

**BY AIRMAIL**

19 April 2013

Bermuda Office  
Appleby (Bermuda)  
Limited  
Canon's Court  
22 Victoria Street  
PO Box HM 1179  
Hamilton HM EX  
Bermuda

Tel +1 441 295 2244  
Fax +1 441 292 8666

applebyglobal.com

## The Futures & Opinions Association

2<sup>nd</sup> Floor

36-38 Botolph Lane

London EC3R 8DE

Dear Sirs

### Netting Analyser Library

You have asked us to give an opinion in respect of the laws of Bermuda (“**this jurisdiction**”) in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an “**Agreement**”) or under an Equivalent Agreement (as defined below).

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

References herein to “this opinion” are to the opinions given in paragraph 3.

*“Insolvency Proceedings” means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this opinion, the occurrence of such proceedings in respect of the Counterparty falls within the definition of Event of Default under the Agreement).*

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## 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 that are incorporated and registered under the laws of this jurisdiction; or

1.1.2 that are overseas companies incorporated under the laws of another jurisdiction but which maintain a registered office in the jurisdiction pursuant to part XI of the Companies Act 1981

insofar as each may act as a counterparty (a “**Counterparty**” or “**Party**”) providing Collateral (as defined in paragraph 1.3) to a member firm of the Futures and Options Association (each a “**Firm**”) under an Agreement.

For the purposes of paragraph 1.1.2 above and 1.1.3 below,

- a reference to a “company” is a reference to a company within the meaning of section 4(1) of the Companies Act 1981;
- a reference to an “overseas company” is a reference to a company within the meaning given for such term in section 2 of the Companies Act 1981.

Except as set forth below, this opinion does not consider companies incorporated by separate legislation of the Bermuda Parliament or existing companies that become subject to such separation legislation after incorporation. In this regard, the process of incorporation by separate legislation (hereinafter referred to as the “Private Act process” for incorporation of Bermuda companies) was the sole procedure for creating Bermuda companies prior to 1970. Separate legislation is still utilised, both for the formation of companies by the Private Act process (in many cases significant Bermuda Companies such as banks and trust companies and statutory Companies including governmental or quasi-governmental agencies will be formed by this process), and as a means of conferring special powers upon or relieving an existing company from the operation of statutory provisions of general application, and/or in imposing restrictions upon its operations.

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1.2 However, this opinion is also given in respect of Counterparties providing Collateral to a Firm that are any of the following, subject to the terms of reference,

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definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

- 1.2.1 Partnerships (schedule 1)
- 1.2.2 Trusts (schedule 2)
- 1.2.3 Segregated accounts companies (schedule 3)
- 1.2.4 Insurance companies/providers (schedule 4);
- 1.2.5 Individuals (schedule 5)
- 1.2.6 Sovereign entities (Schedule 6);

insofar as each may act as a Counterparty to a Firm under an Agreement.

1.3 This opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions (“**Collateral**”). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.4 In this opinion letter:

1.4.1 “**Security Interest**” means the security interest created pursuant to the Security Interest Provisions;

1.4.2 “**Equivalent Agreement**” means an agreement:

1.4.2.1 which is governed by the law of England and Wales;

1.4.2.2 which has broadly similar function to any of the Agreements listed in Annex 1;

1.4.2.3 which contains the Core Provisions (with no amendments, or with Non-material Amendments); and

1.4.2.4 which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect,

modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

1.4.2.5 References to “Core Provisions” include Core Provisions that have been modified by Non-Material Amendments (as defined herein).

References to the “**Agreement**” in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;

1.4.3 A “**Non-material Amendment**” means an amendment having the effect of one of the amendments set out at Annex 3;

1.4.4 “**enforcement**” means, in the relation to the Security Interest, the act of:

1.4.4.1 sale and application of proceeds of the sale of Collateral against monies owed, or

1.4.4.2 appropriation of the Collateral, in either case in accordance with the Security Interest Provisions;

1.4.5 in other instances other than those referred to at 1.4.4 above, 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.

1.4.6 Terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears;

1.4.7 any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter;

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1.4.8 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2; and

1.4.9 headings in this opinion letter are for ease of reference only and shall not affect its interpretation.

## 2. ASSUMPTIONS

We assume the following:

2.1 That the Agreement is legally binding and enforceable against both Parties under their governing laws and is enforceable in accordance with its terms against such Parties under the laws by which it is expressed to be governed.

2.2 That the Security Interest Provisions are valid and enforceable under the governing law of the Agreement to create a Security Interest or charge as those terms are understood under the laws of Bermuda.

2.3 That the Security Interest Provisions are valid and effective under the law of the place where the Collateral is located to create an enforceable security interest.

2.4 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.

2.5 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.

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2.6 That the Agreement has been properly executed by both Parties.

2.7 That the Agreement is entered into prior to the commencement of any insolvency, bankruptcy or analogous proceedings in respect of either Party.

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- 2.8 The 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.
- 2.9 That the Agreement accurately reflects the true intentions of each Party.
- 2.10 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation clause under the governing law of the Agreement.
- 2.11 That there is no other agreement, instrument or other arrangement between the Parties which modifies or supersedes the Agreement.
- 2.12 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.
- 2.13 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.
- 2.14 That any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions shall at all relevant times be located outside this jurisdiction.
- 2.15 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.16 That any calculation required to be made pursuant to the Agreement is made in good faith and in a commercially reasonable manner.
- 2.17 That any Transaction entered into under the Agreement is entered into prior to the Non-Defaulting Party having notice that an act of bankruptcy (as that term is defined in the qualifications section of this opinion).

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- 2.18 That none of the Collateral is located in Bermuda or comprises securities issued by a company incorporated in Bermuda.

That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of “Equivalent Agreement” above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement

## 3. OPINION

On the basis of the foregoing terms of reference and assumptions and subject to the reservations set out in paragraph 9 below, we are of the following opinion.

### 3.1 Valid Security Interest

- 3.1.1 Following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, but subject to the discussion below, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

### 3.2 Absent Insolvency

- 3.2.1 In the absence of insolvency proceedings involving the Chargor, whom we shall refer to as Party A, the validity of the security interest created under the Agreement would not be determined by Bermuda law. However, in the event of the insolvency of Party A, aspects of Bermuda insolvency law may be implicated.

