

25 February 2013

Your Ref

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The Futures & Options Association  
2nd Floor  
36-38 Botolph Lane  
London EC3R 8DE

Dear Sirs

## NETTING ANALYSER LIBRARY

### Collateral Opinion – British Virgin Islands

You have asked us to give an opinion in respect of the laws of the British Virgin Islands ("**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. References to "**Core Provisions**" include Core Provisions that have been modified by Non-Material Amendments.

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.

#### 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<sup>1</sup> ("**BVIBCs**") (but not segregated portfolio companies which are dealt with separately in Schedule 1 (*Segregated portfolio companies*))

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<sup>1</sup> Identified by any of the following in the last part of the name: "Limited", "Corporation" or "Incorporated", "Société Anonyme" or "Sociedad Anonima", "Ltd", "Corp", "Inc" or "S.A.", or in the case of an unlimited company "Unlimited" or "Unltd", or any other word or words, or abbreviations thereof, as may be specified in any regulations promulgated under the BVIBC Act.

incorporated, continued or re-registered<sup>2</sup> under the BVI Business Companies Act 2004 (the “**BVIBC Act**”); and

1.1.2 in respect of Parties which are banks/financial institutions incorporated under the BVIBC Act and licensed under the Banks and Trust Companies Act 1990 (the “**BTCA**”),

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

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

1.2.1 Segregated portfolio companies incorporated or registered as such under the BVIBC Act (Schedule 1 (*Segregated portfolio companies*));

1.2.2 Investment firms/broker dealers incorporated under the BVIBC Act or organised under the Partnership Act 1996 (the “**Partnership Act**”) and licensed to carry out investment business under the Securities and Investment Business Act 2010 (the “**SIBA**”) (Schedule 5 (*Investment firms/broker dealers*));

1.2.3 Partnerships organised under the Partnership Act (Schedule 2 (*Partnerships*));

1.2.4 Insurance companies/providers<sup>3</sup> incorporated under the BVIBC Act and licensed under the Insurance Act 2008 (the “**Insurance Act**”) (Schedule 6 (*Insurance companies/providers*));

1.2.5 Individuals (Schedule 4 (*Individuals*));

1.2.6 Funds incorporated under the BVIBC Act or organised under the Partnership Act and where relevant licensed as mutual funds under the SIBA (Schedule 7 (*Funds*));

1.2.7 Parties organised as BVIBCs, partnerships or individuals acting as trustees of trusts settled in the British Virgin Islands and regulated by the Trustee Act (Cap 303) (the “**Trustee Act**”) and where relevant the Virgin Islands Special Trusts Act 2003 (the “**VISTA**”) (Schedule 3 (*Trusts*));

1.2.8 Charitable trusts/bodies organised as BVIBCs, partnerships or trusts (Schedule 8 (*Charitable trusts/bodies*)); and

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<sup>2</sup> Companies originally incorporated (i) under the International Business Companies Act (Cap 291) and re-registered under the BVI Business Companies Act either voluntarily before 30 November 2006 or automatically on 1 January 2007 or (ii) under the Companies Act (Cap 285) and re-registered under the BVI Business Companies Act either voluntarily before 1 January 2009 or automatically on 1 January 2009.

<sup>3</sup> Note the specific statutory limitations on the ability of an insurance company to enter into guarantees, provide security or invest or trade in derivatives described in Schedule 7 (*Insurance companies*).

- 1.2.9 Pension entities incorporated under the BVIBC Act or organised under the Partnership Act 1996 and where relevant licensed as mutual funds under the SIBA (Schedule 9 (*Pension entities*)),

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:

- (a) which is governed by the law of England and Wales;
- (b) which has broadly similar function to any of the Agreements listed in Annex 1;
- (c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and
- (d) 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);

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:

- (i) sale and application of proceeds of the sale of Collateral against monies owed, or
- (ii) 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;
- 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 its governing laws.
- 2.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.
- 2.3 That the Security Interest Provisions are effective under the law of the place where the Collateral is located to create an enforceable security interest.
- 2.4 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.
- 2.5 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.
- 2.6 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.
- 2.7 That the Agreement has been properly executed by both Parties.
- 2.8 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party.
- 2.9 At the time at which the Agreement is entered into, neither Party has actual notice of the insolvency of the other party.

