



Dated 07 August 2023

**LCH LIMITED**

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**OPINION ON THE ENFORCEABILITY UNDER GUERNSEY  
LAW OF CERTAIN ARRANGEMENTS UNDER THE DEED OF  
CHARGE AND THE SECURITY DEED**

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(LCH)

07 August 2023

Dear Colleagues

## 1 Introduction

We have been requested to provide LCH with a legal opinion (the **Opinion**) as to the laws of the island of Guernsey (**Guernsey**) on the power and capacity of certain Guernsey entities entering into, and the enforceability of the provisions under the following standard form English law governed documents, copies of which we have examined:

- (a) the LCH rulebook which includes: (i) the general regulations; (ii) the default rules; (iii) the settlement finality regulations; (iv) the procedures; (v) the product specific contract terms and eligibility criteria manual obtained on the date of this Opinion from <https://www.lch.com/resources/rulebooks/lch-limited> (collectively, the **Rulebook**);
- (b) the clearing membership agreement obtained on the date of this Opinion from <https://www.lch.com/membership/ltd-membership> (the **Clearing Membership Agreement**); and
- (c) the deed of charge by clearing member (the **Deed of Charge**, together with the Rulebook and the Clearing Membership Agreement the **LCH Agreements**).

We have been requested to provide you with a legal opinion on matters of Guernsey law in connection with the LCH Agreements. We are qualified to give this Opinion.

## 2 Scope of Opinion

- 2.1 Our opinions are provided on the basis of, and should be read together with, the assumptions, qualifications, limitations and information contained in this Opinion (including its Schedules and Appendix).

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- 2.2 Unless the context requires otherwise, capitalised terms shall have the meanings given to them in Schedule 1 to this Opinion provided that terms defined in the standard forms of the LCH Agreements shall have the same meaning in this Opinion.
- 2.3 References to **Transactions** are to transactions of the type described in the Rulebook as (i) **RepoClear Transactions**, (ii) **EquityClear Novation Transactions**, (iii) **ForexClear Transactions**, (iv) **Listed Interest Rates Novation Transactions**, and (iv) **SwapClear Transactions** and entered into pursuant to the LCH Agreements.
- 2.4 This Opinion is given only in respect of Guernsey Parties (referred to in the LCH Agreements as either **Member** or **Clearing Member**, collectively referred to in this Opinion as the **Client**), which for the avoidance of doubt only relates to:
- (a) Guernsey Companies;
  - (b) Guernsey Banks;
  - (c) Guernsey Trusts; and
  - (d) investment firm/broker dealer.

This Opinion does not extend to any type of entity or person save those expressly referred to above. In particular and without limiting the generality of the foregoing, this Opinion is not given in respect of:

- (a) Guernsey protected cell companies (**Protected Cell Company or PCC**) or protected cells of a PCC (**PCells**) as defined in the Companies Law, incorporated cell companies (**ICCs**) and incorporated cells of an ICC (**ICells**) as defined in the Companies Law;
- (b) Guernsey Insurance Companies;
- (c) Guernsey Limited Partnerships;
- (d) registered and authorised Guernsey investment funds (including pension funds) (**Guernsey Investment Fund**)<sup>1</sup>;
- (e) state-owned entities (**State Entities**);
- (f) private individuals resident in Guernsey (**Individuals**);
- (g) a building society;
- (h) a friendly society;
- (i) banks which are not Guernsey Companies (including for the avoidance of doubt branches of banks outside Guernsey);
- (j) trusts which are not Guernsey Trusts;

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<sup>1</sup>which can be structured as a company, PCC, ICC, Guernsey Trust or a Guernsey Limited Partnership

- (k) Guernsey Foundations;
- (l) partnerships which are not Guernsey Limited Partnerships;
- (m) companies which are not Guernsey Companies.

2.5 The central provisions of the LCH Agreements relating to the close-out netting of Transactions on termination are: (i) regulation 45 of the regulations which make up part of the Rulebook; and (ii) rules 3 to 8 of the default regulations which make up part of the Rulebook. We do not purport to opine on the totality of the provisions in the LCH Agreements.

### **3 Summary of Relevant Guernsey Laws**

#### *3.1 The 1979 Law*

The 1979 Law's main purpose was to clarify and confirm the right of set-off pursuant to an agreement governing mutual dealings between the parties. The effect of section 1 of the 1979 Law is to make clear that any third party right is enforceable only against the net balance after set-off unless the parties have agreed to a different effect.

See Schedule 4 for more details of specific relevant provisions of the 1979 Law.

#### *3.2 Companies Law*

A Guernsey Company is registered and governed pursuant to the Companies Law. Section 114 of the Companies Law prescribes that the validity of an act done by a Guernsey Company shall not be called into question on the ground of lack of capacity by reason of anything contained in or omitted from (i) the company's memorandum or articles, (ii) any resolution of the company, or (iii) any agreement between the company's members.

Section 115 of the Companies Law states that in favour of a person dealing with a company in good faith, the powers of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation imposed by or deriving from (i) the company's memorandum or articles (**Articles**), (ii) any resolution of the company, or (iii) any agreement between the company's members. In determining whether a person deals with the Company in good faith, such person (i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so, (ii) is presumed to have acted in good faith unless the contrary is proved, and (iii) is not to be regarded as acting in bad faith solely because he knows that an act is beyond the powers of the directors. However, if the relevant party received a copy of the Articles, for example for know-your-client purposes, these should be reviewed as such party may be considered to be on notice of their terms and any excess of authority as a consequence.

A Guernsey Bank is a Guernsey Company which is licensed to carry on banking business pursuant to the Banking Law, hence subject to both the provisions of the Companies Law and the Banking Law.

Under the Banking Law, no Guernsey Bank (or other person) shall carry or hold itself out as carrying on deposit taking business in or from within Guernsey unless the Guernsey Bank is for the time being registered under the Banking Law.

A Guernsey Company which carries on or holds itself out as carrying on financial firm business in or from within the Bailiwick of Guernsey is required to be licensed under the LCF Law, unless exemptions are available. "Financial firm business" covers, amongst other things, investment business, trust company business and fund services business.

See Schedule 4, for details of specific relevant provisions of the Companies Law with respect to the Guernsey insolvency regime.

### 3.3 *The Trusts Law*

A Guernsey Trust can be established pursuant to a Trust Instrument and is governed by the Trusts Law. Whilst there is acknowledgement of a Guernsey unit trust as a distinct form of trust, the Trusts Law does not contain any provisions directly relating to Guernsey unit trusts, except that section 6(2) of the Trusts Law provides that a unit trust established under the Trusts Law may be created only by an instrument in writing.

The Trusts Law has been drafted widely and permissively and frequently expresses provisions to be "subject to the terms of the trust". There is broad freedom in the creation of trusts akin to contractual freedom. It is comparatively rare that the express terms of a trust cannot overrule or vary what the Trusts Law otherwise provides. Accordingly, the starting point with any trust is to read carefully the Trust Instrument to see what application the Trusts Law will have and what provisions of that law have been effectively excluded. However, certain provisions of the Trusts Law cannot be removed; for example section 39(7) provides that nothing in the terms of a trust may relieve a trustee of liability for breach of trust "arising from his own fraud or wilful misconduct or gross negligence".

Section 11 of the Trusts Law deals with the enforceability of trusts and provides that a trust will be unenforceable to the extent that it purports to do anything contrary to the laws of Guernsey or is otherwise immoral or contrary to public policy. Subject to this, it will be valid and enforceable as a matter of Guernsey law in accordance with its terms, or in the case of a foreign trust in accordance with its proper law.

Unit trusts will often be structured as Umbrella Funds, with a number of sub trusts. The trustee will wish to ensure that any agreements clearly identify the sub trust for which it acts, to ensure that any limited recourse (whether contracted or by the Trusts Law) relates solely to that sub-trust.

See Schedule 4, paragraph 10 for more details of specific relevant provisions of the Trusts Law with respect to the Guernsey insolvency regime.

## Opinion

### 4 General

- 4.1 *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)?*

We set out below the factors which would need to be considered in respect of a Guernsey Company:

- (i) the requisite permissions or any restrictions under the constitutional documents of the Guernsey Company (being the memorandum and articles), setting out any restrictions or limitations on types of transactions (i.e. derivatives) (however, please note our comments below in relation to the abolition of the *ultra vires* doctrine);
  - (ii) any public filings of the Guernsey Company (with the view of ascertaining whether any winding up resolutions have been filed);
  - (iii) any offering documents, prospectuses, scheme particulars or the equivalent setting out any restrictions or limitations on the types of transactions that the Guernsey Company may enter into (i.e. derivatives); and
  - (iv) any fund documentation if an investment fund (i.e. management agreement, investment management agreement, custodian agreement, etc).
- (a) *Ultra Vires*

When considering the capacity of a Guernsey Company another relevant consideration is the Guernsey law position on *ultra vires* which are acts attempted by a company that are beyond the scope of powers granted by the company's Articles which would make null and void any agreement/arrangement entered into on this basis.

Under the Companies Law the *ultra vires* doctrine has effectively been abolished through the application of section 114 of the Companies Law, please see paragraph 3.2 above.

However, the Companies Law position on this point is not entirely clear in that whilst the Companies Law provides that a party to a transaction is not bound to enquire as to whether the transaction is permitted by the company's memorandum or as to any limitation on the director's power to bind the company or to authorise others to do so, it does not deal with the consequences of an agreement or transaction under it being entered into in violation of the Guernsey Company's internal authorisation requirements, nor is there a substantive body of case law on the subject in Guernsey.

As mentioned in paragraph 3.2 above Section 115 of the Companies Law would appear to bind the company if any director (or authorised signatory) signs an agreement but does not deal with the point of whether the director (or authorised signatory) was acting ultra vires or what happens if someone not validly authorised to sign, executes an agreement. Actions in excess of a director's authority may give rise to an action by the company against the directors for breach of their fiduciary duties. We are of the opinion that the Royal Court would follow the English law position on this point.

(b) Guernsey Banks

There are a number of factors specific to a Guernsey Bank that must be considered in relation to its capacity to enter into LCH Agreements, in addition to those normally considered in relation to Guernsey Companies. These include:

- (i) the terms of the licence issued to the Guernsey Bank pursuant to the Banking Law; and
- (ii) any other licences (in addition to those referred to above) that the Guernsey Bank has been issued or restrictions placed on those licences.

(c) Guernsey Trusts

The same issues regarding capacity as described above in relation to Guernsey Companies are relevant to any corporate actions of a Guernsey trustee company. If LCH is proposing to enter into transactions with trustees of Guernsey Trusts, the following scenarios may be relevant:

*Guernsey incorporated trustee of a Guernsey Trust*

The Trusts Law provides that subject to the terms of the Trust Instrument and to the trustee's duties under the Trusts Law (set out below), a trustee shall in relation to the trust property have all the same powers as a beneficial owner of such property.

Note that, unless the terms of the Trust Instrument provide otherwise, where there is more than one trustee, the trustees must act unanimously in exercising their powers and discretions.

A trustee of a Guernsey Trust must comply with its duties under the Trusts Law (that is, in outline, to act in the utmost good faith and act en bon père de famille, which means that the trustee is under a duty to achieve the standard of a prudent administrator of family wealth), must carry out and administer the trust in accordance with its terms and must exercise his powers solely for the benefit of the beneficiaries of the trust. If a third party is on notice that the trustee is acting in breach of its duties under the Trusts Law or of the terms of the Trust Instrument, it is possible that the transaction could be set aside.

However, under section 75(1) of the Trusts Law, a bona fide purchaser for value without actual knowledge of any breach of trust may deal with a trustee in relation



to trust property as if the trustee was the beneficial owner of the trust property and shall not be affected by the trusts under which such property is held. In considering the question of capacity of a Guernsey trustee, a copy of the Trust Instrument should be checked to ensure that no restrictions have been placed on the powers of the trustee. A trustee's resolution approving entry into a transaction should state on the face of it that the trustee is acting in the best interests of the beneficiaries and in accordance with the Trusts Law and the Trust Instrument.

In addition, under section 42(1) of the Trusts Law, if the trustee of a Guernsey Trust informs a third party that it is acting as a trustee, or the third party is otherwise aware of the fact, the trustee will not incur any personal liability and a claim by the third party in respect of the transaction will extend only to the trust property.

*Guernsey incorporated trustee of a non-Guernsey trust*

We cannot comment on any restrictions on authority or otherwise arising as a result of the Guernsey Company acting as trustee of a non-Guernsey trust as those restrictions will be governed by the proper law of the trust concerned.

It should be noted that a foreign trust is unenforceable in Guernsey to the extent that:

- (i) it purports to do anything contrary to the law of Guernsey;
- (ii) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Guernsey; or
- (iii) the Royal Court declares that it is immoral or contrary to public policy.

*Non-Guernsey incorporated trustees of a Guernsey trust*

We cannot comment on the capacity of a non-Guernsey incorporated trustee.

Please note when giving the comments above, we:

- (i) have commented in relation to Guernsey entities and have not commented on foreign law entities (other than in certain limited circumstances); and
- (ii) have not outlined in significant detail the regulatory regime outside of the POI Law that might be applicable to a Guernsey counterparty. For example, the provision of trustee services, insurance business, banking and other activities which are regulated. This is because while failure to comply with regulatory requirements does have consequences for the Guernsey entity, it does not per se affect the capacity of a Guernsey entity to enter into a Transaction.

It is only for the purposes of this Opinion possible to talk generally about the capacity of a Guernsey Party. Each Transaction will have to be authorised by the board, trustees, manager (as the case may be) on a specific transactional basis, (see section on authority

below). It is advisable to get a transaction specific legal opinion in respect of the capacity of a specific counterparty if entering into a Transaction with a Guernsey Party so that the requisite factors specified above can be checked off.

- 4.2 *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 is not nor will it be deemed to be resident, domiciled or carrying on business in Guernsey by reason only of the execution, performance and/or enforcement of the LCH Agreements.

LCH is not required to be licensed, qualified or otherwise entitled to carry on business in Guernsey in order to execute the LCH Agreements or to exercise its rights or perform its obligations under the LCH Agreements.

- 4.3 *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?*

Generally authority to sign documents on behalf of a Guernsey Party will be, where the Guernsey Party is:

- (a) a Guernsey Company (including Guernsey Banks), a resolution of the directors in relation to the execution of the LCH Agreements as well as a list of authorised signatories (together with the relevant resolution authorising these persons as authorised signatories) or where the relevant LCH Agreement is being signed on behalf of the Guernsey Company under a power of attorney, a copy of such power of attorney, together with the resolution approving the power of attorney; and
- (b) a Guernsey Trust with corporate trustee and/or manager, a resolution of the directors of the trustee or manager of the Guernsey Trust in relation to the execution of a LCH Agreement as well as a list of authorised signatories (together with the relevant resolution(s) authorising these persons as authorised signatories) or where a LCH Agreement is being signed on behalf of the trustee as trustee of the Guernsey Trust under a power of attorney, a copy of such power of attorney (together with the resolution approving the power of attorney).

Please note where a LCH Agreement is entered into by the Guernsey Party by a manager or investment adviser for and on behalf of the Guernsey Party a resolution of the board of that agent will also need to be checked as well as a list of authorised signatories and the same issues relating to a power of attorney as above.

Further in relation to the entry into any LCH Agreements, we would suggest that a separate legal opinion in relation to the capacity of the Guernsey Party be obtained.

## Capacity

Save the documents and evidence required as set out in paragraph 4.1 to confirm the capacity of a Guernsey Party to enter into the LCH Agreements, there are no additional documents or evidence that LCH should obtain in relation to a Guernsey Party entering into the Transactions.