- 3.2.2 As a practical matter, if Party A defaults under the Agreement, and Party B, the Chargee, elects to enforce its security interest without resorting to court or by resorting to the courts of England, issues regarding the validity and perfection of the security interests and the exercise of Party B’s rights may never come before the Bermuda courts, particularly if the Collateral is not located in Bermuda. However, if any of the Collateral is located in Bermuda and either :-

- (a) Party B is obliged to pursue its remedies against Party A in the courts of Bermuda, for whatever reason; or

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- (b) Party A, possibly through its liquidator, intervenes in Party B's enforcement proceedings in England, and the English court holds that the courts of Bermuda are the proper forum for determining rights of secured and unsecured creditors of Party A:

then the issue of the validity and perfection of the security interest might be addressed by the Bermuda court. In this opinion, the above scenarios are hereinafter referred to as the "**Bermuda Enforcement Scenario**".

- 3.2.3 In the Bermuda Enforcement Scenario, we consider that on the occurrence of an Event of Default the courts of Bermuda would enforce rights of the Secured Party under the Agreement including rights under Clauses 8 and 11.
- 3.2.4 The exercise by the Secured Party of its rights contemplated by each Security Document, including the right to "liquidate" Collateral by selling it, is permitted by Bermuda law. It is not necessary for any particular formalities to be followed by the Secured Party in exercising its right of sale provided that the Agreement expressly waives the entitlement conferred by Section 29 of the Conveyancing Act 1983 (to the extent applicable) and excludes the application of Section 31 of the Conveyancing Act. Accordingly, the Secured Party may, on enforcement of the Agreement, sell the Collateral.
- 3.2.5 In particular, a court order or auction is not required and notice of sale need not be given to the debtor, although in practice secured creditors do often give a short period of notice before selling Collateral. This does not differ depending on the type of Collateral involved.
- 3.2.6 In exercising its power of sale, the Secured Party is subject to a duty to take reasonable care to obtain the best price reasonably available at the time. This will normally be the current market value of Collateral comprising securities.
- 3.2.7 In our opinion, there would be a right of set-off available under Clause 8.4 of the Agreement.

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3.2.8 A court order which operates as a restraining injunction may prohibit the exercise of a right of set-off, unless this right is excluded from the effect of the order.

3.2.9 In the Bermuda Enforcement Scenario a Bermuda court that accepted jurisdiction following the conflicts of law analysis mentioned above could hold that the security interest of Party B created under the Agreement must be recognised as valid in Bermuda to be enforceable.

3.2.10 The possible adoption by the Bermuda court of this approach, leads to the following three (3) risks for Party B:

(1) the “invalidation risk”, which is the risk that a security interest validly created and perfected under the law of the *lex situs* of the security interest, if not validly created or perfected under Bermuda law, would be characterised as invalid or unperfected by the Bermuda court.

(2) the “re-characterisation risk”, which is the risk that a security interest characterised as a valid security interest of a particular nature under the law governing the creation of the security interest, would be characterised as either a different type of interest (such as an outright transfer) or a different type of security interest under Bermuda law (e.g. a security interest which constituted a valid fixed charge under English law could, in certain instances, be re-characterised as a floating charge under Bermuda law).

(3) the “priorities risk”, which is the risk that as a result of the secured party (i.e. Party B for present purposes) failing to take steps to perfect the priority of its (prior) security interest under Bermuda law, a subsequent (competing) creditor gains priority, by registering its interest in the same collateral.

3.2.11 We are of the view that it is possible for Party B to substantially mitigate the foregoing risks, so that a Bermuda court would hold (in the event issues of priority were held found to be governed by Bermuda law) that a validly created and perfected security interest had been obtained by Party B under the terms of the Agreement.

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3.2.12 In case Bermuda law may be implicated we recommend that the Agreement be registered under Part V of the Companies Act (“Part V”) applies.

3.2.13 Part V contains provisions for the creation of a public register of charges, and for a system of registration of charges and of priorities amongst registered and unregistered charges. Part V applies to any charge on the assets of a company formed under Bermuda law, wherever its assets may be situated, and to any charge on property located in Bermuda which is created or acquired by a company incorporated outside Bermuda. Registration under the provisions of Part V is not mandatory. Failure to register a charge under such provisions does not render the related security interest void, or invalid against the creditors or the liquidator of the Chargor. However, the effect of registering a charge is to confer priority over any subsequently registered charge (irrespective of the date of creation of the latter charge) and over any unregistered charge. Therefore unless the security interests has been registered ahead of a competing interest the “first” ranking referred to in Clause 8.7 of the Agreement may not be valid if issues of priority were to be determined under Bermuda law.

3.2.14 Registration secures priority under Bermuda law of a valid security interest, but does not ensure that a Bermuda court will hold that a security interest is validly created.

3.2.15 It is not mandatory under Bermuda law that any step be taken in order to perfect the security interest. However, where Party A is a Bermuda Company, it is advisable for Party B to perfect its security interest by registering the relevant charge pursuant to Part V.

3.2.16 There is no exhaustive definition of the term “charge” under Bermuda law. A “charge” normally has the following characteristics:

- (i) it is a proprietary interest granted by way of security which entitles the chargee to resort to the charged property only for the purposes of satisfying some liability due to the chargee (whether from the chargor or a third party); and
- (ii) the chargor retains an equity of redemption to have the property restored to him when the liability has been discharged.

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- 3.2.17 There is no time limit for registration of a charge, however, in view of the fact that priority of the charged interest is governed by the date of registration, it is advisable to register the charge as soon as possible following its creation.
- 3.2.18 Registration of the charge may be effected by any person interested in the charge, which would comprise both Party A and Party B. Once a charge has been registered pursuant to Part V it will not be necessary to renew the registration. Part V also provides a procedure for amending particulars filed in the Register of Charges, but only to indicate that the whole or part of the collateral has been released from the charge.
- 3.2.19 It is advisable to obtain confirmation of registration of a charge in the form of a stamped copy of the applicable Form 9 to the Companies Act (Particulars of a Mortgage or Charge), which indicates the date on which the Form 9 was filed and assigns a registration number.
- 3.2.20 Failure to register a charge under Part V does not invalidate the charge. However, where: (i) a Bermuda court hold that priorities of security interests in the same collateral are governed by Bermuda law, (ii) Party A grants a further security interest in the posted Collateral to a party other than Party B (Party B being the beneficiary of the security interest created under the Agreement), (iii) the secured party under the further security interest registers its charge under Part V, and (iv) Party B fails to register its charge under the Agreement, the subsequently created security interest would rank in priority to the security interest created under the Agreement in favour of Party B.
- 3.2.21 Accordingly, we recommend that Party B register, pursuant to Part V, its security interest under the Agreement. The registration regime under Part V will apply to a charge over all types of Collateral.
- 3.2.22 The fact that securities may only be withdrawn or substituted with the prior consent of the Chargee as provided under Clause 8.9 of the Agreement should result in the Bermuda court characterising the security interest conferred under the Agreement as a fixed charge rather than a floating charge which is the intent of Clause 8.7. The key factor for the characterisation will be the degree of control which Party B exerts over the collateral which is the subject of the security interest created. There is no specific authority for the exact degree of control which a Secured Party may permit a Chargor to retain over pledged collateral in the case of a fixed charge.

