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ZOG/RVW/VIE-LCH/REPOCLEAR
M.6737113.1

Re: Legal opinion regarding membership, insolvency, set-off, netting and client clearing under Austrian law

Dear Sirs

You have asked us to provide advice in respect of the laws of the Republic of Austria (the "**Relevant Jurisdiction**") with regard to certain questions raised by LCH.Clearnet Limited ("**LCH**") relating to membership, insolvency, set-off, netting and client clearing under the LCH Agreements as defined in section 3.

1. DEFINITIONS

Words and expressions defined in the LCH Agreements (as defined in section 3) shall, unless otherwise defined in this legal opinion or the context otherwise requires, bear the same meaning herein.

In this opinion:

a) a reference to "**Insolvency Proceedings**" is a reference to insolvency proceedings under Austrian law;

b) a reference to "**Reorganisation Measures**" is a reference to pre-insolvency reorganisation, restructuring and/or resolution measures under Austrian law;

c) a reference to "**Relevant Clearing Member**" is a reference to an Austrian entity constituting a Clearing Member (as defined in the General Regulations);

d) a reference to "**Client Contracts**" is a reference to agreements entered into by a Relevant Clearing Member on behalf of a Clearing Client (as defined in the General Regulations); and

e) a reference to "**Parties**" is a reference to LCH and a single Relevant Clearing Member to which this opinion applies, and a reference to "**Party**" is a reference to either of them.

2. MANDATE

We have been requested to render an opinion as to certain matters of law relating to the LCH Agreements as defined in section 3.

Our comments are limited strictly to the laws of Austria as they are in force on the day of this legal opinion and as currently applied and interpreted by the Austrian Supreme Court (*Oberster Gerichtshof*), the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) and the Austrian Constitutional Court (*Verfassungsgerichtshof*) ("**Austrian law**"), and we express no opinion with regard to any law other than Austrian law (even if imported by Austrian private international law).

In this legal opinion Austrian legal concepts are expressed in English terms and not in their original Austrian terms. The translation of these concepts into English may not accurately represent the scope and extent of the respective legal concept in Austria. This legal opinion may therefore only be relied upon under the express condition that any issue of interpretation will be governed by Austrian law. For the avoidance of doubt, we have included in this legal opinion where appropriate in italics the Austrian original language of legal concepts and statutes.

We express no opinion as to whether any of the Parties to any of the Documents will perform any of their obligations thereunder or in relation to the transactions contemplated thereby.

We have not been instructed to (and therefore do not express) any opinion on Austrian tax laws.

We assume no obligation to update or supplement this legal opinion to reflect any facts or circumstances which may after the date hereof come to our attention or any changes in law which may hereafter occur.

3. DOCUMENTS

For the purpose of this opinion we have relied upon the following documents provided to us (the "**Documents**" or "**LCH Agreements**"):

(a) The Clearing Membership Agreement;

(b) The Deed of Charge;

(c) The Security Deed; and

(d) The Rulebook (which includes the General Regulations, Procedures, Settlement Finality Regulations, the Default Rules and the Product Specific Contract Terms and Eligibility Criteria Manual and becomes a contractual arrangement between each clearing member and LCH through entry into the Clearing Membership Agreement);

each in the form provided to us by Clifford Chance LLP on 9 June 2014.

The Documents are the only documents or records we have examined and we have conducted no searches or other enquiries for the purposes of this legal opinion unless explicitly stated otherwise herein.

We express no opinion as to any agreement, instrument or other document other than the Documents.

We have not been responsible for, or assisted in, the investigation or verification of any statements of fact contained in any of the Documents.

4. ASSUMPTIONS

For the purpose of this legal opinion, we have relied solely on facts as they exist as at the date of this legal opinion, and we have made the following assumptions which we have not independently verified and this legal opinion is given on the basis:

4.1 of the authenticity and completeness of all Documents submitted to us;

4.2 that no foreign law affects the conclusions stated in this legal opinion;

4.3 that the terms of the Documents and the procedures set forth therein, will continue to be duly observed by each of the Parties thereto;

4.4 that each agreement and understanding, other than those provisions opined upon, are legally binding;

4.5 that each Party is duly incorporated and has the capacity, power and authority under all applicable laws to enter into the LCH Agreements and to perform its obligations under the LCH Agreements and that each Party has taken all necessary steps to enter into, execute, deliver, be bound by and perform the LCH Agreements, and that such steps have not been revoked or superseded;

4.6 of the truth, accuracy and completeness at all relevant times of each of the statements of matters of fact, including, but not limited to, dates, amounts and numbers contained in the Documents and that all representations and warranties given by any of the Parties to the Documents in relation to factual matters are, and will be, when made or repeated or when deemed made or repeated (as the case may be) true and accurate and any representation or warranty given by any of the Parties to the Documents to the effect that it is not aware of or has no notice of any act, matter, thing or circumstances means that the same does not exist or has not occurred;

4.7 that there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the LCH Agreements;

4.8 that each of the Documents will been entered into on arm's-length-terms by each of the Parties thereto;

4.9 that each Party entering into any of the Documents has all necessary authorisations, licenses and other approvals to carry out any and all acts as explicitly or implicitly contemplated in any of the Documents for such Party;

4.10 in respect of all Parties to the Documents, the obligations of all such Parties thereunder are legal, valid, binding and enforceable under all applicable laws, except for the opinions expressed set forth in section 5;

4.11 of the lack of bad faith and absence of fraud, duress, error, mistake, impossibility of the material basis of each Document or undue influence on the part of any of the Parties to each Document and their respective directors, employees, agents and advisors;

4.12 the Documents do not violate good morals;

4.13 that no documents, agreements or arrangements have been or will be entered into by the Parties to the Documents (other than those explicitly referred to in this legal opinion) which could affect our opinions expressed herein;

4.14 that all preconditions, conditions precedent for the Documents coming into force or suspensive conditions under the Documents will be met and completely and finally satisfied or fully and unconditionally waived;

4.15 that, insofar as any obligations under the Documents are to be performed in any jurisdiction outside of Austria, their performance will not be illegal or ineffective by virtue of the law of that other jurisdiction;

4.16 that (i) on the date hereof and (ii) except where an opinion is rendered that makes explicit reference to such incidents, on any relevant date of any transaction or operation contemplated in any of the Documents:

a) no application or decision for the commencement of insolvency or administration or reorganization proceedings or a winding-up order has been made in relation to each Party;

b) no voluntary winding up resolution or petition has been presented, ordered or made and no such resolution or petition has been rejected on grounds of insufficiency of assets by a court or by direct application of Austrian law or elsewhere for the winding-up, dissolution or administration of a Party and no winding-up has occurred by operation of law;

4.17 that LCH constitutes at all times a recognized clearing house (*anerkannte Clearingstelle*) within the meaning of sec 2 no 33 Austrian Banking Act (*Bankwesengesetz – BWG*);

4.18 that LCH constitutes a central counterparty and clearing house within the meaning of article 2 lit c – e of the Directive 98/26/EC on settlement finality in payment and

securities settlement systems ("**Finality Directive**", as amended by Directive 2009/44/EC);

4.19 that LCH constitutes a system within the meaning of sec 2 para 1 of the Austrian Finality Act (*Finalitätsgesetz*) and has been notified as such to the European Commission pursuant to article 10 para 1 of the Finality Directive;

4.20 each Relevant Clearing Member has the capacity, power and authority to create the security constituted by the relevant Documents and that each Relevant Clearing Member has the capacity, power and authority to enter into and to exercise its rights and to perform its obligations under the relevant Documents;

4.21 that the consent of the statutory bodies of the Relevant Clearing Members according to applicable law and the articles of association was obtained before entering the LCH agreements;

4.22 all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreements under the laws of any jurisdiction other than Austria have been duly fulfilled, performed and effected;

4.23 that no Party to the LCH Agreements will be considered a consumer (*Verbraucher*) according to sec 1 of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*); and

4.24 no circumstances exist which would indicate that or give reason to inquire further whether or not each Party is in a situation similar to any of the situations as described above.

5. OPINIONS

The following opinions apply to each service offered by LCH (i.e. LME Clearing, the SwapClear Service, the RepoClear Service, the EquityClear Service, the LCH Enclear OTC Service, the Turquoise Derivatives Service, the Nodal Service, the ForexClear Service, the NLX Service and the FEX Service).

After having reviewed the Documents, and subject to the assumptions stated in section 4 above and the qualifications set out in section 6 below, as well as subject to any matters not disclosed to us, we are of the following opinion as at the date hereof:

5.1 General

5.1.1 *Are there any statutory limitations on the capacity of, or specific regulatory requirements associated with, any Relevant Clearing Member entering into the LCH Agreements (including for the purpose of granting of security under the Deed of Charge)?*

Ordinary trading corporation

For the purpose of this review, we will define the term ordinary trading corporation as meaning Austrian corporations (*Kapitalgesellschaften*) only. They may be legally organized as a joint stock corporation (*Aktiengesellschaft – AG*) or as a limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*). European Companies (*Societas Europaea*), which are established pursuant to the European Council Regulation EC/2157/2001 will not be included in this definition.

The term ordinary trading corporations for the purpose of this opinion shall also not include financial institutions (banks, investment firms) to the extent that they are dealt with below, or partnerships (*Personengesellschaften*), private trusts/foundation (*Privatstiftungen*), cooperatives (*Genossenschaften*) unless they are financial institutions. Further, for the purpose of this opinion, public law entities (*öffentlich-rechtliche Körperschaften*) like the Federal Government or local authorities are not included in the term ordinary trading company, although they may engage in transactions as contemplated in the LCH Agreements.

