relation to a Party acting as Firm, or
as the case may be Clearing Member, an Insolvency Proceeding has been initiated in relation to the Party acting as Client, additional considerations will apply which may affect the opinions given in paragraph 3 in respect of the Clearing Module Netting Provision and the Addendum Netting Provision.

4.1 Netting and Set-Off After the Commencement of Insolvency Proceedings

4.1.1 Where an obligation has been entered into (including under a Transaction or a transfer of Margin under the Title Transfer Provisions) after the commencement of Insolvency Proceedings in relation to a Party, any amount which is due in respect of such an obligation shall be capable of inclusion in the netting under the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, or a set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision, subject to its consistency with Malaysia’s statutory insolvency laws under the Companies Act and the Bankruptcy Act. This is discussed in more detail below.

Statutory Insolvency Set-Off

4.1.2 The contractual rights of set-off in the FOA Netting Agreement and Clearing Agreement will in our view only be enforceable in Malaysian insolvency proceedings to the extent that such rights are consistent with the statutory right of set-off contained in section 41 of the Bankruptcy Act, as made applicable to Companies by virtue of subsection 291(2) of the Companies Act.

4.1.3 The statutory right to set-off under section 41 of the Bankruptcy Act stipulates four pre-requisite criteria for its application: -

(a) The mutual claims must have existed prior to or at the time of the winding-up order;

(b) There must be mutuality in relation to the claims to be set-off;

(c) The claims must ultimately be payable in money; and

(d) When entering into the FOA Netting Agreement or Clearing Agreement, each counterparty must not have:

   (i) Notice of the existence of any of the grounds for compulsory winding up listed as (a) to (k) in subsection 218(1) of the Companies Act that would justify the presentation of petition

3 Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd [1998] 4 MLJ 569
against any of the parties under section 218 of the Companies Act for the compulsory winding up of the Company; or

(ii) In the case of a voluntary liquidation, notice of the convening of a meeting of the members of the Company or of the summoning of the creditors of the Company to a meeting, in either case to consider placing the Company in liquidation.

Based on the facts as we are made aware, criteria (a) to (c) should be met, subject to the meeting of the ‘mutuality’ requirement. On this point, if obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement are not “mutual” between the Parties they may not be eligible for inclusion in a netting or set-off pursuant to the FOA Netting Provision, the FOA Set-Off Provisions or the Clearing Module Set-Off Provision.

While there is no Malaysian case law directly on point that we are aware of, our view is that an obligation would be seen as ‘mutual’ where there are mutual credits, mutual debs or other mutual dealings between the insolvent party and its solvent counterparty, which take place before liquidation sets in.

The satisfaction of criteria (d) would depend on the facts of the case.

The Principle of Mutuality: Further Discussion

Only rights and obligations that arise from mutual dealings may be the subject of statutory set-off. Mutuality in this regard simply requires the respective claims to be owed between the same parties and for those parties to be acting in the same capacity.

For example, a debt owed jointly between two or more persons to an insolvent company generally may not be set-off against a claim by one of them against the company. Similarly, there can be no set-off between a claim by a trustee against an insolvent company in respect of a contract entered into for the account of the trust and a debt owed to the company by the trustee in his personal capacity.

In summary, the key elements that need to be satisfied to satisfy ‘mutuality’ are that the debts, credits or other dealings are (a) between the same parties and (b) in relation to the same right or capacity.

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Pari Passu Distribution of an Insolvent Company’s Assets

4.1.4 The statutory winding-up regime also mandates that the assets of an insolvent Company must be distributed in pari passu in satisfaction of all its liabilities to its creditors.\(^8\)

4.1.5 In this regard, the Malaysian Federal Court has recognised that the legislature, in providing for insolvency set-off, gives legitimacy to a system of accounting whereby the party successfully asserting the set-off enjoys a preference over the general body of creditors in a manner similar to that enjoyed by a secured creditor.\(^9\)

4.1.6 The non-defaulting party who is exercising his right to set-off under the FOA Netting or Clearing Agreement therefore has a preferential status over unsecured creditors, which in turn means that the Netting Provision does not offend the pari passu principle.

The Impact of Section 223 of the Companies Act

4.1.7 As a result of section 223 of the Companies Act, any disposition of the property of a Company made after the commencement of the winding-up of a Company shall be void unless otherwise ordered by the High Court.\(^10\)

4.1.8 There is no direct or indirect Malaysian case law authority on whether netting under the Agreement or any similar document would result in a disposition of the Company’s property that might be caught by section 223 of the Companies Act.

4.1.9 It is our opinion, however, that to the extent the FOA Netting and Set-Off Provisions under the Agreement are consistent and harmonious with the statutory set-off arrangement under section 41 of the Bankruptcy Act as provided above, section 223 will not operate so as to negate the contractual netting process under the Agreement.

The Impact of the Preference Provisions under subsection 293(1) of the Companies Act

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\(^8\) Subsection 291(2) of the Companies Act read with subsection 43(4) of the Bankruptcy Act.


\(^10\) Winding up is deemed to have commenced upon the presentation of a winding up petition against a Company.
4.1.10 The statutory insolvency regime provides protection to creditors or any person who are interested in the liquidation assets through striking down of undue preferences.

4.1.11 Subsection 293(1) of the Companies Act provides that any transfer, mortgage, payment or other act relating to property done by the Company, which if done by an individual would in the individual’s bankruptcy be void or voidable, shall likewise be void or voidable as against the Company.

4.1.12 Subsection 293(1) must be read with section 53 of the Bankruptcy Act which stipulates that any transfer of property, or payment made or incurring of an obligation by a person unable to pay his debts out of his own money as and when they become due in favour of a creditor of that person will be deemed to constitute a preference if that person is subsequently adjudged bankrupt on a bankruptcy petition presented within six (6) months of such transfer, payment, etc.

4.1.13 By subsection 293(2) of the Companies Act, the claw back period commences from the date of the presentation of the winding up petition against the Company for compulsory winding up; and in a voluntary liquidation, the passing of a resolution to wind up the Company voluntarily.

4.1.14 The essential elements of a Transaction coming within section 293 of the Companies Act read with section 53 of the Bankruptcy Act were considered by the Federal Court of Malaysia in Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd [1998] 4 MLJ 569 at 579. Arising from this decision, the five elements that have to be shown in order to establish undue preference as against the Company are:

(a) The Transaction in question took place within six months prior to the commencement of winding up of the Company;

(b) The Transaction is of a kind that is either a transfer of property, or a payment, or the incurring of an obligation, out of the Company’s own funds;

(c) The Transaction takes place at a time when the Company is insolvent;

(d) The person in whose favour the Transaction was effected stood in the relation of creditor to the Company; and

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11 Thus, there is no requirement or element of intention to prefer under Malaysian law.
12 In relation to a contract with certain future obligations to be performed by either side, our view, as a matter of principle, is that the relevant timing for determining whether it is or is not a preference is the date of the actual performance/completion of that future obligation under that contract.
(e) The effect of the Transaction was to confer on that person a preference, priority or advantage over other creditors of the Company in the winding up.

4.1.15 If all five elements are present, the Transaction is *ex facie* void.

4.1.16 The Federal Court has recognised that a payment or agreement to set off that falls within the statutory set-off regime under section 41 of the Bankruptcy Act cannot be considered to be a void preference\(^\text{13}\).

4.1.17 A Transaction is protected from the claw-back provision under subsection 293(1) if the Transaction falls within the exception under subsection 54(1) of the Bankruptcy Act. The provision preserves all *bona fide* payment, dealing or Transaction for valuable consideration if it is made before the date the Company is wound up\(^\text{14}\) without notice of any available act of insolvency by the Company.

4.1.18 Thus, where the Company is wound up, whether compulsorily by order of court or voluntarily, the operation of the netting mechanism under the Netting provisions within the six months period immediately preceding the *commencement of the bankruptcy or winding up* will not amount to a preference under section 53 of the Bankruptcy Act (read with section 293 of the Companies Act) if:

(a) The provisions of section 54 of the Bankruptcy Act apply, as described above;

and

(b) The Agreement is entirely consistent with the statutory set-off scheme in section 41 of the Bankruptcy Act.

4.2 **Special Administration under the Danaharta Act**

4.2.1 The Danaharta Act contains provisions which allow Pengurusan Danaharta Nasional Berhad ("Danaharta") to acquire non-performing loans ("NPLs") and the underlying security thereof of a company that is defined as an "affected person" by way of an appointment of a "special administrator" over an "affected person" (as defined below). It must be noted that Danaharta has wound down its operations since 2005, and all its residual assets has been transferred and is now managed by Prokhas Sdn Bhd. Nevertheless, the

\(^{13}\) *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd* [1998] 4 MLJ 569.

\(^{14}\) The reference date is the date of the ‘receiving order’: section 54 of the Bankruptcy Act. The corresponding date for court ordered winding up would be the date of the winding up order itself.
4.2.2 The Danaharta Act has conferred on Danaharta wide range of powers of which two are special and noteworthy.

4.2.3 First, the power to acquire NPLs from local licensed institutions and to statutorily vest such NPLs in itself. Second, to appoint special administrators under Part VI of the Danaharta Act to manage the affairs of distressed companies and to formulate and submit for approval, and subsequently (upon approval) to implement, a workout proposal in relation to such distressed companies, which are known as “affected persons”. An affected person is defined in section 21 of the Danaharta Act as: -

(a) any company owing a duty or liability under a credit facility to the Corporation or any subsidiary of Danaharta, whether present, future, vested or contingent;

(b) any subsidiary of the company referred to in paragraph (a);

(c) any company which has provided security for the performance of or discharge of a duty or liability owed by any person to Danaharta or any subsidiary of Danaharta, whether present, future, vested or contingent; or

(d) any company where at least two per cent of its share capital has been charged, pledged or mortgaged by any person to secure the performance of or discharge of a duty or liability owed by any person to Danaharta or any subsidiary of Danaharta, whether present, future, vested or contingent.

4.2.4 The appointment of a special administrator over an affected person causes a moratorium to come into effect of at least 12 months duration and which can be extended. If the ‘affected person’ is the Company, the operation of the contractual close-out netting provisions of the Agreement will be affected, because upon the appointment of a special administrator over the Company, by section 41(1)(d)(iv) of the Danaharta Act, no party can take steps to set off a debt due to the Company against claims against the Company unless the Danaharta consents under the proviso to section 41(1)(d) of the Danaharta Act.

4.2.5 By virtue of section 29A of the Danaharta Act, when an ‘Event of Default’ under the Agreement is caused by the appointment of a special administrator in respect of the Company under the Danaharta Act: -
(a) Obligations of the Company under the Agreement cannot be terminated, modified or cancelled;

(b) Obligations of the Company under the Agreement cannot be accelerated or enforced.

(c) The Company cannot be obliged to perform obligations under the Agreement that would not otherwise arise for performance but for the occurrence of the event of default caused by the said appointment.

4.2.6 Section 29A of the Danaharta Act thus limits the FOA Netting Provisions, FOA Set-Off Provisions, and Title Transfer Provisions in the FOA Netting Agreement and Clearing Agreement on the appointment of a special administrator.

Policy Statement in Relation to Eligible Financial Institutions

4.2.7 Danaharta wound down its operations at the end of 2005, and has not since January 2006 made any new appointments of special administrators. However, Danaharta’s powers still exist and we are obliged to point this out. To allay concerns on the part of foreign counterparties, Danaharta has also issued a policy statement which is intended to act as an assurance that it will not appoint any new special administrators, and in particular over licensed financial institutions, such as Banks.

4.2.8 On 19 May 2009, Danaharta issued a Policy Statement (“Policy Statement”) stating that having regard to the fact that:

(a) since winding down its operations on 1 January 2006, it had neither acquired any new loan portfolios nor appointed special administrators over ‘failed companies / financial institutions, and

(b) during its seven (7) year operation, it had never appointed a special administrator over any ‘Eligible Financial Institution’,

Danaharta “strongly believes that no appointment of a special administrator over Eligible Financial Institutions that deal with ‘Eligible Financial Contracts’ under an ‘Eligible Netting Agreement’ shall be made in the future”. A copy of the Policy Statement is attached as “Annex 6”. A list of what qualifies as an ‘Eligible Financial Contract’ can be found at paragraph 3(ii) of the Policy Statement, while ‘Eligible Financial Agreement’ is defined at paragraph 3(iii) of the Policy Statement.