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## 3.3 Insolvency Scenario

3.3.1 On the assumption that an Event of Default under the Agreement with respect to Party A has occurred and an insolvent liquidation has been instituted by or against Party A, the position of competing priorities between creditors of an insolvent company in liquidation in Bermuda are generally determined in the following order:

- (a) claims of secured creditors under fixed charges are paid first;
- (b) creditors having preferential claims under section 236 of the Companies Act (these are principally taxes owing to the government and employee claims) rank second in priority;
- (c) claims of secured creditors under floating charges rank third;
- (d) claims by ordinary unsecured creditors rank fourth;
- (e) claims in the nature of capital claims (generally the claims of shareholders) or subordinated claims rank last and, amongst themselves, in accordance with the bye-laws of the company.

3.3.2 If Party A is a Bermuda company then under Bermuda law competing priorities over the same collateral will be governed by order of registration of the charge under Part V (discussed above), if at least one charge is registered. It is uncertain whether the order of registration would govern in a case where the first-registered charge is a merely floating charge.

3.3.3 To provide the highest priority to Party B's security interest under Bermuda law, the following steps should be taken :-

- (i) if Party A is a Bermuda company, the security interest created under the Agreement should be registered under Part V as soon as it is created; and
- (ii) Party B should conduct a search of the Register of Charges to ensure that Party A has not previously charged its interest in the Collateral.

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- 3.3.4 A scheme of arrangement under section 99 of the Companies Act may be implemented and is binding on creditors targeted by the scheme provided that it is approved by a majority in number and 75% in value of each class of creditors it purports to bind and it is approved by the Bermuda court. A scheme which is binding on secured creditors could (in theory at least) vary the rules regarding the order of priority as between types of creditor. However, creditors whose interests conflict with those of other creditors must be established as a separate class.
- 3.3.5 Accordingly, we do not consider that it would be appropriate to include secured creditors in any class of unsecured creditors. Nor should one secured creditor be readily included in the same class as another secured creditor, if (for examples) the arrangement purports to change the relative priority positions as between the two secured creditors or if their interests differ because one has adequate security and one is unsecured. Consequently, a secured creditor should frequently have an effective veto on any such arrangement and as a practical matter it is difficult to see how an arrangement would be approved in a way that binds a secured creditor without its consent.
- 3.3.6 There is no rule of the law in this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.
- 3.3.7 Following exercise of the Firm's rights under the Security Interest Provisions, the ranking of the Firm's rights to the proceeds of realisation of the Collateral in relation to the interests of the Counterparty and any other person would be a matter to be determined under the law of the place where the Collateral is situated.

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## 4. FURTHER ACTS

- 4.1 No further acts, conditions or things would be required by the law of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

## 5. QUALIFICATIONS

The opinions expressed above are subject to the following reservations:-

- 5.1 We express no opinion as to whether specific performance or injunctive relief, being equitable remedies, would necessarily be available in respect of any of the obligations of a party, as set out in the Agreement.
- 5.2 There is a risk that, if the rehypothecation provisions set out in Clause 8.13 of the Agreement came to be considered under Bermuda law, a Bermuda court may re-characterise the Security Provisions as constituting a title transfer collateral arrangement. We do not consider that this risk represents a significant commercial risk since even if the Security Provisions are so recharacterised, the security interest should be enforceable.
- 5.3 Under the law of Bermuda, the conversion of foreign currency for the purpose of determining the value of net claims against a company in liquidation in Bermuda is to be calculated as at the date of the winding-up order: *Re Dynamics Company of America* [1976] 2 All ER 669; *Re Lines Brothers Limited* [1983] Ch. 1. Under the Documents, a different date for converting foreign currencies may apply. In our opinion, the rates as at the date of the winding-up order will likely prevail over the contractual date, if these are different, although this is not a settled point. The conversion will have to be calculated by reference to the winding-up order not only for the purpose of filing any proof of claim in respect of net liability of a Bermuda Company, but probably also for the purposes of calculating rights of set-off.
- 5.4 If, in the course of settling the obligations due under the Agreement including realising on the Collateral, Party B is obliged or elect to secure a judgment of a foreign court, it should be aware of the requirements for enforcing the judgment in the courts of Bermuda.
- 5.5 A final and conclusive judgment of a foreign court against the Company, based upon the Option under which a sum of money is payable (not being a sum of money payable in respect of taxes or other charges of a like nature, in respect of a fine or other penalty, or in respect of multiple damages as defined in The Protection of Trading Interests Act 1981) may be enforceable in Bermuda if the foreign court is situated in a country to which The Judgments (Reciprocal Enforcement) Act 1958 (the "1958 Act") applies. The procedure provided for in the 1958 Act must be followed if the 1958 Act applies. The 1958 Act applies to the United Kingdom.

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Under the 1958 Act, a judgment obtained in the superior courts of a territory to which it applies would be enforced by the Supreme Court of Bermuda without re-examination of the merits of the case provided that:

- 5.5.1 the judgment is final and conclusive, notwithstanding that an appeal may be pending against it or it may still be subject to an appeal in such country;
- 5.5.2 the judgment has not been given on appeal from a court which is not a superior court; and
- 5.5.3 the judgment is duly registered in the Supreme Court of Bermuda in circumstances in which its registration is not liable thereafter to be set aside.

Under Section 3(4) of the 1958 Act, the registration of such a court's judgment in the Supreme Court of Bermuda involves the conversion of the judgment debt into Bermuda dollars as of the date of the foreign court's judgment, but the Bermuda Monetary Authority has indicated that its present policy is to give the consents necessary for any Bermuda dollar award made by the Supreme Court of Bermuda as aforesaid to be recovered in external currency.

The opinions expressed above are subject to any prior rights obtained by third parties where any party to one of the Agreements has been assigned or encumbered in any way in favour of such third party.

A statutory stay of proceeding comes into force automatically upon the obtaining of a winding-up order or the appointment of a provisional liquidator to a company established in Bermuda (or before those events but after the presentation of a petition by order of the court). However, the stay of proceedings does *not* prevent a secured creditor from enforcing its security unless the secured party for some reason requires the assistance of the court for that purpose (and even then leave to proceed is normally granted in favour of a secured creditor wishing to enforce its security).