Austrian corporations come into being with their registration in the companies' register (see sec 2 of the Austrian Limited Liability Companies Act (*Gesetz über Gesellschaften mit beschränkter Haftung – GmbhG*) and sec 34 of the Austrian Stock Corporation Act (*Aktiengesetz – AktG*)). According to Austrian company law, corporations have legal capacity (see sec 61 GmbHG and sec 1 AktG) and there is no limit on the legal capacity of an existing ordinary trading corporation to engage in business activities. The *ultra vires* doctrine does not apply to Austrian corporations. Therefore, there are no restrictions as to the legal capacity of an Austrian ordinary trading company, and thus ordinary trading companies may enter into the LCH Agreements.

There are no regulatory or supervisory approvals required for ordinary trading corporations to have capacity to enter into the LCH Agreements.

Banks/credit institutions

Austrian banks/credit institutions may be legally organized as joint stock corporations (AG), as limited liability companies (GmbH), as cooperative organizations (*Genossenschaften*) or as savings banks (*Sparkassen*). The analysis described above in respect of ordinary trading companies applies to banks which are organized as a GmbH or AG.

Cooperative organizations and savings banks come into being with their registration in the companies' register (see sec 8 of the Austrian Cooperative Act (*Genossenschaftsgesetz – GenG*) and sec 13 para 5 of the Austrian Savings Banks Act (*Sparkassengesetz – SpG*)). According to Austrian company law, cooperative organisations and savings banks have legal capacity (see sec 12 GenG and sec 1 SpG) and there is no limit on the legal capacity of an existing cooperative organisation or savings bank to engage in business activities. The *ultra vires* doctrine does not apply to Austrian cooperative organisations or savings banks. Therefore, there are no restrictions as to the legal capacity of an Austrian cooperative organisation or savings bank, and thus it may enter into the LCH Agreements.

Please note, however, that there are significant exceptions, such as the Austrian National Bank (*Oesterreichische Nationalbank*) and the Austrian Control Bank (*Oesterreichische Kontrollbank*). None of these entities is considered to be a bank for the purposes of this opinion. The Austrian National Bank and the Austrian Control Bank are discussed separately below.

Banks require a licence obtained from the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) pursuant to sec 4 Austrian Banking Act (*Bankwesengesetz – BWG*) to conduct one or more of the banking activities set forth in sec 1 para 1 BWG.

Investment firm/broker dealer

Depending on the exact scope of services provided, entities referred to as investment firms/broker dealers from an Austrian regulatory perspective can be banks or investment firms (*Wertpapierfirmen*).

The term investment firm as used in this opinion covers Austrian investment firms as defined in sec 3 para 1 of the Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz – WAG*). Investment firms as defined in sec 4 para 1 of the WAG (*Wertpapierdienstleistungsunternehmen*) are not included in this opinion, because they are allowed to perform services only in Austria and their turnover must not exceed EUR 730,000.

Investment firms may be organized as joint stock corporations, limited liability companies, or cooperative associations, and require a licence from the FMA in order to perform their business activities.

Pursuant to sec 3 para 5 no 4 WAG, investment firms may, depending on the scope of their license, render only investment advice, portfolio management, the receipt and transmission of orders in relation to one or more financial instruments and the operation of a multilateral trading facility. However, an investment firm must not take proprietary positions when providing its services, i.e. must not hold money, securities or other instruments of its clients so that the investment firm at no time becomes the debtor of its client. These provisions restrict investment firms entering into the transactions contemplated under the LCH Agreements on their own behalf, but permit them to act as an intermediary on behalf of their clients. The consequence of a violation of these restrictions could be the loss of the licence pursuant to sec 5 para 2 no 2 WAG.

Investment Funds (UCITS and AIFs)

In Austria, only UCITS, i.e. undertakings for collective investment in transferable securities (*Organismen zur gemeinsamen Veranlagung in Wertpapieren – OGAWs*) as defined in sec 2 of the Investment Funds Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*) which are managed by management companies (*Verwaltungsgesellschaften*) as defined in sec 3 para 2 no 1 InvFG 2011, and alternative investment funds (*AIFs*) (as further discussed below) may be called investment funds (*Investmentfonds*). Under Austrian law, investment funds are arrangements constituted in accordance with contract law (as common funds jointly owned by the unit-holders, managed by management companies) without legal personality. Management companies, and in the case of an AIF its alternative investment fund manager (*AIFM*), require a licence from the FMA and may be organized only as joint stock corporations or limited liability companies (sec 6 para 2 no 1 InvFG 2011). Management companies authorized in other member states of the European Economic Area may perform their activities in Austria either by the establishment of a branch or pursuant to the freedom to provide services by passporting according to secs 140 et seq InvFG 2011(to the extent that such activities are covered by the licence obtained in their home member state).

Pursuant to sec 2 para 2 InvFG 2011, the assets of an investment fund are jointly owned by the unit-holders. Pursuant to sec 52 InvFG 2011, an investment fund's management company has the exclusive right of disposal over the investment fund's assets. In doing so, the management company acts and enters into contracts in its own name but for the account of the fund's unit-holders notwithstanding that the assets are in the joint ownership of the unit holders of the fund. Since management companies are organized as GmbH or as AG, they have legal capacity (see sec 61 GmbHG and sec 1 AktG) and there is generally no limit on the legal capacity of an existing investment fund to engage in business activities. However, investment funds have to observe detailed investment restrictions which are set forth in the InvFG 2011, some of which have the effect of limiting capacity. For instance, sec 73 InvFG 2011 sets forth under which conditions investment funds may enter into derivative transactions.

However, these provisions do not restrict the legal capacity of the investment fund. Any violation of this provision may result in sanctions imposed by the FMA on the investment fund, but does not in itself endanger the validity of the derivative transaction.

The EU Directive 2011/61/EU (*AIFMD*) does not stipulate any capacity and authority restrictions of an AIF or an AIFM to enter into agreements such as the LCH Agreements.

Please note that there are other similar funds, which are, however, not particularly active in entering into derivative transactions. Among these are Real Estate Investment Funds according to the Real Estate Investment Funds Act (*Immobilieninvestmentfondsgesetz – ImmoInvFG*) and Participation Funds according to the Participation Funds Act (*Beteiligungsfondsgesetz – BeteilFG*). These funds and any other funds that are not UCITS as defined in sec 2 InvFG 2011 or AIFs are not part of this opinion.

Pension Funds

Austrian law acknowledges two types of pension funds:

a) Investment funds which have certain restrictions on their capital investments are called pension investment funds (*Pensionsinvestmentfonds*) according to sec 168 et seq InvFG 2011. Pursuant to sec 172 InvFG 2011, pension investment funds may only enter into derivative transactions for hedging purposes. Since there is no other difference with respect to their legal capacity, our answer to investment funds detailed above also applies to pension investment funds.

b) Pension Funds (*Pensionskassen*) are governed by the Pension Funds Act (*Pensionskassengesetz – PKG*) and may be organized only as joint stock corporations. Further, pension funds require a licence from the FMA.

Pension Funds may not perform business activities which are not linked to the administration of the pension fund (sec 1 para 3 PKG). However, as they are organized as an AG, they have legal capacity (see sec 1 AktG) and therefore in general terms the PKG should not be viewed as limiting the legal capacity of an existing pension fund to engage in business activities.

Insurance company

Austrian insurance companies as defined in sec 1 para 1 of the Austrian Insurance Supervision Act (*Versicherungsaufsichtsgesetz – VAG*) may be legally organized as joint stock corporations, European Companies (*Societas Europaea*) or as mutual insurance companies (*Versicherungsverein auf Gegenseitigkeit*). Insurance companies require a licence from the FMA in order to perform their business activities (sec 4 of the VAG).

The analysis relating to AGs set out in the answer relating to trading corporations above applies equally to an insurance company which is organized as an AG. Further, also

mutual insurance companies have legal capacity (secs 26ff VAG), upon registration in the companies' register (sec 39 VAG).

Austrian Treasury

The Austrian Federal Debt Management Agency (*Österreichische Bundesfinanzierungsagentur*) is the Treasury of the Republic of Austria. Its main purpose is the liquidity and debt management for the Republic of Austria, the nine Austrian provinces and certain other public law entities. The capacity of the Austrian Federal Debt Management Agency is set forth in the Austrian Federal Debt Management Act (*Bundesfinanzierungsgesetz – BFG*). It is organized as a GmbH under the GmbHG.

The BFG provides that one of the tasks of the Austrian Federal Debt Management Agency is to enter into currency swap agreements and other credit operations (*Währungstauschverträge und sonstige Kreditoperationen*). Besides this, the BFG does not provide any specific powers to enter into agreements such as the LCH Agreements. However, because of its organization as a GmbH, there does not appear to be a conflict between the BFG and the entry by the Austrian Federal Debt Management Agency into the LCH Agreements.

As the *ultra vires* doctrine does not apply in Austria, there are no restrictions as to the capacity of the Austrian Federal Debt Management Agency.

Austrian National Bank

The Austrian National Bank (*Oesterreichische Nationalbank or OeNB*) is the Austrian central bank. It is established by the Act on the Austrian National Bank (*Nationalbankgesetz – NBG*) as a joint stock corporation under the Stock Corporation Act and its legal relationships are further influenced by the Treaty on the Foundation of the European Community and the protocol on the statute of the European system of central banks and of the European Central Bank (see sec 1 NBG). It is not registered in the Austrian companies' register, as sec 5 para 3 NBG sets forth an exemption from the registration requirements.

The NBG does not provide any specific powers to enter into agreements and relationships as contemplated in the LCH Agreements. However because of its organization as an AG, there does not appear to be a conflict between the NBG and the entry by the Austrian National Bank into the LCH Agreements. As the *ultra vires* doctrine does not apply in Austria, there are no restrictions as to the capacity of the Austrian National Bank (see sec 4 NBG).

