

CLIFFORD CHANCE LLP

AVENUE LOUISE 65 BOX 2
1050 BRUSSELS
BELGIUM

TEL +32 2 533 5911

FAX +32 2 533 5959

www.cliffordchance.com

LCH.Clearnet Limited
Aldgate House
33 Aldgate High Street
London EC3N 1EA

12 June 2014

Dear Sirs

LCH - opinion in respect of membership, insolvency, security, set-off, netting and client clearing - Belgium

You have asked us to give an opinion in respect of the laws of Belgium ("**this jurisdiction**") in relation to certain specific questions raised by LCH.Clearnet Limited ("**LCH**") in relation to membership, insolvency, security, set-off, netting and client clearing. The relevant questions are set out in full in Section 3 of this opinion letter together with the corresponding responses.

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 This opinion is given in respect of Clearing Members which are:

- (a) credit institutions¹;
- (b) investment firms²; or
- (c) public authorities and publicly guaranteed undertakings,

established under the laws of this jurisdiction, and all references to a "**Relevant Clearing Member**" in this opinion shall be construed accordingly.

1.2 This opinion is given in respect of each of the LME Service, 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, and relates to obligations arising under contracts ("**Contracts**") to which LCH is a party and which have been duly registered by LCH.

¹ Governed by the Law of 22 March 1993 on the status and supervision of credit institutions.

² Governed by the Law of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers.

C L I F F O R D

C H A N C E

1.3 Unless the context otherwise requires, in this opinion:

- (a) "**Arrangements**" means the Client Clearing Arrangements, the Collateral Arrangements and the Default Arrangements;
- (b) "**Client Clearing Arrangements**" means the contractual arrangements by which a Relevant Clearing Member is bound to the default management procedures of LCH in respect of Contracts entered into in connection with Client Clearing Business, constituted by the Relevant Clearing Member's Clearing Membership Agreement and the General Regulations, including the Client Clearing Annex of the Default Rules of LCH;
- (c) "**Code IPL**" means the Law of 16 July 2004 laying down the code of international private law;
- (d) "**Collateral**" means Securities (as such term is defined in the Deed of Charge) lodged by the Relevant Clearing Member with LCH pursuant to the Deed of Charge in accordance with the Procedures of LCH (and in particular, section 4 (*Collateral*) of the Procedures of LCH) and the term, for the avoidance of doubt, includes the Charged Property (as defined in the Deed of Charge);
- (e) "**Collateral Arrangements**" means the security arrangements which govern the provision of Collateral by a Relevant Clearing Member to LCH, constituted by the relevant executed Deed of Charge, the General Regulations of LCH (in particular those set out in Section 4 (*Collateral*) of the Procedures of LCH) and the relevant instruction(s) through LCH's Collateral Management System;
- (f) "**Default Arrangements**" means the contractual arrangements by which a Relevant Clearing Member is bound to the default management procedures of LCH, constituted by the Relevant Clearing Member's Clearing Membership Agreement and the General Regulations, including the Default Rules of LCH;
- (g) "**Exempting Client Clearing Rule**" means any law, regulation or statutory provision (having the force of law) of a governmental authority the effect of which is to protect the operation of the Client Clearing Annex of the Default Rules from challenge under the insolvency rules applicable to any Relevant Clearing Member;
- (h) "**Financial Collateral Law**" means the Law of 15 December 2004 on financial collateral;
- (i) "**Insolvency Proceedings**" means the procedures listed in paragraphs 3.2.1 (a) and (c);
- (j) "**Parties**" means LCH and a single Relevant Clearing Member to which this opinion applies, and "**Party**" means either of them;
- (k) "**Reorganisation Measures**" means the procedures listed in paragraphs 3.2.1 (b) and (d);

C L I F F O R D

C H A N C E

- (l) "Settlement Finality Law" means the Law of 28 April 1999 on the settlement finality in payment and securities payment systems;
- (m) a reference to a "paragraph" is a reference to a paragraph in this opinion and a reference to a "Section" is a reference to a section in this advice; and
- (n) headings are for ease of reference only and shall not affect interpretation of this opinion.