The courts of Bermuda have a general jurisdiction to grant injunctions (a jurisdiction not connected with the commencement of any insolvency proceedings). It is conceivable that in proceedings in which the scope or validity of a security interest were contested, the Bermuda court might enjoin a secured creditor from taking irrevocable steps in connection with the collateral it claimed under the security interest. This jurisdiction could be invoked in circumstances where an insolvency proceeding other than liquidation happened to be pending;

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however, we reiterate that the jurisdiction issue has no direct legal (or obvious practical) connection with any insolvency proceeding.

Our opinions are subject to the doctrines under Bermuda law whereby a transaction may be set aside in the context of an insolvent liquidation. These doctrines are summarised below:

5.6 A disposition in favour of a creditor by an insolvent company, within six months prior to the filing of a petition for the winding-up of the company and for the purpose of preferring the creditor is void. An express statutory exemption protects the interests of any person obtaining title to property through or under a creditor of the insolvent company in good faith and for valuable consideration. See section 237 of the Companies Act, 1981, which incorporates by reference section 47 of the Bankruptcy Act, 1989.

5.7 Within certain limits, a disposition of property:

5.7.1 made with the dominant intention of putting property beyond the reach of a person (or class of persons) who has a claim or may at some time have a claim against the transferor; and

5.7.2 without adequate consideration

is voidable at the instance of certain eligible creditors. This rule applies within or outside liquidation (and in fact a liquidator appears not to have standing in relation to this particular jurisdiction). Insolvency is not a prerequisite. A creditor will be an eligible creditor if it falls into one of the following categories: (a) a person to whom on, or within two years after, the date of the transfer the transferor owed an obligation which obligation remains unsatisfied on the date of the action or proceeding; (b) a person to whom, on the date of the transfer, the transferor owed a contingent liability and since that date the contingency has fallen in, with the liability remaining unsatisfied; or (c) a person to whom the transferor owed an obligation in consequence of a claim that he made against the transferor, where the cause of action giving rise to the claim occurred prior to, or within two years of, the transfer. See part IV A of the Conveyancing Act, 1983.

5.8 A void disposition under our law is any disposition of the property of a company *after* the filing of a petition for the winding-up of a company. Such a disposition is void unless approved by the court. See section 166 of the Companies Act, 1981.

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- 5.9 There is under our law a concept of fraudulent trading, which may apply only if a company goes into liquidation. Fraudulent trading entails the carrying on of the business of a company with intent to defraud creditors of the company or for any other fraudulent purpose. Any person found by a court to have been conducting business in this way may be held personally liable for any or all of the debts of the company. It must be proven that the respondent was knowingly a party to the carrying on of such business. Positive steps in relation to the carrying on of the business of the company with intent to defraud must have been taken by the person sought to be held liable. Actual dishonesty must be proven, although it may be enough to demonstrate that the company continued to incur debt at a time when the directors knew that there was no reasonable prospect of the creditors ever being paid. If the directors can demonstrate that they genuinely believed that the company would come out of its financial difficulties, however, they may be exonerated. See section 246 of the Companies Act, 1981.
- 5.10 There is a statutory jurisdiction for a court to compel repayment or compensation from any director or officer who has misapplied any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. See section 247 of the Companies Act, 1981. This provision is not thought to provide any substantive remedies which would not otherwise exist but provides a summary mechanism.
- 5.11 A floating charge granted by a company while it was insolvent and within 12 months prior to the presentation of a petition is void, except to the extent of cash advances made in consideration for the floating charge. See section 39 of the Companies Act, 1981.
- 5.12 A conveyance or assignment by a company of all its property to trustees for the benefit of its creditors shall be void to all intents. See section 237(2) of the Companies Act 1981.
- 5.13 A liquidator on behalf of a company in liquidation may set aside a transaction in any case in which the company outside of liquidation could have done so. For example if there are questions of *ultra vires*, authority, or breach of fiduciary duties, the liquidator on behalf of the company may take proceedings.
- 5.14 A transaction is void to the extent that it purports to convey, assign, charge, anticipate or give as security:

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- 5.14.1 a right to receive money payable under a pension plan; or
  - 5.14.2 assets being transferred from a pension fund. See section 44(3) of the National Pension Scheme (Occupational Pensions) Act 1998.
- 5.15 In any case where:
- 5.15.1 any warrant of distress is executed against the property of an employer and the property is seized or sold in pursuance of the execution; or
  - 5.15.2 on the application of a secured creditor the property of an employer is sold, the proceeds of the sale of the property shall not be distributed to any person entitled thereto until the court ordering the sale has made provision for the payment into a pension fund of any amounts due in respect of contributions payable by the employer. See section 25 of the National Pension Scheme (Occupational Pensions) Act 1998.

In particular, the obligation of Party A to transfer additional Collateral under Clause 8.1 of the Agreement could be vulnerable to challenge by a liquidator (or other creditor) of Party A in certain circumstances.

In the case of an insurance company:

- (a) Party A's legal capacity to enter into and perform its obligations under the Agreement will not be affected by the fact that it is regulated under the Insurance Act, assuming that its insurance licence exclude or restrict activities of the description contemplated by the Agreement. Absence of such exclusions and restrictions may be readily confirmed from an examination of the Memorandum of Association and Bye-Laws and the insurance licence of Party A.
- (b) Party A's board of directors and managers will be responsible to ensure that its exposure from trading activities under the Agreement does not come into conflict with its Insurance Act obligations for reasons relating to Party A's financial position. In particular, Party A's obligations to meet and maintain the solvency margin and liquidity ratio requirements corresponding to its relevant liabilities under the Insurance Act must be balanced with the contingent obligations under the Agreement to deliver

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additional Collateral. This balance will be dynamic, given likely fluctuations in Party A's exposure under the Agreement and its insurance business, and will require active monitoring. Concern as to maintaining a proper balance will be reduced, to the extent the value of Party A's assets significantly exceed the amount of its Insurance Act requirements.

- (c) To the extent Party A cannot meet a demand requiring it to deliver additional Collateral, because such delivery would impair Party A's statutory solvency, then Party A may become insolvent for the purposes of definitions under the Companies Act and/or the Insurance Act. Insolvency could then precipitate insolvent liquidation proceedings against the Bermuda Company under the Companies Act. Section 161 of the Companies Act provides that a company may be wound up by the Court where (inter alia) it is unable to pay its debts, taking into account contingent and prospective obligations. The Insurance Act also contains an additional test of insolvency for an insurer, which (by virtue of section 33) is deemed to be unable to pay its debts if the value of its assets does not exceed its total liabilities, taking into account contingent and prospective liabilities.