Austrian Control Bank (OeKB)

The Austrian Control Bank (*Oesterreichische Kontrollbank or OeKB*) is organized as a joint stock corporation under the Stock Corporation Act, but also performs certain important statutory tasks which are mandated by law. The Austrian Control Bank has obtained a banking licence from the FMA and is therefore allowed to perform certain banking activities, including activities pursuant to sec 1 para 1 No 7 BWG (trading with all sorts of derivatives).

According to Austrian company law, joint stock corporations have legal capacity (see sec 1 AktG) and there is no limit on the legal capacity of an existing joint stock corporation to engage in business activities or enter into the LCH Agreements.

5.1.2 ***Would LCH be deemed to be domiciled, resident or carrying on business in the Relevant Jurisdiction by virtue of providing clearing services to a Relevant Clearing Member? If so, would LCH be required to obtain a licence or be registered before providing clearing services to a Relevant Clearing Member or are there any special local arrangements for the recognition of overseas clearing houses in these circumstances?***

No, LCH will not be deemed to be domiciled, resident or carrying on business in Austria by reason only of execution of the LCH Agreements with an Austrian Entity or performance or enforcement of the LCH Agreements vis-à-vis an Austrian Entity.

5.1.3 ***What type of documents should be obtained by LCH to evidence that a Relevant Clearing Member and its officers have the capacity and authority to enter into the LCH Agreements? Is LCH required to verify such evidence?***

Ordinary trading corporation

The legal capacity of a GmbH or an AG starts with its registration in the companies' register (see sec 2 para 1 GmbHG and sec 34 para 1 AktG). We therefore advise LCH to obtain an excerpt from the companies' register which sets forth basic legal information like the company's name, its legal form, its business address, the persons authorized to represent the corporation, etc. The companies' register is public, but subject to prior registration. Notaries and lawyers have permanent (online) access to the companies' register, and at court access to the companies' register is granted to any third party.

All registered companies receive a registration number which consists of an abbreviation of the Austrian word for companies' register number (*Firmenbuchnummer – FN*), six digits and a letter (e.g. FN 224135 k). This number stays with a company even if it changes its legal form or its place of business.

Since summer 2005, all documents submitted to the electronic document collection (*Urkundensammlung*) - including articles of association - can be retrieved online, all documents submitted before that date are accessible via the competent court only.

Further, LCH may consider obtaining a copy of the current articles of association, which must be filed with the companies' register and which are publicly available, too.

The information set forth in the excerpt from the companies' register may not be fully up to date, thus a representation by the ordinary trading corporation is recommended as would be a request that the ordinary trading company provide an opinion regarding its legal capacity. While a representation or legal opinion as to the capacity of the ordinary trading corporation to enter into the LCH Agreements may provide additional comfort, neither would help in establishing capacity where in fact it does not exist (although to some extent this is irrelevant given that an ordinary trading corporation has unlimited capacity).

Bank/credit institution

The analysis relating to an ordinary trading corporation applies to all types of banks, including cooperative associations (sec 3 para 1 No 3 GenG) and savings banks (see sec 13 para 5 SpG).

The FMA lists the licenses of all entities regulated in Austria by the FMA (www.fma.gv.at). LCH can thus check the current licence of the Austrian counterparty.

Insurance company

The analysis relating to an ordinary trading corporation applies equally to all types of insurance companies, including mutual insurance companies (sec 39 VAG).

Insurance companies are regulated by the FMA, their current licence can be identified via the website of the FMA (www.fma.gv.at).

Investment firm/broker dealer

The analysis relating to an ordinary trading corporation applies equally to an investment firm.

Investment firms are regulated by the FMA, their current licence can be identified via the website of the FMA (www.fma.gv.at).

Austrian Treasury

The Austrian Treasury is registered in the Austrian companies' register as a GmbH under the number FN 35060 i. Thus, the answers with respect to ordinary trading corporations set up as GmbH also apply to the Treasury.

Austrian National Bank

The Austrian National Bank is not registered in the companies' register, its legal capacity derives directly from the NBG. As discussed above, the Austrian National Bank is formed as an AG and therefore the answers with respect to ordinary trading corporations set up as an AG also apply to the Austrian National Bank.

The Austrian National Bank is represented by its board of directors (*Direktorium*) which consists of the governor (*Gouverneur*), the deputy governor (*Vize-Gouverneur*) and two ordinary members.

Austrian Control Bank

The Austrian Control Bank is registered in the Austrian companies' register as an AG under the number FN 85749 b. Thus, the answer with respect to ordinary trading corporations set up as AG applies also to the Austrian Control Bank.

Investment fund (including pension fund)

The analysis in the answer regarding ordinary trading corporations applies equally to the management company of an investment fund, of a pension investment fund (which in each case may be organised as a GmbH or as an AG) and to a pension fund itself (which may be organised only as an AG). The management company of an investment fund and a pension investment fund and a pension fund itself are regulated by the FMA and the relevant current licence can be identified via the website of the FMA (www.fma.gv.at).

There is legal writing (both, in legal commentaries and literature) which expresses the predominant view under Austrian law that the legal capacity of an investment fund or pension investment fund's management company to act for the account of the unit-holders is limited if it breaches the investment principles set forth in sec 80 to 84 InvFG 2011 or of the legal capacity of a pension fund if it breaches the principles pursuant to sec 14 PKG.

Representation power

The below mentioned principles of representation power apply to all entities listed above unless stated otherwise:

Statutory representatives

The authorized representatives of an Austrian Entity are by law the members of the management board (*Vorstandsmitglieder* for the AG and *Geschäftsführer* for the GmbH).

An Austrian credit institution (including cooperative associations and savings banks) and an Austrian insurance company must be represented by two persons jointly. No single power of representation is permitted (sec 5 para 1 no 12 BWG and sec 4 para 6 no 4 VAG). In case there are two or more members of the management board (as required for an Austrian bank), there are several possibilities as to the power of representation: The authorizing body (in case of a GmbH, the shareholders' meeting (*Generalversammlung*), in case of a AG the supervisory board (*Aufsichtsrat*), may determine the power of representation of the members of the management board. However, as already mentioned, no single power of representation is permitted in case of Austrian credit institutions.

The management board of the Austrian Entity may appoint authorized representatives (*Prokuristen*), which also have representation power on behalf of the Austrian Entity. These authorized representatives do not become members of the management board, but have nearly the same power of representation when dealing with third parties. The authorizing body can also determine that a member of the management board can represent the company together with an authorized representative.

Because of the many possibilities of persons with representative powers, LCH may rely on the excerpt from the companies' register which sets forth the names and powers of representation of the members of the management board and the authorized representatives of the Austrian Entity.

Since the power of representation of members of the management board or of authorized representatives enters into force with the respective appointment (and, thus, prior to the registration in the companies register), we recommended LCH to obtain a representation from the Austrian Entity in relation to the authority of an individual who purports to act on behalf of the Austrian Entity with regard to entering into the Agreements but who is not registered in the companies' register. Such representation should be signed by two management board members who are registered in the companies register.

Two members of the management board together (or a member of the management board together with an authorized representative) can represent and legally bind the Austrian Entity. A subsequent authorization by another member of the management board or an authorized representative is possible, as is a preceding authorization by

another member. Thus, it is important for LCH that all individuals who purport to act on behalf of the Austrian Entity disclose the necessary documentation of their authorization to represent the Austrian Entity.

The lack of corporate authority due to any limitation in any by-laws or internal guidelines on the power of the members of the management board to bind the company will not affect the validity of the Agreements provided LCH has acted in good faith.

Contractual representation power

Members of the management board may provide others with a power of attorney to act on behalf of the company and to legally bind the company for a specific time or for a specific purpose. Persons authorised by power of attorney will not be registered in the companies register. In order to evidence the power of attorney and its specific limitations, the written power of attorney should be annexed to the LCH Agreements when concluded.

In general, LCH is not required to verify the evidence. However, it is advised to seek advice from Austrian counsel to ascertain the relevant documents with regard to actuality and completeness. In addition, it is advised to seek appropriate representations and warranties of the counterparty relating to the evidence provided.

5.1.4 ***Are there any formalities to be complied with upon entry into of any of the LCH Agreements and, if so, what is the effect of a failure to comply with these?***

Assuming that the securities granted as collateral comply with the provisions of Directive 2002/47/EC on financial collateral arrangements ("**Financial Collateral Directive**", as amended by Directive 2009/44/EC) and further assuming that these securities granted as collateral qualify as book entry securities whereby the relevant securities account is located in England, there are no specific filing or other requirements to be observed under Austrian law.

5.1.5 ***Would the courts of the Relevant Jurisdiction uphold the contractual choice of law and jurisdiction set out in Regulation 51 of the General Regulations?***

As a general rule, Austrian law respects the parties' choice of law in respect of their contractual obligations whether the law chosen is Austrian or foreign.

Since 17 December 2009, the law applicable to a contract that has connecting factors to more than one country is determined by Regulation EC 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I). Rome I gives the parties the freedom to choose the law that applies to the contract. The choice must be "made expressly or clearly demonstrated". Where Rome I does not apply, the relevant provision is section 35 of the Austrian International Private Law (**IPL**), which allows the parties to make an "explicit or implicit choice of law" to govern their contract.

The choice of English law as the governing law of an agreement will be upheld by the Austrian courts unless:

a. all other elements relevant to the situation at the time of the choice are connected with another country. This should not be the case since LCH is domiciled in the UK and, therefore, there is a clear connection to a law other than Austrian law.

b. its application would be manifestly incompatible with Austrian public policy (ordre public). In relation to the manner of performance and the steps to be taken in the event of defective performance, the Austrian courts may have regard to the law of the country in which performance takes place.

Finally, the Austrian courts may give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the agreements have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful.

We see no reason under the current laws of Austria as to why the choice of English law as the governing law of the agreements should be contrary to Austrian public policy or incompatible with mandatory rules of Austrian law.