4.2.9 It should be noted that the Policy Statement is not a regulation within the meaning of section 68 of the Danaharta Act. There is actually no statutory
provision that empowers Danaharta to issue the Policy Statement in terms whereby it acquires the force of law. In our view, the Policy Statement therefore has no force of law. As a matter of Malaysian public law, generally, a public body or authority that is the issuer of a ‘policy’ document setting out its intended policy for the future must remain free to depart from the policy if the facts and circumstances of an individual situation warrant a departure so as to avoid fettering its discretion.

4.2.10 However, a document containing a statement as to future policy is not entirely devoid of legal effect. In our opinion, it is capable of giving rise to a legitimate expectation on the part of a person who is one of the intended recipients of the policy document and who can show that relying on the document, he or it has acted on the basis of the statements contained in the document.

4.2.11 In our view, the public body’s ability to alter its published policy where circumstances warrant a departure does not mean that the authority is totally free to ignore or brush aside the existence of a legitimate expectation. Under Malaysian law, a legitimate expectation has been acknowledged as an interest worthy of protection, and therefore its existence becomes a relevant consideration that must be taken into account and given proper weight in the exercise of any discretion where a previously published statement of public policy is to be departed from. Save to that extent, the existence of a legitimate expectation, even when coupled with proof of reliance, cannot entirely tie the public body’s hands as to how its policy is to be implemented in the future.

4.2.12 Assuming that the policy reflected in the Policy Statement is adhered to and not departed from, and that Danaharta does not in future appoint a special administrator over any ‘Eligible Financial Institution’ in Malaysia, the possibility of the Danaharta Act precluding or impacting set-off, netting and title transfer provisions will not arise.

4.2.13 The issuance of the Policy Statement has improved the enforceability of close-out netting in Malaysia in respect of Eligible Financial Contracts entered into by an Eligible Financial, as explained above. The position is reinforced by the fact that no appointment of a special administrator can be made over a domestic bank, a licensed Labuan bank or a licensed insurance company except with the consent and approval of BNM. Given BNM’s own efforts in encouraging and promoting the full enforceability of close-out netting in Malaysia, it may be surmised that such consent or approval is not likely to be given lightly.
4.3 The Appointment of a ‘Conservator’ under the MDICA

4.3.1 The Malaysia Deposit Insurance Corporation ("Corporation") was first set up under the Malaysia Deposit Insurance Corporation Act 2005, which was later repealed and replaced with the MDICA. The Corporation administers various statutory deposit insurance schemes that insure member institutions, and one of its main objectives is to promote or contribute to the stability of the financial system\(^\text{15}\).

Affected Persons

4.3.2 In furtherance of its objectives, the Corporation is vested with the power to appoint a conservator over a company that is deemed to be an “affected person” under the MDICA. An ‘affected person’ is defined as: -

(a) any company owing a duty or liability under an Islamic financing facility or a conventional credit facility to the Corporation or any subsidiary of the Corporation, whether present or future, or whether vested or contingent;

(b) any subsidiary of the company referred to in paragraph (a) above;

(c) any company which has provided security for the performance of or discharge of a duty or liability owed by any person to the Corporation or any subsidiary of the Corporation, whether present or future, or whether vested or contingent, or

(d) any company where at least five percent of its share capital has been charged, pledged or mortgaged by any person to secure the performance of or discharge of a duty or liability owed by any person to the Corporation or any subsidiary of the Corporation, whether present or future, or whether vested or contingent.

4.3.3 The Corporation may appoint a Conservator over an ‘affected person’ owing a liability to the Corporation or its subsidiaries if it is satisfied that: -

(a) such affected person is unable or unlikely to be able to pay its debts or fulfil its obligations to its creditors;

\(^{15}\) Section 4 of MDICA.
(b) the survival of such affected person and the whole or any part of its assets as a going concern may be achieved;

(c) a more advantageous realisation of the assets of such affected person may be achieved than a winding-up, or

(d) the appointment may achieve a more advantageous realisation or more expeditious settlement of a duty or liability owed by such affected person to the Corporation.

4.3.4 Apart from the primary ‘affected person’, a Conservator may be appointed over subsidiaries of the primary ‘affected person’ and any company that has provided security to secure the obligations of the primary ‘affected person’.

4.3.5 Upon the appointment of a Conservator over an ‘affected person’, a moratorium of twelve (12) months comes into effect. The Corporation may extend the moratorium for such period as it deems appropriate to enable the Conservator to prepare or implement a proposal. Under paragraph 179(e)(iv), during the moratorium, no person may set-off a debt owing to the affected person against any claim due to him by the affected person except with the Corporation’s prior approval.

4.3.6 Additionally, section 166 of the MDICA states that upon the appointment of a conservator, a non-defaulting party does not have a right to:

(a) terminate, cancel or modify an Agreement;

(b) enforce or accelerate the performance of an obligation of the Company; or

(c) require the Company to be obliged to perform obligations which would not otherwise arise for performance but for the occurrence of the Event of Default caused by the said appointment.

4.3.7 It is conceivable that a Conservator’s appointment may be terminated before the twelve-month period comes to an end, without another Conservator being appointed by the Corporation, and before a proposal has been prepared. In such a case, the moratorium should come to an end, and the enforceability of the Netting, Set-Off and Title Transfer provisions in the FOA Netting Agreement and Clearing Agreement would be enforceable.

Member Institutions

4.3.8 Under the MDICA, deemed ‘member institutions’ include conventional licensed financial institutions such as those licensed under the FSA, and such
membership inures until it is cancelled under section 38 of the MDICA, or terminated under section 39 of the MDICA.

4.3.9 In addition, the minister responsible for the administration of the MDICA may, pursuant to section 27 of the MDICA, prescribe any ‘development financial institution’ or other corporation regulated and supervised by BNM to be ‘member institutions’ for the purposes of the MDICA.

4.3.10 The Corporation (or a person appointed by the Corporation) has the power to assume control and acquire assets of ‘members institutions’ under the MDICA, where it is under financial stress or has become non-viable. In practice, the latter enables the Corporation to acquire non-performing loan assets from member institutions. The obligors, both primary and secondary, under such assets then become obligated to the Corporation in place of the selling member institution, thereby becoming “affected persons” and can be subjected to conservatorship under section 161 of the MDICA.

4.4 The Assumption of Control or the Appointment of a ‘Receiver and Manager’ under the MDICA

4.4.1 A receiver and manager may also be appointed over a ‘member institution’.

4.4.2 Where the Corporation or an appointed person assumes control of a ‘member institution’, or if a receiver is appointed over the ‘member institution’, and for as long as the control / receivership continues, a number of key consequences should be noted, including:

(a) No creditor has any right of set-off against the ‘member institution’.

(b) No person may terminate any agreement or accelerate any payment by reason of:

(i) The insolvency of the ‘member institution’;

(ii) a default, before the assumption of control under paragraph 99(1)(c) by the Corporation or the appointed person, or the appointment of a receiver takes effect, by the ‘member

16 Paragraph 99(1)(c) of MDICA.
17 Subparagraph 25(1)(2)(a)(i) of MDICA and paragraph 99(1)(c) of the MDICA.
18 Section 2 of the MDICA.
19 This qualification currently applies only to banks and insurance companies incorporated under the laws of Malaysia, as banks and insurance companies are deemed member institution under the MDICA. The Minister has powers under the MDICA to prescribe other financial institutions to be a member institution, but there is no prescription to date.
20 Chapter 1 of Part VII of the MDICA.
institution’ in the performance of its obligations under the relevant agreement, or

(iii) the assumption of control under paragraph 99(1)(c) by the Corporation / appointed person, or the appointment of a receiver.

(c) No action, suit or proceeding in any court or tribunal may be commenced against the Corporation or the appointed person in respect of the assumption of control, or the receiver in respect of the appointment.

(d) No action, suit or proceeding in any court or tribunal may be commenced or continued against the ‘member institution’, or its assets.

(e) No attachment, garnishment, execution or other method of enforcement or judgment, award or order against the ‘member institution’ or its assets may take place or continue.

(f) No creditor of the member institution has any remedy against the ‘member institution’ or its assets.

4.5 Qualified Financial Agreements Under the MDICA

4.5.1 The MDICA has a concept of ‘Qualified Financial Agreements’ (hereinafter, “MDICA Qualified Financial Agreement”) as set out in subsection 115(1) of the MDICA, namely:

(a) a derivative, whether to be settled by payment or delivery, that:

(i) trades on a derivative, futures or options exchange or board or other regulated market; or

(ii) is the subject of recurrent dealings in the over-the-counter derivatives, securities or commodities markets;

(b) an agreement to:

(i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents;

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21 Subsection 115(1) of the MDICA.
(ii) clear or settle securities, futures, options or derivatives Transactions;

(iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sell back agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

4.5.2 For the purposes of subsection 115(1) of the MDICA:

(a) a “derivative” means “a financial agreement whose obligations are derived from, reference to, or based on one or more underlying reference items that are interest rates, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, indices related to those items or indices as may be prescribed in the regulations and includes (a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap; (b) a futures agreement, (c) a cap, collar, floor or spread; (d) an option, and (e) a spot or forward”.

(b) “financial collateral” means “any of the following that is subject to an interest or a right that secures payment or performance of an obligation

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22 Subsection 115(2) of the MDICA.
in respect of a qualified financial agreement or that is subject to a title transfer credit support agreement:

(i) cash or cash equivalents, including negotiable instruments and demand deposits;

(ii) security, a securities account, or a right to acquire securities; or

(iii) a futures agreement or a futures account.”

(c) a “title transfer credit support agreement” means “an agreement under which title to property has been provided for the purpose of securing the payment or performance of an obligation in respect of qualified financial agreement.”

(d) a “financial intermediary” means –

(a) a clearing agency; or

(b) a person, including a broker, bank or trust company, that in the ordinary course of business maintains securities accounts or futures accounts for others.”

4.5.3 Pursuant to subsection 115(2), where the Corporation or appointed person assumes control of a member institution or a receiver is appointed, section 109 shall prevent the termination of any MDICA Qualified Financial Agreement for ten (10) days following the commencement of the assumption of control or the appointment of the receiver as may be prescribed in regulations by the Corporation and if, during such period, the Corporation transfers, or declares by notice in writing that it will transfer, such MDICA Qualified Financial Agreement to a bridge institution 23 pursuant to paragraph 99(1)(g) or a qualified third party 24 pursuant to subsections 115(3), (4) or (5) of the MDICA, the MDICA Qualified Financial Agreement thereafter may only be terminated as against the bridge institution or the qualified third party in accordance with its terms, as if the agreement had always been with the bridge institution or the qualified third party and not the member institution.

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23 A bridge institution is defined to mean a subsidiary of the Corporation designated as a bridge institution under paragraph 99(1)(f) of the MDICA.

24 A qualified third party is defined to mean a corporation that meets such criteria as may be prescribed by the Corporation. The criteria to become a qualified third party for member institutions and affected persons are as per the Malaysia Deposit Insurance Corporation (Criteria In Respect of Qualified Third Party) Order 2012 came into effect on 2 January 2013.
4.5.4 Subsections 115(4) to (6) address aspects of the transfer: must be all or none of the agreements between the member institution and that person, together with property of member institution to which any MDICA Qualified Financial Agreement relates and transfer effected by transfer instrument issued in accordance with the Second Schedule to the MDICA. Where the Corporation does not transfer, nor declare that it will transfer, any MDICA Qualified Financial Agreement and the counterparty is able to terminate the agreement in accordance with its terms such counterparty may do so, but if it has not done so, the Corporation may declare by notice in writing that the agreement is terminated, in which case, and despite any term of the agreement to the contrary, the agreement shall be deemed to have been terminated by the counterparty.

The FOA Netting Agreement is an MDICA Qualified Financial Agreement

4.5.5 We are of the view that the FOA Netting Agreement is an MDICA Qualified Financial Agreement insofar as the following points below apply to the Transactions therein. This is discussed in more detail below.

4.5.6 First, the definition of ‘derivative’ in subsection 115(1) of the MDICA encompasses the concept of a ‘financial’ agreement. This raises the following questions:

(a) If the Transaction relates to a specified underlier and is included within the specified list of contract types, such as swap, cap, collar, floor, spread, option, spot or forward, does this of itself satisfy the ‘financial’ requirement?

(b) What must be shown in order to satisfy the ‘financial’ requirement?