In the case of a Segregated Accounts Company,

- (a) where the procedural requirements mandated for operation of segregated accounts of a Segregated Accounts Company are not followed, there is a risk that the attempt to segregate the dealings/transactions to any particular account will be unsuccessful. In such a circumstance, the Segregated Account Company would remain liable for its obligations arising from Transactions under the Agreement, notwithstanding the failed attempt to segregate (assuming always that the contractual arrangements constituted by the Agreement were otherwise valid and binding). However, none of the assets and property of any other segregated account (assuming the same to have been segregated successfully) would be available to satisfy claims arising from such Transactions.
- (b) the Agreement must be expressly linked to one (or more) of the company's segregated accounts. The counterparty to the Agreement will acquire rights and entitlements as against, and be subject to liabilities in respect of or in favour of, only those segregated account(s) to which the Agreement has in

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fact been linked. Accordingly, in the case of a Segregated Accounts Company the “Parties” to the Agreement will be the Segregated Accounts Company, acting for and on behalf of the particular segregated account(s) to which the Agreement has been linked on the one hand, and the non-Bermuda Counterparty on the other.

The effect of separate legislation to create a company may vary widely from case to case. Accordingly, advice of local counsel should be sought whenever the Bermuda counterparty is a company formed by the Private Act process, or where it has become subject to separate legislation enabling it to establish segregated accounts, after incorporation. We express no opinion in respect of such entities because private legislation is bespoke and conceivably may provide for an outcome that is inconsistent with the opinions expressed in this opinion in respect of entities created under general public legislation.

For the purposes of the assumptions section of this opinion, “act of bankruptcy” is defined in the Bankruptcy Act 1989 (“1989 Act”) as follows:

An “act of bankruptcy” is an act committed by a debtor under the laws of Bermuda if, when in this jurisdiction or elsewhere, in any of the following cases, such debtor:

- (a) makes a conveyance or assignment of his (or its) property to a trustee or trustees for the benefit of his (or its) creditors;
- (b) makes a fraudulent conveyance, gift, delivery, or transfer of his (or its) property, or of any part thereof;
- (c) makes any conveyance or transfer of his (or its) property or part thereof, or creates any charge thereon, which would under this or any other Act of Bermuda be void as a fraudulent preference;
- (d) if with intent to defeat or delay his creditors, the debtor departs out of Bermuda, or being out of Bermuda remains out of Bermuda, or otherwise absents himself or begins to keep house;
- (e) if execution against the debtor has been levied by seizure of his (or its) goods in an action or any civil proceeding in the Bermuda Court, and the goods have been sold or held by the Provost Marshal General of Bermuda or other officer for 21 days (the time elapsing between the date of the summons and the date at which the

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proceedings on the summons are disposed shall be discounted in calculating such period of 21 days where an interpleader summons has been taken out in regard to the goods seized);

- (f) if the debtor files in the Court a declaration of his (or its) inability to pay his (or its) debts or presents a bankruptcy petition against himself (or itself);
- (g) if a creditor has obtained a final judgement or final order against the debtor for any amount, and, execution thereon not having been stayed, has served on him in Bermuda, or, by leave of the Court, elsewhere, a bankruptcy notice under the 1989 Act, and the debtor does not, within 14 days after service of the notice (where the service is effected in Bermuda) or within the time limited by the order giving leave the requirements of the notice or satisfy the Court that he (or it) has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgement debt, or sum ordered to be paid, and which the debtor could not set up in the action in which the judgement was obtained, or the proceedings in which the order was obtained [any person who is, for the time being, entitled to enforce a final judgement or final order, is deemed to be a creditor who has obtained final judgement or final order];
- (h) if the debtor gives notice to any of his (or its) creditors that he (or it) has suspended, or that he (or it) is about to suspend payment on his (or its) debts.
- (i) Any investment agreement entered into as a result of an unsolicited call on an individual, made in breach of the Investment Business Act 2003 of Bermuda may be unenforceable by the party in breach.

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

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This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons'

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groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation. This opinion is to be governed by and construed in accordance with Bermuda law and is issued on the basis that it will not give rise to action in the courts of any jurisdiction other than Bermuda.

Yours faithfully

  
**Appleby (Bermuda) Limited**

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## SCHEDULE 1

### Partnerships

Subject to the modifications and additions set out in this Schedule 1, 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 “Partnership” means partnerships<sup>1</sup>

- that are general partnerships formed under the laws of this jurisdiction;
- that are limited partnerships formed pursuant to the provisions of the Limited Partnership Act 1883, where the general partners are all individuals domiciled in this jurisdiction, corporations incorporated under the laws of this jurisdiction or a combination of the foregoing description of individuals and corporations; or
- that are either general or limited partnerships which are not formed under the laws of this jurisdiction, but which maintain a registered office located in this jurisdiction consequent upon their registration in Bermuda as “overseas partnerships” (within the meaning given such term in the Overseas Partnerships Act 1995)

Notwithstanding the recent growth in limited partnerships as investment vehicles, there is no case law on the effect of netting provisions on Bermuda general or limited partnerships.

Bermuda Partnerships are not regarded as separate legal entities under Bermuda law unless they so elect under the Bermuda Partnership Amendment Act 2006. As a matter of Bermuda law, there is no procedure as such for winding up a Bermuda Partnership.

However, partners of a Bermuda Partnership may be the subject of bankruptcy, winding up or equivalent proceedings. Where the partners of the Bermuda Partnership are individuals present in Bermuda, or companies incorporated in Bermuda, they may be the subject of

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<sup>1</sup> Under Bermuda law, partnerships may be formed by two or more separate legal entities (e.g. two or more partnerships or corporations) and/or individuals; there is no upper limit on the number of partners of Bermuda partnerships.

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bankruptcy or insolvent winding up proceedings under Bermuda law.<sup>10</sup> In such cases, partnership assets under such proceedings would be available, first, for creditors of the Bermuda Partnership, partner creditors, and then for distribution amongst the partners thus being available to discharge the separate liabilities of the partners. Similarly, non-partnership assets of a partner would be available first to that partner's creditors, with the surplus being available for unsatisfied partnership creditors.

When a party contracts with a Bermuda Partnership it is in fact contracting with each partner, in the case of a general partnership or with each general partner in the case of a limited partnership.

There should be no problem applying contractual set off where all the relevant parties are solvent. Difficulties may arise in the context of insolvency set off under the law of Bermuda, as outlined below.