The above does not apply to book entry securities used as collateral in a cross-border context. Here the general rules both according to the Finality Directive and according to section 33a of the Austrian IPL lead to the applicability of the law of the jurisdiction in which such securities are legally recorded on a register, account or centralised deposit system.

5.1.6 ***Will the courts uphold the judgment of the English courts or an English arbitration award?***

English judgment

English judgments will be recognised in Austria in accordance with Article 33 of Regulation EC/44/2001 (Brussels I Regulation) and are enforceable in Austria pursuant to Article 38 of the Brussels I Regulation if the judgment is also enforceable in the United Kingdom and an application was submitted to the competent Austrian court.

Pursuant to Article 41 of the Brussels I Regulation, after the completion of formalities, which have to be submitted according to Article 53 of the Brussels I Regulation, the judgment will be declared enforceable without any review. Article 53 of the Brussels I Regulation provides that a copy of the judgment must be submitted which satisfies the conditions necessary to establish its authenticity. The competent court in the United Kingdom shall issue, at the request of an interested party, a certificate concerning the enforceability of the judgment.

The party against which enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application (Article 41 of the Brussels I Regulation). However, the party against which enforcement is sought has a right of appeal (Article 43 of the Brussels I Regulation).

The grounds to refuse recognition and enforcement of an English judgment in Austria, are limited to the reasons listed in Articles 34 and 35 of the Brussels I Regulation.

Foreign arbitral award

Austria is a signatory to a number of international conventions relating to the enforcement of foreign arbitral awards. The most important, in practice, is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 (New York Convention) to which many states throughout the world have acceded. Currently, 148 states have ratified the New York Convention including Austria and the United Kingdom.

An award made pursuant to a written arbitration agreement is treated in Austria as a New York Convention award qualifying for enforcement. After recognition, a foreign arbitral award may be enforced in the same manner as an Austrian judgement or order to the same effect. Recognition or enforcement of a New York Convention award may be refused only under very narrowly defined circumstances. These include the lack of a valid arbitration agreement, the lack of arbitrability of the matter in dispute, the breach of the right to be heard, and if the arbitral award contravenes Austrian ordre public.

Note that if Austrian entities are involved, Austrian law requires special power of attorney to conclude an arbitration agreement, unless the arbitration agreement is signed by a statutory representative (or by a person holding a commercial power of attorney or is listed in the company register as the legal entity's commercial representative).

Thus, in order to eliminate enforcement risk of a foreign arbitral award in Austria, corporate entities or partnerships must conclude arbitration agreements through their statutory representatives or partners authorized to represent the company. Otherwise, Austrian law requires a written special power of attorney for the conclusion of an arbitration agreement by proxy or a (contractual) representative. Further, as a general rule, consumers may not validly enter arbitration agreements under Austrian law.

Please refer to the qualification in section 6.2 below.

5.1.7 ***Are there any "public policy" considerations that that the courts may take into account in determining matters related to choice of law and/or the enforcement of foreign judgements?***

We can see no public policy considerations that could be of relevance with regard to the choice-of law provisions. With regard to elimination of risk associated with the enforcement of foreign arbitral awards in Austria, please see section 5.1.6 above.

5.2 Insolvency, Security, Set-off and Netting

5.2.1 ***Please identify the different types of Insolvency Proceedings and Reorganisation Measures. Would any of these not be covered by those events entitling LCH to liquidate, transfer or otherwise deal with Contracts as provided for in Rule 3 of the Default Rules? Are any other events or procedures not envisaged in Rule 3 of the Default Rules relevant?***

There are two main types of proceedings pursuant to the Austrian Insolvency Code (*Insolvenzrechtsgesetz – IO*): reorganisation proceedings (*Sanierungsverfahren*) and insolvency proceedings (*Konkursverfahren*). Reorganisation proceedings (*Sanierungsverfahren*) are aimed at the reorganisation of a company on the basis of a reorganisation plan, therefore qualifying as Reorganisation Measures for the purpose of this Legal Opinion. Insolvency Proceedings are aimed at the sale of the company's business or its liquidation.

Insolvency Proceedings

The main statutory rules relating to Insolvency Proceedings with transnational elements are:

- the EU Regulation on Insolvency Proceedings No. 1346/2000 ("**EU Insolvency Regulation**") which applies to Austrian Insolvency Proceedings; and
- the Austrian Insolvency Code which provides in secs 217 to 251 for the most relevant provisions related to Insolvency Proceedings with transnational elements.

As a general rule, Austrian Insolvency Proceedings may be opened in Austria if assets of a corporation, including the assets of a branch of a corporation, are located in Austria irrespective of where the debtor has its registered seat or its head office in Austria.

With respect to debtors who have their registered seat in an EU member state, the EU Insolvency Regulation applies. Therefore, main Insolvency Proceedings may be opened in the member state in which the debtor has its main centre of interests. Secondary proceedings may be opened in the member state where the debtor has an establishment, e.g. a branch. In the latter case the legal effects of secondary Insolvency Proceedings are restricted to the assets located in such member state.

Reorganisation Measures

Prior to Insolvency Proceedings, a company may be subject to business reorganization measures according to the Austrian Business Reorganisation Act (*Unternehmensreorganisationsgesetz - URG*). Measures in the context of the URG constitute Reorganisation Measures *sui generis* and aim at restoring the financial soundness of a company. The relevant aspect of the URG is the obligation of the members of the managing body to file for Reorganisation Measures under the URG in case certain thresholds are triggered. These thresholds include (i) the decrease of the equity ratio of the company below 8% or (ii) a fictive debt redemption period of the company of more than 15 years. The members of the managing body may be held personally liable in case they do not comply with this obligation (see sec 22 of the URG).

Credit institutions

The rules governing Insolvency Proceedings of Austrian credit institutions were introduced to the Insolvency Code and other laws with the Act on International Insolvency (*Internationales Insolvenzrechtsgesetz*) which implemented *inter alia* Directive 2001/24/EC on the reorganisation and winding-up of credit institutions. The Act on International Insolvency applies only to the extent international treaties or legal acts of the European Union do not provide otherwise.

According to sec 237 para 1 of the Insolvency Code, Insolvency Proceedings opened in Austria also affect assets of the bankrupt credit institution which are located abroad (*Universalitätsprinzip*).

Austrian credit institutions (pursuant to sec 1 para 2 BWG) cannot be subject to Reorganisation Measures pursuant to the Austrian Insolvency Code and the URG.

In addition to Insolvency Proceedings, however, Austrian credit institutions may be subject to receivership proceedings (*Geschäftsaufsichtsverfahren*) as regulated in the BWG.

Insolvency Proceedings aim at the winding up of a credit institution and satisfying its creditors with the proceeds of the liquidation, whereas receivership proceedings are intended to enable the credit institution to recover and to continue its business, thus qualifying as Reorganisation Measures.

Receivership proceedings are permissible only if the overindebtedness or insolvency is - in the court's view – likely to be remedied. Receivership proceedings may be opened by the court upon application by the credit institution or the FMA. The court appoints a receiver who controls the management of the credit institution, may veto resolutions of the management board and approves measures that exceed the ordinary course of business. Apart from this, the credit institution may continue its ordinary business.

The main effects of the opening of receivership proceedings over a credit institution are (i) a general moratorium regarding all payment claims (including existing and future interest and cost relating to such claims), (ii) existing claims may not be secured, paid or satisfied in any other way and (iii) no Insolvency Proceedings may be opened on the account of existing claims which are subject to the moratorium.

Receivership ends if it is either lifted by the court or if Insolvency Proceedings are opened. Upon application, the court must lift the receivership proceedings if the overindebtedness or insolvency has ceased to exist, or if one year has lapsed since the commencement of the receivership proceedings.

Receivership is a reorganisation measure within the meaning of Article 2 of the Directive 2001/24. Pursuant to sec 81 para 1 BWG, Austrian law applies throughout the EEA for receivership proceedings commenced in Austria, the pre-conditions for the commencement and the effects of such receivership proceedings. The legal effects of receivership proceedings opened in Austria extend to the entire assets of an Austrian credit institution including its branches within the EEA.

According to sec 83 BWG, the courts competent for the opening of Insolvency Proceedings are also competent for receivership proceedings against Austrian credit institutions.

Following the above, Insolvency Proceedings and receivership proceedings of Austrian credit institutions (including their foreign branches) would be governed exclusively by Austrian law (*lex fori concursus*).

Prior to receivership proceedings or Insolvency Proceedings, an Austrian credit institution can also be subject to certain regulatory measures (*Befristete Maßnahmen*) if the fulfilment of its obligations towards creditors, in particular with respect to the security of the assets entrusted it, is at risk. In such case, the FMA can make certain orders – with a maximum duration of 18 months – to avert such risk.

As a regulatory measure, the FMA can amongst other things prohibit the credit institution from continuing its business in whole or in part. Moreover, the FMA may appoint an expert commissioner (*Regierungskommissär*) who may prohibit individual transactions or, if the FMA has prohibited the credit institution from continuing its business in whole or in part, allow individual transactions.

Regulatory measures also qualify as a reorganisation measure within the meaning of article 2 of the Directive 2001/24. Austrian law applies throughout the EEA for regulatory measures commenced in Austria, the pre-conditions for the commencement and the effects of such regulatory measures.

Insurance companies

Insolvency Proceedings of insurance companies are governed by the secs 87 et seq of the VAG. Pursuant to sec 95 VAG insurance companies may not be subject reorganisation proceedings (*Sanierungsverfahren*). In case of illiquidity or overindebtedness the management board and the liquidator immediately have to notify the FMA. The application for Insolvency Proceedings may solely be filed by the FMA (see sec 89 para 2 VAG), which is obliged to do so if the prerequisites for the Insolvency Proceedings are met. Upon initiation of the proceedings the competent court appoints a trustee (*Kurator*) who attends the interests of the insurance holders. Claims of insurance holders form a special estate (*Sondermasse*) and are satisfied preferentially (see sec 94 VAG).