4.5.7 Given the purpose for the enactment of section 115, we believe that a Transaction that relates to a specified underlier and is of the specified contract type does of itself satisfy the ‘financial’ requirement. Section 115 is intended to address the concerns expressed by market participants over their rights to enforce termination and close-out netting – where the relevant Transactions already fall squarely within the defined parameters of underliers and contract types, we are of the view that the only rational conclusion is that the legislators intended such participants to enjoy the benefit of the safe harbour.

4.5.8 However, where the Transaction relates to a specified underlier (the use of the words ‘that are’ instead of, for example, ‘such as’ suggests that the underliers are stated exclusively), but does not fall within the non-exclusive list of specified contract types, it may still qualify as a ‘derivative’ but would in this

25 Subsection 115(7) of the MDICA.
case, have to satisfy the ‘financial’ agreement requirement. We are of the view that the ‘financial’ requirement can be met so long as one of the parties to the Transaction entered into it for a financial purpose or for managing or distributing financial risk. As the right to terminate and close-out net is a key tool for managing financial risk (i.e., the risk of a counterparty default), we are of the view that where Transactions are subject to the agreement, this would, without more, satisfy the ‘financial’ requirement, but provided the parties are not engaging in those Transactions purely for speculation. As to the situation where some, but not all, of the Transactions satisfy the ‘financial’ agreement, please see para 4.5.10 below.

4.5.9 Second, under the various categories of MDICA Qualified Financial Agreement mentioned in subsection 115(1) of the MDICA, when referring to agreements involving ‘derivatives’ (as defined in subsection 115(2), there is included in sub-clause (a)(ii) a category of derivative that is the subject of “recurrent dealings in the over-the-counter derivatives, securities or commodities markets”. There are four issues that need to be dealt with in relation to the interpretation of this phrase: -

'Recurrent’

(a) Under principles of statutory interpretation in Malaysia, a term in a statute will be taken to bear its ordinary English meaning unless it is used in a technical sense. We are of the view that from the context in which it appears, the term ‘recurrent’ in paragraph 115(1)(a)(ii) is not used in a technical sense. Therefore, its ordinary English meaning applies. It is permitted to have recourse to the dictionary meaning of the word. If so, ‘recurrent’ would then bear the ordinary meaning of ‘repeatedly’ or ‘happening repeatedly or periodically’. No guidance as to the required frequency of the repetition is given from the statutory context, but presumably, the dealing must have happened on at least two occasions and must not be spent (i.e. it must be capable of occurring again and again).

'Dealings’

(b) There is then the issue of exactly what sort of ‘dealings’ need to be the subject of a recurrent quality, and whether a ‘dealing’ would relate either to the agreement itself, or to the Transactions thereunder. On this point, we are of the view that it would not be necessary in practice to make such a distinction between an agreement or Transaction for the following reasons: -
Subsection 115(2) of the MDICA states that for the purposes of subsection 115(1) of the MDICA, a ‘derivative’ means ‘a financial agreement’.

(ii) A derivative as a ‘financial agreement’ need not be a master agreement, since subsection 115(1)(f) of the MDICA states that the derivative as a ‘financial agreement’ may or may not be a master agreement.

(iii) Since a derivative is a ‘financial agreement’, and there are no requirement stated as to its form (e.g. long form, master agreement, etc.), any transaction of derivatives would accordingly be a ‘financial agreement’.

(iv) In practice, therefore, where there is a recurrent dealing in relation to derivatives, a distinction need not be made as to whether such dealings are transactions or agreements, and the only issue that would have to be determined is whether they are recurrent (for which, see subparagraph (a) above).

When Must the Recurrent Dealings Take Place?

(c) There is then the question of when the recurrent dealings must take place so as to make it eligible as an MDICA Qualified Financial Agreement. On the one hand, it would be logical to surmise that the parties must be taken to intend that the agreement must be capable of being identified as a potential MDICA Qualified Financial Agreement at the time when it is first entered into. But that is not necessarily the case. On the other hand, it is permissible as a matter of statutory interpretation to examine what mischief a particular statutory provision was enacted to overcome or what purpose it is intended to serve, even if the mischief or the purpose is not itself manifest in or apparent from the parliamentary debates/proceedings relating to the passage of the bill that became the MDICA. Contextually, subsection 115(1) may be said to have been enacted to address and overcome the myriad concerns raised by participants in the Malaysian OTC derivatives market as to whether the MDICA restricted their rights as counterparties to proceed to effect termination and close-out netting in the context of assumption of control of a member institution or the appointment of a conservator over an affected person. Thus, in this sense, in order to give effect to this broad purpose, the appropriate time at which a relevant dealing must bear the relevant quality,
characteristics or attributes to make it eligible as an MDICA Qualified Financial Agreement should be the time when there is a need to determine if the counterparty, having already entered into such an agreement, needs to invoke paragraph 115(1)(a)(ii) so as to enable the counterparty to terminate and effect close-out netting.

Local or Global OTC Derivatives Market?

(d) Finally, there is the issue of whether ‘over-the-counter derivatives … markets’ refers to the global OTC derivatives markets or only the Malaysian OTC derivatives markets. For the same purposive rationale as set out above, we are of the view that this should be confined to the Malaysian OTC derivatives markets.

4.5.10 Based on the above, an FOA Netting Agreement will be considered as an MDICA Qualified Financial Agreement for the purposes of MDICA, insofar as a Transaction thereunder meets the ‘financial requirement’ (see paragraphs 4.5.6 to 4.5.8) and qualifies as a ‘recurrent dealing’ in the over-the-counter derivatives, securities or commodities markets (see paragraphs 4.5.9(a) to(d)).

4.5.11 In this regard, it should also be noted that the FOA Netting Agreement would be an MDICA Qualified Financial Agreement only with respect to the Transactions that satisfy the ‘financial’ requirement. If some, but not all of the Transactions in respect of the FOA Netting Agreement are considered to be ‘qualified financial transactions’, only those Transactions that are ‘qualified financial transactions’ would be viewed as coming under the provisions that apply to MDICA Qualified Financial Agreements. In other words, the Transactions will be split into two pools, with one pool comprised of those Transactions which are considered to be ‘qualified financial Transactions' and one pool comprised of those Transactions which are not.

As for those Transactions under the FOA Netting Agreement that do not come under the definition of ‘qualified financial transactions’, these would be dealt with separately, and treated in line with agreements that are not MDICA Qualified Financial Agreements The Clearing Agreement is an MDICA Qualified Financial Agreement The key feature of the Clearing Agreement, which comprises of (a) the FOA Netting Agreement, as supplemented by (b) the FOA Clearing Module is the provision of separate netting sets for each CCP service.

4.5.12 In this regard, it might be noted that the separate netting sets only take place in the case of a Clearing Member (see clause 5.2 of the FOA Clearing Module) or CCP default (see clause 5.3 of the FOA Clearing Module). In the case of a Client default, the netting provisions of the underlying FOA Netting

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28 See also paragraphs 4.7.9 and 4.7.14 below.
Agreement would still apply, and all cleared Transactions across all CCPs can be netted into a single amount.

4.5.13 That being said, the question then is whether the FOA Agreement as supplemented by the FOA Clearing Module still falls under the definition of an MDICA Qualified Financial Agreement.

4.5.14 We are of the view that the definition an MDICA Qualified Financial Agreement is wide enough to cover the early termination of separate netting sets for each CCP service, and not simply the global termination and netting of Transactions under the relevant FOA Netting Agreement. This is for the following reasons:

(a) Of the listed agreements at subsection 115(1) a single derivative Transaction is covered by paragraph 115(1)(a) which relates to ‘a derivative, whether to be settled by payment or delivery’.

(b) For Transactions in the plural, this would include any combination of agreements at paragraph 115(1)(a) to (d) (see paragraph 115(1)(e)).

A single netting set for each CCP service is also covered under subsection 115(1)(f), which relates to ‘a master agreement in so far as it is in respect of an agreement referred to in any of subsection 115(1)(a) to (e). This would thus include the Clearing Agreement.

4.6 The Effects of the Appointment of a Conservator in Relation to an MDICA Qualified Financial Agreement

4.6.1 As stated at paragraph 4.3.6 above, and in relation to the appointment of a Conservator over an ‘affected party’, section 166 of the MDICA prevents a non-defaulting party inter alia from terminating or modifying an agreement between the parties, or from enforcing / accelerating the performance of an obligation of the ‘affected person’.

4.6.2 In relation to an MDICA Qualified Financial Agreement, however, such restrictions are lifted two (2) business days after the appointment of a Conservator. This is based on section 180 of the MDICA, read with Regulation 2 of the Malaysia Deposit Insurance Corporation (Temporary Suspension Period) Regulations 2012 (the “2012 Regulations”) and the Malaysia Deposit Insurance Corporation (Temporary Suspension Period) Regulations 2014.

4.6.3 Section 180 of the MDICA is stated in the following terms: -

“... no person who is a counterparty to a qualified financial agreement with the affected person may terminate such agreement, exercise any right of set off under such agreement or exercise any
remedy or right against the affected person or its assets and no stipulation in any such agreement providing for any of the foregoing shall be of any force or effect unless the Corporation otherwise specifies in writing within such period following the appointment of the conservator as may be prescribed in regulations by the Corporation.”

4.6.4 In this regard, Regulation 2 of the 2012 Regulations provides that:

(a) where the Corporation or the appointed person assumes control of a member institution, or a receiver is appointed in respect of a member institution pursuant to MDICA, the termination of an MDICA Qualified Financial Agreement shall be suspended for a period of two business days following the commencement of the assumption of control or the appointment of the receiver; and

(b) where a conservator has been appointed to administer an affected person, no person who is a counterparty to an MDICA Qualified Financial Agreement with the affected person may terminate such agreement, exercise any right of set off under such agreement or exercise any remedy or right against the affected person or its assets, in respect of an MDICA Qualified Financial Agreement, for a period of two business days following the appointment of the conservator.

4.6.5 The effect of this is that Netting and Set-Off rights cannot be exercised immediately upon the onset of the appointment of a Conservator under the MDICA, but is subject to a two (2) business day moratorium.

4.6.6 Under Regulation 3 of the 2012 Regulations, however, Regulation 2 shall not apply to an MDICA Qualified Financial Agreement which is:

(a) a derivative, whether to be settled by payment of deliver that trades on a derivative, futures, or options exchange or board or other regulated market;

(b) an agreement to borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents, conducted under the central lending agency model;

(c) an agreement to clear or settle securities, futures, options or derivatives Transactions, and

(d) an agreement to act as a depository for securities.
To the extent that the plain ordinary meaning or customary usage would refer to a Clearing Agreement, we are of the view that the Clearing Agreement is an agreement to clear or settle securities, futures, options or derivative Transactions. Therefore, the Regulation 2 of the 2012 Regulations would not apply.

4.7 Regulatory Powers Under the CBMA

4.7.1 BNM was set up under the Central Bank Ordinance 1958, under which it was conferred various powers, privileges and functions that are now subsumed and incorporated under the CBMA.

4.7.2 The principal objects of BNM are to promote monetary stability and financial stability conducive to the sustainable growth of the Malaysian economy. In this regard, BNM has all the powers necessary, incidental or ancillary to give effect to its objects and carry out its functions.

4.7.3 The wide-ranging effect of such powers granted to BNM have the potential to affect the enforceability of netting the Agreements, depending on the manner in which the power was exercised by BNM and the type of measure that BNM deployed. In particular:

(a) pursuant to subsection 31(1) of the CBMA, BNM has the power, where it considers it necessary in the interest of financial stability, to issue an order in writing requiring any person to take such measures as BNM may consider necessary or appropriate to avert or reduce any risk to financial stability, after BNM has given such person an opportunity to make a representation.

(b) under paragraph 32(1)(c)(iii) of the CBMA, read with sections 38, 36 and the Third Schedule, BNM may, for the purpose of averting or reducing any risk to financial stability vest in the bank or a third party the whole or part of a business which BNM considers likely to become non-viable.

4.7.4 The Board of BNM also has the power pursuant to subsection 77(1) of the CBMA for the purpose of giving effect to the objects of BNM or to safeguard the balance of its payments position, by notice in writing, to give directions or impose requirements on any person in respect of:

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30 As set out in subsection 5(1) of the CBMA.
31 Subsection 5(3) of the CBMA.
4.7.5 All of the provisions above have, on their face, the potential to detrimentally affect the enforceability of close-out netting in relation to an Agreement.

4.7.6 The Central Bank of Malaysia (Amendment) Act 2013 (CBA(A)), however, which came into force recently on 8 February 2014, modified and restricted the powers of BNM under these provisions in relation to Qualified Financial Agreements (hereinafter, “CBA(A) Qualified Financial Agreement”).

