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**FRENCH LAW OPINION GIVEN IN
CONNECTION WITH THE CLEARING SERVICES
OF LCH LIMITED PROVIDED AFTER BREXIT**

LCH Limited
Aldgate House
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London EC3N 1EA

5 September 2023

Responses to Instructions to Counsel – Membership, Insolvency, Security, Set-off & Netting and Client Clearing

Dear Sirs,

You have asked us to give an opinion in respect of French law in response to certain specific questions raised by LCH Limited ("**LCH**") in relation to membership, insolvency, security, set-off & netting and client clearing where LCH would provide its services to French clearing members after 31 January 2020 (23.00 GMT), being the date on which the United Kingdom has left the European Union ("**Brexit**"), further to the vote on Brexit in the referendum held on 23 June 2016 and the agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 12 November 2019 (2019/C 384 1/01) (the "**Withdrawal Agreement**").

The opinions in this opinion letter (the "**Opinion Letter**") are given by Clifford Chance Europe LLP. Any term not otherwise defined in this Opinion Letter shall have the meaning ascribed to such terms in the relevant Opinion Document (as defined in paragraph 1.3 below).

1. TERMS OF REFERENCE

1.1 Our opinions are given in respect of Clearing Members which are French Credit Institutions and French Investment Firms and all references to a "Relevant Clearing Member" in this Opinion Letter shall be construed accordingly. For these purposes:

1.1.1 a reference to a "**French Credit Institution**" is a reference to a company that is: (i) validly incorporated under French law as a limited liability company (*société anonyme*) or a limited stock partnership (*société en commandite par actions*); and (ii) duly licensed as a credit institution (*établissement de crédit*) in accordance with article L. 511-9 of the Financial Code; and

1.1.2 a reference to a "**French Investment Firm**" is a reference to a company that is: (i) validly incorporated under French law as a limited liability company (*société anonyme*) or a limited stock partnership (*société en*

commandite par actions); and (ii) duly licensed as an investment firm (*entreprise d'investissement*) in accordance with article L. 532-1 of the Financial Code.

- 1.2 The opinions given in this Opinion Letter are applicable to all Services other than those governed by the FCM Regulations.
- 1.3 In this Opinion Letter:
- 1.3.1 a reference to a "**3RCCP**" is a reference to a central counterparty established in a third country and that has been recognised by ESMA under article 25 of EMIR;
 - 1.3.2 a reference to the "**ACPR**" is a reference to the *Autorité de contrôle prudentiel et de résolution*;
 - 1.3.3 a reference to the "**AMF**" is a reference to the *Autorité des marchés financiers*;
 - 1.3.4 a reference to the "**Effective Brexit Date**" is a reference to the date laid down by article 126 of the Withdrawal Agreement on which the transitional period terminated, *i.e.* 31 December 2020;
 - 1.3.5 a reference to "**BRRD**" is a reference to Directive no. 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, as notably amended by Directive (EU) no. 2019/879 of the European Parliament and of the Council of 20 May 2019;
 - 1.3.6 a reference to the "**Civil Code**" is a reference to the French *Code civil*;
 - 1.3.7 a reference to "**Client Clearing Arrangements**" is a reference to the contractual arrangements by which a Relevant Clearing Member is bound to the default management procedures of LCH in respect of Client Contracts, constituted by the Relevant Clearing Member's Clearing Membership Agreement and the General Regulations, including the Client Clearing Annex of the Default Rules of LCH;
 - 1.3.8 a reference to a "**Client Contract**" is a reference to a Contract entered into for the account of a Clearing Client;
 - 1.3.9 a reference to "**Collateral Arrangements**" is a reference to the security arrangements which govern the provision of Collateral (as defined in LCH's Rulebook) by a Relevant Clearing Member to LCH, constituted by the relevant executed Deed of Charge, the General Regulations (in particular those set out in Section 4 (*Collateral*) of the Procedures of