- 2.10 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.
- 2.11 That the Agreement accurately reflects the true intentions of each Party.
- 2.12 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.
- 2.13 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.
- 2.14 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.
- 2.15 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.
- 2.16 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.
- 2.17 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.18 That neither Party has been made subject to United Nations or European Union sanctions as implemented under the laws of the British Virgin Islands.

### 3. **OPINIONS**

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 **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, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.
- 3.1.2 There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral<sup>4</sup>.

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<sup>4</sup> Our view is that Part XVII is intended to uphold collateral provisions on their terms notwithstanding any moratorium provisions arising under any insolvency provisions. However, it remains to be seen how a court would treat (i) an application for a moratorium order as part of a creditor's arrangement under section 51 of the Insolvency Act or (ii) if

3.1.3 Following exercise of the Firm's rights under the Security Interest Provisions, the Firm's rights in respect of the proceeds of realisation of the Collateral would rank ahead of the interests of the Counterparty therein. However the British Virgin Islands has statutory priority provisions (see Annex 6 (*Security interests*)) which would ordinarily be applied by a British Virgin Islands court to determine the priority of creditors secured by the same assets. Where contractual provisions conflict with these priority provisions, a British Virgin Islands court would ordinarily apply the British Virgin Islands rules in preference to the contractual provisions (whether the governing law of the Agreement were British Virgin Islands law or otherwise) and may do so even where Part XVII applies. We believe the better view is that Part XVII should be construed to protect the right to enforce such collateral arrangement even where a security interest exists over the collateral that would have priority under the statutory priority rules set out in the BVIBC Act: however there is no judicial guidance available to support this interpretation and a BVI court might therefore find otherwise.

### 3.2 Further acts

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.

## 4. QUALIFICATIONS

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

- 4.1 See Annex 5 (*Netting and set-off*) for a summary of statutory provisions relating to the close-out of financial contracts in the British Virgin Islands.
- 4.2 See Annex 6 (*Security interests*) for a summary of the law relating to the creation, perfection and priority of security interests in the British Virgin Islands.
- 4.3 Under British Virgin Islands conflicts of laws principles, which are substantially the same as those under English law, the ability to substitute collateral is a matter for the governing law of the Agreement. Although the right of substitution without consent would suggest characterisation of a security interest as a floating charge<sup>5</sup>, this should not be the case where consent of the collateral taker is required for substitution. Again British Virgin Islands law is the same as English law in this respect.
- 4.4 We do not believe there is any reason in principle why a British Virgin Islands court would seek to interfere with a right of re-use or rehypothecation if it is valid as a matter of the governing law. The position under British Virgin Islands law with regard to this issue is the

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administration is brought into force, an automatic moratorium under section 83 of the Insolvency Act. Where Part XVII does not apply Transactions would be subject to avoidance as a preference or as a transaction at an undervalue: however on the basis of the assumption at paragraph 2.10, this would be inapplicable.

<sup>5</sup> An important point to note is that the BVIBC registration regime is not affected by this characterisation. However a floating charge may be subordinated to the costs and expenses of liquidation and preferential creditors and may lose its priority to a subsequent fixed charge where there is no prohibition or restriction on the power of the security provider to create any future charge ranking in priority to or equally with the charge. In addition concerns may arise in respect of non-corporate entities (see Schedules 2 to 4).

same as the position under English law: the courts of equity were historically hostile towards any provision which might interfere with a mortgagor's right to have the property re-conveyed to it, but it is now accepted that parties may agree that a secured party is to have power of sale even without default and such an agreement is not void as impairing the equity of redemption which simply attaches to the proceeds of sale. However where neither governing law nor *lex situs* of the collateral is the British Virgin Islands we consider it unlikely that a British Virgin Islands court would be required to consider the question.

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

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' 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.

Yours faithfully  
HARNEY WESTWOOD & RIEGELS

A handwritten signature in blue ink, appearing to read "Harney Westwood & Riegels", with a long horizontal flourish extending to the right.

