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Our ref: 20184/09285409

Dear Sirs

### ISDA August 2012 DF Protocol Agreement

We have acted as your counsel as to matters of English law for purpose of this opinion in connection with the ISDA August 2012 DF Protocol Agreement (the "**Protocol**") that you (ISDA) have published. Capitalized terms used in this letter without definition have the meanings given to those terms in the Protocol.

The purpose of the Protocol is to enable parties to enter into new Protocol Covered Agreements or supplement the terms of existing Protocol Covered Agreements.

This opinion relates only to matters governed by English law and is confined to such matters.

#### 1. **The Protocol**

The Protocol provides an agreed mechanism (the "**DF mechanism**") whereby parties may amend certain existing agreements or enter into certain new agreements by the subsequently agreed exchange of certain documents in specified manners.

Through the execution, followed by online delivery to ISDA, of an Adherence Letter on or before the Adherence Cut-off Date, a party may adhere to the Protocol. The Adherence Letter must be substantially in the form attached as an exhibit to the Protocol, and it appoints ISDA as the relevant Protocol Participant's agent for the limited purposes of the Protocol. A Protocol Participant may not specify additional provisions, conditions or limitations in its Adherence Letter. ISDA, as agent, may determine in good faith that a purported adherence that is not in compliance with the Protocol is void.

In order to adhere to the Protocol, a Protocol Participant is required to access the "Protocol Management" section of the ISDA website to enter information online that is required to generate its form of Adherence Letter and to submit payment of any applicable fee. Each

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Protocol Participant will print, sign and upload the signed Adherence Letter as a PDF attachment into the Protocol Management system. Once ISDA has reviewed and accepted the signed Adherence Letter, it will provide e-mail confirmation to the Protocol Participant of the Protocol Participant's adherence to the Protocol. ISDA intends to display electronically on its website a record of each Adherence Letter it accepts. Adherence to the Protocol is open until the Adherence Cut-off Date. ISDA will have the right, in its sole and absolute discretion, to designate the Adherence Cut-off Date.

## 2. Analysis

We believe that, in respect of any two Protocol Participants, the mechanism contemplated by the Protocol for entry into the Protocol is effective under English law principles of contractual formation to create the DF mechanism for further agreement either to amend an existing agreement or enter into a new agreement.

Where the parties have entered into a Protocol Covered Agreement prior to the later of the two parties adhering to the Protocol, the Protocol, notwithstanding that it is a multilateral agreement, is sufficiently clear and certain in its operation as between any two Protocol Participants that it operates as a mutually agreed modification to their existing contractual arrangements incorporating the DF mechanism.<sup>1</sup> In the case of the ISDA 2002 and 1992 edition master agreements (the "**Master Agreements**"), helpful support for the mechanism contemplated by the Protocol for entry into the Protocol is provided by the Master Agreements themselves, since they expressly contemplate that they may be amended and modified from time to time. Their modular architecture provides an open-ended framework to facilitate the ongoing trading relationship of the parties.

Section 9(b) of the Master Agreements provides that an amendment to, or modification of, the agreement may be made if it is in writing and executed by each of the parties and Section 9 (e) contemplates amendments and modifications that are executed and delivered in counterparts. We are of the view that the signature by each of the two Protocol Participants of their respective Adherence Letters and the uploading of them as PDF attachments into the Protocol Management System satisfies the requirements of Section 9(b) and constitutes the execution and delivery of counterparts as contemplated in Section 9(e). We are further of the view that to the extent an English court were to consider that, contrary to our view, the mechanism for entry into the Protocol does not otherwise comply with Section 9(b), the Protocol would be interpreted by an English court as effecting an implicit amendment to, or waiver of, Section 9(b) to allow this modification of the relevant Master Agreement in this manner.

If, however, the Protocol Participants have not yet entered into a Protocol Covered Agreement, there is nothing to prevent them from entering into an agreement, such as that comprised in the Protocol.