LCH) and the relevant instruction(s) through LCH's collateral management system (or CMS, as defined in LCH's Rulebook);

- 1.3.10 a reference to the "**Collateral Directive Regime**" is a reference to Directive no. 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (as amended) (the "**Collateral Directive**"), as implemented into French law under articles L. 211–36 *et seq.* of the Financial Code;
- 1.3.11 a reference to the "**Commercial Code**" is a reference to the French *Code de commerce*;
- 1.3.12 a reference to the "**Credit Institution WUD Regime**" is a reference to Directive no. 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (the "**Credit Institution WUD**") as amended by BRRD and as implemented into French law under articles L. 613–31–1 *et seq.* of the Financial Code;
- 1.3.13 a reference to "**Default Arrangements**" is a reference to the contractual arrangements by which a Relevant Clearing Member is bound to the default management procedures of LCH, constituted by the Relevant Clearing Member's Clearing Membership Agreement and the General Regulations, including the Default Rules of LCH;
- 1.3.14 a reference to the "**EEA**" is a reference to the European Economic Area;
- 1.3.15 a reference to the "**eIDAS Regulation**" is a reference to Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market;
- 1.3.16 a reference to "**EMIR**" is a reference to Regulation (EU) no. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (as amended);
- 1.3.17 a reference to "**ESMA**" is a reference to the European Securities and Markets Authority;
- 1.3.18 a reference to the "**EU**" is a reference to the European Union;
- 1.3.19 a reference to the "**EU Insolvency Regulation**" is a reference to Regulation (EU) no. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings;

- 1.3.20 a reference to the "**Finality Directive Regime**" is a reference to Directive no. 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (as amended) (the "**Finality Directive**"), as implemented into French law under articles L. 330-1 *et seq.* of the Financial Code;
- 1.3.21 a reference to the "**Financial Code**" is a reference to the French *Code monétaire et financier*;
- 1.3.22 a reference to "**France**" is a reference (and the term "French" shall be construed accordingly) to the metropolitan territory of the French Republic and all overseas departments (*départements d'outre-mer*) and overseas provinces (*régions d'outre-mer*) but excludes overseas collectivities (*collectivités d'outre-mer*), Nouvelle Calédonie and the Austral and Antarctic territories. For the avoidance of doubt, Monaco is also excluded;
- 1.3.23 a reference to "**French Insolvency Law**" is a reference to the provisions of Book VI of the Commercial Code governing French pre-insolvency and insolvency proceedings;
- 1.3.24 a reference to the "**Insolvency Proceedings**" is a reference to the proceedings listed in paragraph 3.2.1(b);
- 1.3.25 a reference to "**MiFID II**" is a reference to Directive no. 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (as amended);
- 1.3.26 a reference to the "**Parties**" is a reference to LCH and a single Relevant Clearing Member to which this Opinion Letter applies, and a reference to a "**Party**" is a reference to either of them;
- 1.3.27 a reference to the "**Pre-Insolvency Proceedings**" is a reference to the proceedings listed in paragraph 3.2.1(a) below;
- 1.3.28 a reference to the "**Resolution Measures**" is a reference to the measures listed in paragraph 3.2.1(d) below;
- 1.3.29 a reference to "**Rome I Regulation**" is a reference to Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations;
- 1.3.30 a reference to the "**Services**" is a reference to all Services listed in paragraph 1.2 and a reference to a "**Service**" is a reference to either of them;