## Authority

Generally the question of a Guernsey Party's authority will be concerned with a general authority granted under the Guernsey Party's Constitutional Documents and any specific authority in respect of a particular Transaction given by the board, trustee, manager, or any other person authorised to grant authority in a properly convened meeting or other forum provided under the Guernsey Party's Constitutional Documents.

### (a) Guernsey Companies

Notwithstanding the abolition of the doctrine of *ultra vires* (as set out in paragraph 4.1(a) above), there are questions of capacity which could affect the Guernsey Company authority that may arise from the objects clause of a Guernsey Company's memorandum. The issues are as follows:

- (i) *Actual limitation*: The objects clause could conceivably contain limits on the director's authority (in addition to the Articles) albeit since the Companies Law was updated on 1 July 2008 a new trend has been to substantially shorten the memorandum and give the Company unlimited powers, exercisable through its directors.
- (ii) *Ostensible authority* - It is also arguable that the objects clause could limit the authority of the directors of the company because the directors cannot be regarded as having authority to do something on behalf of the company that the company does not itself have the power to undertake according to the objects clause. On the basis that the objects clause is contained in the company's registered documents, the doctrine could prevent a third party from arguing against the company that the directors had the ostensible or usual authority to enter into the transaction (i.e. there would be constructive notice that the directors were acting outside their authority).
- (iii) *Breach of fiduciary duty* – It is the duty of the directors to cause the company to remain within its constitutional powers. For the directors to enter into an *ultra vires* transaction on behalf of the company is a breach of their duty to the company and its shareholders.

The Companies Law provides in favour of a person dealing with a company in *good faith*, the power of the company's directors to bind it, or authorise others to do so, is deemed to be free of any limitation imposed by or deriving from: (A) the company's memorandum (i.e. including the objects of the company) or articles; (B) any resolution of the company; and (C) any agreement between the company's members or any of them.

The issue is what constitutes *good faith* and the Companies Law provides that a party is not regarded as acting in bad faith solely because he knows that the act is beyond the director's powers. This effectively means that it is difficult to prove bad faith and hence avoid the transaction. The conservative view is that there remains a risk through:

- (i) constructive notice (i.e. notice through the publication and lodging of documents in the public domain) in respect of authority; and
- (ii) the argument that a person should not profit from knowingly assisting another party to breach their fiduciary duties (i.e. assisting a director of the company to act outside his powers).

#### Checking authority

The following should be checked with regard to the authority of the directors of a Guernsey Company to enter into a Transaction:

- (i) resolutions of the board of directors of the Guernsey Company approving the execution of the documents relating to the Transaction and any transaction specific authority given in respect of a particular Transaction;
- (ii) memorandum and articles as well as express restrictions on authority (including by way of limitation through the objects, quorum provisions, notice, directors' interests and other provisions relevant to directors' proceedings as well as any provisions as to signing authority);
- (iii) all special resolutions (as these are public documents although LCH should note there is a 30 day period within which to lodge them) which could show amendments to the Constitutional Documents and may also relate to the commencement of a winding up); and
- (iv) the authorised signatory list (if appropriate).

In addition, a search of the Registry should be made to confirm that no special resolutions for the winding up of the Guernsey Company have been filed and enquiries made of HM Sheriff to confirm that there has been no declaration of *désastre* (a form of Guernsey insolvency procedure described in paragraph 5 of Schedule 4) or arrest made of the Guernsey Company's property pursuant to *désastre* proceedings.

#### *Guernsey Bank*

As the Guernsey Banks we are considering for this Opinion will be a Guernsey Company, the issues outlined above in relation to the authority of a Guernsey Company will apply.

Also the Banking Law provides that a Guernsey Bank must not conduct deposit taking business except under the authority of or in accordance with the conditions

of a licence granted by the Commission under the Banking Law. Therefore, the Guernsey Bank's licence should also be checked for the requisite authority.

(b) Guernsey Trusts

Taking into account our previous comments in paragraph 4.1(c):

- (i) where the trust is a Guernsey Trust, the Trust Instrument should be checked (together with any amendments), along with the minutes of the relevant trustees meeting and the authorised signatory lists (if any) and delegated authority such as under an investment advisory agreement;
- (ii) where the trustee is a Guernsey Company, the matters outlined above in paragraph 4.3(a) should be checked in respect of the authority of a Guernsey Company; and
- (iii) also the Fiduciaries Law provides that a person shall not carry on by way of business, in or from within the Bailiwick, the formation, management or administration of trusts, and the provision of advice in relation to trusts except under the authority of or in accordance with the conditions of a licence granted by the Commission under the Fiduciaries Law. Therefore, the Guernsey trustee's licence should also be checked for the requisite authority.

4.4 *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? Please consider in particular any formalities to be complied with to enter into the Deed of Charge and Security Deed.*

The Guernsey Party will generally have been provided a broad authority to enter into the Transactions at the same time as the authority to enter into the LCH Agreements is provided. Please see the issues set out in paragraph 4.3 in relation to authority. Please also refer to the capacity issues as outlined in paragraph 4.1. Save for these requirements, no.

Guernsey law does not recognise the concept of a deed. That does not in any way limit a Guernsey Party's ability to enter into a document which purports to be a deed. It should be noted, however, that a deed does not have any special status under Guernsey law and there are no special rules for execution of a deed by a Guernsey Party.

4.5 *Are electronic signatures valid and enforceable for executing documents, including for a deed? Are there any other formalities relating to the execution of documents electronically that must be complied with (e.g., does the document need to be witnessed, physically delivered or signed in a specified form)? Are electronic signatures admissible in legal proceedings (for example, to prove the identity of the signatory or his or her intent to authenticate the document)?*

The Electronic Transactions (Guernsey) Law, 2000 (the **ETGL**), provides, amongst other things, that:

- (a) a contract or any provision thereof shall not be denied legal effect, validity or enforceability solely because the contract was made in electronic form or by electronic means;
- (b) a signature, seal, attestation or notarisation shall not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form; and
- (c) a document, record, notice or instrument shall not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form.

In addition, the ETGL provides that if a law, whether statutory or customary, requires:

- (a) information or a record, notice, instrument or document of any description to be in writing, a document in electronic form satisfies the law,
- (b) a signature, a signature in electronic form satisfies the law,
- (c) a seal, attestation or notarisation, a seal, attestation or notarisation in electronic form satisfies the law,
- (d) a person to retain a document that is in the form of paper, an article or other material, retention of a copy of the document in electronic form satisfies the law,
- (e) a person to retain a document that is in electronic form, retention of a copy of the document satisfies the law, or a declaration or statement to be made under oath or by affirmation, a sworn or affirmed declaration or statement in electronic form satisfies the law, or
- (f) a statutory declaration or other declaration or statement to be made otherwise than under oath or by affirmation, a statutory declaration or other declaration or statement in electronic form satisfies the law.

Accordingly, under Guernsey law, there is nothing to prevent a document executed electronically from being legally binding and enforceable. This assumes that:

- (a) there are no restrictions on the use of electronic signatures in the constitutional documents of the signing entity;
- (b) the law of the place of a company's incorporation (if not Guernsey) permits electronic signatures and doesn't otherwise contain restrictions on the type of documents that can be signed by way of electronic signature; and
- (c) the electronic signature is applied with the requisite intent and appropriate authority.

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

Yes, provided that the choice of English law to govern the LCH Agreements is bona fide and not made with the intention to evade the laws of the jurisdiction with which the transaction under such document has the closest and most real connection.

On the basis of the principles of conflicts of law under English law, the purported proper law of the LCH Agreements will determine its material validity and enforceability. If this issue were to be considered by the Royal Court, the proper law would be ascertained in accordance with the principles set out in *Amin Rasheed v Kuwait Insurance Co* (see Schedule 6). We also draw your attention to the Jersey case of *Re Nield* (1993) (also discussed in Schedule 6). In particular, the effect of this is that the express choice of governing law will be the proper law provided that such choice is bona fide and legal and not contrary to public policy.

Therefore, subject to our comments above and the assumptions contained in this Opinion, the submission by the Member and LCH to the jurisdiction of the English courts in each of the LCH Agreements would be valid and binding on the Parties.

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

A final and conclusive judgment under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty) obtained against the Guernsey Company in the relevant courts of a reciprocating jurisdiction in respect of the LCH Agreements after a hearing on the merits would be recognised as a valid judgment by the Guernsey courts and would be enforceable in accordance with and subject to the provisions of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the **Reciprocal Enforcement Law**).

In addition, Guernsey is a party to the Arbitral Convention. Arbitral awards made in England and Wales (in respect of the LCH Agreements) will generally be recognised and enforced by the Guernsey courts in accordance with and subject to the provisions of the Arbitral Convention and the Arbitration Law.

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

Yes, the Royal Court will not enforce provisions of the LCH Agreements to the extent that they may be illegal or contrary to public policy in Guernsey or purport to exclude the jurisdiction of the Royal Court or, if obligations are to be performed in a jurisdiction outside Guernsey, to the extent that such performance would be illegal or contrary to public policy under the laws of that jurisdiction. However, although we have not made any specific investigations into such matter, there is nothing contained in the LCH Agreements that would lead us to believe that the Royal Court would hold enforcement of the LCH Agreements to be illegal or contrary to public policy in Guernsey.

## 5 **Insolvency, Security, Set-off and Netting**

Please opine on insolvency proceedings (the **Insolvency Proceedings**) and pre-insolvency reorganisation, restructuring and/or resolution measures (the **Reorganisation Measures**) in respect of Relevant Clearing Members under the laws of the Relevant Jurisdiction and the effect of these on the security interests, and set-off and netting arrangements, provided for under the terms of the LCH Agreements.

Please do not address issues specifically related to Contracts entered into, and collateral delivered, in respect of client clearing in your answer since these are examined separately in the Client Clearing section below. In addition, please assume:

- (a) that the LCH Agreements are legal, valid, binding and enforceable under English law (as the law which governs them); and
- (b) the compliance with all relevant perfection requirements relating to, and the effectiveness of, the collateral arrangements under the Deed of Charge under the law of any jurisdiction(s) (other than the Relevant Jurisdiction) that you consider to be relevant to those matters.

5.1 *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 or Rule 5 of the Default Rules? Are any other events or procedures not envisaged in Rule 3 or Rule 5 of the Default Rules relevant?*

(a) Guernsey Companies

Guernsey Companies are subject to a number of Insolvency Proceedings in Guernsey, these include:

- (i) winding up and administration are insolvency proceedings under the Companies Law which apply to Guernsey Companies. These are discussed in paragraphs 2 to 4 of Schedule 4;
- (ii) liquidation may also be subject to preference provisions of the Companies Law which are discussed in paragraph 7 of Schedule 4; and
- (iii) *désastre* proceedings may apply to the assets of Guernsey Companies. Please see paragraph 5 of Schedule 4.

(b) Guernsey Trusts

The Insolvency Proceedings which apply to a Guernsey Trust and its trustees include:

- (i) the procedures in relation to winding up of a Guernsey Trust which are set out in Schedule 4, paragraph 10; and
- (ii) *désastre* proceedings in relation to the assets of a Guernsey Trust. Please see paragraph 5 of Schedule 4.

A trust is not a legal person. The insolvency procedures set out above, including those in respect of *désastre*, relate to the insolvency of a legal person. There are no equivalent statutory provisions relating to an insolvent Guernsey Trust. However, it is possible that the trustee of a trust, in respect of assets which are Guernsey *situs*, could be subject to the *désastre* proceeding.

As a trust is not a company, the provisions of the Companies Law will not apply.



If a trust became insolvent (on the basis that its total assets were less than its total liabilities, or it was unable to discharge its liabilities as they fell due), as no statutory insolvency procedure would apply, it is likely that the trustee would apply to the Royal Court for directions as to how the trust assets should be distributed.

The Jersey courts had cause to consider the "insolvency" of trusts in the case of *Representation of the Z II Trust* [2015] JRC 196C in which guidance was provided on the underlying principles relevant to "insolvent" trusts. In this regard, it was confirmed that the "cash flow" test was the appropriate test for establishing such "insolvency" in the context of a trust. In addition, the Jersey courts held that, once a trust is "insolvent", the trustee has an obligation to act in the best interests of all of the trust's creditors and not its beneficiaries. Although the Guernsey courts have not ruled on such matters, the reasoning of the Jersey courts may be persuasive to the Guernsey courts should they be called upon to consider similar issues.

The Insolvency Procedures in relation to the bankruptcy or insolvency of a trustee of a Guernsey Trust are set out in Schedule 4, paragraph 10.2.

To ensure that Guernsey insolvency proceedings are expressly covered, we would recommend including (a) the commencement of any procedure which may lead to the making of a declaration that the affairs of a Relevant Clearing Member are *en etat de désastre* (or the making of such a declaration) and (b) any steps being taken towards the making of an application for a preliminary vesting order in *saisie*, proceedings in Guernsey in respect of any realty of a Relevant Clearing Member.

5.2 *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?*

Under Guernsey law there is no general stay or freeze on the insolvency, winding up, liquidation or *désastre* of a Guernsey Party.

In respect of administration, during the period between the presentation of an application for an administration order and ending with the making of such order or the dismissal of the application and during the period for which an administration order is in force, (a) no resolution may be passed or order made for the relevant company's winding up and (b) no proceedings may be commenced or continued against the company except with the leave of the Royal Court and subject to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set off and secured interests, including security interests and rights of enforcement thereof, are unaffected by the provisions of these sections of the Companies Law).

Additionally subject to foreign law security no issue is likely to arise with respect to *désastre* proceedings as these are only relevant to certain types of Guernsey *situs* collateral.

In addition, in a liquidation, the actions provided for under the Default Rules may be potentially subject to characterisation as a vulnerable transaction as discussed in paragraphs 7, 8 and 9 of Schedule 4 below.

- 5.3 *Would LCH have the right to take the actions provided for under the Default Rules (including all the actions 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) if a Relevant Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures? Please state explicitly if any of the actions in Rule 6 or Rule 8 would not be possible in the Relevant Jurisdiction in these circumstances (for example, would LCH be prohibited from deducting overtime expenses from the Defaulter's estate, pursuant to Default Rule 6(r)).*

Please see our response to question 5.2 above and paragraph 11 of Schedule 4.

*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.*

To ensure that Guernsey insolvency proceedings are expressly covered, we would recommend including (a) the commencement of any procedure which may lead to the making of a declaration that the affairs of a Relevant Clearing Member are *en etat de désastre* (or the making of such a declaration) and (b) any steps being taken towards the making of an application for a preliminary vesting order in *saisie*, proceedings in Guernsey in respect of any realty of a Relevant Clearing Member.

- 5.4 *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 for the relevant arrangements, from avoidance or challenge, available under the law of the Relevant Jurisdiction in respect of contracts in financial markets?*

Guernsey law does provide for circumstances which apply where transactions may be *voidable* and/or set-aside by application to the Royal Court, as more fully set out in paragraphs 7, 8 and 9 of Schedule 4.

- 5.5 *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?*

There is no dedicated netting legislation under Guernsey law, limited modern Guernsey case law on netting and/or contractual set-off, and very little case law on insolvency issues generally, and accordingly, it is difficult to predict the attitude that the Royal Court would take with respect to these issues.

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

Yes, it would generally be possible to obtain a judgment in a foreign currency in Guernsey and a claim for the net termination amount in a Termination Currency other than the currency of Guernsey would be enforceable under Guernsey law.