If the initiation of Insolvency Proceedings would adversely affect the interests of insurance holders, the FMA may decide (i) to prohibit payments to insurance holders and (ii) to alleviate the obligations of the insurance company in order to overcome the financial distress (see sec 98 VAG).

Investment firm/broker dealer

There are no special Insolvency Proceedings applicable to investment firms (*Wertpapierunternehmen*).

Investment Funds and Alternative Investment Funds

There are no special Insolvency Proceedings applicable to investment funds and alternative investment funds (*AIFs*).

Pension Funds

Special provisions for Insolvency Proceedings of pension funds are stipulated in secs 37 et seq of the PKG. The provisions are similar to those of insurance companies as described above.

Due to the general nature of Rule 3 of the Default Rules, all types of Insolvency Proceedings and Reorganisation Measures under Austrian law will be covered by Rule 3 of the Default Rules.

5.2.2 ***Would the Deed of Charge be effective in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant Clearing Member? Is there anything that would prevent LCH from enforcing its rights under the Deed of Charge? Would LCH be required to take any particular steps or abide by any particular procedures for the purposes of enforcing against Collateral provided to it by a Relevant Clearing Member under the Deed of Charge?***

We are of the opinion that the Deed of Charge is effective and enforceable under the laws of Austria.

In an insolvency situation, the possibilities to terminate contracts are generally restricted under Austrian law (see secs 25a et seq Insolvency Code). However, these restrictions on the possibility to terminate contracts in an insolvency situation do not impact on LCH's ability to terminate agreements as well as to enforce and realize the security interest in accordance with the LCH Agreements in the event of a default of a Relevant Clearing Member. Additionally, in the event of Insolvency Proceedings being opened in relation to an Austrian entity participating in LCH.Clearnet, the rights and obligations arising from, or in connection with, such participation will be governed by English law according to sec 16 of the Austrian Finality Act.

Further, in Austrian Insolvency Proceedings, Austrian law would not govern the question of invalidity, voidability or relative invalidity of legal acts for reason of causing disadvantage to the creditors if (i) the legal act was governed by the law of another EU member state and (ii) pursuant to the law of such other EU member state the legal act cannot be challenged. Thus, if, under applicable English law, the provisions of the LCH Agreements and the Default Rules could not be challenged in any way, Austrian contestation rules would not apply (see article 13 of the EU Insolvency Regulation). This equally applies for non-EU member states according to sec 229 of the Insolvency Code.

Predominant legal literature argues that actions set after the initiation of Insolvency Proceedings or Reorganisation Measures are no longer subject to the exemptions of sec 229 of the Insolvency Code and article 13 of the EU Insolvency Regulation. Thus, actions set after the initiation of Insolvency Proceedings may be subject to limitations and challenges pursuant to the Insolvency Code. The restrictions, however, will not apply to the enforcement of the Collateral under the Deed of Charge as actions according to the Default Rules will most likely happen prior to the official initiation of Insolvency Proceedings. Please refer to section 5.2.3 for further details in this regard.

LCH is not required to take any particular steps or to abide by any specific procedures in order to enforce its rights under the Deed of Charge. Sec 5 et seq of the FSG and the Austrian Finality Act provide for a prompt enforcement of financial securities and as *leges speciales* supersede all contradicting Austrian law provisions. Rights to challenge or to declare actions void, however, are not affected by the FSG pursuant to sec 11 para 2 FSG and sec 17 of the Austrian Finality Act.

5.2.3 ***Would LCH have the right to take the actions provided for the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but not at this stage considering those actions specifically provided for in the Client Clearing Annex to the Default Rules) in the event that a Relevant Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures? Is it necessary or recommended that LCH should specify that certain Insolvency Proceedings and/or Reorganisation Measures will constitute an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules? If the answer is affirmative, please identify those specific Insolvency Proceedings and/or Reorganisation Measures to which the answer applies and briefly explain your reasoning.***

In our view LCH may take the actions as set out in the Default Rules in the event that a Relevant Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures.

According to Article 5 of the EU Insolvency Regulation (and outside its scope of application sec 222 of the Insolvency Code) rights *in rem* of creditors in respect of tangible or intangible, moveable or immoveable assets (and also with respect to a fluctuating pool of assets) belonging to the debtor which are situated within the territory of another Member State at the time of opening of Insolvency Proceedings would remain unaffected by the opening of Austrian Insolvency Proceedings. Such rights include in particular the right to dispose of a right *in rem* based on a pledge or a mortgage and recovery rights based on security assignments.

Article 4 para 2 lit m of the EU Insolvency Regulation provides that in Austrian Insolvency Proceedings, Austrian law would also govern the question of invalidity, voidability or relative invalidity of legal acts for reason of causing disadvantage to the creditors. However, pursuant to Article 13 of the EU Insolvency Regulation this provision does not apply if the person, which gained an advantage due to such legal act, can prove that (i) the legal act was governed by the law of another EU member state and (ii) pursuant to the law of such other EU member state the legal act cannot be challenged. Sec 229 of the Insolvency Code contain a comparable rule for Insolvency Proceedings outside the scope of the EU Insolvency Regulation.

Following this, there would generally be a risk of contestation/avoidance under Austrian law of any legal acts during the preference period if any of the conditions set out below are met. However, if, under applicable English law such acts could not be challenged, Austrian contestation rules would not apply. This, however, solely applies to actions set prior to the initiation of Insolvency Proceedings.

Once Insolvency Proceedings have been instituted, the position of a creditor depends considerably on the kind of his claims. Three different groups of creditors have to be distinguished:

a) Those who, by virtue of their legal ownership of assets possessed by the insolvent debtor, are entitled to claim their property in natura (*Aussonderungsrecht*). A person is entitled to demand segregation if such person can prove that an asset does not belong to the debtor's estate; the most important reason for segregation is the ownership of the asset by the Party demanding the segregation. Rights of segregation are generally not affected by the Insolvency Proceedings and the owner of the property may bring an action against the bankruptcy administrator (in Insolvency Proceedings) for the return of his property.

b) Secured creditors, i.e. creditors in whose favour a pledge, mortgage, lien or any other security has been constituted, be it by way of contract or by way of seizure according to enforcement proceedings. The secured assets will be set aside from the insolvent debtor's estate. The secured creditors have priority in the settlement of their claims with the proceeds of the liquidation of the assets in which they hold a security interest (*Absonderungsrecht*).

c) All creditors other than those described above. Their unsecured claims will be given equal treatment and will be settled on a pro-rata basis.

According to this distinction, LCH would be in the position of a secured creditor and may seek for preferred satisfaction of its claims from the assets in which it holds a security interest by way of setting aside the secured assets from the insolvent debtor's assets.

In Austrian Insolvency Proceedings, the effects of the opening of Insolvency Proceedings do not affect rights of separate satisfaction. Therefore, since LCH is in possession of the pledged assets it can liquidate the Collateral as provided for in the Agreements without prior judicial authorisation or consent (also refer to secs 5 et seq of the FSG).

However, pursuant to sec 120 Insolvency Code, the bankruptcy administrator has a right to terminate the pledge by paying back in full the secured claim.

The Insolvency Code has certain restrictions on the possibility to terminate contracts in the event of an insolvency of the other Party:

- The debtor's counterparty may not terminate a contract within six months from the opening of the Insolvency Proceedings if the termination jeopardizes the continuation of the debtor's business. Although a termination for good cause remains possible, the law explicitly states that, upon the opening of Insolvency Proceedings, (i) the deterioration of the debtor's financial situation and (ii) non-fulfilment of a claim which already became due before the opening of Insolvency Proceedings do not qualify as good cause for the termination of a contract. The restriction on termination does not apply (i) if the counterparty itself faces severe personal or economic damage; (ii) to the freezing credit lines; or (iii) in case of employment agreements.

- An agreement whereby a termination right, or the automatic termination of the agreement in case of the opening of Insolvency Proceedings in respect of one of the Parties is agreed, is void.

These restrictions on the possibility to terminate contracts in an insolvency situation do not, however, impact on LCH's ability to terminate contracts in accordance with the Agreements in the event of a member default, since LCH – as a "system" under the Settlement Finality Directive – can rely on the provisions of the Austrian Finality Act (*Finalitätsgesetz*).

Sec 16 of the Austrian Finality Act, which has implemented Article 8 of the Settlement Finality Directive, expressly states that in the event of Insolvency Proceedings being opened in relation to a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing the system.

Accordingly, in the event of Insolvency Proceedings being opened in relation to an Austrian Entity participating in LCH.Clearnet, the rights and obligations arising from, or in connection with, such participation are governed by English law (as the law governing the system).

Further, sec 17 of the Austrian Finality Act stipulates that Collateral provided in the context of systems remains unaffected by Insolvency Proceedings against participants of the respective system.

Financial Collateral Act (FSG)

The provisions of Austrian insolvency law have been partially superseded by the FSG which enables the collateral taker to realise the collateral notwithstanding the opening of Reorganisation Measures, liquidation or Insolvency Proceedings (sec 6 para 2 FSG). This is subject to a special agreement between the collateral taker and the collateral provider.

As regards receivership proceedings, sec 86 para 1 BWG provides that all claims against the credit institution which have been created prior to the opening of the receivership proceedings, are granted a statutory respite until the receivership is ended, even if such claims have become due only after the opening of the receivership proceedings. In our view, however, this provision is superseded by the FSG.