**SCHEDULE 1**  
**Segregated portfolio companies**

For the purposes of this Schedule 1 (*Segregated portfolio companies*), "SPC" means a BVIBC incorporated or registered with the approval of the British Virgin Islands Financial Services Commission as a segregated portfolio company. A SPC is a specific type of BVIBC which is formed with one or more portfolios, each of which is required to be designated with the words "Segregated Portfolio". The assets and liabilities which are attributable to a particular portfolio are compartmentalised and are treated separately from assets and liabilities attributable to each other portfolio, and from assets and liabilities which are the general assets and liabilities of the SPC (ie assets of the company which are not attributable to a particular portfolio). Only insurance companies<sup>6</sup> or funds regulated as Mutual Funds<sup>7</sup> under SIBA may be organised as SPCs.

Subject to our comments in respect of the segregation of assets and liabilities above, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are segregated portfolio companies.

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<sup>6</sup> See Schedule 7 (*Insurance companies*).

<sup>7</sup> See Schedule 8 (*Funds*).

## **SCHEDULE 2**

### **Partnerships**

For the purposes of this Schedule 2 (*Partnerships*), "**Partnership**" means a partnership or limited partnership formed or regulated under the Partnership Act. Partnerships are not separate legal entities under British Virgin Islands law.

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.

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. ADDITIONAL QUALIFICATIONS**

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

- 1.1 The registration and statutory priority rules summarised in Annex 6 (*Security interests*) are not applicable to partnerships and questions of priority would generally be determined in accordance with the common law (which under conflicts of law rules would generally mandate the *lex situs* for determining priority). There is some question as to whether security created under a document executed by a partner on behalf of the partnership should be registered against the partner where the partner is itself a BVIBC. The generally accepted view is that registration is not appropriate where the assets are not beneficially owned by the BVIBC (as is the case where it acts as partner), but equally there is nothing to prevent registration against the partner and undoubtedly some secured lenders will have chosen to do so.
- 1.2 We have reservations as to the ability of unincorporated entities to create valid floating (as opposed to fixed) charges. While we take the view that characterisation as a floating charge is unlikely given the requirement for consent to substitution, if there is any question as to the degree of control over the secured assets of the secured party, care should be taken when dealing with partnerships.

## SCHEDULE 3

### Trusts

For the purposes of this Schedule 3 (*Trusts*), "**Trustee**" means a BVIBC, partnership or individual acting as trustees of a trust settled in the British Virgin Islands and regulated by the Trustee Act and where relevant the VISTA.

Subject to the modifications and additions set out in this Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Trustees.

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. ADDITIONAL ASSUMPTIONS

- 1.1 That the trustees are entitled to recourse against trust assets in respect of any liability arising under transactions entered into as trustee.
- 1.2 If any trustees are providing trust services in or from the British Virgin Islands that they are duly licensed under the BTCA or are exempt from the requirement to obtain a trust license by virtue of the Financial Services (Exemptions) Regulations 2007.
- 1.3 That the trust instrument confers sufficiently wide power on the trustees to enter into Transactions<sup>8</sup>.
- 1.4 Where the proper law of the trust is British Virgin Islands law, that the trust instrument has been stamped with applicable British Virgin Islands trust duty (failing which it may be inadmissible in a British Virgin Islands court).

#### 2. ADDITIONAL QUALIFICATIONS

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

- 2.1 The registration and statutory priority rules summarised in Annex 6 (*Security interests*) are not applicable to trusts and questions of priority would generally be determined in accordance with the common law (which under conflicts of law rules would generally mandate the *lex situs* for determining priority). There is some question as to whether security created under a document executed by a trustee on behalf of the trust should be registered against the trustee where the trustee is itself a BVIBC. The generally accepted view is that registration is not appropriate where the assets are not beneficially owned by the BVIBC (as is the case where it acts as trustee), but equally there is nothing to prevent registration against the trustee and undoubtedly some secured lenders will have chosen to do so.

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<sup>8</sup> Section 3 of the Trustee Act permits a trustee to invest trust funds "in any kind of investments" wherever situate, as long as "he exercises the diligence and prudence that a reasonable person would be expected to exercise in making an investment as if it were his own money". There are no decided authorities in the British Virgin Islands but it is doubtful the extent to which the usual prudent man of business rule would be construed to permit British Virgin Islands trustees to enter into derivative transactions.