Terms not otherwise defined in this opinion shall have the meaning ascribed to such terms in LCH's Rulebook.

1.4 For the purposes of this opinion we have only reviewed the following documents (the "**Opinion Documents**"):

- (a) the General Regulations, Procedures, Default Rules and Settlement Finality Regulations of LCH in the form provided to LCH by Clifford Chance LLP on 9 June 2014 ("**LCH's Rulebook**");
- (b) a standard form template version of the Clearing Membership agreement to be entered into between LCH and each Relevant Clearing Member, which incorporates LCH's Rulebook (the "**Clearing Membership Agreement**"); and
- (c) a standard form template version of the agreement entitled "Charge by Clearing Member – Charge Securing Own Obligations" (Version 8.0, related to companies incorporated in this jurisdiction executing the agreement with and without the use of a seal, as provided to us on 9 June 2014) (the "**Deed of Charge**" and together with the Clearing Membership Agreement, the "**Agreements**").

We have reviewed the Opinion Documents in connection with the instructions to counsel dated 22 October 2013 (the "**Instructions**") and the Service Description (as defined in the Instructions).

1.2 This advice relates solely to matters of Belgian law (as in force at the date hereof) and does not consider the impact of any laws (including insolvency laws) other than Belgian law, even where, under Belgian law, any foreign law falls to be applied.

1.3 We are not expressing any opinion as to any matters of fact.

2. ASSUMPTIONS

We assume:

2.1 That each Party has the capacity, power and authority, under all applicable laws, to enter into and to exercise its rights and to perform its obligations under the Agreements and all Contracts, and that each Party has duly authorised, executed and delivered the Agreements and Contracts and taken all necessary steps to ensure their legality, validity, enforceability and admissibility in evidence in Belgium.

C L I F F O R D

C H A N C E

- 2.2 That each Party holds and complies with all regulatory licences or other requirements applicable in connection with its entry into and exercise of its rights and performance of its obligations under the Agreements and all Contracts.
- 2.3 That the Agreements and all Contracts are legal, valid, binding and enforceable in accordance with their respective terms and conditions under the law by which they are expressed to be governed and the laws of the places where the obligations thereunder have to be or have been performed³ (save that this assumption does not apply to the Agreements when governed by Belgian law or where the place of performance is Belgium).
- 2.4 That there is no other agreement, instrument or other arrangement between or affecting the Parties to the Agreements which conflicts with, overrides, modifies or supersedes the Agreements.
- 2.5 That each Agreement and Contract is entered into prior to the commencement of any Insolvency Proceedings against either Party.
- 2.6 That (save in relation to any non-performance by one Party which leads to the taking of action by the other Party under the termination and close-out provisions of the Agreements) each Party will duly perform its obligations under each Agreement and Contract in accordance with their respective terms.
- 2.7 That the obligations assumed under the Agreements and the Contracts are "mutual" between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party.
- 2.8 That each Party, when transferring margin pursuant to the Collateral Arrangements, has full legal title to such margin at the time of transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).
- 2.9 That all margin transferred pursuant to the Collateral Arrangements is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of margin pursuant to the Collateral Arrangements will have been effectively carried out.
- 2.10 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

³ This assumption is required because the courts of Belgium may give effect, at their discretion, to the overriding mandatory laws of any jurisdiction where the obligations arising out of an agreement have to be or have been performed; they may also take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance. Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**"), Art. 9.3 and 12.2

3. OPINION

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

3.1 Membership

- 3.1.1 *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)?*

The limitations imposed by the constitutional documents of a Relevant Clearing Member to enter into the Agreements are discussed in paragraph 3.1.3 below.

In this jurisdiction only banks, investment firms and public authorities can act as clearing members⁴. There are no other specific statutory limitations or regulatory requirements under the laws of this jurisdiction which would limit the capacity of an appropriately authorised Relevant Clearing Member to enter into the Agreements.

- 3.1.2 *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?*

LCH would not be deemed to be domiciled, resident or carrying on business in this jurisdiction by reason merely of providing clearing services to a Relevant Clearing Member⁵.