## 6 **Client Clearing**

### ***Exempting Client Clearing Rule***

#### *Overview*

This section addresses any legal issues that may arise in relation to a Relevant Clearing Member providing Client Clearing Services to Clearing Clients (whether incorporated in the Relevant Jurisdiction or in any other jurisdiction).

It is contemplated that Relevant Clearing Members will be entitled to offer Client Clearing Services to their Clearing Clients in accordance with the provisions of the Rulebook (including, in particular, Regulation 11 and the Client Clearing Annex to the Default Rules). LCH requires legal advice in the Relevant Jurisdiction as to whether the default arrangements providing for:

- (a) the porting of the Contracts entered into on behalf of a Clearing Client (**Client Contracts**) and the associated Account Balance to a Backup Clearing Member; or
- (b) the liquidation of Client Contracts and the return of the relevant Client Clearing Entitlement directly to the relevant Clearing Client or (failing that) to the relevant Defaulter for the account of such client,

would be effective in the event of a Default of a Relevant Clearing Member.

The porting of Client Contracts may be effected by either:

- (a) a close-out of the relevant Client Contracts between LCH and the Defaulter followed by the replication of such Contracts (by the opening of new Client Contracts on the same terms) between LCH and the Backup Clearing Member; or
- (b) a transfer of the relevant Client Contracts (in the form of open positions and without close-out) from the Defaulter to the Backup Clearing Member.

Please consider both alternative porting mechanisms when providing your answers below and (if applicable) highlight any differences in the analysis of one compared with the other.

Please note that it cannot be assumed in all cases where LCH returns a Client Clearing Entitlement to a Defaulter for the account of a Clearing Client, that the relevant Clearing Client will:

- (a) have taken enforcement action under the Security Deed;
- (b) have instructed LCH to take that course of action; and/or
- (c) necessarily even be known to LCH.

In these circumstances, LCH will return the Client Clearing Entitlement to the Defaulter on the basis that the relevant assets are assets of the Clearing Client and should be treated as such. Please indicate any concerns associated with this approach.

### *Questions*

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.

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 Exempting Client Clearing Rule applies to enter into a Security Deed; and (ii) ignore questions 6.7 to 6.9.

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) that you consider to be relevant to that matter; and (iii) provide a response to questions 6.7 to 6.9.

- 6.1 *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?*

Assuming this approach works from an English law perspective, it does not present any issues under Guernsey law.

- 6.2 *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 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?*

Assuming this approach works from an English law perspective, it does not present any issues under Guernsey law.

### ***Insolvency related default***

- 6.3 *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?*

Assuming this approach works from an English law perspective, it does not present any issues under Guernsey law. In addition, we assume the LCH Agreements do not constitute vulnerable transactions as discussed in paragraphs 7, 8 and 9 of Schedule 4 below.

- 6.4 *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 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?*

Assuming this approach works from an English law perspective, it does not present any issues under Guernsey law. In addition, we assume the LCH Agreements do not constitute vulnerable transactions as discussed in paragraphs 7, 8 and 9 of Schedule 4 below.

#### **Reorganisation measures**

- 6.5 *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?*

Assuming this approach works from an English law perspective, it does not prevent any issues under Guernsey law. In addition, we assume the LCH Agreements do not constitute vulnerable transactions as discussed in paragraphs 7, 8 and 9 of Schedule 4 below.

- 6.6 *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?*

Assuming this approach works from an English law perspective, it does not prevent any issues under Guernsey law. In addition, we assume the LCH Agreements do not

constitute vulnerable transactions as discussed in paragraphs 7, 8 and 9 of Schedule 4 below.

***Security deed***

- 6.7 *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?*

A Guernsey Party has capacity (as a matter of Guernsey law) to grant security governed by non-Guernsey law over collateral situated outside Guernsey. Assuming that the security interest over the collateral is valid, binding and enforceable as a matter of its governing law (and, if different, the law of the jurisdiction where the collateral is situated), no particular Guernsey law issues arise and the validity of the non-Guernsey law security interest would be recognised by the Royal Court.

- 6.8 *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?*

It is not necessary in order to ensure the legality, validity, enforceability or admissibility in evidence of the Security Deed in Guernsey that it be filed, registered, recorded or enrolled with any court or governmental authority in Guernsey.

In addition, there are no registration, stamp or other duties or fees required to be paid on or in relation to the Security Deed, save in respect of the payment of court fees in the event of litigation before the Guernsey courts.

- 6.9 *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?*

Please see our response to questions 5.2 and 5.5 above.

- 6.10 *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.*

Where the counterparty to a LCH Agreement is a trustee of a Guernsey Trust, the description of the parties and the relevant signature block in the LCH Agreement should state that it is being entered into by the trustee acting in its capacity as trustee of the relevant Guernsey Trust.

Where the counterparties to the LCH Agreements are joint parties, we would advise that the Guernsey customary law right of "droit de division" is expressly excluded. The "droit de division" allows a co-surety to require that the liability is apportioned between the co-sureties.

Where a guarantor is involved in the Transactions, we would recommend that the Guernsey customary law right of "droit de discussion" is expressly excluded. The "droit

de discussion" allows a guarantor to require that the creditor exhausts its rights against the debtor before seeking to claim under the guarantee.

## **7 Settlement Finality**

### *Overview*

This section is concerned with the impact on the finality of settlement of a Payment Transfer Order or Securities Transfer Order (or both), including the corresponding transfer of funds or securities, respectively, from a Relevant Clearing Member to LCH through a Settlement Services Provider or PPS Bank (or both) in the event of that Relevant Clearing Member entering Insolvency Proceedings or becoming subject to Reorganisation Measures.

### *Questions*

- 7.1 *Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect the finality of settlement of a Payment Transfer Order, including the corresponding transfer of funds, from the Relevant Clearing Member to LCH through a Settlement Services Provider or PPS Bank (or both)? If so, please clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.*

On the basis that the provisions of the Payment Transfer Order are effective under English law and the *lex situs* to effect an unconditional transfer of ownership in the funds, a subsequent creditors' winding up, administration or *désastre* of the Relevant Clearing Member would not affect the enforceability of the rights of LCH under the Payment Transfer Order (however, see Schedule 4 in respect of priorities, insolvency and preferences).

However, absent any security over the funds, once a liquidator is appointed to the Relevant Clearing Member, the liquidator is obliged to realise the company's assets and discharge the company's liabilities in accordance with the relevant provisions of the Companies Law (see paragraph 3.9 of Schedule 4). Similarly, and again absent any security over the funds, once an administrator has been appointed to the Relevant Clearing Member the administrator is obliged to manage the affairs, business and property of the company, and the assets liable under that agreement (see paragraph 4.2 of Schedule 4).

Accordingly, the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member may affect the transfer of the funds to LCH.

- 7.2 *Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect the finality of settlement of a Securities Transfer Order, including the corresponding transfer of securities, from the Relevant Clearing Member to LCH through a Securities System Operator? If so, please clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.*

On the basis that the provisions of the Securities Transfer Order are effective under English law and the *lex situs* to effect an unconditional transfer of ownership in the

securities, a subsequent creditors' winding up, administration or désastre of the Relevant Clearing Member would not affect the enforceability of the rights of LCH under the Securities Transfer Order (however, see Schedule 4 in respect of priorities, insolvency and preferences).

However, absent any security over the securities, once a liquidator is appointed to the Relevant Clearing Member, the liquidator is obliged to realise the company's assets and discharge the company's liabilities in accordance with the relevant provisions of the Companies Law (see paragraph 3.9 of Schedule 4). Similarly, and again absent any security over the securities, once an administrator has been appointed to the Relevant Clearing Member the administrator is obliged to manage the affairs, business and property of the company, and the assets liable under that agreement (see paragraph 4.2 of Schedule 4).

Accordingly, the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member may affect the transfer of the funds to LCH.

7.3 *Are there any circumstances (such as the commencement of Reorganisation Measures) which might give rise to a loss of finality protections before the commencement of Insolvency Proceedings? If so, please clarify from which point in time and in which circumstances finality protections would be lost.*

No (however, see Schedule 4 in respect of priorities, insolvency and preferences).


## **8 Governing Law and Reliance**

8.1 This Opinion shall be governed by and construed in accordance with Guernsey law and is limited to the matters expressly stated herein. This Opinion is confined to and given on the basis of the laws and practice in Guernsey at the date hereof. We express no opinion with regard to the laws of any other jurisdiction and we have not made any investigation into any such laws.

8.2 This Opinion is given for the sole benefit of LCH in connection with the LCH Agreements and it may not be disclosed to or relied upon by any person or used for any other purpose or referred to or made public in any way without our prior written consent, save that it may be disclosed on a non-reliance basis to legal advisers, auditors and prudential regulators of LCH and, if required, by any applicable law, regulation or stock exchange rule or in connection with any legal proceedings relating to LCH.

8.3 In addition, we hereby consent to this Opinion being made publicly available for information purposes and on a strictly non-reliance basis only on LCH's website (<https://www.lch.com/>).

Yours faithfully

  
**Ogier (Guernsey) LLP**



## SCHEDULE 1

### Definitions

**1929 Law** means the Law relating to Debtors and Renunciation 1929;

**1979 Law** means the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979, as amended;

**1993 Law** means the Security Interests (Guernsey) Law, 1993;

**A Rules** means the Collective Investment Schemes (Class A) Rules 2002 or the Authorised Collective Investment Schemes (Class A) Rules 2008 (as relevant);

**Arbitral Convention** means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

**Arbitration Law** means the Arbitration (Guernsey) Law 2016;

**Banking Law** means the Banking Supervision (Bailiwick of Guernsey) Law, 2020, as amended;

**Bailiwick and Bailiwick of Guernsey** means the collective jurisdictions of Guernsey, Alderney and Sark and their constituent islands;

**B Rules** means the Authorised Collective Investment Schemes (Class B) Rules and Guidance, 2021;

**COB Rules** means together the Licensees (Conduct of Business) Rules and Guidance 2021 and the Licensees (Capital Adequacy) Rules and Guidance 2021;

**Commission** means the Guernsey Financial Services Commission established by the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended;

**Committee** means the States Committee for Economic Development or such other Committee or body as the States of Guernsey may by ordinance appoint for the purposes of the LP Law;

**Companies Law** means The Companies (Guernsey) Law, 2008, as amended;

**Constitutional Documents** means:

- (b) in relation to a Guernsey Company, the Articles;
- (c) in relation to a Guernsey Trust, the Trust Instrument;
- (d) in relation to a State Entity, the Mandate;

**Enforcement Law** means The Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020;

**Fiduciaries Law** means the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2020;

**Financial Services Commission Law** means the Financial Services Commission (Bailiwick of Guernsey) Law 1987;

**Foreign Bank** means a Bank/Credit Institution (as described in Appendix B) Party which is a company or body corporate incorporated or organised outside of Guernsey and licensed in that jurisdiction to carry on banking business;

**Greffe** means the office of His Majesty's Greffier in Guernsey including, for the purposes of this opinion, the principal registry for public records;

**Guernsey Bank** means a Guernsey Company which is licensed to carry on deposit taking business pursuant to the Banking Law;

**Guernsey Company** means a Party (including a Guernsey Bank or Guernsey Insurer) which is a company incorporated under the laws of Guernsey pursuant to the Companies Law (save, for the purposes of this Opinion, does not include a protected cell company of a protected cell nor incorporated cell companies or incorporated cells) but includes a company incorporated pursuant to the Companies Law acting as trustee of a Guernsey Trust;

**Guernsey Foundation** means a foundation established under the Foundations (Guernsey) Law, 2012;

**Guernsey Insurance Company** means an Insurance Company (as described in Appendix B) which is a company incorporated under the Companies Law and which is licensed to carry on insurance business pursuant to the Insurance Law;

**Guernsey Investment Fund** means a collective investment scheme authorised or registered by the Commission (including pension funds) established as a Guernsey Company, a Guernsey Trust or a Guernsey Limited Partnership;

**Guernsey Limited Partnership** means a limited partnership structure acting through its general partner governed by the LP Law and a Partnership Agreement for the benefit of the partners (meaning general partner(s) and limited partner(s)) of the Guernsey Limited Partnership, whether or not a limited partnership with a separate legal personality in accordance with the LP Law;

**Guernsey Party** means any Party which is a Guernsey Company, Guernsey Bank, Guernsey Trust, investment firm or broker dealer;

**Guernsey Trust** means a Guernsey trust (including a unit trust) governed by the Trusts Law constituted by a Trust Instrument;

**Home Jurisdiction** means, in respect of a Foreign Bank, the jurisdiction in which such Foreign Bank is incorporated or organised;

**ICell** means an incorporated cell of an ICC as defined in the Companies Law;

**Incorporated Cell Company” or “ICC”** means an incorporated cell company as defined in the Companies Law;

**Insolvency Proceedings** means the provisions of the Companies Law relating to liquidation or administration of a Guernsey Company, and the winding up of a Guernsey Trust;

**Insurance Law** means the Insurance Business (Bailiwick of Guernsey) Law, 2002 (as amended);

**Jurat** means one of 16 officers of the Royal Court, elected in accordance with the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950;

**LCF Law** means the Lending, Credit and Finance (Bailiwick of Guernsey) Law, 2022 (as amended);

**LP Law** means the Limited Partnerships (Guernsey) Law, 1995 (as amended);

**Master Agreement** means any of the LCH Agreements as defined in paragraph 1 of this Opinion;

**Parties** means the parties to a LCH Agreement and “Party” shall be construed accordingly;

**Partnership Agreement** means the constitutional document of a Guernsey Limited Partnership setting out the duties and responsibilities of the general partner and the rights of the partners;

**POI Law** means the Protection of Investors (Bailiwick of Guernsey) Law, 2020, as amended;

**Protected Cell Company or PCC** means a protected cell company as defined in the Companies Law;

**Preferred Debts Law** means the Preferred Debts (Guernsey) Law, 1983, as amended;

**Q Rules** means the Collective Investment Schemes (Qualifying Professional Investor Funds) (Class Q) Rules and Guidance, 2021;

**Relevant Jurisdiction** means the island of Guernsey;

**Renunciation** means the procedure provided for under the 1929 Law;

**Royal Court** means the Royal Court of Guernsey and in a *désastre* proceedings, includes a Commissioner of the Court;

**Schedule** means, unless the context requires otherwise, a schedule to this Opinion;

**Section** means, unless otherwise stated, a provision of a LCH Agreement;

**Security Interests Law** means the Security Interests (Guernsey) Law, 1993, as amended;

**Solvency Test** for the purposes of the Companies Law a company satisfies the solvency test if:

- (a) the company is able to pay its debts as they become due;
- (b) the value of the company’s assets is greater than the value of its liabilities; and
- (c) in the case of a supervised company, the company satisfies any other requirements as to solvency imposed in relation to it by or under the applicable regulations;

**Sub-Fund** means a discrete class of an Umbrella Fund formed pursuant to a Trust Instrument or a Supplemental Trust Instrument;

**Supplemental Trust Instrument** means a supplement to the Trust Instrument amending or supplemental to the main Trust Instrument under which the Guernsey Trust was constituted;

**Transaction(s)** has the meaning given to such term in paragraph 2.3 of this Opinion and are of the type set out in the Annex hereto;

**Trust** means a trust within the meaning of the Trusts Law, the proper law of which is the law of Guernsey;

**Trust Instrument** means the constitutional documents of a Guernsey Trust establishing the Guernsey Trust and setting out the duties and responsibilities of the trustee (and manager as the case may be) and the rights of the beneficiaries or Unitholders (as the case may be) and where amended or supplemented by a Supplemental Trust Instrument means the Trust Instrument as amended or supplemented;

**Trusts Law** means the Trusts (Guernsey) Law, 2007;

**Umbrella Fund** means a Guernsey Trust with one or more Sub-Funds formed pursuant to a Trust Instrument or a Supplemental Trust Instrument; and

**Unitholder(s)** means a holder of unit(s) in the Guernsey Trust.

## SCHEDULE 2

### Assumptions

- 1 For the purposes of this Opinion, in addition to the assumptions that we have made elsewhere in this Opinion, we have assumed:
  - (a) that the Parties at least one of which is a Guernsey Party, have entered into a LCH Agreement;
  - (b) that the provisions of the LCH Agreement have not been altered in any material respect;
  - (c) on the basis of the terms and conditions of the LCH Agreement and other relevant factors and acting in a manner consistent with the intentions stated in the LCH Agreement, the Parties over time enter into a number of Transactions that are intended to be governed by the LCH Agreement; and
  - (d) that any calculation of the liquidation value of Transactions will be made in good faith and in a commercially reasonable manner.
  