2.2 We have reservations as to the ability of unincorporated entities to create valid floating (as opposed to fixed) charges. While we take the view that characterisation as a floating charge is unlikely given the requirement for consent to substitution, if there is any question as to the degree of control over the secured assets of the secured party, care should be taken when dealing with trusts.

## **SCHEDULE 4**

### **Individuals**

For the purposes of this Schedule 4 (*Individuals*), "**Individual**" means an individual (a) ordinarily resident in the British Virgin Islands, (b) personally present in the British Virgin Islands, (c) carrying on a business in the British Virgin Islands either personally or by way of an agent or manager, (d) who is a member of a partnership carrying on a business in the British Virgin Islands by means of a partner or partners or of an agent or manager, (e) with a place of residence in the British Virgin Islands, (f) having or appearing to have assets in the British Virgin Islands or (g) in respect of whom there is a reasonable prospect that the making of a bankruptcy order will benefit their creditors.

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.

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. ADDITIONAL QUALIFICATIONS**

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

- 1.1 The registration and statutory priority rules summarised in Annex 6 (*Security interests*) are not applicable to individuals and questions of priority would generally be determined in accordance with common law (which under conflicts of law rules would generally mandate the *lex situs* for determining priority).
- 1.2 We have reservations as to the ability of unincorporated entities to create valid floating (as opposed to fixed) charges. While we take the view that characterisation as a floating charge is unlikely given the requirement for consent to substitution, if there is any question as to the degree of control over the secured assets of the secured party, care should be taken when dealing with individuals.

**SCHEDULE 5**  
**Investment firms/broker dealers**

For the purposes of this Schedule 6 (*Investment firms/broker dealers*), "**Investment firm/broker dealer**" means an entity organised as a BVIBC, partnership or trust and licensed to carry on investment business under the SIBA.

Subject to any modifications and additions set out in, where appropriate Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment firms/broker dealers.

**SCHEDULE 6**  
**Insurance companies/providers**

For the purposes of this Schedule 7 (*Insurance companies*), "**Insurance company**" means an insurance company organised as a BVIBC (including as a segregated portfolio company) and licensed under the Insurance Act.

Subject to the modifications and additions set out in this Schedule 7 (*Insurance companies*) and where appropriate Schedule 1 (*Segregated portfolio companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance companies.

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. ADDITIONAL QUALIFICATIONS**

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

- 1.1 The Insurance Act provides that a British Virgin Islands insurance company "shall not invest or trade in a derivative without the prior written approval of the [Financial Services] Commission". The Regulatory Code 2009 provides that as part of the application for an insurance license, the business plan should include among other things "any plans that the applicant has to purchase or sell derivatives" (a "derivative" being defined in the Regulatory Code as "an option, a future or a contract for differences"). Properly therefore such approval would have been obtained at the time of licensing. If an insurance company were to invest or trade in a derivative without consent, any agreement to that effect would be unenforceable against the counterparty under the Financial Services Commission Act, 2001. Note however that the agreement would still be enforceable against the insurance company by the counterparty, which would also be entitled to recover from the insurance company any money or other property paid or transferred by it under the agreement, as well as compensation for any loss.
- 1.2 The Insurance Act also provides that an Insurance company may not enter into any guarantee or provide any security in connection with a loan by any other person to a connected person without the approval of the Financial Services Commission. While this would not normally be problematical for futures or options, care should be taken where there is any third party benefit to the security granted under the Agreements.

## SCHEDULE 7 Funds

For the purposes of this Schedule 8 (*Funds*), “**Fund**” means an entity organised as a BVIBC (including as a segregated portfolio company), partnership or trust for investment purposes and “**Mutual Fund**” means a Fund regulated as a mutual fund<sup>9</sup> under the SIBA.

Subject to any modifications and additions set out in, where appropriate Schedule 1 (*Segregated portfolio companies*), Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Funds whether licensed as Mutual Funds or not.

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<sup>9</sup> A mutual fund is an entity which (a) collects and pools investor funds for the purpose of collective investment and (b) issues shares that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the entity. Investment funds which are not mutual funds are not subject to additional licensing requirements.