- 3.1.3 *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?*

In this jurisdiction, a company's capacity and powers are generally defined by the corporate object set out in its articles of association.

To be bound by a transaction, the transaction must comply with the stated business purpose of the company or, if applicable, fall within a catch-all provision contained in its objects clause permitting the company to conduct ancillary activities that are necessary or useful to its main business purpose. Belgian company law provides that, when a company enters into a transaction and is duly represented in accordance with its articles of association, the company is bound even if the transaction in question falls

⁴ Settlement Finality Law, Art. 1/1, 2° and 6°.

⁵ Law of 22 February 1998 on the status of the National Bank of Belgium, Art. 36/25 et seq.

C L I F F O R D
C H A N C E

outside its corporate object⁶. There is an exception to this rule when the counterparty to the transaction knew about the scope of the corporate object and about the *ultra vires* nature of the transaction.

A company is validly represented by its board of directors. In addition, the company's articles of association may grant powers of representation to one or more directors and, for matters that fall within the day to day management, to one or more managing directors or other persons entrusted with daily management. The company can also be validly represented by special proxy holders within the limits of their proxy.

In this jurisdiction the legal status of public authorities and publicly guaranteed undertakings may vary from being a part of government to being a separate entity with the government as a regular shareholder. Public authorities and publicly guaranteed undertakings may either be set up by law or incorporated under a deed of constitution, and they must act within the powers granted to them in their constitutional laws and documents and/or delegated by the higher level of government. Signing powers of public authorities and publicly guaranteed undertakings are similarly regulated by their constitutional laws and documents.

In view of the above:

- (a) when dealing with a company in this jurisdiction, we advise that LCH requests a copy of the up-to-date articles of association of the Relevant Clearing Member and of any special proxy conferring authority to signatories, and checks these documents for compliance of the transaction with the corporate object of the company and for evidence of the signing powers of the signatories; and
- (b) when dealing with a public authority or publicly guaranteed undertaking in this jurisdiction, we advise that LCH requests a copy of the up-to-date constitutional laws and documents of the Relevant Clearing Member and of any delegation of powers by any higher government, and checks these documents and instruments for compliance of the transaction with the powers of the authority and for evidence of the signing powers of the signatories.

3.1.4 ***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?***

No specific formalities apply to the entry into the Agreements by a Relevant Clearing Member under the laws of this jurisdiction.

The perfection of the Collateral Arrangements is pursuant to Belgian conflicts of laws rules governed by the law of the place where the rights of LCH to the Collateral are legally recorded on a register, account or centralised deposit system (*ie* English law, we assume)⁷, and you will need to

⁶ Company Code, Art. 526.

ensure that the Collateral Arrangements are duly perfected in accordance with English law.

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

In contractual matters, the Belgian rules of conflicts of laws give effect to the choice of governing law made by the parties, subject to certain mandatory rules (*lois de police / bepalingen van bijzonder dwingend recht*) or rules of international public policy (*ordre public international / internationale openbare orde*)⁸. The Arrangements do not conflict with any such mandatory rules or rules of international public policy. However:

- (a) Where all the elements relevant to a situation were, at the time the choice of law was made, connected with a particular country, the courts will apply the rules of law of that country which cannot be derogated from by contract (*dispositions impératives / bepalingen van dwingend recht*)⁹.
- (b) The courts of this jurisdiction may give effect, at their discretion, to the overriding mandatory laws of any jurisdiction where the relevant obligations have to be or have been performed; they may also take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance¹⁰.
- (c) The courts of this jurisdiction may apply Belgian law despite the choice of another law by the Parties if it appears clearly impossible, in the course of legal proceedings, to determine the substantive rules of the chosen law¹¹.

Choice of jurisdiction clauses are in principle valid and enforceable in Belgium. However:

- (a) The courts may refuse to give effect to a contractual choice of jurisdiction if they expect that a foreign judgment rendered pursuant thereto will not be capable of recognition or enforcement in Belgium¹².
- (b) The courts of this jurisdiction may accept jurisdiction despite a contractual choice of another jurisdiction if they are already seized with a closely connected matter, or if the dispute is closely connected

⁷ Settlement Finality Law, Art. 8, §2 to 4.