- 2 In addition to the specific assumptions made in paragraph 1 of this Schedule, we have made the following general assumptions:
  - (a) that all Parties to the LCH Agreements have been duly and properly established;
  - (b) that all Parties to a LCH Agreement have the capacity and power to enter into such document and to exercise their rights and perform their obligations under such agreements (and where a Guernsey Company Party is entering into the LCH Agreement acting as trustee of a Guernsey Trust or acting as general partner of a Guernsey Limited Partnership, such capacity is expressly stated in the description of and signature block for such Party in the LCH Agreement);
  - (c) that all Parties to a LCH Agreement have taken all corporate or other actions and obtained all necessary agreements or consents required to authorise the execution and delivery of such document and to exercise their rights and perform their obligations under such documents and that such Parties have duly authorised, executed and delivered such agreements in accordance with such authorisations;
  - (d) that the LCH Agreement as executed does not differ in any material respect from the forms which we have examined;
  - (e) that each Party (and any authorised entity acting on its behalf) entering into a LCH Agreement and any Transactions is acting, and will be acting at all times, in compliance with the legislation, rules, regulations and guidances that it is subject to;
  - (f) that the execution and delivery of a LCH Agreement and the performance of the obligations of the parties thereunder will not contravene any provision of the

relevant Party's constitutional documents, memorandum and articles of incorporation or, in the case of a Guernsey Insurance Company, its business plan as submitted to the Commission;

- (g) that the LCH Agreement, when executed and delivered by the Parties, will constitute the legal, valid and binding obligations of the Parties to it, enforceable in accordance with (i) its terms under English law by which law such document is expressed to be governed, (ii) the constitutions and laws regulating the existence of the Parties thereto and (iii) all other applicable laws (excluding the laws of Guernsey);
- (h) that none of the opinions expressed hereunder will be adversely affected by the laws or public policies of any jurisdiction other than Guernsey and, in particular but without limitation, there are no provisions of the laws of any jurisdiction other than Guernsey which would be contravened by the execution or delivery of the LCH Agreement or by any Party to such LCH Agreement exercising its rights or performing its obligations under it;
- (i) that England is currently party to the Arbitral Convention and that the Arbitral Convention applies to the recognition and enforcement of arbitration awards made in the supreme court and the senior courts of England and Wales, excluding the Crown Court;
- (j) that the choice of English law to govern the LCH Agreements is bona fide and not made with any intention to evade the laws of the jurisdiction with which the Transactions under the LCH Agreements have the closest and most real connection;
- (k) that there are no agreements, documents or arrangements other than the documents expressly referred to herein as having been examined by us which materially affect, amend or vary the Transactions envisaged in the LCH Agreement or restrict the powers and authority of the directors of the Guernsey Party in any way;
- (l) at the time at which a Transaction is entered into under the LCH Agreement neither party has actual notice of the bankruptcy of any other Party;
- (m) that all of the Parties to the LCH Agreement are dealing with each other in good faith and that none of the parties are or will be seeking to achieve any purpose not apparent from the LCH Agreement which might render the LCH Agreement illegal or void;
- (n) that all parties to the LCH Agreement (and their functionaries) have obtained all consents, licences, permits, approvals, authorisations and registrations required under any applicable laws and regulations;
- (o) the entering into of the LCH Agreement by the Guernsey Party and the exercise by it of its rights and the performance by it of its obligations thereunder will not conflict with, or result in a breach of, any consents, licences, approvals, registrations or authorisations to which the Guernsey Party is subject (or any

conditions attaching thereto) issued or published by any governmental or regulatory authority in Guernsey;

- (p) the execution and delivery of the LCH Agreement and the performance of the Guernsey Party's obligations thereunder will not contravene;
  - (i) any applicable provision of Guernsey law to which the Guernsey Party is subject; or
  - (ii) any provision of the Guernsey Party's Constitutional Documents;

and for the avoidance of any doubt, the Constitutional Documents of the Guernsey Party and laws of Guernsey do not restrict the Guernsey Party from entering into Transactions under the LCH Agreement;

- (q) the LCH Agreement and all Transactions thereunder have been entered into for bona fide commercial reasons and at an arm's length by each of the Parties and, in resolving to enter into such Document and all Transactions pursuant thereto, each of the directors of the Guernsey Party is not exercising their powers for improper purposes and is acting in good faith with a view to the best interests of the Guernsey Party and exercising the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;
- (r) immediately after the Parties entered into the LCH Agreement and any Transactions under it, each Guernsey Party was able to meet its debts in full as they fell due;
- (s) where any Guernsey Company is acting as trustee, Guernsey law is the proper law of the Guernsey Trust of which it is the trustee;
- (t) where the Guernsey Company is acting as trustee, the Guernsey Company Party has at all material times and continues to have the capacity, power and authority to act as trustee in accordance with its constitutional documents;
- (u) where the Guernsey Company is acting as trustee, the execution by it of the LCH Agreement, the exercising of its rights and the performance of its obligations thereunder is within its legal capacity as trustee of the Guernsey Trust and will not exceed or breach the powers or duties conferred on it as trustee;
- (v) where the Guernsey Company is acting as trustee, it was validly appointed as the sole trustee of the Trust, and has at all times been, and remains, validly appointed as the sole trustee of the relevant Guernsey Trust and there is no change in the trustee of the Trust after the execution of the LCH Agreement;
- (w) where the Guernsey Company is acting as trustee, the Guernsey Trust was and continues to be validly established under Guernsey law and, in particular all assets transferred to the Guernsey Trust were validly transferred and are held by the trustee on the terms of the Guernsey Trust;

- (x) where the Guernsey Company is acting as trustee, all actions taken by it in connection with the LCH Agreement are taken (i) in Guernsey, (ii) in accordance with the terms of the instrument pursuant to which the Guernsey Trust is established and the Trusts Law and (iii) on behalf of the Trust (and the same is expressly stated in writing);
- (y) where the Guernsey Company is acting as trustee, in entering into the LCH Agreement and exercising its rights and performing its obligations under it, it is acting *bona fide* and in the best interests of the beneficiaries or beneficiary of the Guernsey Trust;
- (z) where the Guernsey Company is acting as trustee it has complied with all applicable law, including having obtained all licences, consents and authorisations (or similar) under all applicable laws in order to act as trustee of the Guernsey Trust;
- (aa) where the Guernsey Company is acting as trustee, all jurisdictions other than Guernsey which may be relevant to any action taken by the Guernsey Company acting as trustee in connection with the LCH Agreement will recognise the existence of the Guernsey Trust and its terms;
- (bb) any custodian, designated manager or manager entering into the relevant LCH Agreements and any Transaction on behalf of a collective investment scheme has:
  - (i) been duly appointed by the collective investment scheme under the terms of an appropriate agreement and such custodian, administration or management agreement remains in full force and legal effect at all material times; and
  - (ii) the necessary capacity, power and authority to enter into such LCH Agreements in accordance with (a) valid corporate or other actions requested to authorise the execution and delivery of such documents, (b) all consents, licences, approvals, representations or authorisations required by it and/or the Guernsey Party, and (c) the laws under which such party is governed; and
- (cc) none of the assets of the Guernsey Party over which security is being created pursuant to any of the LCH Agreements is situate in Guernsey.



## SCHEDULE 3

### Qualifications and Limitations

#### Qualifications

This Opinion is subject to the following qualifications:

- 1 The term "enforceable", when used in this Opinion, means that the relevant obligations are of a type which the Royal Court will enforce, but it does not mean that such obligations will necessarily be enforced in all circumstances or in accordance with their terms. In particular, but without limitation:
  - (a) save as expressly set out in this Opinion, enforcement of any of the LCH Agreements may be limited by dissolution, bankruptcy, liquidation, administration, reorganisation, insolvency or other laws of general application relating to, or affecting the rights of, creditors. Please see Schedule 4 to this Opinion for a general summary of Guernsey's insolvency regime which may apply to Guernsey Parties;
  - (b) enforcement may be limited by general principles of equity and, in particular, equitable remedies (to the extent applicable in Guernsey) such as specific performance and injunction are discretionary and may not be available where damages are considered to be an adequate remedy;
  - (c) claims may be barred under the laws relating to the prescription and limitation of actions or may be subject to the general doctrine of estoppel in relation to representations, acts or omissions of any relevant Party or may become subject to the defence of set-off or counterclaim;
  - (d) the Royal Court will not enforce provisions of the LCH Agreements to the extent that they may be illegal or contrary to public policy in Guernsey or purport to exclude the jurisdiction of the Royal Court or, if obligations are to be performed in a jurisdiction outside Guernsey, to the extent that such performance would be illegal or contrary to public policy under the laws of that jurisdiction. However, although we have not made any specific investigations into such matter, there is nothing contained in the LCH Agreements that would lead us to believe that the Royal Court would hold enforcement of the LCH Agreements to be illegal or contrary to public policy in Guernsey;
  - (e) the Royal Court may not enforce provisions of the LCH Agreements to the extent that the Transactions contemplated under it conflict with or breach economic or other sanctions imposed in respect of certain states or jurisdictions by any treaty, law, order or regulation applicable to Guernsey;
  - (f) the enforcement of the obligations of the Parties to the LCH Agreements may be limited by the provisions of Guernsey law applicable to documents held to have been frustrated by events happening after their execution;

- (g) the effectiveness of any provisions in the LCH Agreements exculpating any Party from a liability or duty otherwise owed may be limited by law;
- (h) any provisions of the LCH Agreements purporting to provide for a payment to be made in the event of breach of the LCH Agreements would not be enforceable to the extent that the Royal Court were to construe such payment to be a penalty which was excessive, in that it unreasonably exceeds the maximum damages which an obligee could have suffered as a result of the breach of an obligation;
- (i) any provisions of the LCH Agreements purporting to fetter any statutory power of a Guernsey Party may not be enforceable;
- (j) the Royal Court may refuse to give effect to any provisions in an agreement for the payment of the costs of enforcement (actual or contemplated) or of unsuccessful litigation brought before the Royal Court where the Royal Court has itself made an order for costs;
- (k) the Royal Court may refuse to give effect to any provisions in an agreement which would involve the enforcement of any foreign revenue or penal laws;
- (l) the Royal Court may refuse to allow unjust enrichment or to give effect to any provisions of an agreement that it considers usurious;
- (m) enforcement of any obligations may be invalidated or vitiated by reason of fraud, duress, misrepresentation or undue influence;
- (n) the Guernsey courts may refuse to enforce the provisions of the LCH Agreements to the extent that they purport to grant rights to third parties.

2 Liability of a trustee on behalf of a trust created under Guernsey law for its obligations under a contract (including the LCH Agreements) may be limited to the assets comprised in the trust fund of the trust regardless that the governing law of such contract is not the law of Guernsey. This may apply whether proceedings are brought directly in the Guernsey courts, or enforcement of a judgment obtained outside Guernsey is sought to be enforced in the Guernsey courts. Section 42 of the Trusts Law, provides as follows:

- "(1) Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee, or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property...
- (3) Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority";

on this basis, where the liabilities of a trust exceed the assets comprised in the trust, such liabilities may not be fully recoverable. The trust assets are separate from the personal assets of the trustee; where a trustee in its own right becomes insolvent, its personal creditors have no right or claim against any trust property (section 74 of the Trusts Law).

3 A trust is not a separate legal person but acts through its trustee. The insolvency procedures set out in Schedule 4, including those in the Companies Law and in respect of *désastre*, relate to the insolvency of a legal person. There are no equivalent statutory provisions relating to an insolvent Guernsey trust. However, it is conceivably possible that the property of a trust if such assets are Guernsey *situs* could be subject to a *désastre* proceeding. Also, as a trust is not a company, the provisions of the Companies Law will not apply. In the context of any close-out netting provisions or set-off, in our view, this means that, subject to the provisions of section 42 of the Trusts Law, the contractual close-out netting or set-off provisions set out in the terms of the LCH Agreements would always apply. Where the assets of the trust are less than its liabilities (because of distributions made or otherwise) and the trust is unable to pay its debts in full and, as a result, a LCH Agreement has been terminated and the contractual close-out netting provisions applied, any person to whom a net amount is owing by the trust would rank alongside all other creditors for payment. In such circumstances, as no other insolvency procedure applies to a trust, it is likely that a trustee would apply to the Royal Court for directions as to how the trust assets should be distributed.

4 Under section 44 of the Trusts Law each trustee and former trustee (if any) of a trust is entitled to a statutory non-possessory lien over the trust fund of the relevant trust for the purpose of securing such trustee's or former trustee's right to pay from the trust fund, and to be reimbursed from the trust fund for, all expenses and liabilities (whether existing, future, contingent or otherwise) properly incurred in connection with the relevant trust. This statutory entitlement continues after a trustee ceases to be a trustee and has duly surrendered all trust property in accordance with section 43 of the Trusts Law when it resigns or is removed. In particular, section 44(3) of the Trusts Law provides as follows:

- "(3) The lien attaches to any trust property, except to the extent that
- (a) the lien is expressly waived or released, or
  - (b) the property -
    - (i) is no longer identifiable,
    - (ii) is in the hands of a *bona fide* purchaser for value or a person (other than the trustees) who derived title through such a purchaser, or
    - (iii) comprises real property."

The Trusts Law does not state the priority or other interaction of this statutory non-possessory lien in relation to any other security of any type that is granted by a trustee over the trust property of the relevant trust in favour of any third party creditor. Further, to date the issue has not been considered by the Royal Court. Accordingly, to the extent that the trustee (and each former trustee of the trust, if any) has not validly and effectively expressly waived or released such statutory non-possessory lien, it is not clear how the Royal Court would treat the priority of this statutory non-possessory lien in relation to any other security of any type that is granted or is being granted by the trustee over trust property of the trust in favour of any creditor of the trust.

5 Recognition and enforcement of arbitral awards made under the Arbitral Convention are subject to the following qualifications:

- (a) the Arbitration Law contains provisions enabling the person against whom an award made under the Arbitral Convention is invoked to apply to the Guernsey courts to refuse to recognise and enforce the award on the following grounds:
- (i) that a party to the arbitration agreement was (under the law applicable to that party) under some incapacity;
  - (ii) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
  - (iii) that that person was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present that person's case;
  - (iv) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
  - (v) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; and
  - (vi) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made;
- (b) recognition or enforcement of the award may also be refused by the Guernsey courts if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award;
- (c) where an application for the setting aside or suspension of an award has been made to such competent authority as is mentioned at 5(a)(vi) above, the court before which the award is sought to be relied upon may, if it considers proper, adjourn the decision on the recognition or enforcement of the award. It may also, on the application of the party claiming recognition or enforcement of the award, order the other party to give suitable security; and
- (d) in order for an award made under the Arbitral Convention to be enforced in Guernsey in the same manner as a judgment of the Royal Court, leave of the court must first be granted.