## SCHEDULE 8 Charitable trusts/bodies

For the purposes of this Schedule 9 (*Charitable bodies*), “**Charitable body**” means an entity organised as a BVIBC, partnership or trust for charitable purposes. It excludes any organisation licensed under the BTCA and any charitable or non-charitable purpose trust where the trustee is licensed under the BTCA<sup>10</sup>, as to which see Schedule 5 (*Banks/financial institutions*).

Subject to any modifications and additions set out in this Schedule 9 (*Charitable bodies*) and where appropriate Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Charitable bodies.

### 1. ADDITIONAL QUALIFICATIONS

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

- 1.1 In 2012 the British Virgin Islands passed the Non-profit Organisations Act, 2012 (the “**NPOA**”) which regulates the activities of charitable bodies in the British Virgin Islands. While it is not known when the NPOA will be brought into force. The NPOA is not expected to affect the conclusions of this opinion letter.

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<sup>10</sup> In other words, this schedule applies only to true charities, not financial structures that use charitable purposes to achieve orphan status.

**SCHEDULE 9**  
**Pension entities**

For the purposes of this Schedule 10 (*Pension entities*), “**Pension entity**” means an entity organised as a BVIBC (including as a segregated portfolio company), partnership or trust for collective investment of pension contributions, which may be regulated as a Mutual Fund<sup>11</sup> under the SIBA.

Subject to any modifications and additions set out in, where appropriate Schedule 1 (*Segregated portfolio companies*), Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Pension Entities whether licensed as Mutual Funds or not.

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<sup>11</sup> See Schedule 8.

**ANNEX 1**  
**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, 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.

**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. "**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).
7. "**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);
8. "**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*);
  - (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*);
  - (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*);

- (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);
  - (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).

9. "**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.

**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 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.

**ANNEX 5**  
**NETTING AND SET-OFF**

- 1.1 Insolvency set-off is regulated under Part V (*Provisions applicable to the liquidation of companies and the bankruptcy of individuals*) of the Insolvency Act and is applicable to BVIBCs, foreign companies and individuals. Specifically Section 150 provides for set-off of mutual credits and debts incurred prior to the commencement of liquidation.
- 1.2 Part XVII (*Netting and Financial Contracts*) of the Insolvency Act (“**Part XVII**”), based on the ISDA model netting act<sup>12</sup>, provides that notwithstanding anything contained in the Insolvency Act, the insolvency rules promulgated under the Insolvency Act or in any rule of law relating to insolvency, provisions relating to netting and set off under a netting agreement are enforceable against each party to that contract.
- 1.3 Section 150 of the Insolvency Act is expressly made subject to Part XVII, and so if the insolvency set-off rules were to produce a different result from the netting provisions of a “netting agreement”, the netting provisions would prevail.
- 1.4 A “netting agreement” is defined in Part XVII as an agreement between two parties only, in relation to present or future financial contracts between them the provisions of which include the termination of those contracts for the time being in existence, the determination of the termination values of those contracts and the set-off of the termination values so determined so as to arrive at a net amount due.
- 1.5 For the purposes of Part XVII of the Insolvency Act, a financial contract is a contract, including any terms and conditions incorporated into any such contract, pursuant to which payment or delivery obligations that have a market or an exchange price are due to be performed at a certain time or within a certain period of time.
- 1.6 Without limiting paragraph 1.5, the following are financial contracts:
  - (a) a currency, cross-currency or interest rate swap agreement;
  - (b) a basis swap agreement;
  - (c) a spot, future, forward or other foreign exchange agreement;
  - (d) a cap, collar or floor transaction;
  - (e) a commodity swap;
  - (f) a forward rate agreement;
  - (g) a currency or interest rate future;
  - (h) a currency or interest rate option;

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<sup>12</sup> The ISDA model netting act was amended in 2007 specifically to provide for margin lending. Part XVII has not been amended to reflect those changes.