5.2.4 ***Is there a "suspect period" prior to Insolvency Proceedings and/or Reorganisation Measures where Contracts with a Relevant Clearing Member could be avoided or challenged and, if so, what are the grounds? What are the risks for LCH in entering into Contracts and in taking Collateral in respect of those Contracts during such a period? Are any special protections or exemptions from the relevant arrangements for avoidance or challenge available under the law of the Relevant Jurisdiction in respect of contracts in financial markets?***

In the event of Insolvency Proceedings, the bankruptcy administrator can generally contest legal actions and transactions which have taken place within certain suspect periods before the opening of Insolvency Proceedings and which relate to the assets of the insolvent (illiquid or overindebted) debtor, provided that those acts have reduced the funds of the bankrupt or the satisfaction of other creditors.

The Insolvency Code sets forth various circumstances for contestation. Such provisions are essentially the following:

a. Pursuant to sec 28 no 2 of the Insolvency Code (intent to disadvantage creditors (*Anfechtung wegen Benachteiligungsabsicht*)), legal acts may be contested (i) if they have caused disadvantage to the creditors of the bankrupt debtor, and (ii) if the debtor's intention to cause disadvantage must have been known to the counterpart and (iii) if the legal acts have been carried out two years prior to the opening of the Insolvency Proceedings. If the counterpart actually had knowledge of this intention, the time limit between the opening of Insolvency Proceedings and the contested legal act is extended to up to ten years (sec 28 no 1 of the Insolvency Code).

b. According to sec 28 no 4 of the Insolvency Code (fraudulent conveyance (*Anfechtung wegen Vermögensverschleuderung*)), the right of avoidance applies to certain contracts (including purchase and exchange contracts) discriminating creditors and entered into by the debtor within one year preceding the formal opening of Insolvency Proceedings with the intention of e.g. selling the goods for an unusual and unjustified low price, if the counterparty to the contract had knowledge of this intention or should have had knowledge of this intention when acting with due diligence. Not only can the transaction itself constitute fraudulent conveyance, but also a clear disproportion between the transaction and the assets of the debtor.

c. Sec 30 of the Insolvency Code (preferential treatment (*Anfechtung wegen Begünstigung*)) permits the contestation of legal acts which were carried out by the bankrupt debtor after the occurrence of insolvency or after an application for bankruptcy or during 60 days prior to application, if (i) the creditor has obtained a security or satisfaction which he was not entitled to receive in this way or at this time, or (ii) if the securities or satisfactions have been given to a creditor with the intention to favour this creditor over the other creditors. The intention must be known to the favoured creditor or should have been known by him if he had acted with due care. A contestation pursuant to sec 30 of the Insolvency Code is not possible if the legal acts were carried out more than one year before the opening of the Insolvency Proceedings.

d. Pursuant to sec 31 of the Insolvency Code (knowledge of insolvency of the debtor (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*)), legal acts of the debtor which lead to the satisfaction or collateralisation of a creditor or transactions which are disadvantageous to creditors can be contested, if the acts or transactions were undertaken within six months prior to the opening of Insolvency Proceedings, provided that the debtor was already insolvent (illiquid or overindebted) at the point

of time such acts were undertaken or concluded and inter alia the following conditions are met:

a) at the moment a legal act was undertaken, the insolvency was known to the other Party or must have been known if due care had been applied; or

b) in respect of legal transactions which are disadvantageous to the creditors, the counterparty of the debtor is aware of the insolvency or the insolvency is unknown to him because of negligence. The disadvantage for the other creditors must be objectively foreseeable.

The right of avoidance can also apply to transactions without consideration which took place within two years before the opening of the Insolvency Proceedings (sec 29 no 1 of the Insolvency Code).

According to article 5 of the EU Insolvency Regulation (and outside its scope of application sec 222 of the Insolvency Code) rights *in rem* of creditors in respect of tangible or intangible, moveable or immoveable assets (and also with respect to a fluctuating pool of assets) belonging to the debtor which are situated within the territory of another member state at the time of opening of Insolvency Proceedings would remain unaffected by the opening of Austrian Insolvency Proceedings. Such rights include in particular the right to dispose of a right *in rem* based on a pledge or a mortgage and recovery rights based on security assignments.

Article 4 para 2 lit m of the EU Insolvency Regulation provides that in Austrian Insolvency Proceedings, Austrian law would also govern the question of invalidity, voidability or relative invalidity of legal acts for reason of causing disadvantage to the collective of creditors. However, Article 13 of the EU Insolvency Regulation and sec 229 of the Insolvency Code provide for an exemption as stated above in section 5.2.3.

Following this, there would be a general risk of contestation/avoidance under Austrian law of any legal acts during the preference period if any of the conditions set out above are met. However, if, under applicable English law, such acts could not be challenged in any way, Austrian contestation rules would not apply.

Upon the initiation of Insolvency Proceedings and/or Reorganisation Measures, however, the actions under the LCH Agreements may according to predominant legal literature be contested/challenged as article 13 of the EU Insolvency Regulation and sec 226 of the Insolvency Code no longer applies.

The Austrian Finality Act and the FSG are intended to exempt financial collateral agreements in financial market transactions. Yet the Austrian Finality Act and the FSG expressly stipulate that challenging rights and rights to declare an action void remain unaffected by the respective laws (see sec 17 of the Austrian Finality Act and sec 11 para 2 of the FSG).

In addition to the aforesaid avoidance rights pursuant to the Insolvency Code, there are general avoidance rights governed by the Austrian Avoidance Act (*Anfechtungsordnung – AnfO*). These rights are not contingent on Insolvency Proceedings and apply to certain actions deemed detrimental for creditors. The main two types of actions affected are (i) actions with the intent to disadvantage creditors (*Anfechtung wegen Benachteiligungsabsicht*) pursuant to sec 2 AnfO and (ii) actions qualified as fraudulent conveyance (*Anfechtung wegen Vermögensverschleuderung*) according to sec 3 AnfO. The contestation periods are equal to the periods of the corresponding provisions of the Insolvency Code. Please note, however, that in practice contestations pursuant to the AnfO are rarely observed.

5.2.5 ***Is there relevant netting legislation in the Relevant Jurisdiction that, in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant Clearing Member, might apply as an alternative to the relevant arrangements set out in the Default Rules?***

General

Under Austrian law, the Parties may set off their reciprocal claims to the extent they correlate to each other as debtor and creditor.

Furthermore, a unilateral declaration of set-off based on statutory law and unless otherwise agreed, would be conditional on the following requirements (secs 1438 ff of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*)): (i) the requirement of a set-off statement (*Aufrechnungserklärung*) of the Party, which sets off; (ii) similarity (*Gleichartigkeit*) of the claims (the claims shall be of the same nature, i.e. both are money claims), (iii) maturity (*Fälligkeit*) of the claims, (v) the correctness of the claim (*Richtigkeit*) i.e. enforceability of the claim, (vi) no contractual set-off prohibitions.

Set-off in Insolvency Proceedings

Under Austrian law, mandatory restrictions regarding set-off in Insolvency Proceedings are contained in secs 19 et seq of the Insolvency Code.

Set-off in Insolvency Proceedings is permitted only if the requirements for set-off have already been met as of the date of opening the Insolvency Proceedings. Maturity of the claims is, however, not required and the claims may be conditional at the time of the opening of the Insolvency Proceedings. It is, however, required that the claims to be set off legally exist between the Parties prior to the opening of Insolvency Proceedings, even if they become mature and are set-off at a later point of time.

Therefore, if one or both the claims to be set off come into existence after or upon the opening of Insolvency Proceedings, set-off is not permissible. For instance, close out netting of claims, which arise upon the termination of the contract because of the opening of Insolvency Proceedings would generally not be permitted.

The Austrian Supreme Court has generally adopted a wide approach with regard to the conditionality of obligations and has accepted that conditional obligations (i.e. obligations the existence of which depends on the satisfaction or occurrence of certain conditions) may be set off, even if their creation depends on a future, uncertain event.

In an international context article 6 of the EU Insolvency Regulation provides that the set-off right of a creditor who is a creditor and debtor already at the time of the opening of the Insolvency Proceedings is not affected by opening of Insolvency Proceedings if such set-off is permitted under the law of a member state governing the claim of the insolvent debtor (or, in case of a set-off agreement, governing such set-off agreement), such governing law to be understood to include the substantial contractual law as well as the rules on set-off under any insolvency law of such jurisdiction. This means that even where set-off in Insolvency Proceedings may not be allowed under Austrian insolvency law it may nevertheless be permitted under foreign law governing the claim of the insolvent debtor. The corresponding provision for non-EU member states is stipulated in sec 233 of the Insolvency Code.

Set-Off in Receivership Proceedings

Whereas Insolvency Proceedings aim at winding-up a credit institution and satisfying its creditors with the liquidation proceeds, receivership proceedings opened over a credit institution are intended to enable the credit institution to recover and continue its business. Accordingly, the legal consequences of these proceedings differ.

Section 86 para 1 BWG provides that all claims against the credit institution, which have been created prior to the opening of the receivership proceedings, are granted a statutory respite until the receivership is ended, even if such claims have become mature after the opening of the receivership proceedings. Further, section 86 para 3 of the Banking Act provides that claims created prior to the opening of receivership proceedings may neither be secured, nor be paid out nor be satisfied in any way during receivership proceedings. Depending on the report of the receiver on the financial status of the credit institution and its ability to meet a specific percentage of liabilities accrued before the commencement of receivership proceedings the court may permit satisfaction of the claims to a certain extent (section 86 para 2 BWG).

The effects of these provisions on set-off in receivership proceedings are judged ambiguously in Austrian legal literature and no case law has been published on this issue. According to certain Austrian commentators, a set-off of the claims created before the opening of receivership proceedings is not allowed in receivership proceedings due to the absence of maturity following the respite of the claims. Other Austrian commentators regard set-off as a satisfaction of the claims and therefore regard set-off in receivership proceedings as not admissible. However, according to Austrian literature recently published on this issue, set-off in receivership proceedings should be permitted where the claims would have been able to be set off prior to the opening of receivership proceedings.