6 The Reciprocal Enforcement Law contains provisions enabling an application to be made to the Guernsey courts to set aside a judgment registered under that law on the following grounds:

- (a) the judgment is not a judgment to which the Reciprocal Enforcement Law applies or was registered in contravention of the Reciprocal Enforcement Law; or

- (b) the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
- (c) the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend those proceedings and did not appear; or
- (d) the judgment was obtained by fraud; or
- (e) that the enforcement of the judgment in Guernsey would be contrary to public policy in Guernsey; or
- (f) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
- (g) that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

- 7 The Trusts Law provides that notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that (a) it is inconsistent with the Trusts Law, or (b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, or orders.
- 8 The Royal Court may decline to accept jurisdiction in an action where it determines that there is another more appropriate forum in another jurisdiction or that a court of competent jurisdiction has already made a determination of the relevant matter or where there is litigation pending in respect thereof in another jurisdiction or it may stay proceedings if concurrent proceedings are instituted elsewhere.
- 9 The question of whether or not any provision of the LCH Agreements which may be invalid on account of illegality may be severed from the other provisions thereof would be determined by the Royal Court in its discretion.
- 10 Any provision of the LCH Agreements which purport to give conclusive effect to any calculation, determination or certification may be held by the Royal Court not to be conclusive as the Royal Court may review the grounds on which such calculation, determination or certification is made or given.
- 11 Where any Party to the LCH Agreements is vested with a discretion or may determine a matter in its opinion, the Royal Court, if called upon to consider the issue, may require that such discretion is exercised reasonably or that such opinion is based on reasonable grounds.

- 12 Where the Guernsey Party is an Umbrella Fund, we have assumed that the trustee and/or the manager for an on behalf of the Sub-Fund, rather than the Umbrella Fund itself, will be the contracting party in a LCH Agreement. There has been no case law or clarification from the Royal Court as to whether this is the correct approach or whether the Umbrella Fund should be the contracting party acting on behalf of a particular Sub-Fund. In the latter case, this would have implications for the drafting of the documents because insolvency of the Umbrella Fund could result in the termination of Transactions with unrelated solvent Sub-Funds. It is questionable whether it would be in the best interests of the directors of the trustee of the Umbrella Fund to enter into such an arrangement as this would be unfairly prejudicial to the interests of the Sub-Funds other than the relevant one for the purpose of the particular LCH Agreements and related Transactions.
- 13 There is no dedicated netting legislation under Guernsey law, limited modern Guernsey case law on netting and/or contractual set-off, and very little case law on insolvency issues generally, and accordingly, it is difficult to predict the attitude that the Royal Court would take with respect to these issues.

### **Limitations**

- 14 This Opinion is limited to the matters stated in it and, in particular, we offer no opinion:
- (a) in relation to the laws of any jurisdiction other than Guernsey (and we have not made any investigation into any such laws);
  - (b) on the effect, validity or enforceability of, or the validity or effectiveness of any document, save as expressly set out herein;
  - (c) in relation to any representation or warranty made or given in any documents or, save as expressly set out herein, as to whether any party will be able to perform its obligations under any documents;
  - (d) as to the commerciality of the transactions envisaged in any documents or, save as expressly stated in this Opinion, whether any documents referred to in this Opinion achieve the commercial, tax, legal, regulatory or other aims of the parties to such documents; or
  - (e) save in relation to the questions answered and matters addressed in paragraphs 4, 5, 6 and 7 of our Opinion, on Guernsey Companies, Guernsey Investment Funds and Guernsey Trusts generally, on regulatory matters in respect of Guernsey Companies, Guernsey Investment Funds and Guernsey Trusts or on the treatment of and manner in which Guernsey Companies, Guernsey Investment Funds and Guernsey Trusts are required to carry on business or transact.

## SCHEDULE 4

### Overview of Guernsey's Insolvency Procedures

#### 1 Recent changes to Guernsey's insolvency procedures

The Companies (Guernsey) Law 2008 (Insolvency) (Amendment) Ordinance, 2020 (the **Insolvency Ordinance**) was passed on 15 January 2020, enacted on 8 December 2022 and came into force on 1 January 2023. The Insolvency Ordinance, amongst other things, provides for the making of rules for the purposes of giving effect to the provisions of the Insolvency Ordinance. The Companies (Guernsey) (Insolvency Rules) Regulations, 2022 (the **Insolvency Regulations**) were made in accordance with such provisions of the Insolvency Ordinance and came into effect on 1 January 2023.

#### 2 Overview of Guernsey's insolvency procedures

The principal circumstances in which someone may be appointed to take control of either a Guernsey Party or the movable assets of a Guernsey Party are as follows:

##### (a) Winding up under the Companies Law

This applies to Guernsey companies and is discussed further below. The procedure is set out in paragraph 3 of this Schedule. The preference provisions of the Companies Law and other laws are discussed in paragraph 7 and paragraph 8 of this Schedule.

##### (b) Bankruptcy under the 1929 Law

Although broad enough to extend to companies, the 1929 Law appears to be intended for individuals. The procedures under it are, moreover, little used even for individuals with the *désastre* proceeding referred to below being generally preferred for recovery by creditors. The preference provisions under the 1929 Law are discussed in paragraph 8 of this Schedule.

##### (c) Administration under the Companies Law

This applies to Guernsey Company Parties and is discussed further in paragraph 4 of this Schedule.

##### (d) *Désastre*

*Désastre* is an informal procedure whereby, in the event that the proceeds of execution by HM Sheriff against a debtor's assets in Guernsey are insufficient to satisfy the debts of the arresting creditor and other debts notified to HM Sheriff, the Royal Court may appoint a commissioner to establish the claims of creditors and whether any are preferred. This is however, in essence, a procedure for the recovery of debts and it is not a requirement that the debtor be insolvent or likely to become insolvent in order for *désastre* proceedings to be commenced. The process is briefly explained in paragraph 5 of this Schedule.

(e) *Saisie*

There is also a further procedure known as *Saisie* which applies to Guernsey realty and which is briefly explained in paragraph 6 of this Schedule.

These procedures are discussed further in paragraphs 3 to 14 of this Schedule.

3 Winding Up

- 3.1 Under the Companies Law, a company can be wound up compulsorily or voluntarily.
- 3.2 Under the Companies Law, the company, any director, a member, a creditor or any other interested party may apply for a company to be compulsorily wound up if, inter alia, the company is unable to pay its debts (as set out in the Companies Law and discussed below) or the Royal Court is of the opinion that it is just and equitable that the company should be wound up.
- 3.3 For the purposes of the Companies Law a company is deemed to be unable to pay its debts if (i) (a) a creditor to whom the company owes a sum exceeding £750 which is then due serves on the company through HM Sergeant a written demand for payment at the company's registered office; and (b) the company for a period of 21 days immediately following the date of service, neglects to pay the sum or to secure payment to the reasonable satisfaction of the creditor; or (ii) if it is proved to the satisfaction of the Royal Court that the company fails to satisfy the Solvency Test.
- 3.4 On the making of an application for the compulsory winding up of a company or at any time thereafter, any creditor of the company may apply to the Royal Court for an order restraining, on such terms and conditions as the Royal Court thinks fit, any action or proceeding pending against the company and/or appointing a provisional liquidator to ascertain the company's assets and liabilities, manage its affairs and do all acts authorised by the Royal Court.
- 3.5 Under the Companies Law a company may be wound up voluntarily (1) in either of the following cases: (i) the period (if any) fixed by its articles for the duration of the company expires, or (ii) if an event occurs on the occurrence of which the articles provide that the company shall be dissolved; provided that in each case the company resolves in general meeting that it be wound up voluntarily; or (2) if it passes a special resolution to that effect.
- 3.6 Where a company is to be wound up voluntarily, the directors will be required to declare that the company is able to satisfy the statutory Solvency Test. If they are unable to make that declaration, the directors will only be permitted to appoint liquidators who are independent third parties, unconnected with the directors or members of the company and the liquidator will be required to call a meeting of all creditors within one month of their appointment, unless in their opinion there are no assets for distribution.
- 3.7 A company which is being or which is to be voluntarily wound up may, by special resolution, delegate to its creditors or to any committee thereof the power to: (i) appoint a liquidator and to fill any vacancy in the office of liquidator; or (ii) enter into any arrangement regarding the powers to be exercised by the liquidator and the manner in



which they are to be exercised and any act done by the creditors in pursuance of such delegated power shall have effect as if done by the company.

3.8 Any arrangement entered into between a company which is being or which is to be voluntarily wound up, and its creditors shall, (subject to a right of appeal by a creditor or shareholder of the company to have such arrangement set aside within 21 days of the date of completion of the arrangement), be binding if sanctioned by a special resolution of the company and by three quarters in number and value of the creditors.

3.9 A liquidator appointed by the Royal Court will be sworn and will have the powers set out in the Companies Law (upon which we can advise further if required) or authorised by the Royal Court. Upon the appointment of a liquidator, all powers of the directors cease, except to the extent that:

- (a) in the case of a company being wound up voluntarily, the company by ordinary resolution or the liquidator sanctions their continuance; or
- (b) in the case of a company being wound up compulsorily, the liquidator sanctions their continuance.

A liquidator shall (i) realise the company's assets and discharge the company's liabilities, and (ii) having done so, distribute any surplus amongst the company's shareholders according to their respective entitlements in accordance with the relevant provisions of the Companies Law.

3.10 The Insolvency Regulations grant liquidators the power to disclaim onerous property (which will include unprofitable contracts, certain personal property, which may not be readily saleable or which may give rise to liability) or real property situated outside of Guernsey. However, the Insolvency Regulations further provide that, without limitation, any rights relating to netting, set-off or compensation, along with any rights of enforcement in connection therewith, are unaffected by the liquidator's power to disclaim onerous property under the Companies Law and the Insolvency Regulations. A notification procedure applies with any person claiming an interest in any property to be disclaimed having a right of application to the Royal Court.

3.11 All costs, charges and expenses properly incurred in the voluntary or compulsory winding up of a company, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims.

3.12 Subject to the provisions of the Companies Law and of any rule of law as to preferential payments, any agreement between the company and any of its creditors as to the subordination of one debt to other debts, and any agreement between the company and any creditor thereof as to set-off, the company's assets in a winding up will be realised and applied in satisfaction of the company's debts and liabilities *pari passu*.

3.13 The Insolvency Ordinance introduced legislation whereby a non-Guernsey company may be compulsorily wound up by the Royal Court. An application for the compulsory winding up of a non-Guernsey company under the Companies Law may be made to the Royal Court if:

- (a) the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
- (b) the company is unable to pay its debts; or
- (c) the Royal Court is of the opinion that it is just and equitable that the company should be wound up.

Although yet to be tested in the Royal Court, it is expected that the Royal Court will look to guidance available under English and Welsh law in connection with an application under the Companies Law to wind up a non-Guernsey company. As a result, it is likely that any non-Guernsey company will require a sufficient connection to Guernsey in order for the Royal Court to exercise its discretion to wind up that company.

#### 4 Administration

4.1 Under the Companies Law, if the Royal Court is satisfied that a company does not satisfy or is likely to become unable to satisfy the Solvency Test, and considers that the making of an order may achieve one or more of the purposes set out in paragraph 4.3 of this Schedule, the Royal Court may make an order (an **administration order**) in relation to such company.

4.2 An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company, the assets liable under that agreement, shall be managed by a person (the **administrator**) appointed for the purpose by the Royal Court.

4.3 The purposes for the achievement of which an administration order may be made are:

- (a) the survival of the company and the whole or any part of its undertaking, as a going concern,
- (b) a more advantageous realisation of the company's assets than would be effected on a winding up,

and the order shall specify the purpose for which it is made.

4.4 Subject to the provisions of the Companies Law, an administration order may be made notwithstanding that,

- (a) an order for the company's winding up has been made by the Royal Court, or
- (b) the company has passed a resolution for voluntary winding up,

and, if an administration order is so made, then,

- (a) the order for the company's winding up shall be discharged or suspended, or
- (b) the resolution for voluntary winding up shall cease to have effect or shall be suspended as the case may be),

on such terms and conditions as the Royal Court thinks fit.

4.5 An administration order, in respect of a company:

- (a) may not be made if:
  - (i) a liquidator has been appointed to act in respect of the company;
  - (ii) an application has been made for the winding up of the company; or
  - (iii) the company has passed a resolution for the voluntary winding up;
- (b) shall cease to be of effect upon the appointment of a liquidator to act in respect of the company, but without prejudice to prior acts.

4.6 An application for an administration order may be made by, amongst certain others, the directors of the company, any member, any creditor, the Commission.

4.7 Subject to the provisions of the Companies Law, during the period between the presentation of an application for an administration order and ending with the making of such an order or the dismissal of the application:

- (a) no resolution may be passed or order made for the company's winding up; and
- (b) no proceedings may be commenced or continued against the company except with the leave of the Royal Court and subject to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set-off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of this paragraph).

However, nothing summarised in paragraph 4.5 of this Schedule requires the leave of the Royal Court for the presentation of an application for the company's winding up.

4.8 Subject to the provisions of the Companies Law, on the making of an administration order any application for the company's winding up shall be dismissed.

4.9 Subject to the provisions of the Companies Law, during the period for which an administration order is in force:

- (a) no resolution may be passed or order made for the company's winding up; and
- (b) no proceedings may be commenced or continued against the company except with the consent of the administrator or the leave of the Royal Court and subject (where the Royal Court gives leave) to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, rights of set-off and secured interests, including security interests (within the meaning of the 1993 Law) and rights of enforcement thereof, are unaffected by the provisions of this paragraph).

- 4.10 The administrator may do all such things as may be necessary or expedient for the management of the affairs, business and property of the company.
- 4.11 The administrator shall, on his appointment, take into his custody or under his control all the property to which the company is or appears to be entitled. The administrator shall manage the affairs, business and property of the company in accordance with any directions given by the Royal Court.
- 4.12 The administrator may at any time apply to the Royal Court for the administration order to be discharged or varied. The administrator shall apply to the Royal Court for the administration order to be discharged or varied if it appears to him that the purpose or each of the purposes specified in the order has been achieved or is incapable of achievement or it would otherwise be desirable or expedient to discharge or vary the order.
- 4.13 The administrator's remuneration and any costs, charges and expenses properly incurred in the administration are payable from the company's assets in priority to all other claims. The administrator's fees shall be fixed by the Royal Court.

## 5 *Désastre*

There is no clear code of procedure for *désastre*, but a brief outline of the process is set out below:

- (a) *Désastre* proceedings arise out of the arrest of a debtor's personalty in Guernsey by HM Sheriff, either at the instance of a judgment creditor or a creditor without a judgment where there is good reason for an immediate arrest.
- (b) Following confirmation of the arrest by the Court and realisation of the assets, the Court may institute *désastre* procedures where HM Sheriff has insufficient resulting funds to cover the debt of the arresting creditor and any other debts notified to him.
- (c) The Court will order the arresting creditor, the debtor and other creditors to appear before a Jurat appointed by the Court to act as Commissioner for the purpose of establishing the claims of debtors and any preferences.
- (d) At a meeting attended by the arresting creditor and HM Sheriff the Commissioner declares the debtor to be en *désastre* (in a state of financial disaster) and fixes the place, date and time at and on which he will examine the claims and preferences of the various creditors and declare a dividend amongst them.
- (e) The arresting creditor must publish a notice on two occasions in the Gazette Officielle stating that a meeting of creditors is to be held at and on the appointed place, date and time.
- (f) At the meeting of creditors, each creditor submits his claims and these are duly marshalled by the Commissioner, having regard to any preferred debts. The debtor is again summoned formally to attend this meeting.