The basic problem in applying, the insolvency set off principles set out above in the section entitled Bermuda Companies to Bermuda Partnerships is the requirement for mutuality in relation to debits and credits sought to be set off. Only claims owed by and against each general partner (or in the case of joint rights and obligations, group of the same) may be set off if the mutuality requirement is satisfied in respect of each partner (or group of the same). This mutuality requirement will be affected by changes in respect of partners of the partnership, brought about either by agreement amongst the partners (e.g. admissions or withdrawals), or by operation of law as a result of the dissolution, bankruptcy or death of a partner. The effect of such a change in the partnership can only be analysed in the light of the agreement between the partners and the nature of the interests the relevant partners have in the partnership. However, it seems clear that Transactions carried out under the Agreement after such a change in a partnership will not be brought into the same insolvent set off account as those taking place prior to such change, unless:

- (a) The assets of the partnership prior to the change have been assigned to the partnership as constituted immediately after such change; and
- (b) The liabilities existing prior to such change have been novated so that they are liabilities of the partnership as constituted after that change.

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Even where a Bermuda Partnership is structured to achieve the results set out in (a) and (b), we would note that this has not been tested by any judicial authority of which we are aware. However, provided that the necessary assignments and novations referred to in paragraphs (a) and (b) have been complied with, in our opinion, our analysis and opinion as to the enforceability of the netting and set-off provisions of the Agreement should be as set out in the opinion.

In practice, the above complications with respect to maintaining mutuality have more relevance to Bermuda Partnerships that are general partnerships than where a Bermuda Partnership is a limited partnership. Where an Agreement is made with a Bermuda Partnership that is a limited partnership, and a Bermuda Company as general partner executes the Agreement and all Transactions thereunder, mutuality would only be an issue when changes are made to the general partner of the Bermuda Partnership.

The discussion set out above relating to the conversion of delivery obligations and foreign currency conversions would also apply to Bermuda Partnerships.

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## SCHEDULE 2

### Trusts

Subject to the modifications and additions set out in this Schedule 2, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Trusts. For the purposes of this Schedule “Trust” means a trust or unit trust that is a “unit trust scheme”<sup>2</sup> as defined in Section 1 of the Stamp Duties Act 1976 of Bermuda where the named counterparty is a Bermuda Company and acts in its capacity as trustee of the relevant trust or unit trust (“Bermuda Trust”).

There should be no problem applying contractual set off where all the relevant parties are solvent. Difficulties may arise in the context of insolvency set off under the law of Bermuda, as outlined below.

Bermuda trusts give rise to special issues in the event of Insolvency Proceedings. While no definitive opinion is possible based on the current state of the jurisprudence, we consider that (subject to what we say below) insolvency set off likely applies to trusts in the same way as it does to insolvent companies (as described above).

If the position were to be determined by application of insolvency set-off, we consider that the commercial result would **not** be in accordance with the Agreement **unless** the Bermuda counterparty (i) is the beneficial owner of the claims against the other party thereto that arise pursuant to that Agreement, and is personally liable to the other party in respect of each Transaction entered into pursuant thereto and (ii) in entering into each Transaction under such Agreement, each party is acting in the same capacity (and as principal rather than as agent or in any other capacity). Our reasoning is set out in the immediately following paragraphs.

The basic problem in applying the termination and closeout provisions of the Agreement in relation to the Bermuda counterparty in respect of the Bermuda Trust is the

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<sup>2</sup> As a matter of Bermuda law, trusts and unit trusts do not have separate legal personality. It is the trustee of a trust that, pursuant to the powers granted by the terms of the trust deed or settlement establishing or governing the trust, in accordance with those terms and in its capacity as trustee of the trust, will take certain actions in relation to the trust, to bind the assets of the trust.

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requirement of mutuality in relation to debits and credits sought to be netted. Netting and set-off of obligations of the Bermuda counterparty in its capacity as trustee of the Bermuda Trust, where the trustee is personally liable for debts of the Bermuda Trust may only be netted and set off against obligations owed to the Bermuda counterparty in the same capacity. Further, a trustee of a Bermuda Trust is not strictly speaking the person beneficially entitled to debts owed to the trust for the purposes of insolvency set-off and netting mutuality. The trustee is not a beneficial owner of such claims. However, since the trustee has a lien over those claims to the extent of obligations undertaken by him on behalf of the trust, we consider that a Bermuda court would likely hold that the necessary mutuality exists and insolvency set off would apply.

In practice, insolvency of the Bermuda counterparty (as opposed to the trust itself) may not have a substantive impact upon enforcement of rights under the Agreement as it is likely that a liquidator (or similar insolvency representative) of the Bermuda counterparty would be appointed to administer the Agreements upon its insolvency. Alternatively, following insolvency the Bermuda counterparty's obligations in its trustee capacity of a solvent trust could be transferred to a third party, as its replacement. Set-off rights of and against the beneficially entitled parties under the Agreements (the beneficiaries of the solvent Bermuda Trust) would therefore survive the Bermuda counterparty's insolvency.

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## SCHEDULE 3

### Segregated Accounts Companies

Subject to the modifications and additions set out in this Schedule [\*] [(Name)], the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Segregated Accounts Companies. For the purposes of this Schedule), “Segregated Accounts Company” means a Bermuda Company registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 (as amended) where it is acting in respect of a segregated account .

All Transactions to be included for the purposes of set off with a Segregated Accounts Company must be linked to the same segregated account. If that is done, both contractual and insolvency set off will result in all claims being netted into a single net sum payable by one party or the other.

Where the contractual requirements imposed for establishing and maintaining segregated accounts are not established in the constitution of a Segregated Accounts Company or where assets and liabilities are not appropriately allocated in accordance with the contractual intentions of the parties, problems may arise. In such circumstances, there is, in our view, a risk that the parties’ attempts to segregate their dealings and transactions to such segregated account will be unsuccessful or that some of the protections afforded by the Segregated Accounts Companies Act may not be available. Where segregation is not achieved, then the counterparty would be contracting with the general account of the Segregated Accounts Company generally, and insolvency set off would apply to all contracts executed in this manner and to all claims in either directions arising under such contracts. The problem is that in these circumstances there is a possibility that two or more netting or set off accounts will have to be calculated, as described below.

Contractual and insolvency set off rights may be compromised under the hypothesis posed above since some transactions may be allocated to a given segregated account and others may be allocated either to other segregated accounts, or to the general account, of the Segregated Accounts Company. This is so even though, in our opinion, the fact that assets, rights, obligations and liabilities which relate to the Transactions are not successfully segregated to a particular segregated account of a Segregated Account Company will not necessarily affect the enforceability *per se* of the contractual set off provisions as between the Segregated Account Company itself and its counterparty. Following a failed attempt to segregate, the liabilities and rights in relation to a given Transaction will fall into the general account of the segregated

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accounts of the Segregated Accounts Company, which is to say the assets and liabilities of the Segregated Account Company that have not been attributed to a segregated account. As regards all claims by and against the general account of the Segregated Accounts Company, the netting process will operate on the basis set out in the body of this opinion. Only the assets allocated to the general account of the Segregated Accounts Company (being those assets not allocated to a segregated account) will be available to apply towards the settlement of any net sum which the Segregated Account Company is liable to pay as the result of the netting. In these circumstances, it is possible that two (or more) separate netting or set off accounts will have to be calculated: one in respect of claims in either direction under contracts or transactions allocated to the general account of the Segregated Account Company and one (or more) in respect of claims in either direction under any contracts or transactions allocated to any segregated accounts.