⁸ Rome I, Art. 3, 9 and 21; Code IPL, Art. 20 and 21.

⁹ Rome I, Art. 3.3.

¹⁰ *Ibid.*, Art. 9.3.

¹¹ Code IPL, Art. 15 §2.

¹² Code IPL, Art. 7. This denial of jurisdiction clauses is not possible in cases where the European Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Regulation 44/2001**") applies; see Art. 23.3 of that Regulation.

with this jurisdiction and litigation abroad appears impossible or unreasonable¹³.

3.1.6 ***Will the courts uphold the judgement of the English courts or an English arbitration award?***

Subject to and in accordance with Regulation 44/2001, the courts of this jurisdiction would recognise and enforce any final judgment obtained in the courts of England by LCH against a Relevant Clearing Member in connection with the Agreements.

An election of arbitration in accordance with the Agreements will be recognised and given effect to by the courts of this jurisdiction. This jurisdiction is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the Geneva Convention on International Commercial Arbitration of 21 April 1961, and an arbitral award would be recognised and enforced accordingly¹⁴.

3.1.7 ***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?***

The Arrangements do not conflict with any mandatory rules or rules of international public policy under the laws of this jurisdiction.

3.2 **Insolvency, Security, Set-off and Netting**

3.2.1 ***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?***

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party could be subject in this jurisdiction are the following:

- (a) bankruptcy (*faillite / faillissement*) under the law of 8 August 1997; this law also permits the temporary appointment of a provisional administrator (*administrateur provisoire / voorlopige bewindvoerder*) in the anticipation of a possible declaration of bankruptcy;
- (b) judicial reorganisation (*réorganisation judiciaire / gerechtelijke reorganisatie*) under the law of 31 January 2009¹⁵; this law also permits the temporary appointment of a judicial representative (*mandataire de justice / gerechtsmandataris*) if the continuity of the

¹³ Code IPL, Art. 9 and 11; Regulation 44/2001, Art. 27 *et seq.* The circumstances where jurisdiction can be accepted are more restrictive in cases where Regulation 44/2001 applies.

¹⁴ See also Judicial Code, Art. 1676 *et seq.*

¹⁵ Law of 31 January 2009 on the continuity of enterprises.

business is jeopardised; reorganisation proceedings, however, are not available to credit institutions, insurance companies and certain other categories of regulated financial institutions¹⁶;

- (c) voluntary or judicial liquidation (*liquidation / vereffening*) under the Company Code; it should be noted that a liquidation does not necessarily imply that the entity is insolvent properly speaking, but the proceeding triggers the applicability of many rules of insolvency law; and
- (d) rescue measures (*mesures de redressement / herstelmaatregelen*) taken by the government in respect of a financial institution of systemic importance under the law of 2 June 2010¹⁷.

Immunities against Insolvency Proceedings and Reorganisation Measures are generally available to public authorities. These immunities will not affect the effectiveness of the Arrangements in accordance with the analysis made in this opinion, however, because the core of this analysis is based on the Settlement Finality Law which applies equally to public authorities¹⁸.

The events and procedures specified in Rules 3 and 5 of the Default Rules adequately refer to all Insolvency Proceedings and Reorganisation Measures except rescue measures referred to in paragraph 3.2.1(d).

3.2.2 ***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?***

The Settlement Finality Law provides that the rights of a participant to collateral security provided to it in connection with a payment and securities settlement system are not affected by insolvency proceedings against the participant that provided the collateral security¹⁹. As a result, the Deed of Charge would be effective in the context of Insolvency Proceedings or Reorganisation Measures of a Relevant Clearing Member. With regard to the conditions for enforcement of collateral security provided to a participant in connection with a payment and securities settlement system, Belgian conflicts of laws rules refer to the law of the place where the rights of the

¹⁶ *Ibid.*, Art. 4, par. 2.

¹⁷ The government's powers to impose rescue measures relate only to insurance companies, credit institutions, and operators of clearing and settlement systems; law of 2 June 2010 on the completion of rescue measures applicable to enterprises in the banking and financial sector, Art. 3, 5 and 6.