- (g) Once this has been done and HM Sheriff has disclosed the amount of the monies in his hands, the Commissioner declares a dividend and makes a report on the proceedings held before him.
- (h) The monies in the hands of HM Sheriff are then distributed among the creditors, preferential claims being satisfied in full and the other claims met in part according to the dividend declared by the Commissioner.

## 6 *Saisie*

*Saisie* is a process involving the enforcement of a judgment debt of the Royal Court against the realty of the debtor situate in Guernsey. Although usually commenced by a single judgment creditor, the process allows all creditors to participate, although in so doing, they will be renouncing any right thereafter to proceed against personalty.

During the process debts will be ranked in order of priority and will include debts secured against the realty. The process culminates in one of the creditors, usually the most senior, taking outright ownership. A lower ranking debtor may elect to take the property, but would have to pay off all the prior ranking creditors.

## 7 Preferences

7.1 The liquidator of a company may apply to the Royal Court for an order under the Companies Law if the company has given a preference to any person at any time after the commencement of a period of six months immediately preceding the relevant date. For the purposes of the Companies Law, a company gives a preference to a person if:

- (a) that person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities; and
- (b) the company does anything, or permits anything to be done, which improves that person's position in the company's liquidation.

7.2 The relevant date is the earlier of the date of any application for the compulsory winding up of the company under the Companies Law and the date of the passing by the company of any resolution for the voluntary winding up of the company.

7.3 If, on such an application by the liquidator, the Royal Court is of the opinion that:

- (a) the company was at the time of giving the preference, or became as a result of giving the preference, unable to pay its debts within the meaning of the Companies Law; and
- (b) the company was influenced in deciding to give a preference by a desire to produce the effect mentioned in paragraph 7.1(b) of this Schedule,

the Royal Court may make such order as it thinks fit for restoring the position to what it would have been if the company had not given the preference.

- 7.4 In the application of these provisions of the Companies Law to any case where the person given a preference is connected with the company:
- (a) the reference in paragraph 7.1 of this Schedule to six months is to be read as a reference to two years; and
  - (b) the company is presumed, unless the contrary is shown, to have been influenced in deciding to give the preference by such desire as is mentioned in paragraph 7.3(b) of this Schedule.
- 7.5 For these purposes, a person is connected with the company at any time if the company knew or ought to have known at that time that:
- (a) that person had any significant direct or indirect proprietary, financial or other interest in or connection with the company (other than as a creditor, surety or guarantor); or
  - (b) another person had any such interest in or connection with both that person and the company.
- 7.6 The fact that something is done or permitted pursuant to a court order does not, without more, prevent it from being a preference.
- 7.7 These provisions of the Companies Law are without prejudice to any other remedy. See, for example, the provisions of the 1979 Law with respect to contractual set-off agreements, discussed in paragraph 11 of this Schedule.
- 8 Transactions at an undervalue / Fraudulent Preference
- 8.1 Article IX of the 1929 Law provides that every conveyance of property whether movable or immovable, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if such conveyance, charge, payment, obligation, or judicial proceeding has been made, taken, suffered or obtained within three months prior to the debtor's application for a declaration of insolvency, be deemed fraudulent and void as against the committee of creditors.
- 8.2 Section 1(2) of the 1979 Law provides that where a jurat presiding over a meeting of arresting creditors in a *désastre* proceeding has reasonable cause to believe that any contractual set-off agreement was entered into by the party whose state of affairs have been declared in a state of *désastre* (the **debtor**) less than six months before the date of the meeting, the matter of the agreement shall be referred to the Royal Court and if the Royal Court is satisfied that the agreement was entered into with a view of giving a preference over other creditors of the debtor, the Court may make an order directing that the agreement shall be treated as fraudulent and void as against the other creditor of the debtor. See paragraph 9 below.

- 8.3 The Jersey courts have applied customary law principles in cases including the so-called Pauline Action to provide victims of fraud with rights in certain circumstances to revoke transfers by fraudsters of the victim's assets to a third party recipient. The elements of the cause of action differ depending on whether the transfer is at full value (aliénation onéreuse) or at less than full value (aliénation lucrative). Although the Guernsey courts have not ruled on such matters (certainly in recent times), the customary law principles applied by the Jersey courts in such actions and the reasoning of the Jersey courts would be persuasive to the Guernsey courts should they be called upon to consider similar issues.
- 8.4 A liquidator or administrator of a company may apply to the Royal Court for an order under the Companies Law if:
- (a) the company has entered into a transaction with a person at an undervalue at any time after the commencement of a period of 6 months immediately preceding the relevant date; and
  - (b) the company was unable to satisfy the Solvency Test when it entered into the transaction or became unable to satisfy the solvency test as a result of entering into the transaction.
- 8.5 For the purposes of the Companies Law, a company enters into a transaction with a person at an undervalue if the company:
- (a) makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no valuable consideration; or
  - (b) enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
- 8.6 The relevant date is the earlier of the date of any application for the compulsory winding up of the company under the Companies Law, the date of the passing by the company of any resolution for the voluntary winding up of the company or the date of the making of any application for an administration order in respect of the company.
- 8.7 On such an application by a liquidator or an administrator the Royal Court may make an order on such terms and conditions and subject to such penalty as it thinks fit for restoring the position to what it would have been if the company had not entered into the transaction except that the Royal Court shall not make an order if it is satisfied:
- (a) that the transaction at an undervalue was entered into by the company in good faith and for the purpose of carrying on its business; and
  - (b) that at the time the transaction was entered into there were reasonable grounds for believing that the transaction would be of benefit to the company.

## 9 Extortionate credit transactions

9.1 In addition, a liquidator or administrator of an insolvent company may apply to the Royal Court for an order under the Companies Law if:

- (a) the company is, or has been, a party to a transaction for, or involving, the provision of credit to the company;
- (b) the transaction is or was extortionate; and
- (c) the transaction was entered into during the period of 3 years immediately preceding the relevant date.

9.2 For the purposes of the Companies Law a transaction is extortionate if, having regard to the risk accepted by the person providing the credit:

- (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit; or
- (b) it otherwise grossly contravened ordinary principles of fair dealing; and
- (c) any real property situated outside the Bailiwick of Guernsey which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

## 10 Guernsey Trustees

### 10.1 Overview

A Guernsey Trust is not a legal person. The insolvency procedures set out in Schedule 4, including those in the Companies Law and in respect of *désastre*, relate to the insolvency of a legal person (and in some instances to particular forms of legal persons). There are no equivalent statutory provisions relating to Guernsey Trusts. However, it is conceivably possible that the property of a trust, if such assets are Guernsey *situs*, could be subject to a *désastre* proceeding, however we are unaware of any precedent for this. Also, as a Guernsey Trust is not a company, the provisions of the Companies Law will not apply.

If the assets held by a Guernsey Company on trust in respect of a particular Guernsey Trust were less than the total liabilities of the Guernsey Company acting as trustee of that particular trust, or the Guernsey Company acting as trustee was unable to discharge the Guernsey Trust's liabilities as they fell due, as no statutory insolvency procedure applies to Guernsey Trusts, a Guernsey Company acting as trustee might apply to the Royal Court for directions as to how the trust assets should be distributed.

The Jersey courts had cause to consider the "insolvency" of trusts in the case of *Representation of the Z II Trust* [2015] JRC 196C in which guidance was provided on the underlying principles relevant to "insolvent" trusts. In this regard, it was confirmed that the "cash flow" test was the appropriate test for establishing such "insolvency" in the context of a trust. In addition, the Jersey courts held that, once a trust is "insolvent", the trustee



has an obligation to act in the best interests of all of the trust's creditors and not its beneficiaries. Although the Guernsey courts have not ruled on such matters, the reasoning of the Jersey courts may be persuasive to the Guernsey courts should they be called upon to consider similar issues.

A Guernsey Company itself could potentially become the subject of the procedures set out in this Schedule. In this regard we would however note the provisions of the Trusts Law referred to below.

## 10.2 Insolvent/Bankrupt Trustee

Under Section 72 of the Trusts Law, the interest of a trustee in the trust property is limited to that which is necessary for the proper performance of the Guernsey Trust and the trust property does not form part of the assets of the trustee. Where a trustee of a Guernsey Trust is also a beneficiary thereof the above does not apply to its interest as a beneficiary.

Section 74 of the Trusts Law further provides that where a trustee becomes bankrupt, or upon his property becoming liable to arrest, *saisie* or similar process of law, his creditors have no recourse against the trust property except to the extent that the trustee itself has a claim against it or a beneficial interest in it.

Therefore, if a Guernsey Company Party that was a trustee of a Guernsey Trust became subject to *désastre*, insolvency (under the 1929 Law), *saisie* or a winding up proceedings this would only affect the personal property of the trustee and would not affect any trust property (except to the extent that the trustee itself has a claim against it or a beneficial interest in the Guernsey Trust). The trust property is separate from personal property of the trustee, and the personal creditors of the trustee would have no right to claim against the trust property in accordance with Section 74 of the Trusts Law.

## 10.3 Liability of trustee

In accordance with Section 42 of the Trusts Law (as described below) and/or limited recourse wording which may be incorporated in the relevant LCH Agreement, the liability of the trustee for its obligations under the relevant LCH Agreement may be limited to the assets comprised in the trust property of the trust, regardless that English law is the governing law of such LCH Agreement. This may apply whether proceedings are brought directly in the Guernsey courts, or enforcement of a judgment obtained outside Guernsey is sought to be enforced in the Guernsey courts. Section 42 of the Trusts Law provides as follows:

- "(1) Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee, or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property.
- (2) If the trustee fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of the fact -

- he incurs personal liability to the third party in respect of the transaction or matter, and
  - he has a right of indemnity against the trust property in respect of his personal liability, unless he acted in breach of trust.
- (3) Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority;"

Therefore, provided the other Party is informed or aware that the Guernsey Company is acting as trustee, where the Guernsey Company is *en désastre*, insolvent (under the 1929 Law), subject to *saisie* proceedings or subject to a winding up, the trustee will only be liable as trustee, with the other Party's recourse being limited to trust property. Conversely, where the other Party is not informed or aware that the Guernsey Company is acting as trustee, where the Guernsey Company is *en désastre*, insolvent (under the 1929 Law), subject to *saisie* proceedings or subject to a winding up, the trustee will be personally liable, with the other Party having recourse to the personal property of the trustee (although the trustee Guernsey Company will then have a right of indemnity against the trust property (to the extent there is trust property), provided the trustee did not act in breach of trust).

#### 10.4 Termination of a Guernsey Trust

Section 53 (1) of the Trusts Law provides that on the termination of a Guernsey Trust, the trust property shall be distributed by the trustee within a reasonable time and in accordance with the terms of the trust to the persons entitled thereto. This is subject to Section 53 (2), whereby the trustee may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before distributing trust property. The Trust Instrument will usually contain provisions on the termination of the Guernsey Trust, the realisation of Guernsey Trust property and the distributions to beneficiaries.

In accordance with Section 53 (3) of the Trusts Law, notwithstanding the terms of the Guernsey Trust, where all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under legal disability, they may require the trustee to terminate the Guernsey Trust and distribute the Guernsey Trust property among the beneficiaries.

Section 53(4) of the Trusts Law provides, in summary, that the Royal Court has the power on application of certain persons to direct the trustee to distribute, or not to distribute, the Guernsey Trust property, or make such other order in respect of the termination of the Guernsey Trust and the distribution of the Guernsey Trust property as it thinks fit.

#### 11 Set-off under Guernsey law

##### Contractual Set-off

- 11.1 The 1979 Law provides that where there is for the time being in force an agreement (whether written or oral and whether express or implied) whereby, in respect of mutual dealings between them, any debt from one party is to be set off against any debt from the

other party, the effect of that agreement is, unless the parties have expressly or by implication agreed to a different effect, that the only action which may be taken at any time in relation to what would otherwise be those mutual debts (whether by or at the instance of either party or any third party, and whether by way of enforcement, assignment, arrest, restraint or otherwise) is in respect of the balance (if any) then due after that set-off.

11.2 This is subject to the following exceptions:

- (a) in ascertaining the balance due as described above (but only for the purposes of the above), if a contingent liability is to be taken into account the contingency is to be treated as having occurred, and if a future liability is to be taken into account it is to be treated as if presently payable; and
- (b) in a case where the affairs of one party have been declared in a state of *désastre* at a meeting of his arresting creditors held before a Jurat as Commissioner of the Royal Court, where a Jurat has reasonable cause to believe that any set-off agreement was entered into by the party whose affairs have been declared in a state of *désastre* less than six months before the date of the creditors' meeting, the matter of the agreement shall be referred to the Royal Court to determine whether the agreement was entered into with a view to giving to the other party a preference over the other creditors of the debtor, in which case the Royal Court may make an order directing that the agreement shall be treated as being fraudulent and void as against the other creditors of the debtor.

## Customary Law

11.3 There is also under Guernsey customary law a concept of compensation. There is some ambiguity as regards the customary law position although it has been stated<sup>2</sup> that the principal features of *compensation* were:

- (a) that there were two debts between two parties in respect of which they were reciprocally creditors and debtors the one of the other;
- (b) that the two parties were creditor and debtor in the same right, i.e. a party indebted personally could not set off against it a sum due to him as agent or trustee of another;
- (c) both debts must be *certain* and *liquid*. A disputed claim could not be set off against a certain debt. Nor could a claim for an unliquidated sum be used in set off;
- (d) both debts must be presently due; and
- (e) compensation occurred "*ipso facto*", i.e. automatically when the features were present.

## 12 Priority of debts

In making distributions to creditors of a person whose affairs have been declared to be in a state of *désastre* or in a winding up of a company which is insolvent, there are a number of creditors who have priority by law. These are set out in a number of laws including the Companies Law, the 1979 Law, the Preferred Debts Law and the Security Interests Law. The order of priority, generally, will be determined with primary regard to the following principles:

12.1 Where a valid contractual set-off exists the only action which may be taken at any time is in respect of the balance (if any) then due after that set-off.

(1979 Law, Section 1)

12.2 A party with a valid security interest under the Security Interests Law (the **secured party**):

- (a) without title to the collateral, to the extent that the collateral is sufficient, has priority over all other claims for the amount due to the secured party; and
- (b) with title to the collateral, may realise or otherwise deal with the collateral notwithstanding insolvency, *désastre* or other judicial proceedings or arrangements with respect to the debtor (subject to the terms of the Security Interests Law, including the right of an arresting creditor to apply to the Royal Court for an order vesting in him the rights of the secured party to the collateral).

(Security Interests Law, Section 5)

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<sup>2</sup> Set-Off, P.R. Collas, January 1986

12.3 An award of damages by the Royal Court to a person granting security under the Security Interests Law or pursuant to an assignment under the 1979 Law (a **debtor**) following:

- (a) a failure to cancel or discharge all or part of a security interest under the Security Interests Law upon payment by the debtor;
- (b) the arrest of collateral the subject of a security interest under the Security Interests Law by HM Sheriff or the winding up of the secured party and tender of full discharge, payment or performance by the debtor; or
- (c) an action for breach of a proviso or condition for re-assignment of the collateral to the debtor,

shall be paid in full in priority to all other debts, other than a debt secured by way of a bond or judgment registered in the Livre des Obligations kept at the Greffe (effectively, a debt or judgment secured against Guernsey real property).