If a court would endorse the latter view, we would assume that under Austrian law the ability to set off claims would in particular require that prior to the opening of receivership proceedings the claims have already existed reciprocally between the Parties and that they were mature and unconditional.

In an international context, section 81c BWG, which has implemented Article 23 of Directive 2001/24/EC on the reorganisation and winding-up of credit institutions, states that the adoption of Reorganisation Measures (including receivership proceedings) in relation to a credit institution does not affect the right of a creditor to set-off, provided that such set-off is permitted by the law governing the credit institution's claim. This provision must be read in conjunction with Section 81I BWG, which has implemented Article 25 of Directive 2001/24/EC and states that netting agreements shall be governed solely by the law governing such agreement.

Section 81c BWG applies specifically in the event of Reorganisation Measures (including receivership proceedings) being opened against a credit institution, i.e. already at a stage prior to the opening of Insolvency Proceedings. By contrast, the insolvency-related provisions of the Austrian Finality Act (in particular sections 16 and 17) apply only after Insolvency Proceedings have been opened against a credit institution.

Therefore, LCH will be able to rely on sections 81c and 81I BWG if receivership proceedings are opened (i.e. already at a stage prior to the opening of Insolvency Proceedings), whereas LCH will be able to rely on the insolvency-related provisions of the Austrian Finality Act once Insolvency Proceedings have been opened.

Financial Collateral Act (FSG)

Provisions regarding the treatment of netting arrangements in the context of Insolvency Proceedings are also contained in the FSG. Sec 9 para 1 FSG provides that a close-out netting provision would be effective in accordance with its terms (i) notwithstanding the commencement or continuation of winding-up, Reorganisation Measures and Insolvency Proceedings in respect of the Collateral provider and/or the Collateral taker; and/or (ii) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

Unless otherwise agreed by the Parties a set-off may be carried out, subject to a contrary agreement between the Parties, without prior notice, judicial authorisation or consent, public auction or observing a waiting period (sec 9 para 2 FSG).

Furthermore, sec 233 of the Insolvency Code contains specific provisions for netting agreements (*Aufrechnungs- und Schuldumwandlungsvereinbarungen*) providing that netting agreements shall exclusively be governed by the law applicable to such agreements.

The interaction of the netting arrangements provision with the provisions mentioned above is unclear as Austrian law lacks published precedents:

- One possible construction would be to give it the same meaning as sec 223 of the Insolvency Code, thereby subjecting netting arrangements to the same general rules as set-off. In effect, this would mean that the interaction described above would not be affected by the special rule on netting arrangements, as the netting arrangements would simply qualify as a set-off provision, thereby being covered by the general rule.

- Another possible interpretation would be that the general rules on set-off (sec 223 of the Insolvency Code) only apply with respect to non-contractual set-off whereas the special rules on netting arrangements (sec 233 of the Insolvency Code) apply to contractual set-off and are therefore the specific rule to the general rule. This could be interpreted as if contractual netting arrangements are solely to be governed by their applicable law and are not even subject to the provisions regarding avoidance and nullity of the country where the proceedings are opened. In such case, English law would be applicable (even without having regard to Austrian voidance, voidability or enforceability rules) and the set-off contemplated thereby would be valid, if valid under English law. We are of the view that this interpretation is convincing and should prevail over the interpretation described in the previous paragraph.

Due to the absence of any case law published on this issue, the construction of the provisions cited above remains unclear until the first court decision on this question is published. However, in our opinion, the interactions set out above are a reasonable interpretation and should in our view be a plausible means to argue before an Austrian court that, even if netting provisions were not valid under Austrian law, the court should apply English law in order to decide on the validity of the netting provisions.

If Austrian law would apply, set-off would only be permissible for obligations that have been due prior to the institution of Insolvency Proceedings between the same Parties (sec 19 of the Insolvency Code). Thus, close-out netting would not be available in such case.

There is some ambiguity whether the special provisions for the permissibility of set-off of claims arising from financial contracts listed in sec 20 para 4 of the Insolvency Code which have been terminated due to insolvency would be applicable in the case at hand. No relevant precedents, express rulings or legal literature exist on this subject, but we are of the opinion that the arrangements in the case at hand would not fall under such provision.

5.2.6 ***Can a claim for a close-out amount be proved for in Insolvency Proceedings without conversion into the local currency?***

Where claims of the creditor are expressed in a currency other than Euro, they have to be converted into Euro at the conversion rate applicable at the time of the commencement of Insolvency Proceedings (sec 14 of the Insolvency Code).

5.3 CLIENT CLEARING

Exempting Client Clearing Rule

5.3.1 ***Please opine on the availability and effectiveness of any law, regulation or statutory provision (having the force of law) in the Relevant Jurisdiction which (if so designated by LCH) would be expected to qualify as an Exempting Client Clearing Rule. Please clarify whether the relevant Exempting Client Clearing Rule would be expected to apply to Relevant Clearing Members of all entity types or to only certain entity types.***

There is no law, regulation or statutory provision under Austrian law qualifying as an Exempting Client Clearing Rule as defined in Regulation 1 *per se*. The FSG and the Austrian Finality Act do aim at protecting clearing operations from interferences with Austrian insolvency law to some extent (in particular, as concerns provided collateral). However, characterising the relevant provisions as Exempting Client Clearing Rule is not feasible.

The direct applicability and the priority of article 48 of the EU Regulation No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**") vis-à-vis opposing Austrian law generally lead to the result that Austrian law provisions mitigating or frustrating EMIR provisions must not be applied (priority of application (*Anwendungsvorrang*)).

We have to emphasise that the scope of the priority of application of EMIR-provisions have not yet been determined by Austrian court rulings. We may, thus, not definitely and infinitely opine whether the priority of EMIR-provisions (together with the stipulations of the FSG and the Austrian Finality Act) protect the operation of the Client Clearing Annex of the Default Rules from challenge under Austrian insolvency laws.

From an IPL perspective, however, sec 16 of the Austrian Finality Act provides that in case of an insolvency of a member of a system pursuant to sec 2 of the Austrian Finality Act, all rights and obligations arising out of the membership of the relevant member are governed by the law the system is subject to. As regards the system created by the LCH Agreements, the governing law is English law. Provided that Austrian courts uphold the choice of English law and English law does not require a Security Deed, LCH would not be legally obliged to demand a Security Deed from its clients.

Default Outside Insolvency Proceedings or Reorganisation Measures

5.3.2 ***If LCH were to: (i) declare a Relevant Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Reorganisation Measures in respect of that clearing member and (ii) seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the Relevant Clearing Member or any other***

person successfully challenge the actions of LCH and claim for the amount of the Account Balance?

As discussed under section 5.2.4, there are specific periods prior to the initiation of Insolvency Proceedings during which certain actions may be challenged. Apart from these challenging rights and standard civil law objections (e.g. error, violation of bones mores, etc.) we are not aware of any possibility to challenge the actions of LCH and claim for the amount of the Account Balance.

Applicable challenging provisions and other rights having the same effect, however, will not be applicable to the LCH Agreements prior to the initiation of Insolvency Proceedings as stated in section 5.2.3 above.

5.3.3 ***If LCH were to: (i) declare a Relevant Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Reorganisation Measures in respect of that clearing member; and (ii) seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the Relevant Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?***

For the return of Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter the answer of section 5.3.2 equally applies.

Insolvency-related Default

5.3.4 ***If (i) following the commencement of Insolvency Proceedings, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?***

In general, following the initiation of Insolvency Proceedings an insolvency officer appointed may contest/challenge the actions of LCH by claiming a violation of secs 25 et seq of the Insolvency Code which limits the possibilities to terminate agreements upon the occurrence of Insolvency Proceedings. Further, any actions of the Relevant Clearing Member may be contested by the insolvency officer appointed on the grounds of a violation of sec 3 of the Insolvency Code prohibiting any actions of the debtor.

The provisions of the Austrian Finality Act and the FSG (as stated above in section 5.2.4), however, should effectively prevent the actions of LCH of being successfully contested as, in particular, sec 17 of the Austrian Finality Act and sec 5 et seq of the FSG foresee a porting mechanism. In addition, Article 48 of EMIR expressly requires central counterparties to dispose of procedures to port Client Contracts as one

alternative in case a Relevant Clearing Member defaults. Thus, there is no material chance of a successful challenge of the actions of LCH when porting Client Contracts.

5.3.5 ***If (i) following the commencement of Insolvency Proceedings, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?***

For the return of Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter the answer of section 5.3.4 equally applies. As regards the return of Client Clearing Entitlements, article 48 of EMIR expressly requires central counterparties to dispose of procedures to liquidate Client Contracts as the other alternative in case a Relevant Clearing Member defaults.

Reorganisation Measures

5.3.6 ***If (i) following the implementation of Reorganisation Measures, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?***

Porting the Client Contracts and the Account Balance of a Clearing Client to a Backup Clearing Member following the implementation of Reorganisation Measures is not subject to the challenging rights set forth in section 5.2.4. Other rights to contest the actions of LCH, however, remain unaffected, such as objections regarding the validity of the agreement, violation of bones mores, error, etc.

5.3.7 ***If (i) following the commencement of Reorganisation Measures, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?***

For the return of Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter following the initiation of Reorganisation Measures the answer of section 5.3.6 equally applies.

Security Deed

5.3.8 ***Would the Security Deed provide an effective security interest under the laws of the Relevant Jurisdiction over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client?***

Yes, the Security Deed provides for an effective security interest over the Account Balance or the Client Entitlement in favour of the relevant Clearing Client under the laws of Austria. Austrian courts would recognize the Security Deed and qualify it as a right *in rem*, most likely as a pledge, if all perfection requirements according to English law are fulfilled. Please refer to section 5.3.9 regarding international private law stipulations.