Section 24 of the 2000 Act provides that a Segregated Accounts Company registered under that Act shall be wound up in accordance with the provisions of that Act, the 1981 Act and any other Act which applies to the company's winding up, save that in the event of conflict, the provisions of the 2000 Act shall prevail.

The said restrictions will apply both to the voluntary winding up of a Segregated Accounts Company and to petitions for its winding up presented to the Bermuda court by any person. The effect of such restrictions is that consent of the Bermuda Registrar of Companies is required for the winding up to proceed. Further, any Insolvency Representative who is appointed to conduct the winding up will be required to ensure that assets linked to one segregated account are not applied to discharge liabilities linked to any other segregated account (unless the relevant liability is in fact linked to more than one segregated account), and will be obliged to deal with the assets and liabilities of the respective segregated accounts of the Segregated Accounts Company in accordance with the terms of any relevant contracts that are linked to such accounts. In this regard, assets linked to the respective segregated accounts established by a Segregated Accounts Company are deemed to be "owned" by the company as separate funds that are not part of the company's general assets; such assets are instead held subject to the rights and entitlements of parties who have entered into contracts, or who hold securities, that are linked to such accounts.

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## SCHEDULE 4

### Bermuda Insurance Companies

Subject to the modifications and additions set out in this Schedule 4, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Bermuda Insurance Companies. For the purposes of this Schedule, “Bermuda Insurance Company” means a Bermuda Company that is licensed to carry on insurance business, as that term is understood under the Bermuda Insurance Act 1978 (as amended) and the regulations promulgated thereunder (the “Insurance Act”).

Bermuda Insurance Companies operate in a complex legal and regulatory environment, and the precise netting analysis that applies to a given Bermuda Insurance Company can only be determined in light of the specific circumstances of that Bermuda counterparty. Accordingly, in order for non-Bermuda Counterparties to effectively structure their Transactions, it is advisable to seek transactional advice rather than relying on generic advice concerning netting.

#### *Introduction*

There are three types of Bermuda Insurance Companies from a netting perspective, which is determined by the nature of the insurance business the Bermuda Insurance Company is licensed to carry, or otherwise carries, on:

- (a) Bermuda Insurance Companies that carry on general business only (a “**General Business Insurance Company**”);
- (b) Bermuda Insurance Companies that carry on long-term business only (a “**Long-term Business Insurance Company**”); and
- (c) Bermuda Insurance Companies that carry on both general and long-term business (a “**Composite Insurance Company**”).

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a copy of any conditions attached to the Bermuda Insurance Company's licence, which is issued by the Bermuda Monetary Authority.

## *General Business Insurance Companies*

Our opinion as to the enforceability of the Agreement relating to General Business Insurance Companies is as set out above in the body of this opinion, i.e. we are of the opinion that the provisions of the Agreement providing for the netting claims (even upon the insolvency of a General Business Insurance Company) are enforceable under the law of Bermuda.

## *Long-term Business Insurance Companies*

Section 24 of the Insurance Act requires that a Long-term Business Insurance Company must maintain its accounts in respect of that long-term business separate from any accounts it has in respect of any other business. All receipts of a Long-term Business Insurance Company are required to be carried to, and form part of, a special fund with an appropriate name, referred to in the Insurance Act as the 'long-term business fund'. A Long-term Business Insurance Company is required to maintain books of account and other records such that the assets of its long-term business fund and the liabilities of its long-term business can be readily identified at any time. No payment from a Long-term Business Insurance Company's long-term business fund may be made directly or indirectly, other than for a purpose of the Long-term Business Insurance Company's long-term business; notwithstanding any arrangement for its subsequent repayment out of receipts of business, other than the long-term business, except insofar as such payment can be made out of any surplus certified by the Long-term Business Insurance Company's approved actuary to be available for distribution otherwise than to policyholders.

In addition, Section 36 of the Insurance Act applies in any winding up of a Bermuda Insurance Company which immediately before the winding up was carrying on or entitled to carry on long-term business, i.e. Section 36 applies in any winding up of a Long-term Business Insurance Company. Section 36 provides that on any such winding up:-

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- (a) the assets in the insurer's long-term business fund shall be available only for meeting the liabilities of the insurer attributable to its long-term business; and

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- (b) other assets of the insurer shall be available only for meeting the liabilities of the insurer attributable to its other business.

Where the value of the assets in (a) or (b) exceeds the amount of the liabilities mentioned in that paragraph, the restriction imposed does not apply to such of those assets as represents the excess.

Accordingly, subject to the possibility of there being a surplus, the assets in the insurer's long-term business fund shall only be available for meeting the liabilities of the insurer attributable to its long-term business<sup>3</sup>. Thus, for the purposes of netting, in order to preserve the contractual effect of the provisions of the Agreement, particularly in the insolvency of the Long-term Business Insurance Company, all Transactions must either be attributable to the long-term business fund or all transactions must be attributable to the Long-term Business Insurance Company's other business. In other words, Transactions entered into under an Agreement may only be netted and paid out of the fund to which those Transactions are attributed, be it the long-term business fund or the other assets (the general account) of the insurer.

Accordingly, where all Transactions entered into pursuant to an Agreement are attributable to the long-term business fund, then, and save as aforesaid, our opinion as to the enforceability of the Agreement relating to Long-term Business Insurance Companies is as

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<sup>3</sup> It is of note, however, that, in the winding up of a Long-term Business Insurer, a liquidator must, unless the Supreme Court of Bermuda orders otherwise, carry on the long-term business of the insurer with a view to its being transferred as a going concern to another insurer, whether an existing insurer or an insurer formed for that purpose; and, in carrying on that business as aforesaid, the liquidator may agree to the variation of any contracts of insurance in existence when the winding up order is made, but may not effect any new contracts of insurance. Where the insurance business or any part of the insurance business of an insurer has been transferred to an insurer under an arrangement in pursuance of which the first mentioned insurer (the subsidiary insurer) or the creditors thereof has or have claims against the insurer to which the transfer was made (the principal insurer) then, if the principal insurer is being wound up by or under the supervision of the Supreme Court of Bermuda, the Supreme Court must, subject to Section 28 of the Insurance Act of Bermuda, order the subsidiary insurer to be wound up in conjunction with the principal insurer, and may by the same or any subsequent order appoint the same person to be liquidator for the two insurers, and make provision for such other matters as may seem to the Supreme Court of Bermuda to be necessary, with a view to the insurers being wound up as if they were one insurer.