(Security Interests Law, Section 6; 1979 Law, Section 3(3))

12.4 The remuneration of an administrator and any costs, charges and expenses properly incurred in the administration of a company, an Incorporated Cell Company or an Incorporated Cell are payable from the assets of the company, Incorporated Cell Company or the Incorporated Cell in priority to all other claims.

(Companies Law, Section 383)

12.5 All costs, charges and expenses properly incurred in the winding up of a company (voluntary or compulsory), including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims.

(Companies Law, Sections 404 and 418 - also Preferred Debts Law, Section 6, with respect to costs in a *désastre*)

12.6 The Preferred Debts Law provides that certain preferred creditors in a *désastre* or winding up shall be paid in priority to all other debts, including:

- (a) in the case of a Guernsey Bank, in priority to all other debts, all amounts paid up to the total amount of compensation payable in respect of qualifying deposits with that bank in accordance with section 12(2) of the Banking Deposit Compensation Scheme (Bailiwick of Guernsey) Ordinance, 2008 (the **DCS Ordinance**), when read with section 14 of that ordinance, by the Guernsey Banking Deposit Compensation Board as compensation for qualifying deposits in accordance with the DCS Ordinance,
- (b) with respect to all debts other than those referred to in paragraph (a) above:
  - (i) firstly, in respect of any debts owing to the landlord by his tenant in respect of the rent of any immovable property to the extent that such debt is secured by goods present in or upon that immovable property which is

subject to tacit hypothecation by operation of law (in the French language tacite hypothèque) for the payment of that rent;

- (ii) thereafter and ranking equally among themselves, and to be paid in full (but subject to certain limits) unless the assets are insufficient, in which case they shall abate in equal proportions:
  - (A) employees' wages or salary due for period(s) not exceeding four months in aggregate in respect of services rendered to the debtor during the six years immediately preceding the relevant date;
  - (B) employees' accrued holiday remuneration becoming payable on the termination of his employment before, or by the effect of the insolvency or winding-up;
  - (C) all income tax deducted during period(s) not exceeding twelve months in aggregate in accordance with Section 81A of the Income Tax (Guernsey) Law, 1975, as amended, by an employer for the emoluments of an employee within the six years immediately preceding the relevant date and not paid by the employer;
  - (D) all primary Class I social security payments deducted by employers in respect of employees during period(s) not exceeding twelve months in aggregate, in accordance with Section 13 of the Social Insurance (Guernsey) Law, 1978, as amended, for earnings of and within the six years immediately preceding the relevant date and not paid by the employer.
- (c) in the case of a Guernsey Bank, in priority to all other debts other than debts to which paragraph (a), or (b) relates, any amount representing a qualifying deposit with that Guernsey Bank to which paragraph (a) does not relate.

(Preferred Debts Law, Section 1)

- 12.7 The Companies Law recognises on a winding up subordination agreements between a Guernsey company and its creditors.

(Companies Law, Section 419)

- 12.8 Subject to the above, remaining assets in a *désastre* or winding up will be realised and applied in satisfaction of debts and liabilities *pari passu*.

(Companies Law, Section 419)

### 13 Renunciation

- 13.1 The 1929 Law contains anti-preference provisions in materially similar terms to those in the Companies Law (a significant difference being, however, that the relevant period is three months prior to the debtor's application for a declaration of insolvency).

- 13.2 The Renunciation procedure involves the debtor taking an oath not to leave the Island, provide full details on oath of his assets wherever situated and surrender them to his creditors.
- 13.3 On completion of the procedure, the Royal Court can declare the debtor freed from any further liability to his creditors.
- 13.4 Given the rarity of any application under the 1929 Law and, in our view, the unlikelihood of its provisions being applied to companies, we do not consider these further here.

#### 14 Limited Recourse under Guernsey Law and Practice

Limited recourse provisions are in common usage under Guernsey law and practice to enable a party to become "bankruptcy remote".

##### 14.1 Contractual Limited Recourse

By using limited recourse language in contracts, creditors can agree that their recourse is limited to either: (i) a specific pool of assets; or (ii) to specific parties (and not to the assets of any affiliates or connected parties).

Contractual limited recourse provisions are commonly used in connection with security interest agreements in order to allow security to be taken over certain classes or categories of assets, but not others, lending arrangements, special purpose vehicles in securitisations, insurance transformers, and generally as protection against potential insolvency scenarios. Umbrella funds and other entities set up from different classes or protected assets would ordinarily use contractual limited recourse to segregate the assets and liabilities between different classes who would not automatically have creditor protection.

#### 15 Intervention, Administration and Winding Up under the Enforcement Law

Please see Schedule 5 for details of the Guernsey Regulatory Laws, including the powers of intervention, administration and winding up under the Enforcement Law.

The information in this Schedule 4 is summary in nature and should not be considered to be exhaustive.

## SCHEDULE 5

### Guernsey Regulatory Laws

#### 1 The POI Law

Under the POI Law, a collective investment scheme is an arrangement relating to property of any description that:

- (a) enables a number of investors to participate in or receive profits or income arising from the acquisition, holding, management or disposal of that property;
- (b) in which investors do not have a day to day control over the management of the property to which the arrangement relates;
- (c) under which:
  - (i) the contributions of the investors and the profits or income out of which payments are to be made are “pooled”; or
  - (ii) the property in question is managed as a whole by or on behalf of the person which is responsible for its management.

Under the POI Law, a collective investment scheme can be declared by the Commission as **authorised** or **registered** and can be an open ended investment scheme or a closed ended investment scheme. The Commission has specific rules relating to each of these types of schemes (the **Rules**, together with the POI Law, the **Regulatory Laws**).

An open-ended investment fund is basically defined as a vehicle where investors are entitled to redeem their holding at a price related to the value of the underlying assets and a closed-ended fund does not entitle investors to redeem although redemptions may be made by directors or manager.

#### 1.1 Authorised Collective Investment Schemes

Authorised collective investment schemes are more strictly regulated and are divided under the POI Law into two categories: authorised closed ended schemes and authorised open ended schemes. Authorised open-ended schemes are sub-divided into three classes Class A, Class B or Class Q to which the A Rules, B Rules or Q Rules respectively apply. Authorised closed-ended schemes are subject to the Authorised Closed-Ended Investment Scheme Rules and Guidance, 2021.

#### 1.2 Registered Collective Investment Schemes

Registered schemes can be either open-ended or closed-ended and are not authorised under the POI Law but must be registered under the POI Law with the Commission. Any information/offering particulars relating to registered schemes must make disclosures prescribed by the Prospectus Rules and Guidance, 2021. Unless specifically agreed otherwise by the Commission the Registered Collective Investment Scheme Rules and Guidance, 2021 apply to registered schemes and should be read in conjunction with the



Prospectus Rules and Guidance, 2021. Whilst registered schemes are not regulated per se in Guernsey by the Commission, the Commission will conduct limited enquires into the parties to be associated with the registered schemes and will consider the scheme's investment objectives at the time of the initial application. The Commission will assess the designated manager's due diligence on the parties associated with the scheme as part of their post-facto monitoring of the designated managers as a licensee (see discussion below on POI licenses). Registered schemes must not be offered directly to the public in Guernsey, however may be offered to regulated entities in Guernsey or offered to the public by entities appropriately licensed under the POI Law. In the case of registered open-ended schemes, a designated manager and a designated trustee/custodian licensed under the POI Law and domiciled in Guernsey must be appointed. In the case of a registered closed-ended investment scheme, a designated manager licensed under the POI Law and domiciled in Guernsey must be appointed.

### 1.3 Manager-Led Products

Manager-Led Products can be either open-ended or closed-ended and are not authorised under the POI Law but must be registered under the POI Law with the Commission.

### 1.4 Private Investment Funds

(a) Private Investment Funds may be either open-ended or closed-ended collective investment schemes and are subject to the Private Investment Fund Rules and Guidance (1), 2021 (the **PIF Rules**). The philosophy of a private investment fund is a close relationship between investors and management.

(b) Funds applying for registration as a Private Investment Fund must fulfil the criteria applicable to one of the following three categories of Private Investment Funds:

(i) POI Licensed Manager PIF

This category of Private Investment Fund requires a licensed manager in the structure. No rules are applied against the licensed manager. As part of the application process, the proposed licensed manager provides warranties on the ability of the investors to assume loss.

A POI Licensed Manager PIF may contain no more than 50<sup>3</sup> legal or natural persons holding an ultimate economic interest in the Private Investment Fund, save in the instance where the investment is made by an investment manager acting as agent for a wider group of stakeholders.

(ii) Qualifying Private Investor PIF

To qualify for registration under this category of Private Investment Fund, all investors must fit within the definition of a Qualifying Private Investor

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<sup>3</sup> In the previous twelve months, a POI Licensed Manager PIF can add no more than 30 new ultimate investors. This test must be applied and evidenced by the licensed manager who is required to keep a record of such tests.

(QPI), being, in summary, investors who are able (a) to evaluate the risks and strategy for investing in a Private Investment Fund and (b) to bear the consequences of investment therein, including the possibility of any loss arising from the investment).

No manager is required for this category of Private Investment Fund but a designated administrator, who is required to make certain declarations to the Commission with respect to the procedures of the Private Investment Fund, must be appointed and certain other criteria must also be met.

(iii) Family Relationship PIF

To qualify for registration under this category of Private Investment Fund, all investors must share a family relationship or be an employee of the family meeting the definition of a QPI.

No manager is required for this category of Private Investment Fund but a designated administrator, who is required to make certain declarations to the Commission with respect to the procedures of the Private Investment Fund, must be appointed and certain other criteria must also be met.

- (c) A Private Investment Fund must appoint a qualified auditor as auditor of the scheme.
- (d) The PIF Rules contain requirements for managing conflicts of interest, submitting annual returns notifying of any change to the information contained in the application form submitted for registration as a Private Investment Fund and submitting annual audited accounts.
- (e) There is no requirement for information particulars to be prepared.

## 1.5 Qualified Investor Funds

In addition, the Commission has issued guidance notes in respect of Qualified Investor Funds which are applicable to open and closed-ended funds, whether authorised or registered. Only "Qualified Investors" (as defined in the guidance notes) are permitted to invest. Qualified Investor Funds are funds which are registered or authorised following a particular procedure.

## 1.6 Licensing under the POI Law

The POI Law requires a person or Guernsey body conducting certain activities relating to collective investment business to obtain a licence from the Commission. Failure to do so is an offence. This requirement differs slightly, however, as between Guernsey bodies and non-Guernsey persons or other persons.

In relation to non-Guernsey persons, the POI Law states that no such person may carry on any "*controlled investment business*" "*in or from within*" Guernsey, except under and in accordance with the terms of a licence issued by the Commission. In relation to a Guernsey body, the POI Law states that no such Guernsey body may carry on any

“*controlled investment business*” anywhere at all, unless it is licensed to do so by the Commission.

A person carries on “*controlled investment business*” if, by way of business, he or she engages in a “*restricted activity*” in connection with a “*controlled investment*”.

“*Controlled investments*”, for the purposes of the POI Law, include “*collective investment schemes*” together with General Securities and Derivatives (including shares and stock in the share capital of a company - loan stock, bonds and other instruments creating or acknowledging the debt of a company, interests in limited partnerships and units in unit trusts, together with various other forms of derivative product).

The definition of “*restricted activity*” is very broad, including:

- (a) **promotion** (which includes advertising controlled investments, issuing a prospectus or circulating promotional material);
- (b) **subscription** (which includes receiving funds or assets for investment);
- (c) **registration** (which includes recording particulars of investors or issuing certificates);
- (d) **dealing** (which includes buying, selling, subscribing for, borrowing, lending or underwriting investments or making arrangements for another person to do the same, and providing facilities for another person to realise the value of an investment);
- (e) **management** (which includes exercising any managerial function in relation to an investment or in relation to the assets underlying an investment);
- (f) **administration** (which includes accountancy and book-keeping services and valuation);
- (g) **advising** (which includes giving advice as to the purchase, sale, subscription for or underwriting of investments);
- (h) **custody** (which includes holding assets as trustee or custodian); and
- (i) **operating an investment exchange** (which is defined as providing a facility, whether by electronic means or otherwise, for the orderly trading of securities, or for the listing of securities for the purpose of trading, by members of the investment exchange).

The POI Law also provides that entering into a contract with another person for the performance by that other person of any restricted activity also constitutes a restricted activity for the purposes of the POI Law.

On this basis, the Transactions potentially undertaken by a Guernsey Party pursuant to the LCH Agreements may constitute a controlled investment business requiring a licence

under the POI Law. This may usually be determined from one or more of the following elements:

- (a) the scheme particulars information memorandum or prospectus governing the issue of shares, units, or interests to investors; and
- (b) the constitutional document: (i) in the case of a fund structured as a company, the memorandum and articles of association (together with any special resolutions, which may have the effect of altering the articles); (ii) or in the case of a fund structured as a unit trust structure, the trust instrument; and
- (c) the investment management agreement or agreements (including any sub-management or investment advisory arrangements), to determine whether the collective investment scheme has given discretionary power and authority to contract as agent of the scheme to an investment manager or adviser.

Subject to the requirement to investigate the structure of each fund on a case by case basis, we note that:

- (a) a class fund of a unit trust (which is a separate trust) will not have a legal personality;
- (b) a unit trust does not have a legal personality and must contract through the trustee (who holds the assets of the fund on trust for the investors) or through a manager; and
- (c) a unit trust may invest through a subsidiary company.

Guernsey Investment Funds will be covered by the investment restrictions adopted by the particular fund. It is important to establish the restrictions that have been adopted by the fund.

**All licensees under the POI Law:** All Guernsey managers, administrators, advisers, trustees and custodians of a collective investment scheme are required to be licensed under the POI Law. As licensees, they are required to comply with the COB Rules.

The Authorised Rules require the designated manager of an authorised closed-ended scheme to administer such scheme in accordance with its principal documents, the Authorised Rules, the scheme particulars of the scheme and subject to any proper direction from time to time given by the directors.

Generally, only the A Rules contain specific guidance on permitted investments (although they do not deal with share repurchase (repo), foreign exchange (forex), listed interest rates or swap Transactions as a separate category). The B Rules and Q Rules direct your attention to the principal documents and scheme particulars of the scheme. The COB Rules are more concerned with the general conduct of the business of a licensee under the POI Law.

The Commission has also issued the Principles of Conduct of Derivatives Business which apply to all those carrying on derivatives business or persons intending to use derivatives as part of their finance business in Guernsey.

## 1.7 Exemption to Licensing

The promotion of controlled investments (as defined in the POI Law) is a restricted activity and requires a licence if carried on either (a) by a Guernsey entity anywhere or (b) carried on by a non-Guernsey entity in or from within the Bailiwick unless one of the following statutory exemptions applies.

### *Promotion by a POI licensee*

A non-Guernsey promoter does not require a POI licence if it engages the services of a person licensed to carry on promotion in Guernsey (the **POI Licensee**) and the POI Licensee carries out the promotion in Guernsey on the non-Guernsey promoter's behalf, provided that the non-Guernsey promoter enters into the service contract with the POI Licensee outside of the Bailiwick.

### *Reverse solicitation*

Where restricted activities are conducted by a firm without a base in the Bailiwick of Guernsey at the initiation of the client, ie on a reverse solicitation basis, then a POI licence is not required.