¹⁸ Settlement Finality Law, Art. 1/1, 2° and 6°.

¹⁹ Settlement Finality Law, Art. 8, §1.

participant to such collateral security are legally recorded on a register, account or centralised deposit system (*ie* English law, we assume)²⁰.

- 3.2.3 ***Would LCH have the right to take the actions provided for in 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.***

The Settlement Finality Law provides that in the event of insolvency proceedings against a Belgian participant in a payment and securities settlement system governed by the law of another EU member or third party state, the rights and obligations arising from, or in connection with, the participation of that Belgian participant in the system shall exclusively be determined by the foreign law governing the system²¹. The impact of Insolvency Proceedings or Reorganisation Measures against a Relevant Clearing Member on its rights and obligations arising from, or in connection with, its participation in the LCH system must therefore be determined under English law.

Under the laws of this jurisdiction, it is not necessary 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.

- 3.2.4 ***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?***

The Belgian bankruptcy law contains voidable preference rules that challenge certain transactions made by or with a bankrupt debtor during the pre-bankruptcy suspect period of up to six months²². The following actions and payments are caught by the voidable preference rules:

²⁰ Settlement Finality Law, Art. 8, §2 to 4.

²¹ Settlement Finality Law, Art. 7, §2.

²² Law of 8 August 1997 on bankruptcy, Art. 17, 18 and 20.

C L I F F O R D
C H A N C E

- (a) transactions made without consideration, or at a significant undervalue.
- (b) payments made in respect of liabilities that were not yet due and payable.
- (c) payments in kind, unless the payment in kind is an agreed enforcement method of a financial collateral arrangement.
- (d) all transactions with a counterparty who had knowledge of the insolvency of the debtor.
- (e) new security granted for pre-existing debts.

However, these rules have been made inapplicable by the Settlement Finality Law which provides that insolvency proceedings against a participant in a payment and securities settlement system have no retroactive effect on its rights and obligations arising from, or in connection with, its participation in the system prior to the moment of opening of the proceedings²³, and are thus not relevant to the Arrangements.

3.2.5 ***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?***

The general rules on set-off are laid down in the Civil Code²⁴. Subject to specific exceptions, the Financial Collateral Law offers broad protection for contractual close-out netting arrangements in the insolvency of a party²⁵.

However, the Settlement Finality Law provides that in the event of insolvency proceedings against a Belgian participant in a payment and securities settlement system governed by the law of another EU member or third party state, the rights and obligations arising from, or in connection with, the participation of that Belgian participant in the system shall exclusively be determined by the foreign law governing the system²⁶. Belgian substantive netting rules have thus been made inapplicable, and the question must be looked at under English law instead.

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

Claims may be filed in Insolvency Proceedings in any currency in which they are denominated. In the case of a bankruptcy or a liquidation, an unsecured net claim filed in a foreign currency will be converted, for the purposes of measuring *pro rata* distributions between creditors, at the rate of exchange

²³ Settlement Finality Law, Art. 6.

²⁴ Civil Code, Art. 1244; Judicial Code, Art. 1333 *et seq.*

²⁵ Financial Collateral Law, Art. 14.

²⁶ Settlement Finality Law, Art. 7, §2.

prevailing on the date of commencement of the Insolvency Proceedings or, if applicable, at the rate set by agreement between the parties²⁷.

The enforceability in Belgium of monetary claims is not limited to claims denominated in euro. Judgments from the Belgian courts ordering the payment of a sum of money, however, may only be expressed in euro or in the currency of an OECD member state²⁸; claims denominated in another currency will be converted into euro by the courts.

3.3 Client Clearing

- 3.3.1 *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 Rule would be expected to apply to Relevant Clearing Members of all entity types or to only certain entity types.*

If, and to the extent that, you consider such an Exempting Client Clearing Rule to be available, please (i) assume for the purposes of answering the following Questions that LCH will rely upon the existence of the relevant Exempting Client Clearing Rule and will not require those Relevant Clearing Members to which that Rule applies to enter into a Security Deed; and (ii) ignore Questions 3.3.8 to 3.3.10.