- (i) equity derivatives, such as equity or equity index swaps, equity options and equity index options;
- (j) credit derivatives, such as credit default swaps, credit default basket swaps, total return swaps and credit default options;
- (k) energy derivatives, such as electricity derivatives, oil derivatives, coal derivatives and gas derivatives;
- (l) weather derivatives, such as weather swaps or weather options;
- (m) bandwidth derivatives;
- (n) freight derivatives;
- (o) carbon emissions derivatives;
- (p) a spot, future, forward or other commodity contract;
- (q) a repurchase or reverse repurchase agreement;
- (r) an agreement to buy, sell, borrow or lend securities, such as a securities lending transaction;
- (s) a title transfer collateral arrangement;
- (t) an agreement to clear or settle securities transactions or to act as a depository for securities;
- (u) any other agreement similar to any agreement or contract referred to in paragraphs (a) to (t) with respect to reference items or indices relating to (without limitation) interest rates, currencies, commodities, energy products, electricity, equities, weather, bonds and other debt instruments and precious metals;
- (v) any derivative or option in respect of, or combination of, one or more agreements or contracts referred to in paragraphs (a) to (u); and
- (w) any agreement or contract designated as such by the [British Virgin Islands Financial Services] Commission.

## ANNEX 6 SECURITY INTERESTS

### 1.1 Creation

The British Virgin Islands courts would generally recognise the validity of a security interest if that security interest was valid under the governing law of the relevant Agreement. Subject to what follows therefore the security interest would be enforceable in the British Virgin Islands.

The laws of the British Virgin Islands do not impose any additional requirements of form or otherwise for the recognition or validity of a security interest created by a British Virgin Islands entity (except where the security is over shares in a BVIBC<sup>13</sup>).

We have reservations as to the ability of unincorporated entities to create valid floating (as opposed to fixed) charges.

### 1.2 Perfection

Under British Virgin Islands rules of private international law, the relevant law governing the perfection of a security interest granted in an asset is the law of the place of the location of the asset at the time such security interest attaches to the asset.

- (a) Cash will be considered to be located in the place where the entity with which the cash is deposited is located<sup>14</sup>.
- (b) British Virgin Islands law would ordinarily consider the location of a directly held, registered certificated security to be the place where the register is located and that of a directly held, bearer, physically certificated security to be the place where the certificate is located. For the purposes of determining matters relating to title and jurisdiction, the location of the ownership of shares, debt obligations or other securities of a BVIBC is the British Virgin Islands<sup>15</sup>.

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<sup>13</sup> If the collateral comprises shares in a BVIBC, in order to create a valid mortgage or charge, the BVIBC Act requires that there must be a written instrument which clearly indicates (a) the intention to create a mortgage or charge; and (b) the amount secured by the mortgage or charge or how that amount is to be calculated. Where the collateral comprises bearer shares in a BVIBC the share certificates must be deposited with a custodian which is either recognised or authorised by British Virgin Islands law. However, the BVIBC Act also expressly provides that the parties may select their own law to govern the instrument and that in such an event the rights and remedies of the mortgage or charge are to be determined by the governing law. The difficulty that may sometimes arise is that a number of foreign laws (including English law) provide that matters relating to the constitution of companies are so intimately connected with the country of incorporation that they must fall to be adjudicated by that country's law. Our view is that British Virgin Islands law mandates the application of the foreign law chosen by agreement, even when the consequence is that the foreign jurisdiction would apply British Virgin Islands law in its own courts.

<sup>14</sup> *Arab Bank v Barclays Bank (Dominion, Colonial and Overseas)* 1954 AC 495

<sup>15</sup> Section 245 of the BVIBC Act

- (c) In relation to securities held indirectly or on a fungible basis with or through a custodian or securities depository a British Virgin Islands court is likely to adopt the “place of the relevant intermediary approach” (“**PRIMA**”)<sup>16</sup>.
- (d) In the case of contract rights a British Virgin Islands court would, subject to certain restrictions such as public policy issues and any attempt to contract out of statutory provisions regarding title and location of shares debts and securities, look to the governing law of the underlying contract for issues of perfection.

### 1.3 **Priority**

A British Virgin Islands court would apply British Virgin Islands rules<sup>17</sup> as summarised below to questions of priority.

#### *BVIBCs*

In respect of a BVIBC, these can be summarised as follows.