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set out above in the body of this opinion, i.e. we are of the opinion that the provisions of the Agreements providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Long-term Business Insurance Company are enforceable under the law of Bermuda.

Where, however, certain Transactions are not attributable to the long-term business fund, then recourse will lie only as against the general account of the Long-term Business Insurer and as against such assets (if any) as may be credited to its general account at the relevant time. As regards all claims by and against the general account in respect of Transactions not attributable to the long-term business fund, netting will apply.

## *Composite Insurance Companies*

In relation to Composite Insurance Companies, we repeat the statements made above in relation to General Business Insurance Companies and Long-term Business Insurance Companies and, for emphasis, we draw attention to the point that Transactions entered into under an Agreement may only be netted and paid out of the fund to which those Transactions are attributed, be it the long-term business fund or the other assets (the general account) of the Composite Insurance Company.

## General

In the case of all Bermuda Insurance Companies:

The Bermuda Insurance Company's legal capacity to enter into and perform its obligations under the Agreement will not be affected by the fact that it is regulated under the Insurance Act, assuming that its insurance licence exclude or restrict activities of the description contemplated by the Agreement. Absence of such exclusions and restrictions may be readily confirmed from an examination of the Memorandum of Association and Bye-Laws and the insurance licence of the Bermuda Insurance Company.

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The Bermuda Insurance Company's board of directors and managers will be responsible to ensure that its exposure from trading activities under the Agreement does not come into conflict with its Insurance Act obligations for reasons relating to the Bermuda Insurance Company's financial position. In particular, the Bermuda Insurance Company's obligations to meet and maintain the solvency margin and liquidity ratio requirements corresponding to its relevant liabilities under the Insurance Act must be balanced with the contingent obligations under the Agreement to deliver additional Collateral. This balance will be

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dynamic, given likely fluctuations in the Bermuda Insurance Company's exposure under the Agreement and its insurance business, and will require active monitoring. Concern as to maintaining a proper balance will be reduced, to the extent the value of the Bermuda Insurance Company's assets significantly exceed the amount of its Insurance Act requirements.

To the extent the Bermuda Insurance Company cannot meet a demand requiring it to deliver additional Collateral, because such delivery would impair the Bermuda Insurance Company's statutory solvency, then the Bermuda Insurance Company may become insolvent for the purposes of definitions under the Companies Act and/or the Insurance Act. Insolvency could then precipitate insolvent liquidation proceedings against the Bermuda Insurance Company under the Companies Act. Section 161 of the Companies Act provides that a company may be wound up by the Court where (inter alia) it is unable to pay its debts, taking into account contingent and prospective obligations. The Insurance Act also contains an additional test of insolvency for an insurer, which (by virtue of section 33) is deemed to be unable to pay its debts if the value of its assets does not exceed its total liabilities, taking into account contingent and prospective liabilities.

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## SCHEDULE 5

### Individuals

Subject to the modifications and additions set out in this Schedule 5, 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 5, "Individual" means a natural person domiciled in Bermuda.

No substantive qualifications to our general advice apply to individuals. Set off will operate as described in the body of our opinion. Individuals cannot be subject to liquidation proceedings under the Companies Act. They can be subject to bankruptcy proceedings only. Section 37 of the Bankruptcy Act 1989 concerning insolvency set off applies to such proceedings.

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## SCHEDULE 6

### Sovereign Entities

For the purposes of this schedule, "Sovereign Entity" can mean only the government of Bermuda. Since the Sovereign Entity is not subject to either the Companies Act nor the Bankruptcy Act and can create and amend the laws of Bermuda as it sees fit, we do not think it is appropriate to advise concerning the Sovereign Entity.

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### FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the “**Professional Client Agreement 2007**”)
2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the “**Professional Client Agreement 2009**”)
3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the “**Professional Client Agreement 2011**”)
4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the “**Retail Client Agreement 2007**”)
5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the “**Retail Client Agreement 2009**”)
6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the “**Retail Client Agreement 2011**”)
7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the “**Eligible Counterparty Agreement 2007**”)
8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the “**Eligible Counterparty Agreement 2009**”)
9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the “**Eligible Counterparty Agreement 2011**”)

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the “**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,

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where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include 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.

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## ANNEX 2

### DEFINED TERMS RELATING TO THE AGREEMENTS

1. The “**Eligible Counterparty Agreements**” means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).
2. The “**Professional Client Agreements**” means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).
3. The “**Retail Client Agreements**” means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).
4. An “**Equivalent 2011 Agreement without Core Rehypothecation Clause**” means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.
5. “**Core Provisions**” means:
  - (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and
  - (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.
6. “**Rehypothecation Clause**” means:
  - (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
  - (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);

- (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); and
- (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7. “**Security Interest Provisions**” means:

- (a) the “**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*); and
  - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the

foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(b) the “**Power to Charge Clause**”, being:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (*Power to charge*);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (*Power to charge*);
- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (*Power to charge*);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (*Power to charge*);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (*Power to charge*);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (*Power to charge*);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (*Power to charge*);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (*Power to charge*);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (*Power to charge*); and
- (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(c) 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*);

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- (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*); and
  - (x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (d) the “**Power of Appropriation Clause**”, being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (*Power of appropriation*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (*Power of appropriation*);
  - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (*Power of appropriation*);

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- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (*Power of appropriation*);
  - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (*Power of appropriation*);
  - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (*Power of appropriation*);
  - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (*Power of appropriation*);
  - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (*Power of appropriation*);
  - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (*Power of appropriation*); and
  - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (e) the “**Lien Clause**”, being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (*General lien*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (*General lien*);
  - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (*General lien*);
  - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (*General lien*);
  - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (*General lien*);

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- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (*General lien*);
  - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (*General lien*);
  - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (*General lien*);
  - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (*General lien*); and
  - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and
- (f) the “**Client Money Additional Security Clause**”, being:
- (i) 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);
  - (ii) 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);
  - (iii) 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);
  - (iv) 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);
  - (v) 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);

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- (vi) 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);
- (vii) 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);
- (viii) 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);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement); and
- (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).

8. **“Two Way Clauses”** means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

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## ANNEX 3

### 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”) 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 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. 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), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.
4. 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.
5. 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

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termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.

6. 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.
7. 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).
8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.

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