In cases where you do not consider an Exempting Client Clearing Rule to be available, please: (i) assume for the purposes of answering the following Questions that LCH will require Relevant Clearing Members to enter into a Security Deed; (ii) assume that the Security Deed is legal, valid, binding and enforceable under English law (as its governing law) and complies with all relevant perfection requirements under the law of any jurisdiction(s) other than the Relevant Jurisdiction which you consider to be relevant to that matter; and (iii) provide a response to Questions 3.3.8 to 3.3.10.

In this jurisdiction there is no law, regulation or statutory provision which would qualify as an Exempting Client Clearing Rule.

However, the Settlement Finality Law provides that in the event of insolvency proceedings against a Belgian participant in a payment and securities settlement system governed by the law of another EU member or third party state, the rights and obligations arising from, or in connection with, the participation of that Belgian participant in the system shall exclusively be determined by the foreign law governing the system²⁹. The rights of LCH, following the commencement of Insolvency Proceedings or

²⁷ A. Zenner, *Dépistage, faillites & concordats*, No. 410; A. Cloquet, *Les concordats et la faillite*, *Novelles*, t. IV, No. 1725.

²⁸ Law of 30 December 1885, Art. 3.

²⁹ Settlement Finality Law, Art. 7, §2.

C L I F F O R D
C H A N C E

Reorganisation Measures of a Relevant Clearing Member, (i) to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member, or (ii) to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, are set out in the Agreements and as such constitute "rights and obligations arising from, or in connection with, the participation in a payment and securities settlement system" for these purposes. The impact of Insolvency Proceedings or Reorganisation Measures against a Relevant Clearing Member on these arrangements must therefore be determined under English law as the governing law of the LCH system.

We understand that English substantive insolvency law (in particular Part VII of the Companies Act 1989, "**Part VII**") would give effect to the provisions in the LCH Rules entitling LCH to either port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member or to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such Clearing Client, irrespective of the existence and/or enforceability of a Security Deed entered into between the Clearing Member and its Clearing Clients. Part VII would therefore operate as an Exempting Client Clearing Rule for English law purposes (please refer to the English law opinion provided by Clifford Chance in this respect).

- 3.3.2 ***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?***

In the absence of Insolvency Proceedings or Reorganisation Measures, the laws of this jurisdiction in principle give full effect to whatever contractual provisions parties may have agreed between themselves with regard to porting of positions³⁰.

- 3.3.3 ***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?***

In the absence of Insolvency Proceedings or Reorganisation Measures, the laws of this jurisdiction in principle give full effect to whatever contractual provisions parties may have agreed between themselves with regard to close-out and leapfrogging of net payments to clearing clients³¹.

³⁰ Civil Code, Art. 1134.

³¹ Civil Code, Art. 1134.

- 3.3.4 *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 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?*

The impact of Insolvency Proceedings against a Relevant Clearing Member on the arrangements with respect to porting of positions must, in accordance with the conflict of law rule set forth by the Settlement Finality Law, be determined under English substantive law. Please refer to paragraph 3.3.1 above.

- 3.3.5 *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?*

The impact of Insolvency Proceedings against a Relevant Clearing Member on the arrangements with respect to close-out and leapfrogging of net payments to clearing clients must, in accordance with the conflict of law rule set forth by the Settlement Finality Law, be determined under English substantive law. Please refer to paragraph 3.3.1 above.

- 3.3.6 *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?*

The impact of Reorganisation Measures against a Relevant Clearing Member on the arrangements with respect to porting of positions must, in accordance with the conflict of law rule set forth by the Settlement Finality Law, be determined under English substantive law. Please refer to paragraph 3.3.1 above.

- 3.3.7 *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*

C L I F F O R D
C H A N C E

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?

The impact of Reorganisation Measures against a Relevant Clearing Member on the arrangements with respect to close-out and leapfrogging of net payments to clearing clients must, in accordance with the conflict of law rule set forth by the Settlement Finality Law, be determined under English substantive law. Please refer to paragraph 3.3.1 above.