- (a) A charge entered in the register of registered charges maintained in respect of the BVIBC at the British Virgin Islands Registry of Corporate Affairs (the “**Register of Registered Charges**”) has priority over any subsequently registered charge over the same assets.
- (b) Priorities between unregistered security interests are determined by the common law<sup>18</sup>. The rules can be summarised as follows:
  - (i) a security interest in the nature of a legal estate acquired for value without notice of a security interest in the nature of an equitable interest takes priority over that equitable interest;
  - (ii) as between themselves, security interests which are in the nature of a legal estate rank in order of creation; and
  - (iii) as between themselves, security interests which are in the nature of equitable interests rank in order of the giving of notice to the holder of the legal estate<sup>19</sup>.

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<sup>16</sup> As set out in the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary.

<sup>17</sup> We note that there is a possibility that a British Virgin Islands court would not consider itself the appropriate forum for enforcement proceedings in respect of the collateral located outside the British Virgin Islands. Therefore, it will be a matter for the conflict of laws rules applicable in the jurisdiction in which enforcement is sought as to whether British Virgin Islands priority rules would be relevant. Further, even if the British Virgin Islands court accepts such jurisdiction, as ultimate enforcement proceedings in respect of the collateral will by necessity take place in the jurisdiction of the location of the asset, it will be a matter for the conflict of laws rules applicable in such jurisdiction as to whether British Virgin Islands priority rules or a British Virgin Islands court judgment based on British Virgin Islands priority rules would be relevant to enforcement.

<sup>18</sup> We believe the correct analysis is that, where a British Virgin Islands court would apply common law rules (as opposed to the statutory priority rules), they would also look to other principles of substantive law. Therefore in practice, the issues raised by the common law rules would prove academic as a British Virgin Islands court would defer questions of priority to the *lex situs* through application of conflict of laws rules. We note however that this point has never been tested in the British Virgin Islands courts.

- (c) The order of priorities is subject to the express consent of the holder of a prior charge or agreement between creditors.
- (d) A registered floating charge is postponed to a subsequently registered fixed charge unless the floating charge contains a prohibition or restriction on the power of the BVIBC to create any future charge ranking in priority to or equally with the charge<sup>20</sup>.

### *IBCs*

Charges created by a BVIBC in its previous corporate form as an International Business Company (“**IBC**”) are subject to the priority rules applicable to IBCs.

- (a) Fixed security took priority over floating security save for cases described in (c) below.
- (b) Security interests created before 1 January 1991 had priority over all security interests created on or after 1 January 1991 and as between themselves ranked in order of creation.
- (c) Where an IBC created a register of mortgages, charges and other encumbrances (an “**IBC Register of Charges**”), all security interests recorded in the IBC Register of Charges took priority over all security interests which had not been entered in the IBC Register of Charges (except for security interests created prior to 1 January 1991) and as between themselves rank in order of their entry into the IBC Register of Charges, whether they are characterised as fixed or floating security interests.
- (d) Priorities between unregistered security interests created on or after 1 January 1991 were determined by the common law rules outlined above.

### *Transitional priority rules for a BVIBC that was formerly an IBC*

Priority of charges between those created by a BVIBC and those created by a BVIBC in its previous corporate form as an IBC are a matter for transitional provisions.

- (a) Charges registered in the IBC Register of Charges have priority over subsequent charges.
- (b) Our view as to the priority between unregistered charges created by a BVIBC in its previous corporate form as an IBC and charges entered in the Register of Registered Charges under the BVIBC regime is that, notwithstanding registration in the Register of Registered Charges, priority is determined in accordance with the common law rules outlined above.

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<sup>19</sup> *Dearle v Hall* (1828) 3 Russ. Therefore as a matter of British Virgin Islands law the priority of unregistered security interests created in both contract rights and in securities held indirectly or on a fungible basis with or through a custodian or securities depository would theoretically be determined by notice rather than creation. There is some question however as to how notice is achieved in relation to investment securities: Goode (Legal Problems of Investment Securities, p159 and p170) for example argues that *Dearle v Hall* is inapplicable.

<sup>20</sup> However, we do not believe there is any practical way in which a third party could take such a fixed charge over collateral credited to an account held with the Bank without the knowledge or consent of the Bank.