The Introduction of CBA(A) Qualified Financial Agreements

4.7.7 CBA(A) Qualified Financial Agreements were introduced under the CBA(A) and inserted into section 2 of the CBMA with a definition as follows: -

(a) a master agreement in respect of one or more qualified financial transactions under which if certain events specified by the parties to the agreement occur—

(i) the transactions referred to in the agreement terminate or may be terminated;

(ii) the termination values of the transactions under paragraph (a) are calculated or may be calculated; and

(iii) the termination values of the transactions under paragraph (a) are netted or may be netted, so that a net amount is payable,

and where an agreement is also in respect of one or more transactions that are not qualified financial transactions, the agreement shall be deemed to be a qualified financial agreement only with respect to the transactions that are qualified financial transactions and any permitted enforcement by the parties of their rights under such agreement;
In addition to the definition of CBA(A) Qualified Financial Agreement above, the following new terms were introduced into Section 2 of the CBMA: -

“qualified financial transaction” means—

(a) a derivative, whether to be settled by payment or delivery; or

(b) a repurchase, reverse repurchase or buy-sell back agreement with respect to securities;

“financial collateral” means any of the following that is subject to an interest or a right that secures payment or performance of an obligation in respect of a qualified financial agreement or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits;

(b) security, a securities account, or a right to acquire securities; or

(c) a futures agreement or a futures account.

“title transfer credit support agreement” means an agreement under which title to property has been provided for the purpose of securing the payment or performance of an obligation in respect of a qualified financial agreement.

The FOA Netting Agreement is a CBA(A) Qualified Financial Agreement

We are of the opinion that the FOA Netting Agreement would satisfy the criteria at paragraph 4.7.7 above, and would be a CBA(A) Qualified Financial Agreement in respect of Transactions under the FOA Netting Agreement that fall under the definition of ‘qualified financial transaction’ at paragraph 4.7.8
above. In other words, the Transactions will be split into two pools, with one pool comprised of those Transactions which are considered to be 'qualified financial Transactions' and one pool comprised of those Transactions which are not\(^{32}\). As for those Transactions under the FOA Netting Agreement that do not come under the definition of 'qualified financial Transactions', these would be dealt with separately, and treated in line with agreements that are not CBA(A) Qualified Financial Agreements.

*The Clearing Agreement is a CBA(A) Qualified Financial Agreement*

4.7.10 As for the Clearing Agreement, we are of the view that it is a CBA(A) Qualified Financial Agreement, notwithstanding the provision of separate netting sets per CCP service, based on the following provisions of the CBMA:

(a) subparagraph 2(a)(i): ‘a master agreement in respect of one or more qualified financial transactions’, under which there are provisions for netting and set-off of one or more such Transactions, and

(b) subparagraph 2(b)(i), wherein a qualified financial transaction includes ‘a derivative, whether to be settled by payment or delivery’.

4.7.11 We are of the view that the definition of a CBA(A) Qualified Financial Agreement in section 2 of the CBMA is wide enough to cover the netting of each Client Transaction in a Cleared Transaction Set:

(a) The definition of a CBA(A) Qualified Financial Agreement under subparagraph 2(a)(i) states that it relates to a master agreement ‘in respect of one or more qualified financial transactions’.

(b) Pursuant to this master agreement, there are provisions for netting and set-off, whereby:

(i) the transactions referred to in the agreement terminate or may be terminated;

(ii) the termination values of the transactions under subparagraph 2(a)(i) are calculated or may be calculated, and

(iii) the termination values of the transactions under subparagraph 2(a)(i) are netted or may be netted so that a net amount is payable.

4.7.12 While the netting and set-off provisions above refer to ‘s’ in the plural, parts (a) to (c) above make it clear that this has to be seen in the context of the master

\(^{32}\) See also paragraphs 4.5.10 and 4.7.14.
agreement, which at subparagraph 2(a)(i) states relates to ‘one or more qualified financial transactions’.

4.7.13 The last paragraph of subparagraph 2(a)(i) also states that ‘the agreement shall be deemed to be a CBA(A) Qualified Financial Agreement only with respect to Transactions that are qualified financial transactions’. This also implies that the definition of CBA(A) Qualified Financial Agreement need not cover all Transactions under the master agreement, and therefore netting of Cleared Transaction Set is covered, insofar as they can be classed as a ‘qualified financial transaction’ (see paragraph 4.7.8 above). It also follows that non-qualified financial transactions would not be afforded the protections granted to a CBA(A) Qualified Financial Agreement.

The Preservation of Rights for CBA(A) Qualified Financial Agreements

4.7.14 The important point to note about the CBA(A) is that the enforcement by parties of their rights under a CBA(A) Qualified Financial Agreement are now preserved by the following new provisions into the CBMA:

(a) subsection 31(8) of the CBMA provides that the enforcement of parties’ rights under a CBA(A) Qualified Financial Agreement shall not be affected by any measure or order issued in the interest of financial stability under subsection 31(1) of the CBMA, notwithstanding subsection 31(5) of the CBMA.

(b) subsection (1A) to section 32 of the CBMA provides that the enforcement by the parties of their rights under a CBA(A) Qualified Financial Agreement shall not be affected by the making of a vesting order under paragraph 32(1)(c)(iii) of the CBMA.

(c) paragraphs 2(5A) to 2(5D) of the Third Schedule to the CBMA relate to the application of a vesting order to a CBA(A) Qualified Financial Agreement. A transferee will assume all rights and obligations under any CBA(A) Qualified Financial Agreement of the transferor from whom such agreement was transferred. The enforcement by the parties of their rights under such CBA(A) Qualified Financial Agreement shall be in accordance with the terms of such agreement as if the transferee had always been a party to such agreement. Where there are two or more qualified financial transactions under a CBA(A) Qualified Financial Agreement with the transferor, all or none of the qualified financial transactions shall be transferred to the transferee. Where a CBA(A) Qualified Financial Agreement relating to financial collateral that applies to any property of the transferor is transferred, that property shall also be transferred to the transferee. As regards Transactions that are not qualified financial transactions, the safe
harbour provisions that apply to CBA(A) Qualified Financial Agreements would not apply, and the provisions at paragraphs 4.7.3 to 4.7.4 above would therefore still be applicable. The Transactions will thus be split into two pools, with one pool comprised of those Transactions which are considered to be ‘qualified financial transactions’ and one pool comprised of those Transactions which are not\(^33\).

(d) the revised subsection 77(1) of CBMA specifies that any direction given or requirement imposed under the section by the BNM shall not affect the enforcement by the parties of their rights under a CBA(A) Qualified Financial Agreement.

4.7.15 It is therefore our view that the provisions of the CBMA, as revised by the CBA(A) will not have an effect on the Netting and Set-Off provisions under the FOA Agreement and Clearing Agreement, insofar as it meets the criteria for ‘qualified financial transactions’ at paragraph 4.7.8 of the Opinion.

4.8 The Issuance of Directives by the SC Under Section 346C of the CMSA

4.8.1 The CMSA was enacted to consolidate the Securities Industry Act 1983 and Futures Industry Act 1993, to regulate and to provide for matters relating to the activities of markets and intermediaries in the capital markets, and for matters consequential and incidental thereto\(^34\).

*The Introduction of Section 346C*

4.8.2 Section 346C was introduced into the CMSA via the Capital Markets and Services (Amendment) Act 2011, and came into force on 3 October 2012. Subsection 346C(1) confers powers on the SC to issue a directive requiring any person to take any measures as the SC may consider necessary in the interest of monitoring, mitigating or managing “systemic risk in the capital market”.

4.8.3 The term “systemic risk in the capital market” is defined under section 346A as a situation when one or more of the following events occur or is likely to occur:

(a) Financial distress in a significant market participant or in a number of market participants;

(b) An impairment in the orderly functioning of the capital market; or

\(^33\) See also paragraphs 4.5.10 and 4.7.9 above.

\(^34\) Preamble of CMSA.
(c) An erosion of public confidence in the integrity of the capital market.

4.8.4 In exercising its powers under the sole supervision of the BNM, the SC shall take into consideration the interest of financial stability.

4.8.5 Where the person is under the sole supervision of the BNM, the SC shall recommend to the BNM to issue such directive.

4.8.6 A person will be given an opportunity to be heard before issuing such directive\(^{35}\), although the SC may issue such directive without first giving the person an opportunity to be heard if any delay in issuing such directive would aggravate systemic risk in the capital market\(^{36}\). In the event of the latter, a person shall be given an opportunity to be heard after the directive has been issued\(^{37}\). Where a person is given an opportunity to be heard, a directive issue may be amended or modified\(^{38}\).

4.8.7 The failure to comply with a directive issue by the SC under subsection 346C(1) shall amount to an offence, which upon conviction, shall be punishable by a fine not exceeding ten million ringgit or imprisonment for a term not exceeding ten years or both\(^{39}\).

Possible Impact on Netting and Set-Off Enforceability

4.8.8 It is possible that the SC could issue a directive pursuant to section 346C of the CMSA, requiring any person to take any measures as the SC may consider necessary in the interest of monitoring, mitigating or managing “systemic risk in the capital market”, and as the ambit of ‘measures’ is potentially wide and the language is cast in broad terms, these measures could, in theory, potentially extend to and affect rights of persons (in respect of whom the directive is issued) and parties dealing with them to terminate and close-out agreements.

4.8.9 There are no express carve-outs for netting arrangements such as those that have now been inserted by way of the amendments to the CBMA. Such express carve-out would have helped provide clarity as to where netting arrangements stand vis-à-vis the new section 346C. We understand, however,

\(^{35}\) Subsection 346C(4) of the CMSA.

\(^{36}\) Subsection 346C(5) of the CMSA.

\(^{37}\) Subsection 346C(6) of the CMSA.

\(^{38}\) Subsection 346C(7) of the CMSA.

\(^{39}\) By virtue of section 367 of the CMSA, if the offender is a body corporate, any person who at the time of the commission of the offence was a director, a chief executive, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstance.
that the SC is currently addressing this lack of a carve-out and future legislation is a possibility.

4.9 **The Impact of the Provisions of the FSA**

4.9.1 The FSA came into force on 30 June 2013. The FSA essentially aims to provide for the regulation and supervision of financial institutions, payment systems and other relevant entities and the oversight of the money market and foreign exchange market to promote financial stability.

4.9.2 The regulatory objectives in the preamble are further enunciated in section 6. The principal regulatory objective is to promote financial stability. BNM is further obligated to foster the safety and soundness of financial institutions, the integrity and orderly functioning of the money market and foreign exchange market, safe, efficient and reliable payment systems and payment instruments, and fair, reasonable and professional business conduct of financial institutions. BNM is also obligated to protect the rights and interests of consumers of financial services and products.

4.9.3 The FSA seeks to consolidate four existing statues namely: -

(a) The Banking and Financial Institution Act 1989;

(b) The Insurance Act 1996;

(c) The Payment Systems Act 2003, and

(d) The Exchange Control Act 1953.

4.9.4 In so far as close-out netting is concerned, the following provisions are worth noting:

*Miscellaneous Powers of BNM*

4.9.5 The FSA expands BNM’s powers in various ways, which could potentially interfere with contractual rights between parties, including:

(a) The power to issue directions to an authorized person or operator of a designated payment system, financial holding companies and subsidiaries (“relevant party”), such as the following (sections 116 and 156): -

(i) to vary or terminate any agreement or arrangement entered into by the relevant party with any person in relation to its business, affairs or property;
(ii) to dispose of all or any of the investments or assets held by the relevant party in any body corporate;

(iii) to prohibit the relevant party from carrying on any part of its business; or

(iv) to prohibit the relevant party from entering into any other Transaction or class of Transactions, or to enter into it subject to such restrictions or conditions as may be specified by BNM;

(b) The power to safeguard the balance of payments position and the value of the currency of Malaysia by prohibiting the undertaking or engagement in any Transactions set out in Schedule 14\(^{40}\) of the FSA without BNM’s written approval (Section 214).

4.9.6 The FSA, however, provides a ‘safe harbour’ for ‘Qualified Financial Agreements’ as defined under the FSA (hereinafter, “FSA Qualified Financial Agreement")\(^{41}\), in that the directions or measures mentioned above ‘shall not affect the enforcement by the parties of their rights under a qualified financial agreement (subsections 117(3), 157(3) and 214(8)).