5.3.9 ***Are there any perfection steps which would need to be taken under the laws of the Relevant Jurisdiction in order for the Security Deed to be effective?***

According to Austrian International Private Law, in particular sec 31 of the Austrian International Private Law Act (*Internationales Privatrechtsgesetz – IPRG*), the effectiveness of rights *in rem* are governed by the laws of the location of the relevant object (*lex rei sitae*). In case of book entry securities, sec 33a IPRG contains a special provision stating that securities will be governed by the jurisdiction the securities account is subject to.

As a result, the perfection steps have to be assessed in accordance with the laws of the relevant securities account or the location of the securities (in case of materialized securities).

In case the securities are governed by English law according to the above provisions, Austrian law does not require any further or separate perfection steps.

5.3.10 ***Is there any risk of a stay on the enforcement of the Security Deed in the event of Insolvency Proceedings or Reorganisation Measures being commenced in respect of a Relevant Clearing Member?***

As discussed in section 5.2.3, in particular with reference to sec 5 of the EU Insolvency Regulation concerning EU Member States and sec 222 of the Austrian Insolvency Code concerning non-EU Member States, the Security Deed will not be affected by Insolvency Proceedings or Reorganisation Measures initiated in Austria. This also applies for the enforcement and the realization of the security interest under the Security Deed.

Furthermore, sec 6 of the FSG as well as sec 17 of the Austrian Finality Act foresee that the enforcement of Collateral remains unaffected by local law Insolvency Proceedings which also applies for Reorganisation Measures (see sec 3 para 1 no 10 FSG).

Sec 16 of the Austrian Finality Act, eventually, provides that rights in the context of a system (as defined in sec 2 para 1 Austrian Finality Act) shall be governed by the law the system is subject to in case of the initiation of Insolvency Proceedings or Reorganisation Measures (see sec 11 of the Austrian Finality Act).

5.4 **General**

5.4.1 ***Please provide brief details of any other significant legal or regulatory issues which might be expected to arise in connection with the provision by a Relevant Clearing Member of Client Clearing Services and which are not covered by the Questions above.***

Banking activities could be denied enforceability if they are seen as gambling contracts. A specific rule in sec 1 para 5 BWG limits the applicability of the provisions regarding gambling contracts and declares that these provisions are not applicable to banking activities carried out by licensed banks. Foreign credit institutions acting in Austria are treated like banks licensed in Austria in this respect.

According to sec 1 para 1 no 7 BWG, only licensed Austrian entities may trade in securities on a commercial basis. If an Austrian Entity trades with its own assets (*Privatvermögen*), no licence is required.

The non-compliance with licence requirements on the side of the Austrian Entity can result only in sanctions against the Austrian Entity and would not render the LCH Agreements null and void.

Finality Act

The Austrian Finality Act (*Finalitätsgesetz*) was enacted in 1999 and implements EU Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems ("**Finality Directive**", as amended by Directive 2009/44/EC). The Austrian Finality Act applies to systems which are defined as an arrangement between three or more participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardised arrangements for clearing (whether or not through a central counterparty) or the execution of transfer orders between the participants, governed by the law of a EEA member state chosen by the participants , and notified to the European Commission by the member state whose law is applicable as being in line with Article 2 lit a third dash of EU Directive 98/26 (*System*).

The Austrian Finality Act aims at reducing systemic risk in securities and payment settlement systems by safeguarding that payment and transfer orders entered into a system are final in the sense that they are valid and protected against the risk of insolvency of the participants in the system. This insolvency protection also applies to set-offs and Collateral provided in connection with the system. Further, the Austrian Finality Act contains provisions on conflicts of laws.

Sec 16 Austrian Finality Act (implementing Article 8 of the Finality Directive) provides that in case of insolvency over the assets of a participant in the System (i.e. the Austrian Entity), the rights and obligations of the Austrian Entity arising out of or in connection with the participation in the system shall be governed by the law governing the system.

Further, pursuant to Sec 17 Austrian Finality Act, the rights of a system operator or of a participant to Collateral provided to them in connection with a system or any interoperable system, and the rights of central banks of the member states or the European Central Bank to Collateral security provided to them, shall not be affected by Insolvency Proceedings against (i) the participant (in the system concerned or in an interoperable system), (ii) the system operator of an interoperable system which is not a participant, (iii) a counterparty to central banks of the member states or the European Central Bank or (iv) any third Party which provided the Collateral security. Such Collateral may be used for the satisfaction of the secured obligations. However, the civil law claims including the rights of avoidance under insolvency law regarding legal acts carried out outside the clearing of the system are not affected.

Rights *in rem* to securities which are provided as Collateral to participants or system operators in a system as a security for obligations shall be governed by the following law: (i) if the rights are created by registration in a register in an EEA member state by the law of such member state, (ii) if the rights are created by book entry in a central securities depositary established in an EEA member state, by the law of such member state, and (iii) if the rights are created by a book entry on an account in an EEA member state, the law of such member state (sec 18 Austrian Finality Act).

6. QUALIFICATIONS

6.1 General qualifications

6.1.1 No opinion is expressed on matters of fact.

6.1.2 An agreement on the exclusive competence of a foreign jurisdiction does not prejudice a Party to file a claim with the Austrian court and the court will hear the case unless the defendant raises an objection not later than the deadline for submission of an answer to the claim and before the defendant has presented its submissions on the dispute.

6.1.3 No opinion is expressed on the tradeability of any of the rights and assets granted as security under any of the Documents.

6.1.4 In case of enforcement by filing a claim in an Austrian court or applying for enforcement under Austrian law, court fees or similar enforcement fees will become payable.

6.1.5 If any Party to any of the Documents knew or ought reasonably to have known that any representation, warranty or statement in any of the Documents was incorrect, inaccurate or incomplete or any covenant was or could reasonably be expected to be impossible to

be fulfilled, such person may be limited in enforcing its rights under the relevant Documents under Austrian law.

6.1.6 If recognition of an arbitral award or court judgment rendered abroad or enforcement is sought by filing a claim in an Austrian court, the translation of foreign language documents into the Bulgarian language will be required and costs (such as court fees, attorney's fees and duties) will become payable.

6.2 **Arbitration clause**

The validity of an arbitration clause will generally be evaluated on the basis of the law applicable to the arbitration clause. If the arbitration clause has been concluded by proxy, the law applicable to the validity of the representation will have to be determined. Generally, this is the law of the seat of the represented party. Austrian law requires (contractual) representatives to hold a specific power of attorney authorising the conclusion of arbitration clauses. Representatives holding such specific power of attorney may validly bind the represented party to submit disputes to arbitration.

Dual representation (i.e. the conclusion of a contract through the joint representative of two parties) must be permissible under the applicable law. Under Austrian law, such transactions fall under the term of self-dealing and must be explicitly authorised by the represented parties. For the sake of legal certainty, such authorisation should be obtained in advance in writing.

Consequently, whether foreign arbitral awards rendered on the basis of an arbitration clause concluded by a representative can be enforced against the represented party is subject to the condition that the represented party explicitly authorised the representative to conclude an arbitration clause. In addition, self-dealing must be permitted under the applicable law. Therefore, in order to minimise the risk of non-enforceability under Austrian law, the contracts between the LCH and the Relevant Clearing Members should include a special power of attorney explicitly authorising LCH to conclude arbitration clauses on behalf of the Relevant Clearing Member. Further, a clause by which the Relevant Clearing Members accept self-dealings and the conclusion of dealings with third parties also represented by LCH is required.

We do not opine on the enforceability of the rules of the arbitration proceedings agreed upon as the Regulation 33 of the General Regulations refers to the relevant Exchange Rules or ATP Market Rules. The Exchange Rules in turn are defined as "the rules, administrative procedures, Memorandum and Articles of Association or bye-laws which regulate an Exchange" and the ATP Market Rules as "the rules, administrative procedures, Memorandum and Articles of Association or bye-laws which regulate an ATP and the market administered by it". As we did not review any Exchange Rules or ATP Market Rules for the purpose of this opinion, we cannot ascertain whether these rules governing arbitration proceedings would be enforceable before an Austrian court.

6.3 Austrian Finality Act / Austrian Financial Security Act

Both the Austrian Finality Act and the FSG contain provisions aiming at facilitating transactions in financial markets, *inter alia* clearing transactions.

For this reason both laws include provisions relating to national Insolvency Proceedings. The objective of these provisions is to exclude financial collateral from the enforcement and realization under national Insolvency Proceedings and any other objections arising out of national law, which the financial collateral is – according to the choice of law – not subject to.

As discussed above in the opinion, we are of the view that both the Austrian Finality Act and the FSG constitute *leges speciales* vis-à-vis contradicting Austrian law of all kinds and, thus, supersede contradicting provisions according to Austrian interpretation rules.

However, there is no explicit legislation or Supreme Court rulings supporting / confirming this view. The risk of divergent rulings, even though unlikely, cannot be excluded.

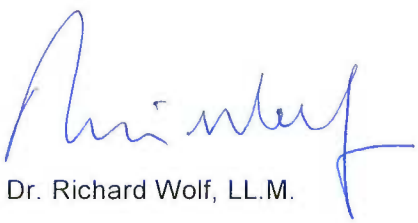
Further, there is no clear legislation or Supreme Court ruling on the scope of the objections or other rights affected by the Austrian Finality Act and the FSG.

* * *

This letter and the opinion expressed herein are to be governed by and construed in accordance with Austrian law as it stands at the date of this letter.

This opinion is addressed to LCH.Clearnet Limited solely for its benefit in connection with the Documents. It is not to be transmitted to anyone else nor may it be relied upon by anyone else or for any other purpose or quoted or referred to in any other document or filed with anyone without our express prior written consent.

We consent to a copy of this advice being made publically available on the website of LCH.Clearnet Limited and to it being shown to the relevant regulators and/or any counsel appointed by the addressee to advise on matters of the laws of other jurisdictions, for information purposes only and solely on the basis that we assume no responsibility to any such Parties as a result or otherwise.



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