- 3.3.8 *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?*

We understand that Part VII operates as an Exempting Client Clearing Rule for English law purposes (please refer to the English law opinion provided by Clifford Chance in this respect) and consequently, in accordance with the Instructions, we have not provided an answer to this question.

- 3.3.9 *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?*

We understand that Part VII operates as an Exempting Client Clearing Rule for English law purposes (please refer to the English law opinion provided by Clifford Chance in this respect) and consequently, in accordance with the Instructions, we have not provided an answer to this question.

- 3.3.10 *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?*

We understand that Part VII operates as an Exempting Client Clearing Rule for English law purposes (please refer to the English law opinion provided by Clifford Chance in this respect) and consequently, in accordance with the Instructions, we have not provided an answer to this question.

- 3.3.11 *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.*

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

4. **QUALIFICATIONS**

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

- 4.1.1 *Abuse of right.* The courts have developed a body of case law to the effect that rights may not be exercised in an abusive manner, and a party may be

C L I F F O R D
C H A N C E

denied the right to invoke a contractual right if so doing would be abusive³². It is unlikely in fact that the exercise of a right of set-off could ever be considered abusive, but the exercise of a right to terminate or close out a Contract might be susceptible of abuse. As to conflicts of laws, however, we believe that these issues must be regarded as being contractual matters, that a Belgian court should apply the law that governs the Agreements, and that Belgian law should thus not be relevant to an allegation of abusive termination pursuant to the Agreements.

- 4.1.2 *Liquidated damages and penalties.* Belgian law allows contractual arrangements providing for liquidated damages (*clause pénale / strafbeding*), but gives the courts the power to reduce the agreed amount of liquidated damages if such amount manifestly exceeds a genuine pre-estimate by the parties of the loss to be suffered in the event of a breach³³. The determination of a termination amount upon close-out of the Contracts may fall under these rules. As to conflicts of laws, however, we believe that these issues must be regarded as being contractual matters, that a Belgian court should apply the law that governs the Agreements, and that Belgian law should thus not be relevant to an allegation that a termination payment determined in accordance with the Agreements is excessive.
- 4.1.3 *Grace periods.* The courts have the power to grant periods of grace for the performance of its obligations to a debtor who has acted in good faith³⁴. It is uncertain whether this power is a matter of substantive law and can only be exercised if an agreement is governed by Belgian law, or is a procedural matter and can always be exercised by the Belgian courts irrespective of the governing law of an agreement.
- 4.1.4 *Mandatory rules and rules of public policy.* Certain rules of law of this jurisdiction are mandatory (*impératives / van dwingend recht*) rules or relate to public policy (*ordre public / openbare orde*), and overrule any contractual provision with which they would be inconsistent. The Arrangements do not conflict with any such mandatory rules or rules of public policy.
- 4.1.5 *Contingent or unascertained obligations.* If a party is subject to insolvency proceedings in this jurisdiction, the courts may not give effect to the close-out netting arrangements of the Agreements to the extent that these arrangements seek to allow set-off of an obligation owed to that party against obligations of that party that are merely contingent or unascertained.
- 4.1.6 *Excessive delay.* The courts of this jurisdiction may not allow the operation of the close-out netting arrangements of the Agreements to delay the payment of a termination amount beyond a reasonable period of time³⁵.

³² For example, Cass., 8 February 2001, *Pas.*, 2001, p. 244; 6 January 2011, with concl. Adv. Gen. Henkes, *juridat*, C.09.0624.F.

³³ Civil Code, Art. 1231.

³⁴ Civil Code, Art. 1244; Judicial Code, Art. 1333 *et seq.*

³⁵ See the discussion of the concept of "abuse of right" in paragraph 4.1.1.

C L I F F O R D

C H A N C E

This advice is given for the exclusive benefit of the addressee. It may not, without prior written consent, be relied on by any other person. We consent to a copy of this advice being made publically available on its website and to it being shown to the Bank of England, the U.S. Commodities and Futures Trading Commission, the Federal Reserve, the U.S. Securities and Exchange Commission 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.

Yours faithfully

Clifford Chance LLP

Clifford Chance LLP