4.9.7 In this regard, an FSA Qualified Financial Agreement is defined in paragraph 2(5)(a) of the FSA as: -

(i) a master agreement in respect of one or more qualified financial transactions under which if certain events specified by the parties to the agreement occur—

(A) the transactions referred to in the agreement terminate or may be terminated;

(B) the termination values of the transactions under subparagraph (i) are calculated or may be calculated; and

(C) the termination values of the transactions under subparagraph (i) are netted or may be netted, so that a net amount is payable,

and where an agreement is also in respect of one or more transactions that are not qualified financial transactions, the agreement shall be deemed to be a qualified financial agreement only with respect to the

\(^{40}\) Schedule 14 generally relates to international and domestic financial transactions.

\(^{41}\) The definition of qualified financial agreement is the same as the definition in the CBMA, as introduced under the CBA(A), except that BNM requires the concurrence of the Minister of Finance to prescribe additional qualified financial agreements under the FSA.
transactions that are qualified financial transactions and any permitted enforcement by the parties of their rights under such agreement;

(ii) an agreement relating to financial collateral, including a title transfer credit support agreement, with respect to one or more qualified financial transactions under a master agreement referred to in subparagraph (i); or

(iii) any other agreement as prescribed under section 4.”

A “qualified financial transaction” means:

(i) a derivative, whether to be settled by payment or delivery; or

(ii) a repurchase, reverse repurchase or buy-sell back agreement with respect to securities.

“financial collateral” means any of the following that is subject to an interest or a right that secures payment or performance of an obligation in respect of a qualified financial agreement or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits;

(b) security, a securities account, or a right to acquire securities; or

(c) a futures agreement or a futures account.

“title transfer credit support agreement” means an agreement under which title to property has been provided for the purpose of securing the payment or performance of an obligation in respect of a qualified financial agreement.”

4.9.8 As the definition of FSA Qualified Financial Agreement and the subdefinitions thereto are identical to that in the CBMA, we repeat paragraphs 4.7.9 to 4.7.13 above in our assessment as to whether the FOA Netting Agreement and Clearing Agreement are FSA Qualified Financial Agreements.

Assumption of Control Under Part XIII, Division 2, Subdivision 2 of the FSA

4.9.9 BNM may assume control of the whole or part of the business, affairs or property of licensed person or an operator of a designated payment system (“institution”) and manage the whole or such part of its business and affairs in two ways. It can either assume control directly, or it can appoint any person (“appointed person”) to do so on behalf of BNM. The power to assume control
is under subsection 167(1) of the FSA. BNM may exercise this power provided it has the prior approval of the Minister of Finance. The assumption of control is given effect to by BNM through an order in writing.

4.9.10 In the case of BNM assuming control through an ‘appointed person’, the concept of an ‘appointed person’ (and his/her rights, powers, duties, privileges and immunities) is similar in nature and effect to both:

(a) the ‘special administrator’ appointed under Part VI of the Danaharta Act, and

(b) the ‘appointed person’ under the assumption of control provisions contained in Part VII of the MDICA.

4.9.11 Notwithstanding the assumption of control, as with the ‘safe harbour’ provisions paragraph 209(2)(a) of the FSA provides that parties under an FSA Qualified Financial Agreement may continue to enforce their rights under the FSA Qualified Financial Agreement and shall not be affected by the assumption of control of an institution under section 167, except during such period as may be prescribed in regulations made under section 260 upon the commencement of the assumption of control. No regulations have yet been passed specifying the prescribed period.

The Moratorium under Part XIII, Division 2, Subdivision 8 of the FSA

4.9.12 Sections 116, 156 and 214 of the FSA confer powers on BNM to issue directions prohibiting an institution from carrying on all or part of its business. Where in the interests of the depositors, policy owners or participants of such an institution, BNM has issued such a direction, BNM is also empowered to apply to the High Court for an order staying any proceeding of a civil nature against such institution.

4.9.13 This power is contained in section 190 of the FSA, which, under the heading ‘Application for Moratorium’ provides that ‘the Bank may apply to the High Court’ for a stay of any civil action. Three points should be noted:

(a) First, the moratorium is not compulsory and does not automatically come into force when BNM exercise any its powers under Part XIII. Instead, BNM has to choose whether or not to apply for a moratorium on civil proceedings and it is granted according to the discretion of the court.

(b) Second, the length of the moratorium cannot exceed 6 months. There is no provision in the FSA that caters for any extension of the moratorium beyond the maximum 6 months period.
Third, the moratorium is confined to a stay of civil proceedings only and does not prohibit set-off or interfere with self-help remedies for creditors.

4.9.14 Given that the moratorium under the FSA (should BNM choose to apply to court for it) is limited to a stay on civil proceedings, it will not prevent the exercise of close-out netting rights under the FOA Netting and Clearing Agreements even if BNM’s application is granted by the High Court.

The Issuance of Directions Under Section 216 of the FSA

4.9.15 Section 216 of the FSA is stated in the following terms:

"(1) The Bank (i.e. BNM) may, with the approval of the Minister, in the national interest, issue directions to any person in Malaysia, to prohibit, restrict or require the doing of any act as may be specified by the Bank, with or without conditions, in relation to dealings or transactions, with any person resident in a country or territory, or in any currency, as may be specified by the Bank.

(2) Any person for whom the directions are issued under subsection (1) shall comply with the directions notwithstanding any other duty imposed on that person by any contract or international agreement.

(3) No person shall, in carrying out any act in compliance with the directions made under subsection (1), be treated as being in breach of any such contract or international agreement.

(4) Any person who fails to comply with any direction or condition referred to in subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding fifty million ringgit or to both."

4.9.16 Section 216 of the FSA enables BNM, with the Finance Minister's approval, to issue directions compelling or preventing anyone from doing anything 'in relation to dealings or transactions', when it is in the national interest to do so. It is therefore possible that section 216 has the potential to restrict netting.

4.9.17 While ex facie it does not appear that derivatives are per se intended to be subjected to section 216 of the FSA, it is possible that in its widest sense, potentially the Transactions under the Agreements could be included in a class
of Transactions or dealings that could be subjected to directions under section 216.

4.9.18 It should also be stressed, however, that subsection 216(1) of the FSA only empowers BNM to issue directions where it is in ‘the national interest’ to do so. In our view, such directives are unlikely to be given in the context of the facts which this Opinion addresses, and therefore does not rank as a primary provision that will immediately or directly have an impact on the Netting and Set-Off provisions in the FOA Netting and Clearing Agreements.

4.10 **Pending Legal Developments: The Netting of Financial Agreements Bill 2014**

4.10.1 BNM has been leading an initiative in the formulation of a Netting Act, so as to protect the enforcement rights of close-out netting under financial contracts, and to improve Malaysia’s status as a ‘netting-friendly’ jurisdiction.

4.10.2 The Netting of Financial Agreements Bill 2014 (“Netting Bill”) has since been drafted and tabled at Parliament, and as of the date of this opinion, it has passed both houses of Parliament and is currently awaiting royal assent, which is likely to be given as a matter of course by the end of 2014. It is therefore likely that the Netting Act will be gazetted and come into force either by the end of 2014 or early 2015.

*The Purpose of the Netting Bill*

4.10.3 The primary purpose for the drafting of the Netting Bill is to remove the legal impediments and uncertainties to netting as posed under existing legislation.\(^\text{42}\)

4.10.4 The Bill is not intended to address issues apart from netting, such as the validity of a financial contract, the regulation of financial transactions, or conduct of financial institutions dealing with financial instruments. The Bill also does not prevent regulators from restricting or imposing conditions and requirements in respect of financial market activities that may be performed by their regulated entities.\(^\text{43}\)

*The Application of the Bill to Netting Provisions of Qualified Financial Agreements*

4.10.5 The Netting Bill is intended to ensure that netting ‘provisions’ in ‘qualified financial agreements’ (“NB Qualified Financial Agreements”) in respect of ‘qualified financial transactions’ (“NB Qualified Financial Transactions”) are enforceable in accordance with their terms, notwithstanding any provisions

\(^{42}\) See BNM’s Consultation Paper on *Netting of Financial Agreements Bill* dated 9 September 2014 (the “Consultation Paper”), para 5.1.

\(^{43}\) See the Consultation Paper at para 6.2
under Malaysian law that might have a detrimental effect on netting, as set out in Part 1 of the Schedule to the Netting Bill\(^{44}\).

**The Disapplication of Statutory Provisions Affecting the Enforceability of Netting**

4.10.6 Part 1 of the Schedule to the Netting Bill lists out the relevant provisions to date that have been construed as having a possibly detrimental effect on the enforceability of netting. They include:

(a) Sections 29A and 41 of the Danaharta Act: see paragraphs 4.2 to 4.2.13 above.

(b) Section 346C of the Capital Markets and Services Act 2007 ("CMSA"): see paragraphs 4.8 to 4.8.9 above.

4.11 **Relevant Definitions**

**The Definition of ‘Netting Provision’**

4.11.1 A ‘netting provision’ is defined under section 3 of the Netting Bill as involving the following steps:

(a) Termination of NB Qualified Financial Transactions entered into under the NB Qualified Financial Agreement;

(b) Calculation of termination values owed by the parties to each other in respect of each NB Qualified Financial Transactions under (a) above;

(c) Determination of a single net amount of the terminable values under (b) above, which becomes payable by one party to another.

4.11.2 In our view the definition of ‘netting provision’ is general and wide enough to include the relevant Netting and Set-Off Provisions under the FOA Netting Agreement and Clearing Agreement.

**The Definition of ‘NB Qualified Financial Agreement’**

4.11.3 Section 2 defines an NB Qualified Financial Agreement in the following terms:

(a) A master agreement, with a netting provision, in respect of one or more NB Qualified Financial Transactions, and where a master agreement is also in respect of one or more transactions that are not NB Qualified Financial Transactions, the master agreement shall be an NB Qualified

\(^{44}\) See section 3 of the Netting Bill.
Financial Transaction only with respect to the transactions that are NB Qualified Financial Transactions:

(b) Any agreement or arrangement prescribed by the Minister under paragraph 6(1)(a); or

(c) An agreement relating to financial collateral that secures payment or performance of an obligation, including any agreement under which title to property has been provided for the purpose of such security, with respect to one or more NB Qualified Financial Transactions under a master agreement referred to in paragraph (a) or an agreement or arrangement referred to in paragraph (b).

The Definition of ‘NB Qualified Financial Transaction’

4.11.4 Section 5(1) of the Netting Bill sets out the scope of NB Qualified Financial Transactions as including transactions that involve the following:

(a) Over-the-counter derivatives;

(b) Repurchase, reverse repurchase, buy-sell back in respect of securities; or

(c) A lending or borrowing of unlisted debt securities under the Real Time Electronic Transfer of Funds and Securities System established under paragraph 44(1)(a) of the CBMA.

4.11.5 As to the definition of a ‘derivative’, this is stated at section 5(2) of the Netting Bill as:

‘any agreement including an option, a swap, futures or forward contract, whose market price, value, or delivery or payment obligation is derived from, referenced to or based on, but not limited to, securities, commodities, assets, rates (including interest rates, profit rates or exchange rates) or indices and shall include derivative which are in accordance with Shariah.’

The Finance Minister’s Power to Prescribe Other NB Qualified Financial Agreements, NB Qualified Financial Transactions, and Netting Provisions

4.11.6 Section 6 of the Netting Bill provides that the Finance Minister of Malaysia may, on the recommendation of BNM, the Securities Commission, the Corporation and Danaharta prescribe:
(a) Any other agreement or arrangement to be an NB Qualified Financial Agreement;

(b) Any other mechanism which has the effect of determining a single net amount as netting provision; or

(c) Any other transaction to be an NB Qualified Financial Transaction.

4.12 The FOA Netting Agreement is an NB Qualified Financial Agreement

4.12.1 As the definition of NB Qualified Financial Agreement is very similar to a CB(A) Qualified Financial Agreement and FSA Qualified Financial Agreement, we repeat the analysis at paragraph 4.7.9 above and the conclusions therein in relation to the FOA Netting Agreement.

4.13 The Clearing Agreement: NB Qualified Financial Agreement?

4.13.1 As noted at paragraph 4.11.4 above, the only derivatives that qualify as NB Qualified Financial Transactions are ‘over-the-counter derivatives’. This is a narrower definition of Qualified Financial Transactions as compared to the definition for qualified financial transactions under the CBMA and FSA. In view of this, the Clearing Agreement would not be an NB Qualified Financial Transaction insofar as its transactions are not over-the-counter derivatives. A new category has also been added that was not present in the definition of ‘qualified financial transaction’ in the CBMA and FSA in the form of the lending or borrowing of unlisted debt securities (see paragraph 4.11.4(c) above). Otherwise, the same analysis as outlined at paragraph 4.7.10 to 4.7.15 will apply.