### *Promotion to an entity regulated in Guernsey*

A firm with a main place of business in one of the jurisdictions designated for the purposes of section 44(1)(d) of the POI Law promoting controlled investments (as described in category 1 and category 2 of Schedule 1 to the POI Law) to certain licensed entities in the Bailiwick of Guernsey does not require a licence provided that the following requirements are met:

- (a) the firm does not have a permanent place of business within the Bailiwick;
- (b) the firm is an entity established in a jurisdiction listed in the first column of the Schedule to the Investor Protection (Designated Countries and Territories) (Bailiwick of Guernsey) Regulations, 2017;
- (c) the promotion is only carried out to person licensed to carry on business under any of the Regulatory Laws; and
- (d) written notice of the date from which the firm intends to carry out the promotional activity is given to the Commission by completion of the following webpage form: (<http://www.gfsc.gg/overseas-promotions-form>).

### *Promotion from a designated country or territory/in respect of certain entity types*

A firm with a main place of business in a jurisdiction that has been designated for the purposes of section 44(1)(c) of the POI Law to promote collective investment schemes

(as described in category 1 and category 2 of Schedule 1 to the POI Law) to the public in the Bailiwick of Guernsey does not require a licence provided that the following requirements are met:

- (a) the firm does not carry on any restricted activity (as such term is defined in the POI Law) from a permanent place of business within the Bailiwick;
- (b) the firm is an entity established in a jurisdiction designated for the purposes of section 44(1)(c) and has provided evidence that it is recognised as a national of that designated jurisdiction;
- (c) the collective investment scheme falls within the categories specified in any designated jurisdictions regulations that make designations in respect of section 44(1)(c) (see the paragraph below);
- (d) the promotion is carried out in accordance with the laws of that designated jurisdiction;
- (e) prior notice is given to the Commission by completion of a Form EX and submission of the requisite documentation; and
- (f) the Commission has issued confirmation of the exemption.

A number of regulations have been enacted in Guernsey which state that the United Kingdom of Great Britain and Northern Ireland, the Bailiwick of Jersey, the Isle of Man and the Republic of Ireland are designated countries or territories which, in the opinion of the Committee, afford in relation to the promotion of specific types of entities, adequate protection to investors. More specifically:

- (a) United Kingdom of Great Britain and Northern Ireland - promotion carried on in connection with an authorised unit trust scheme within the meaning of the United Kingdom's Financial Services Act 1986;
- (b) Bailiwick of Jersey - promotion carried on in connection with a Collective Investment Fund within the meaning of the Collective Investment Funds (Jersey) Law, 1988 and in respect of which a functionary holds a permit granted under that Law;
- (c) Isle of Man - promotion carried on in connection with an authorised scheme within the meaning of the Financial Supervision Act 1988 (an Act of Tynwald);
- (d) Republic of Ireland - promotion carried on in connection with an authorized scheme within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989; and
- (e) for designated countries and territories as defined in the EU Alternative Investment Fund Managers Directive (the **AIFMD**), an Alternative Investment Fund (as defined under the AIFMD).

2 Winding up etc.

## 2.1 Winding up on application of the Commission

Pursuant to the Enforcement Law, the Commission may present an application for the dissolution or winding up, in accordance with the Companies Law, of a licensee or former licensee under the Regulatory Laws, any authorised or registered collective investment scheme or any body (licensed or not) which has contravened any provision of the Enforcement Law, the Financial Services Commission Law or the Regulatory Laws, on the grounds:

- (a) that a winding up event has occurred in relation to that body;
- (b) that the body is insolvent being that the body is unable to pay its debts within the meaning of the Companies Law (see paragraph 3.3 of Schedule 4);
- (c) that the body has contravened or committed an offence under any of the provisions of, amongst other things, the Enforcement Law, the Financial Services Law or the Regulatory Laws;
- (d) that the body has contravened any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision;
- (e) the Commission is unable to ascertain the financial position of the body;
- (f) that the dissolution or winding up of the body is necessary or desirable:
  - (i) for the protection of the public;
  - (ii) to counter financial crime or the financing of terrorism in the Bailiwick or elsewhere;
  - (iii) for the maintenance of confidence in the finance sector in the Bailiwick; or
  - (iv) to protect or enhance the reputation of the Bailiwick as a finance centre;
- (g) that the body has defaulted in an obligation to pay any sum due and payable:
  - (i) in respect of a deposit or in respect of pursuant to the carrying on by the body of regulated business; or
  - (ii) to the Commission in respect of any fee, penalty or interest;
- (h) that any of the minimum criteria for licensing are not or have not been fulfilled in relation to that body, or in relation to any person who is or is to be the holder of a supervised role in respect of, or an officer or employee of, the body;
- (i) that it is just and equitable that the body should be dissolved or as the case may be wound up.

Where an order is made for the winding up or dissolution of the body is made, the provisions of the Companies Law apply.

## 2.2 Repayment of Monies from Unlawful Business and the Appointment of a Receiver

If on application of the Commission it appears to the Royal Court that a person has carried on business in contravention of any provision of the Enforcement Law, the Financial Services Commission Law or any other Regulatory Law or any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision, the Royal Court may:

- (a) order that person and any other person who appears to the Royal Court to have been knowingly concerned in the contravention, immediately or at such time as the Royal Court may direct, to repay monies accepted from or paid over (whether to that person or to any other persons) by customers or other persons in the course of such person so carrying on that business; or
- (b) appoint a receiver (upon such terms and conditions and with such functions as the Royal Court may direct) to recover those monies.

If on the application of the Commission it appears to the Royal Court that profits have accrued to a person as a result of any business having been carried on in contravention of any provision of the Enforcement Law, the Financial Services Commission Law or any other Regulatory Law or any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision, the Royal Court may order such person to pay to His Majesty's Sheriff, or may appoint a receiver (upon such terms and conditions and with such functions as the Royal Court may direct) to recover from such person such sums as appear to the Royal Court to be just having regard to the profits appearing to the Royal Court to have accrued to such person.

If on the application of the Commission it appears to the Royal Court that a person has carried on business in contravention of any provision of the Enforcement Law, the Financial Services Commission Law or any other Regulatory Law or any prohibition, restriction, condition, obligation, enforcement requirement, other requirement, duty, direction or arrangement imposed, issued or arising under any such provision, and that any customer has suffered loss or been adversely affected as a result of that contravention, the Royal Court may order such person to pay to His Majesty's Sheriff, or may appoint a receiver (upon such terms and conditions and with such functions as the Royal Court may direct) to recover from such person such sums as appear to the Royal Court to be just having regard to the extent of any such loss or adverse effect.

In deciding whether and on what terms and conditions to make an order above, the Royal Court must have regard to the effect that payment or repayment pursuant to the order would have on the solvency of the person concerned and on the ability of the person concerned to carry on business in a manner satisfactory to creditors.

Any amount paid to His Majesty's Sheriff or recovered by a receiver must be distributed among such persons as the Royal Court shall direct being:



- (a) persons appearing to the Royal Court to have been customers in respect of whom the business as a result of which the monies or profits accrued was carried on or (as the case may be) who suffered the loss or other adverse effect; or
- (b) such other persons as the Royal Court thinks just.

Where the Royal Court has appointed a receiver it may, on application of the receiver or of any other person appearing to the Royal Court to have a sufficient interest in the matter, direct any person holding or having possession or control of any monies, profits or assets in respect of which the receiver was appointed to give possession of them to the receiver or otherwise to deal with them, or not to deal with them, in any manner specified by the Royal Court.

### 3 Administration and Intervention

Under and subject to the provisions of the Enforcement Law, if the Royal Court is

- (a) satisfied that an **administered person** (or in the case of a protected cell company, any cell thereof):
  - (i) has performed an act or made an omission; or
  - (ii) will or is likely to perform, continue or repeat any act or make, continue or repeat any omission,

that has caused or is likely to cause undue risk to customers or potential customers, and considers that the making of an order under this section would achieve the purpose of the protection of customers or potential customers; or

- (b) is of the opinion that it is necessary or desirable that an order should be made in relation to an administered person (or in the case of a protected cell company, any cell thereof) for the purpose of the protection of the public or the reputation of the Bailiwick as a finance centre,

the Royal Court may make an order (an **administration management order**) in relation to the administered person (or in the case of a protected cell company, any cell thereof).

An **administered person** means any person or entity which (a) is a licensee or authorised or registered collective investment scheme (but only includes a licensee under the Banking Law where the licensee is incorporated in the Bailiwick, (b) is not a person or entity mentioned in paragraph (a) but carries on regulated business; (c) applies or has applied for a licence under any of the Regulatory Laws or for an authorisation or registration of a collective investment scheme under the POI Law; or (d) is a person or entity in respect of which such an application is or has been made

**Undue risk** includes:

- (a) an investment or financial risk that a reasonable person informed of the investment or financial strategy and potential returns of the administered person

(or in the case of a protected cell company, any cell thereof) would consider excessive;

- (b) any risk which has led or could lead to a partial or complete loss of assets held, managed, administered, controlled or operated by the administered person (or in the case of a protected cell company, any cell thereof) and which has arisen or could arise from a lack of proper management or administration of the business of the administered person (or the cell as the case may be); or
- (c) any other risk which has arisen or could arise from a lack of proper management or administration of the business of the administered person (or in the case of a protected cell company, any cell thereof).

An administration management order is an order directing that, during the period for which the order is in force, the affairs, business and property of the administered person shall be managed by a person (an administration manager) appointed for the purpose by the Royal Court.

To be clear, an administration management order is not an insolvency procedure but rather is an order that may be made for the protection of investors. That said such an order may impact on insolvency procedures.

An administration order may be made notwithstanding that a winding up event has occurred in relation to the administered person and, if an administration management order is so made, then the declaration, appointment, order, resolution, winding up, proceedings, measure or other procedure comprising the winding up event shall (unless the Royal Court orders otherwise) be discharged or suspended on such terms as the Royal Court thinks fit.

An application for an administration management order may only be made by the Commission.

Subject to any directions given by the Royal Court, the administration manager may do all such things as may be necessary or expedient for the management of the affairs, business and property of the administered person (or as the case may be, the cell), including, unless the Royal Court orders otherwise, having certain powers set out in the Enforcement Law.

An administration manager shall, on appointment, take into the custody of, or under the control of, the administration manager all the business, property and affairs of the administered person (or the cell as the case may be) or to which the administered person (or the cell as the case may be) is or appears to be entitled.

An administration manager's remuneration, and any costs, charges and expenses properly incurred in the administration of an administered person, are payable from the administered person's assets in priority to all other claims.

If on the application of the Commission, the Royal Court is satisfied that:

- (a) there is a reasonable likelihood that an administered person will perform any act or make any omission that is likely to cause undue risk to customers, the public or the reputation of the Bailiwick as a finance centre; or
- (b) an administered person may have performed any act or made any omission that has caused or is likely to have caused undue risk to customers, the public or the reputation of the Bailiwick as a finance centre and that there is a reasonable likelihood that the act or omission will continue or be repeated;

the Royal Court may grant an injunction restraining the act or omission.

If on the application of the Commission, the Royal Court is satisfied that the administered person has or may have performed any act or made any omission as is described above, the Royal Court may grant an injunction restraining the administered person or any of the holders of supervised roles in respect of, or officers or employees of, the administered person or any other person controlling the business, property or affairs of the administered person from disposing of or otherwise dealing with any assets or class or description of assets while the suspected act or omission is investigated.

An injunction may be granted on such terms and conditions, and may contain such incidental, ancillary, consequential or supplementary provision, as the Royal Court thinks fit including, without prejudice to the generality of the foregoing, provision for the appointment of a receiver or other person to exercise such powers as the Royal Court may consider necessary or expedient for the purpose of ensuring that any assets subject to the injunction are not disposed of or otherwise dealt with in contravention of the injunction, including powers to locate, ascertain, hold, gather in, sequester or take possession or control of any such assets.

#### 4 The Fiduciaries Law

The Fiduciaries Law requires any Guernsey Company which is carrying on or wishes to carry on any “regulated activities” by way of business anywhere, and any other person who is carrying on or wishes to carry on any “regulated activities” by way of business in or from within Guernsey, are required to obtain a licence from the Commission in order to do so.

The meaning of “regulated activity” covers three broad areas – trust administration, company administration and the provision of executorship services. The category relating to trust administration includes forming, managing or administering trusts; advising on the formation, management or administration of trusts; acting as corporate or individual trustee or as protector for trusts and providing corporate or individual trustees or protectors to trusts. The category relating to company administration includes forming, managing or administering companies, partnerships or other unincorporated bodies; advising on the formation, management or administration of companies, partnerships or other unincorporated bodies; providing directors, secretaries or other officers, nominees, shareholders or registered office addresses to companies, partnerships or other unincorporated bodies; acting as a director of a company or unincorporated body; and acting as a partner of any partnership.

You should also be aware that where you are dealing with a unit trust, if the unit trust is not a collective investment scheme, but a joint venture or similar arrangement, the Fiduciaries Law will be the applicable law. If the unit trust is a collective investment scheme (whether open or closed-ended) the POI Law will be relevant.

## SCHEDULE 6

### Conflict of laws and Lex Situs

#### Conflict of laws

As a general principle, the Royal Court will, when considering issues relating to conflicts of law, have regard to the principles established under English law. On this basis, English law principles will be relevant to:

- (a) determining the *lex situs* of an asset;
- (b) determining the governing law of a transfer of movables; and
- (c) determining the proper law of a contract.

However, with regard to paragraph (c), please note that the United Kingdom Contracts (Applicable Law) Act 1990 and the Rome Convention of 1980 do not apply in Guernsey and, therefore, the Royal Court will have regard to the English common law principles set out in the English case of Amin Rasheed Shipping Corp. v Kuwait Insurance Co. ([1984] A.C. 50). In particular, the effect of this is that the express choice of governing law will be the proper law provided that such choice is bona fide and legal and not contrary to public policy.

We would also draw your attention to the Jersey case of Re Nield (1983), where the Jersey court were asked to consider the validity of a purported English law mortgage over Jersey law life insurance policies. It was held that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law and under which the agreement would not be valid. Therefore, to the extent that any credit support documents purport to create security over Guernsey *situs* Collateral in a manner that does not satisfy the requirements of the 1993 Law, it is, in our view, possible that the Royal Court could reject the choice of the governing law of the relevant credit support document.

#### Lex Situs

The United Kingdom Financial Collateral Arrangements (No. 2) Regulations 2003 are not applicable in Guernsey. However, we believe that the Royal Court would have regard to the following principles in determining the location of the Collateral, which principles we understand are established under English common law (which we understand is based on principles set out in Dicey and Morris):

- (a) Cash: the *situs* will be deemed to be the jurisdiction where the bank account is located.
- (b) Securities in bearer form: the *situs* will be deemed to be the jurisdiction where the certificate of title representing the security is from time to time to be found.
- (c) Securities in registered form: the *situs* will be deemed to be the jurisdiction where, under the law of the country in which the issuer of such securities was incorporated, the registered securities can be effectively dealt with as between the owner for the time being and the issuer. In effect, this will be the place where the register of securities is kept. If they are transferable by reference to more than one register, the securities will be situate

at the place of the register on which they are dealt with in the ordinary course of affairs by the registered owner for the time being.

- (d) Dematerialised securities: the *situs* will be deemed to be the jurisdiction of the place where the register of securities is kept (see paragraph (c) above).
- (e) Rights in a custodian agreement: the *situs* will be deemed to be the location of the proper law of the custody agreement.
- (f) Rights in immobilised securities held by a CSD: in our view (in reliance on Dicey and Morris) the proprietary rights are located at the place where the account with the depository or clearing system is maintained and the *lex situs* will be the law governing the relationship with the depository or clearing system.
- (g) Rights in a Guernsey bank account: the *situs* will be the jurisdiction where the bank account is located.