To the extent English law on contractual formation is relevant, the procedure for entry into the Protocol contemplated by the Protocol is clearly founded, in our view, on the traditional

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<sup>1</sup> This modification might in our view be construed as an amendment to the existing contractual arrangements of each pair of Protocol Participants or as a collateral contract (between those parties amongst others) operating alongside them. We do not consider that anything turns on this distinction in this context and in the remainder of this opinion we assume that it would be construed as an amendment.

doctrine of offer and acceptance. The delivery by a party of an Adherence Letter to ISDA is both an effective offer to each market participant who has yet to adhere to the Protocol and an effective acceptance of the offer made by each other market participant (if any) who has already adhered at that time, in each case on the terms and subject to the conditions of the Protocol. The fact that this occurs in the context of a reasonably elaborate multilateral mechanism does not, in our view, affect the validity of the offer or acceptance as between each pair of Protocol Participants.

3. **Opinion**

On the basis of the foregoing, having regard to such legal considerations as we deem relevant and subject to the assumptions and qualifications set out below, we are of the opinion that the delivery to ISDA of an Adherence Letter before the Adherence Cut-off Date by each of two parties in each case on and subject to the terms set out in the Protocol, will be sufficient under English law to create the DF mechanism as an agreed mechanism to facilitate further agreement to amend an existing agreement or enter into a new agreement between those parties in accordance with the terms of the Protocol.

4. **Assumptions and qualifications**

This opinion is given subject to the following assumptions and qualifications:

- (1) each relevant Protocol Covered Agreement is governed by English law and is, or contains provisions regarding amendments and modifications identical to those found in, a Master Agreement;
- (2) under each applicable law, each Protocol Participant is and was at all relevant times able lawfully to enter into each relevant Protocol Covered Agreement, its entry into each relevant Protocol Covered Agreement was duly authorised and each relevant Protocol Covered Agreement constitutes the legal, valid and binding obligations of each relevant Protocol Participant;
- (3) under each applicable law, each Protocol Participant is able lawfully to adhere to the Protocol on the terms set out in the Protocol, its adherence to the Protocol is duly authorized and each Adherence Letter has been properly completed, executed and delivered to ISDA in accordance with the terms of the Protocol and substantially in the form attached as an exhibit to the Protocol and under the laws of the State of New York, by which it is expressed to be governed, the Protocol constitutes the legal, valid and binding obligations of each relevant Protocol Participant;
- (4) the Protocol reflects correctly the commercial intentions of each Protocol Participant and there is no fact, matter or circumstance relating to any Protocol Participant or pair of Protocol Participants (such as misrepresentation, fraud, undue influence, circumstances giving rise to an estoppel or a separate agreement between them inconsistent with the Protocol) which would or might affect this opinion;
- (5) as between any two Protocol Participants, the later of them to adhere does so prior to the formal commencement of insolvency or reorganisation proceedings against either of them and this opinion is not otherwise affected by the insolvency laws applicable to any Protocol Participant;

- (6) insofar as the Protocol relates to a regulated activity in the United Kingdom, any Protocol Participant that is carrying on, or purporting to carry on, that regulated activity is an authorised person permitted to carry on that regulated activity or an exempt person in respect of that regulated activity under the Financial Services and Markets Act 2000 and no such activity has been entered into in consequence of the communication made in breach of s21 of that Act; and
- (7) insofar as performance in any jurisdiction outside England is contemplated, such performance will not be illegal or invalid by virtue of the laws of that jurisdiction.

This opinion is rendered solely to ISDA for distribution to its members and each other party adhering to Protocol. This opinion may not be distributed to any other person without our prior written consent, except that we consent to ISDA including a copy of this opinion on the "ISDA August 2012 DF Protocol" section of its website for information purposes only. This opinion may also be shown by an ISDA member or another party adhering to the Protocol to a competent regulatory authority for such person for information purposes only, on the basis that we assume no responsibility to such authority or any other person as a result or otherwise.

Yours faithfully

*Mayer Brown International LLP*

**Mayer Brown International LLP**