4.14 Periods of Stay

4.14.1 There are a number of statutory provisions in Malaysia which impose mandatory stays on the enforceability of netting and set-off under an Agreement. These would include the imposition of a stay upon the following:

(a) The assumption of control by the Corporation or the assumption of control by an appointed person or receiver over a “member institution”\textsuperscript{45}; section 115(3) of the MDICA.

(b) The appointment of a conservator over an ‘affected person’\textsuperscript{46}; section 180(1) of the MDICA.

\textsuperscript{45} As defined in section 2 of the MDICA.

\textsuperscript{46} Ibid.
(c) The assumption of control of a ‘licensed person’\(^{(47)}\) by BNM; the appointment of a receiver and manager over any institution, or the making of an order for the compulsory transfer of the business, assets or liabilities of a ‘licensed person’; see section 209(2) of the FSA; section 220(2) of the Islamic Financial Services Act 2013 (“IFSA”).

(d) The appointment of a Special Administrator over an ‘affected person’\(^{(48)}\); see section 41 of the Danaharta Act.

4.14.2 Each of the statutory provisions above is listed in Part II of the Schedule to the Netting Bill. In this regard, section 7(1) of the Netting Bill states that the Finance Minister may, on the recommendation of the relevant authority having the power to enforce the provisions of Part II of the Schedule (e.g. BNM, the Corporation, or Danaharta), prescribe any period during which the enforceability of the netting provision under section 3 shall be stayed for the purposes of, and notwithstanding, the provisions specified in Part II of the Schedule.

4.14.3 Section 7(2) of the Netting Bill provides that in prescribing the period of stay, the Finance Minister shall cause a ‘reasonable notice’ to be given to persons affected by the period of stay prescribed under section 7(1), unless the circumstances do not permit this.

4.14.4 While a stay or moratorium does not in itself affect the enforceability of netting as a matter of law, it may raise concerns from a risk perspective, particularly where a lengthy period of stay is prescribed by the Finance Minister. In our view, however, it is unlikely that the Finance Minister would prescribe a stay for an extended or lengthy period of time, as this would inevitably compromise the purpose and effectiveness of the Netting Act.

4.15 The Continued Application of Provisions in Part III of the Schedule

4.15.1 Section 8 of the Netting Bill states that except as provided for in the Bill, nothing in this Bill shall affect the continued application of the provisions specified in Part III of the Schedule with respect to NB Qualified Financial Agreements.

4.15.2 The relevant statutory provisions in Part III of the Schedule relate to the suspension periods for NB Qualified Financial Agreements and the transferring of Qualified Financial Agreements to qualified third parties / bridge institutions under the MDICA and the FSA. These provisions do not in themselves affect the enforceability of netting and set-off.

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\(^{(47)}\) ‘Licensed person’ means a person licensed under section 10 of the FSA / IFSA to carry on a licensed business.

\(^{(48)}\) As defined in section 21 of the Danaharta Act.
4.16 The Overriding Applicability of the Netting Act

4.16.1 Section 9 of the Netting Bill was drafted to ensure that any future legislation that has the potential to detrimentally affect the enforceability of netting to be added to the Schedule of the Netting Bill. In this regard:

(a) Section 9(1) allows the Finance Minister, by order published in the Gazette, to amend the Schedule upon consultation with the relevant authority having the power to enforce the provisions specified in the Schedule or having the power to enforce the provisions proposed to be added into the Schedule.

(b) Pursuant to section 9(2), an order under section 9(1) shall also be laid down before the Dewan Rakyat (i.e., Malaysia’s lower house of Parliament) as soon as practicable after its publication in the Gazette.

4.16.2 Analysing these provisions from a Malaysian constitutional law perspective, the general constitutional principle on this issue has been usefully expressed in the following terms by Sir Owen Woodhouse P in the New Zealand Court of Appeal in Combined State Unions v State Services Co-ordinating Committee [1982] 1 NZLR 742 at 745:

“It is an important constitutional principle that subordinate legislation cannot repeal or interfere with the operation of a statute except with antecedent authority of Parliament itself. It is a constitutional principle because it gives effect to the primacy of Parliament in the whole field of legislation. And as a corollary a rule of construction springs from it that the Courts will not accept that Parliament has intended its own enactments to be subject to suspension, amendment or repeal by any kind of subordinate legislation at the hands of the Executive unless direct and unambiguous authority has been expressly spelled out to that effect, or is to be found as a matter of necessary intendment, in the parent statute.”

4.16.3 That being said, the courts in Commonwealth jurisdictions have countenance the use by Parliament of what is known as ‘Henry VIII’ clauses. This is a clause that is inserted in a primary statute that states that a delegate may by delegated legislation affect (that is, amend, suspend or repeal) either the parent statute itself, or other statutes, or both.

4.16.4 The lawfulness and acceptance of such a principle has been accepted in the leading text books in the field of statutory interpretation. The judgment of French CJ in Public Service Association and Professional Officer's
“...A parliament may also authorize the making of regulations which have effect notwithstanding provisions of the Act under which they are made. Section 146 does that. Such powers are analogous to so-called “Henry VIII” clauses, authorizing the making of regulations which amend the Act under which they are made. Those powers have been criticized for their effects upon the relationship between the parliament and the executive, but not held invalid on that account under either the Commonwealth Constitution or constitutions of the States.”

4.16.5 Having regard in particular to the concluding words of the dictum of Woodhouse P in the Combined State Unions v State Services Co-ordinating Committee case supra, the critical question is whether Parliament has sufficiently and unambiguously demonstrated in sections 9 read with the Schedule that it has clearly authorised and empowered the Minister of Finance to add future statutes to the list through regulations, notwithstanding that it thereby overrides the effect of such future legislation.

4.16.6 We are of the view that the language used in section 9 is similar in nature to a ‘Henry VIII’ clause and arguably demonstrates an intention by Parliament to allow the overriding of future statutes through the use of subsidiary legislation. However, it is ultimately a question for the Malaysian courts to consider and decide upon, based on its own interpretation of section 9 of the Netting Bill.

4.17 Conclusions on Netting Bill

4.17.1 In conclusion, and insofar as existing legislation applies, we are able to state at this point in time that all relevant statutory provisions have been taken into account for the purposes of netting enforceability under the Netting Bill. As such, we are of the view that once the Netting Act comes into force, netting under the FOA Netting Agreement and Clearing Agreement would be enforceable under their own terms, insofar as they fall within the definition of NB Qualified Financial Agreements, notwithstanding the various issues and qualifications raised at paragraphs 4.1 to 4.9 and 4.21 above.

4.17.2 We would caution, however, that our conclusions may change over time, depending on the types of legislation that are drafted in the future.

4.104.18 Title Transfer Provisions
4.10.14.18.1 The Malaysian courts would not re-characterise Transfers of Margin under the Title Transfer Provisions of an Agreement (with Title Transfer Provisions) as creating a security interest, if the same comes within the definition of “title transfer credit support agreement” under the MDICA, CBMA and FSA, and for the reasons that follows, should not be interpreted to mean “security interest”.

(a) The MDICA, CBMA and FSA all define “title transfer credit support agreement” as an agreement under which title to property has been provided for the purpose of securing the payment or performance of an obligation in respect of a relevant Qualified Financial Agreement.

(b) Security interest is not specifically defined under the MDICA, CBMA and FSA, but it is generally understood to mean an interest created over a property to secure the payment or performance of an obligation. These statutes treat security interest and a title transfer credit support agreement as falling under the broader umbrella of “financial collateral”.

(c) It is apparent that the MDICA, CBMA and FSA make a distinction between a financial collateral that is in the form an interest that is used to secure performance with a title transfer credit support agreement.

(d) As such, while there is no Malaysian case law authority on this point, we are of the opinion that the Title Transfer Provisions of the FOA Netting Agreement and Clearing Agreement, which is designed to facilitate the transfer of the transferee’s title to a property to the transferor is a separate and different form of collateral than a security interest.

4.10.2 In addition to the above, it should be noted that the possible restrictions to netting and set-off as described at paragraphs 4.1 to 4.9 above would equally apply to the enforceability of the title transfer provisions, from the various moratoriums under a special administrator or conservator, as well as the possible directives by the SC or directions by BNM.

4.114.19 Single Agreement

4.114.19.1 In our view, all Transactions under the FOA Netting Agreement as supplemented by the FOA Clearing Module are part of a single agreement and although there is no direct or indirect Malaysian case law authority on point, we believe that on first principles, the ‘single agreement’ clause will be likely to be upheld under Malaysian law.

4.124.20 Recognition of Choice of Law Clause
Our opinion is based on a Malaysian court upholding the choice of law governing the FOA Netting Agreement and Clearing Agreement. There is no direct authority on point, although there are cases that have implicitly recognised the efficacy of a choice of law clause. A Malaysian court will normally recognize such an express selection of a governing law of an Agreement, but while normally unimpeachable, it is not in any sense conclusive as there are some limitations. The courts of Malaysia would recognise the parties’ agreement on the governing law of an Agreement unless:

(i) the choice of law was shown not to be a *bona fide* choice;

(ii) made to avoid the operation of Malaysian law or statute which would otherwise apply;

(iii) is contrary to public policy in Malaysia; or

(iv) where under the applicable conflicts of laws principles, Malaysian courts would apply mandatory provisions of Malaysian law as part of the law of the place of performance of the Transactions or other provisions of Malaysian law that apply under exceptions that are commonly recognised under applicable conflicts of laws principles (for example, in matters of procedure or where the applicable English law is of the character of revenue or penal law).

Satisfactory evidence of the applicable English law is required to be pleaded and proved as a fact in any proceedings before Malaysian courts.

The laws governing the proprietary aspects of a Title Transfer Provision would be the *lex situs* of the Title. Malaysia is not a signatory to the Hague Convention on the Law Applicable to Certain Rights in respect of securities held with an Intermediary.

The various provisions at paragraph 3.1 above are likely to be treated by the Malaysian courts as mandatory in their application to the Malaysian party where the relevant circumstances arise.

The Impact of Disclaimer Provisions

The relevant provisions relating to the power of disclaimer of onerous Transaction or property for the purposes of an insolvent Party under Malaysian law are:

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49 The Malaysian courts may refuse to apply a provision of English law if the application of that provision would be manifestly incompatible with the public policy in Malaysia. In our view, FOA Netting and Set-Off Provisions are not manifestly incompatible with the public policy in Malaysia.
(a) Subsection 296(1) of the Companies Act, as exercised by a liquidator;

(b) Section 178 of the MDICA; as exercised by a conservator, and

(c) Subsection 40(1) of the Danaharta Act; as exercised by a special administrator.

Although there is no direct or indirect Malaysian case law authority on point, we believe that on first principles, the ‘single agreement’ clause in the Agreement will be likely to be upheld under Malaysian law.

It follows that we are of the view that a Malaysian court should find that a liquidator, special administrator, or Conservator as the case may be, of the Party will not be able to “cherry-pick” and disclaim individual Transactions that are unprofitable (from the Company’s perspective) and insist only on performance of obligations under Transactions that are profitable or ‘in the money’ for the Party.

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

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

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

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

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

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

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made and in preparing this opinion we have not had regard to the interests of any such person.
We accept responsibility to FIA Europe and the subscribing members in relation to the matters opined on in this opinion. However, the provision of this opinion is not to be taken as implying that we assume any other duty or liability to the subscribing members. The provision of this opinion does not create or give rise to any client relationship between this firm and the subscribing members.

Yours faithfully,

Rabindra Nathan / Christina Kow / Lukas Lim / Krystle Lui

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Subject to the modifications and additions set out in this Schedule 1 (Broker-dealers), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Broker-dealers. For the purposes of this Schedule 1 (Broker-dealer), "Broker-dealer" means a company incorporated under the Companies Act and is a holder of a Capital Markets Services Licence to carry on business of dealing in derivatives under the CMSA.

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

1. **MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS**
   
   None.

2. **ADDITIONAL ASSUMPTIONS**

   We assume the following:

   2.1 the Broker-dealer trades as principal with a Firm, and not as agent for a third party.

3. **MODIFICATIONS TO OPINIONS**

   On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the opinions as set out in paragraph 3.1 (only for Broker-dealers incorporated under the Companies Act).

4. **ADDITIONAL QUALIFICATIONS**

   This opinion in this opinion letter is subject to the following additional qualifications.

   None.

5. **MODIFICATIONS TO QUALIFICATIONS**

   The qualifications at paragraph 4 are deemed modified as follows.
5.1 Special administration under the Danaharta Act

Where a Broker-dealer becomes an affected person under the Danaharta Act, a Special Administrator may only be appointed with the written approval of SC as the relevant regulatory body.

5.2 The Assumption of Control / Appointment of a “Receiver and Manager” Over A Member Institution under the MDICA

5.2.1 This does not apply to Broker-Dealers.

5.3 The Impact of the Provisions of the FSA

5.3.1 This does not apply to Broker-Dealers, except for section 216 of the FSA, which applies to ‘any person’.
Subject to the modifications and additions set out in this Schedule 2 (Partnerships), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are partnerships. For the purposes of this Schedule 2 (Partnerships), a "Partnership" means a partnership subject to the Partnership Act 1961 ("Partnership Act"), which excludes the relation between members of any company or association which is:

(a) registered as a company under the Companies Act or as a co-operative society under any written law relating to co-operative societies; or

(b) formed or incorporated by or in pursuance of:
   (i) any other law having effect in Malaysia or any part thereof, or
   (ii) any letters patent, Royal Charter or Act of the Parliament of the United Kingdom.

Subsection 3(1) of the Partnership Act provides that “partnership is a relation which subsists between persons carrying on business in common with a view of profit.”

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

We assume that each partner in a partnership is an individual subject to the bankruptcy law of Malaysia.

3. MODIFICATIONS TO OPINIONS

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

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50 The Limited Liability Partnership Act 2012 has been enacted but has not come into force yet.
51 Subsection 3(2) of the Partnership Act.
3.1 Dissolution of the Partnership

Dissolution by bankruptcy, death or charge under section 35 of the Partnership Act is as follows:

35(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

35(2) A partnership may, at the opinion of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

Section 40 of the Partnership Act provides that after the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete Transactions begun but unfinished at the time of the dissolution, but not otherwise.

In this regard, the provisions relating to the winding up of a partnership would fall under the provisions of the Partnership Act, none of which would affect the enforceability of the FOA Netting and Set-Off Provisions.

3.2 Insolvency Proceedings: Partnerships

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Partnership could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the procedures under the Bankruptcy Act 1967 and the Bankruptcy Rules made there under (the “Bankruptcy Act”) which applies to insolvency of individuals as set out in Schedule 4 (Individuals) and Division 5 of Part 10 of the Companies Act 1965 for winding up of a partnership consisting of more than five members.

We confirm that all of the Events of Default in the Agreement adequately refer to and extend to all Insolvency Proceedings.

3.3 Set-Off on the Insolvency of a Partnership

3.3.1 Our opinion as set out at paragraphs 3.3 to 3.6 of the Opinion applies mutatis mutandis in respect of winding up of a partnership consisting of more than five members under Division 5 of Part 10 of the Companies Act 1965.

3.3.2 The insolvency of a Partnership will trigger the application of the insolvency set-off regime under the Bankruptcy Act in respect of each partner as an individual.
3.3.3 The statutory right to set-off under Section 41 of the Bankruptcy Act stipulates four pre-requisite criteria for its application:

(a) The mutual claims must have existed prior to or at the time of the winding-up order\textsuperscript{52};

(b) There must be mutuality in relation to the claims to be set-off;

(c) The claims must ultimately be payable in money; and

(d) When entering into the Agreement or of the individual Transactions entered into under the Agreement, the other party must not have notice that the Partnership had committed an ‘act of bankruptcy’

3.3.4 An ‘act of bankruptcy’ is defined under section 3 of the Bankruptcy Act as follows:-

3. (1) A debtor commits an act of bankruptcy in each of the following cases:

(a) if in Malaysia or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;

(b) if in Malaysia or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof;

(c) if in Malaysia or elsewhere he makes any conveyance or transfer of his property or of any part thereof, or creates any charge thereon which would under this or any other written law for the time being in force be void as a fraudulent preference if he were adjudged bankrupt;

(d) if with intent to defeat or delay his creditors he does any of the following things:

(i) departs out of Malaysia or being out of Malaysia remains out of Malaysia;

(ii) departs from his dwelling-house or otherwise absents himself, or begins to keep house or closes his place of business; or

(iii) submits collusively or fraudulently to an adverse judgment or order for the payment of money;

(e) if execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court, Sessions Court or Magistrates Court where the judgment, including costs, is for an amount of *one thousand ringgit or more;

\textsuperscript{52} See Majlis Amanah Rakyat v Official Receiver Malaysia [1984] 1 MLJ 173
(f) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;

(g) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(h) if he makes to any two or more of his creditors, not being partners, an offer of composition with his creditors or a proposal for a scheme of arrangement of his affairs, and such offer or proposal is not followed by the registration within fourteen days thereafter of a deed of arrangement with his creditors, in accordance with the rules for the time being in force for the registration of deeds of arrangement under this Act;

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

(j) if the officer charged with the execution of a writ of attachment or other process makes a return that the debtor was possessed of no property liable to seizure; and for the purposes of this paragraph the date when the writ is lodged with the officer shall be deemed to be the date of the act of bankruptcy.

3.3.5 Paragraph 4.1 of this opinion letter applies to Partnerships as if set out herein in so far as it concerns the Bankruptcy Act.
4. ADDITIONAL QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows:

4.1 Preference under the Bankruptcy Act

4.1.1 Section 53 of the Bankruptcy Act provides that any transfer of property, or payment made or incurring of an obligation by a person unable to pay his debts out of his own money as and when they become due in favour of a creditor of that person will be deemed to constitute a preference if that person is subsequently adjudged bankrupt on a bankruptcy petition presented within six (6) months of such transfer, payment, etc.

4.1.2 Preference under the Companies Act applies to Partnerships as if set out herein in so far as it concerns the Bankruptcy Act.

5. MODIFICATIONS TO QUALIFICATIONS

5.1 The Recognition of Choice of Law

5.1.1 Paragraph 4.12.4 is modified to only include the provisions under the Bankruptcy Act as mandatory provisions of Malaysian insolvency law which the Malaysian courts are likely to treat as mandatory in their application to a Partnership in the Event of Default, as follows:

“Only the provisions under the Bankruptcy Act at paragraph 3.1 above are likely to be treated by the Malaysian courts as mandatory in their application to the Malaysian party where the relevant circumstances arise.”

The Impact of Section 223 of the Companies Act

5.1.2 Paragraph 4.1 does not apply to Partnerships consisting of less than five members.

5.2 The Impact of the Preference Provisions under Subsection 293(1) of the Companies Act

5.2.1 Paragraph 4.1 does not apply to Partnerships.

5.3 Special Administration under the Danaharta Act

5.3.1 Paragraph 4.2 does not apply to Partnerships.

53 Thus, there is no requirement or element of intention to prefer under Malaysian law.
5.4 The Appointment of a ‘Conservator’ under the MDICA

5.4.1 Paragraph 4.3 does not apply to Partnerships.

5.5 The Assumption of Control or the Appointment of A “Receiver and Manager” under the MDICA

5.7.1 Paragraph 4.4 does not apply to Partnerships.

5.6 Regulatory Powers under the CBMA

5.6.1 Paragraph 4.7 does not apply to Partnerships.

5.7 The Issuance of Directives by SC under Section 346C of the CMSA

5.7.1 Paragraph 4.8 does not apply to Partnerships.

5.8 The Impact of the Provisions of the FSA

5.8.1 Paragraph 4.9 does not apply to Partnerships, except for section 216 of the FSA, which applies to ‘any person’.

5.9 Disclaimer

5.9.1 At paragraph 4.1321 of the qualification, the relevant provision relating to the power of disclaimer of onerous Transaction or property for an insolvent Partnership under Malaysian law is subsection 59(1) of the Bankruptcy Act, as exercised by the Director General of Insolvency.
SCHEDULE 3

INSURANCE COMPANIES

Subject to the modifications and additions set out in this Schedule 3 (Insurance Companies), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies. For the purposes of this Schedule 3 (Insurance Companies):

(a) an "Insurance Company" means a locally company incorporated under the Companies Act and licensed to carry on insurance business under section 10 of the FSA and means a locally incorporated company other than a company carrying on the business of a reinsurer and Danajamin Nasional Berhad;

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Insurance (please see paragraph 3.1 of this opinion)

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Insurance Company could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

(a) Winding up under Part X of the Companies Act.
(b) Winding up of an Insurer under Division 3 of Part XIII of the FSA.
(c) Assumption of Control under Chapter 1 of MDICA 2014.
(d) Special Administration under the Pengurusan Danaharta Nasional Berhad Act 1998 (the “Danaharta Act”) which applies to an Insurance Company only with prior approval of Bank Negara Malaysia

We confirm that all of the Events of Default in the Agreement adequately refer to and extend to all Insolvency Proceedings in relation to Insurance Companies only, if supplemented by the following events:

(a) The Assumption of Control under Chapter 1, Part VII of the MDICA-2011;

(b) The appointment of a Special Administrator under Part VI of the Danaharta Act;

(c) The exercise of the powers of the BNM pursuant to sections 38 and 77 of the CBMA.

(d) The issuance of a directive by the SC pursuant to section 346C of the CMSA in the event of a “systemic risk in the capital market” as defined under section 346A of the CMSA.

(e) The issuance of directions by BNM under the section 216 of the FSA.

4. ADDITIONAL QUALIFICATIONS

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

4.1 Winding up of an Insurer under Division 3 of Part XIII of the FSA

4.1.1 By virtue of section 192 of the FSA, the provisions of the Companies Act 1965 in relation to the winding up of an Insurance Company shall apply to the winding up of an Insurance Company unless specifically provided otherwise in Division 3 of Part XIII of the FSA, which includes a few additional requirement/restrictions, such as the following:

(a) Voluntary winding-up or application by persons other than BNM to wind up an Insurance Company requires the prior written approval of BNM (sections 194 and 195 of the FSA).

(b) Where a winding-up order is made based on an application by BNM, the High Court shall appoint a liquidator as determined by BNM (section 196 of the FSA).

4.1.2 Paragraph 4.1 of this Opinion applies to Insurance Companies as of set out herein.
4.2 Assumption of control under MDICA

4.2.1 Each Insurance Company is deemed under subsections 36(1) of the MDICA 2011 to be “member institutions” until membership is cancelled or terminated under the MDICA 2011.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows:

5.1 The Appointment of a Special Administrator under the Danaharta Act

5.1.1 This applies to Insurance Companies as set out herein, except that the appointment, by Danaharta, of a special administrator over an Insurance Company would require the prior approval of Bank Negara Malaysia, pursuant to paragraph 27(b) of the Danaharta Act.

5.2 The Appointment of a ‘Conservator’ under the MDICA

5.2.1 This does not apply to Insurance Companies.
Subject to the modifications and additions set out in this Schedule 4 (Individuals), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are individuals. For the purposes of this Schedule 4 (Individuals), "individual" means a natural person to whom Malaysian laws apply by any reason including domicile, residency or citizenship.

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

1. **MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS**

   None.

2. **ADDITIONAL ASSUMPTIONS**

   We assume each Individual would be resident for exchange control purposes. An Individual is a resident for exchange control purposes where he is (i) a citizen of Malaysia excluding a person who has obtained permanent resident status outside Malaysia and is residing outside Malaysia, or (ii) a non-citizen of Malaysia who has obtained permanent resident status in Malaysia and is residing permanently in Malaysia.

3. **MODIFICATIONS TO OPINIONS**

   On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the opinions as set out at Section 3 of Schedule 2 (Partnerships).

3.1 **Insolvency Proceedings: Individuals** (see paragraph 3.1 of the Opinion)

   The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Partnership could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the procedures under the Bankruptcy Act 1967 and the Bankruptcy Rules made there under (the “Bankruptcy Act”) which applies to insolvency of individuals.

   We confirm that all of the Events of Default in the Agreement adequately refer to and extend to all Insolvency Proceedings.
4. **ADDITIONAL QUALIFICATIONS**

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

4.1 **Insolvency of Foreign Parties**

4.1.1 By virtue of subsection 3(3) of the Bankruptcy Act, the Defaulting Party is considered to be a “debtor” for the purposes of bankruptcy proceedings in Malaysia if at the time of the act of bankruptcy, the Defaulting Person:

(a) was personally present in Malaysia;

(b) ordinarily resided or had a place of residence in Malaysia;

(c) was carrying on business in Malaysia either personally or by means of an agent; or

(d) was a member of a firm or partnership which carried on business in Malaysia

5. **MODIFICATIONS TO QUALIFICATIONS**

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.

5.1 **The Recognition of Choice of Law**

5.1.1 Paragraph 4.12 is modified to only include the provisions under the Bankruptcy Act as mandatory provisions of Malaysian insolvency law which the Malaysian courts are likely to treat as mandatory in their application to Individuals in the Event of Default, as follows: -

“Only the provisions under the Bankruptcy Act at paragraph 3.1 above are likely to be treated by the Malaysian courts as mandatory in their application to the Malaysian party where the relevant circumstances arise.”

5.2 **The Impact of Section 223 of the Companies Act**

5.2.1 Paragraph 4.1 does not apply to Individuals.

5.3 **The Impact of the Preference Provisions under Subsection 293(1) of the Companies Act**

5.3.1 Paragraph 4.1 does not apply to Individuals.
5.4 **Special Administration under the Danaharta Act**

5.4.1 Paragraph 4.2 does not apply to Individuals.

5.5 **The Appointment of a ‘Conservator’ under the MDICA**

5.5.1 Paragraph 4.3 does not apply to Individuals.

5.6 **The Assumption of Control or the Appointment of a ‘Receiver and Manager’ under the MDICA**

5.6.1 Paragraph 4.4 does not apply to Individuals.

5.7 **Regulatory Powers under the CBMA**

5.7.1 Paragraph 4.7 does not apply to Individuals.

5.8 **The Issuance of Directives by SC under Section 346C of the CMSA**

5.8.1 Paragraph 4.8 does not apply to Individuals.

5.9 **The Impact of the Provisions of FSA**

5.9.1 Paragraph 4.9 does not apply to Individuals, except for section 216 of the FSA, which applies to ‘any person’.

5.10 **Disclaimer**

5.10.1 At paragraph 4.132 of the qualification, the relevant provisions relating to the power of disclaimer of onerous Transaction or property for insolvent Individuals under Malaysian law is subsection 59(1) of the Bankruptcy Act, as exercised by the Director General of Insolvency.
SCHEDULE 5
GOVERNMENT AND STATUTORY BODIES

Subject to the modifications and additions set out in this Schedule 6 (Government and Statutory Bodies), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Government of Malaysia and statutory bodies. For the purposes of this Schedule 6 (Government and Statutory Bodies):

(a) The "Government" means the Government of Malaysia.

(b) A “statutory body” means a statutory body established under a Malaysian federal statute.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Government and Statutory Bodies

There are no bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Government or Statutory Body could be subject to under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter.

4. ADDITIONAL QUALIFICATIONS

The enforceability of the Netting Provisions, the Set-Off Provisions and the Title Transfer Provisions will be subject to any statutory provision or order made under the law that affects the applicability thereof.
5. MODIFICATIONS TO QUALIFICATIONS

5.1 The Impact of Section 223 of the Companies Act

5.1.1 Paragraph 4.1 does not apply to Government and Statutory Bodies.

5.2 The Impact of the Preference Provisions under Section 293(1) of the Companies Act

5.2.1 Paragraph 4.1 does not apply to Government and Statutory Bodies.

5.3 Special Administration under the Danaharta Act

5.3.1 Paragraph 4.2 does not apply to Government and Statutory Bodies.

5.4 The Appointment of a ‘Conservator’ under the MDICA

5.4.1 Paragraph 4.3 does not apply to Government and Statutory Bodies.

5.5 The Assumption of Control or The Appointment of a ‘Receiver and Manager’ under the MDICA

5.5.1 Paragraph 4.4 does not apply to Government and Statutory Bodies.

5.6 Regulatory Powers under the CBMA

5.6.1 Paragraph 4.7 does not apply to Government and Statutory Bodies.

5.7 The Issuance of Directives under Section 346C of the CMSA

5.7.1 Paragraph 4.8 does not apply to Government and Statutory Bodies.

5.8 The Impact of the Provisions of the FSA

5.8.1 Paragraph 4.9 does not apply to Government and Statutory Bodies.
Subject to the modifications and additions set out in this Schedule 6 (Trust Companies), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are trust companies. For the purposes of this Schedule 7 (Trust Companies), "trust company" means a company incorporated under the Companies Act and registered as a trust company under the Trust Companies Act 1949 (Act 100) ("Trust Companies Act"). The Trust Companies Act provides for the registration and regulation of trust companies in Malaysia.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 6 (Trust Companies).

2. ADDITIONAL ASSUMPTIONS

We assume that a trust company enters the Agreement in its capacity as trustee.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the opinions as set out at paragraph 3.

3.1 Insolvency Proceedings: Trust Companies

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Trust Company could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

(a) Section 23 of the Trust Companies Act, read with;

(b) Winding up under the Companies Act, the Companies Regulations, 1966 and the Companies (Winding-Up) Rules, 1972 which applies to a Company and to a Foreign Company, read with the Bankruptcy Act 1967 and the Bankruptcy Rules made there under.
We confirm that all of the Events of Default in the Agreement adequately refer to and extend to all Insolvency Proceedings in relation to Trust Companies only, if supplemented by the following events:-

(a) The appointment of a Conservator on a Company under Chapter 2, Part XI of the MDICA 2011;

(b) The appointment of a Special Administrator under Part VI of the Danaharta Act;

(c) The exercise of the powers of BNM pursuant to sections 38 and 77 of the CBMA.

(d) The issuance of a directive by the Securities Commission pursuant to section 346C of the Capital Market and Services Act 2007 (“CMSA”) in the event of a “systemic risk in the capital market” as defined under section 346A of the CMSA.

4. ADDITIONAL QUALIFICATIONS

4.1 Under Section 23 of the Trust Companies Act, the winding-up of a Trust Company shall be according to the provisions of the Companies Act 1965.

5. MODIFICATIONS TO QUALIFICATIONS

Nil.
Subject to the modifications and additions set out in this Schedule 7 (Labuan Companies), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Labuan companies. For the purposes of this Schedule 7 (Labuan Companies), “Labuan company” means a Labuan company incorporated under the Labuan Companies Act 1990 (“LCA”).

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None.

2. ADDITIONAL ASSUMPTIONS

None.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the opinion as set out at paragraph 3.

3.1 Insolvency Proceedings: Labuan Companies

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Labuan Companies could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

(a) Section 131 of the LCA, read with54;

(b) Winding up under the Companies Act, the Companies Regulations, 1966 and the Companies (Winding-Up) Rules, 1972 which applies to a Company and to a Foreign Company, the Bankruptcy Act 1967 and the Bankruptcy Rules made there under; and

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54 Section 131 of the LCA requires all the provisions at Schedule 7, paragraph 3.1 (b) above to be taken into account.
We confirm that all of the Events of Default in the Agreement adequately refer to and extend to all Insolvency Proceedings in relation to Labuan Companies only if supplemented by the following events:

(a) The appointment of a Conservator on a Company under Chapter 2, Part XI of the MDICA;

(b) The appointment of a Special Administrator under Part VI of the Danaharta Act;

(c) The exercise of the powers of BNM pursuant to sections 38 and 77 of the CBMA.

(d) The issuance of a directive by the SC pursuant to section 346C of the CMSA in the event of a “systemic risk in the capital market” as defined under section 346A of the CMSA.

(e) The issuance of directions by BNM under section 216 of the FSA.

4. ADDITIONAL QUALIFICATIONS

4.1 Under section 23 of the LCA, the winding-up of a Labuan Company shall be in accordance to the provisions of the Companies Act 1965

5. MODIFICATIONS TO QUALIFICATIONS

None.
ANNEX 1
FORMS OF FOA NETTING AGREEMENTS


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

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

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

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


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


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

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

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


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

Each of the Agreements listed at items 13 to 30 of this Annex 1 may be deemed to include FOA Netting Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement, in which case references to the Insolvency Events of Default and FOA Netting Provision in respect of such FOA Netting Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.
ANNEX 2
List of Transactions

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

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

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

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

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

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

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

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

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

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

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

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

55 Non-EU counsel should discuss with Clifford Chance if clarification is needed.
"Addendum Netting Provision" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

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

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow, together with the defined terms required properly to construe such Clauses.

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

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

(b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow, together with the defined terms required properly to construe such Clause.

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

"Clearing Agreement" means an agreement:

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

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

(c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.
"Clearing Module Netting Provision" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

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

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow, together with the defined terms required properly to construe such Clauses.

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

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

(b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow, together with the defined terms required properly to construe such Clause.

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

"Client Money Additional Security Clause" means:

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

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

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

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

(e) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (Additional security) at module F Option 1 (where incorporated into such Agreement);
(f) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (Additional security) at module F Option 1 (where incorporated into such Agreement);

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

"FOA Netting Agreement" means an agreement:

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

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

(c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provisions, and with or without the Title Transfer Provisions, with no Adverse Amendments.
"FOA Netting Agreements (with Title Transfer Provisions)" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1) or a FOA Netting Agreement which has broadly similar function to any of the foregoing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

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

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

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

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

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (Set-off upon default or termination);
(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (Set-off on default);

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


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

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

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

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

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

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

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

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

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

"ISDA/FOA Clearing Addendum" means the ISDA/FOA Client Cleared OTC Derivatives Addendum as first published on 11 June 2013, or any subsequent published versions up to the date of this opinion letter.
"Long Form Two-Way Clauses" means each of the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

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

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

"Non-Cash Security Interest Provisions" means:

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

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

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

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

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

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

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

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

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

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (Security Interest Provisions) of Annex 4 which are highlighted in yellow; and
(b) the "Power of Sale Clause", being:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Rehypothecation Clause" means:

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

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

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

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

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

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

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

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

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

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow.
"Two Way Clauses" means each of the Long-Form Two Way Clauses and the Short-Form Two Way Clauses.
ANNEX 4

PART 1
CORE PROVISIONS

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

1. **FOA Netting Provision:**

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

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

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

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

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

   c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting
2. **General Set-Off Clause:**

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

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

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

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

"The following shall constitute Events of Default:

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

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

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

   b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction.

Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

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

   a) **[Firm Trigger Event/CM Trigger Event]**

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

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

   (b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof:
(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the occurrence of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[ or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed] [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

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

b) CCP Default

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

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

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

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

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

c) Hierarchy of Events

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

Or

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

Or

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

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

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

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

(a) is attributable to such Client Transactions;

(b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and
The Relevant Collateral Value will constitute a positive amount if the relevant collateral has been transferred by Client to [Firm/Clearing Member] and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement] and a negative amount if the relevant collateral has been transferred by [Firm/Clearing Member] to Client and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement].

7. Clearing Module Set-Off Provision

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

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

8. Addendum Set-Off Provision

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

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

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

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

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

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.
PART 2
NON-MATERIAL AMENDMENTS

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

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

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

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

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

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

7. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.
8. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

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

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

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

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

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

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

15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.
16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.

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

18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:
   - more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
   - more than one FOA Clearing Module or Clearing Module Netting Provision
   - one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.

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

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

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

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

23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and
its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.
PART 3
SECURITY INTEREST PROVISIONS

1. Security Interest Clause

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

2. Power of Sale Clause

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and
amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid.".
ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. Necessary amendments

2. Desirable amendments

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

4. Additional events for the purposes of paragraph 3.1:

5. Alterations which constitute material alterations:

For the purposes of paragraph 4.1 of the FOA Netting Agreement, we confirm that all of the Events of Default adequately refer to and extend to all Insolvency Proceedings if supplemented by the following events:

(a) The appointment of a Special Administrator under Part VI of the Pengurusan Danaharta Nasional Berhad Act 1998;

(b) The appointment of a Conservator on an ‘affected person’ under Chapter 2, Part XI of the Malaysia Depository Insurance Corporation Act 2011;

(c) The assumption of control provisions / appointment of a receiver and manager over a ‘member institution’ under Chapter 1 of Part VII of the MDICA;

(d) The exercise of the powers of the Central Bank of Malaysia pursuant to sections 38 and 77 of the Central Bank of Malaysia Act 2009;

(e) The issuance of directives by the Securities Commission pursuant to section 346C of the Capital Markets and Services Act 2007, and

(f) The assumption of control provisions / appointment of a receiver and manager under Sub-Division 2 of Division 2, Part XIII of the Financial Services Act 2013.
ANNEX 6
DANAHARTA POLICY STATEMENT