- 1.3.31 unless the context otherwise requires, a reference to a "paragraph" is a reference to a paragraph of this Opinion Letter; and
- 1.3.32 headings are for ease of reference only and shall not affect interpretation of this Opinion Letter.
- 1.4 In this Opinion Letter, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.5 In this Opinion Letter, references to the "**enforcement**" of the Collateral under the Deed of Charge and any cognate terms means the act of:
- 1.5.1 sale and application of proceeds of the sale of Collateral against monies owed; or
- 1.5.2 appropriation of the Collateral,
- in either case in accordance with the provisions of the Deed of Charge.
- 1.6 For the purposes of preparing our opinions given in this Opinion Letter we have only reviewed the following documents (the "**Opinion Documents**"):
- 1.6.1 the General Regulations, Procedures, Default Rules, Settlement Finality Regulations and the Product Specific Contract Terms and Eligibility Criteria Manual published on LCH's website accessed by us on 4 September 2023 (the "**LCH's Rulebook**");
- 1.6.2 an unexecuted standard form template version of the Clearing Membership Agreement (as defined in the LCH's Rulebook) which is substantially in the form appended as Appendix 1 to this Opinion Letter (the "**Clearing Membership Agreement**");
- 1.6.3 an unexecuted standard form template version of the Deed of Charge (as defined in the LCH's Rulebook) which is substantially in the form of the deed of charge set out in Appendix 2 to this Opinion Letter and which contains no material modifications to the wording set out in clause 2 of that annexed form (for the avoidance of doubt, a change to the numbering of the clause or other provision in which the relevant wording appears in a particular deed of charge would not (in either such case) of itself constitute a "material modification" for these purposes) (the "**Deed of Charge**"); and
- 1.6.4 an unexecuted standard form template version of the Security Deed (as defined in the LCH's Rulebook) which is substantially in the form appended as Appendix 3 to the Opinion Letter (the "**Security Deed**" and

together with the Clearing Membership Agreement and the Deed of Charge, the "Agreements").

- 1.7 We have reviewed the Opinion Documents in connection with the instructions to counsel provided as attachment to an email sent to Frédérick Lacroix on 24 July 2018, as updated.
- 1.8 This Opinion Letter is a formal statement of opinion as to French law in force as at 5 September 2023 (the "**Opinion Date**"), as set out in paragraph 3 (*Statement of opinion*) below. It is based on our understanding of the Opinion Documents, within the scope described in paragraphs 1.9 and 1.10, and is subject to the assumptions set out in paragraph 2 (*Assumptions*) and to the qualifications set out in paragraph 4 (*Qualifications*). Attention is drawn to the fact that we do not have updated, and have not been instructed to update, this Opinion Letter according to the state of French law since the Opinion Date.
- 1.9 The opinions given in this Opinion Letter are strictly limited to the specific questions raised by you as set out in paragraph 3 (*Statement of opinion*) below and do not extend to any other matters. We have assumed that any matters which are or could be material in the context of our delivery of this Opinion Letter have been disclosed to us.
- 1.10 For the purpose of issuing this Opinion Letter, we have made no investigation or verification, and we express no opinion, express or implied, with respect to:
 - 1.10.1 the validity and enforceability of any provisions of any Opinion Documents without prejudice to the statement of opinion in paragraph 3 (*Statement of opinion*) below;
 - 1.10.2 any Non-Clearing Participant (NCP) even where such Non-Clearing Participant is subject to French law;
 - 1.10.3 any liability to tax as a result of or in connection with the Services, or the tax treatment of any Contract, or the tax position of any party thereto;
 - 1.10.4 any matters of fact (including any calculations or mathematic methods or formulae, any economic or financial information or figure as well as the adequacy or the relevance of any orders of priority for payments) or the reasonableness of any statements of opinion or intention expressed in relation to any Service, including any facts, events or circumstances arising as a result of the execution of any related documents by the Parties or the performance of the Parties' obligations deriving therefrom;
 - 1.10.5 any laws of any jurisdiction other than France, including jurisdictions in which our firm has an office or correspondents;
 - 1.10.6 the recognition and enforcement of foreign judgments;

- 1.10.7 any prudential treatment of any Relevant Clearing Member's exposure to LCH (or any part thereof);
- 1.10.8 the compliance of the Opinion Documents with the provisions of EMIR; and
- 1.10.9 the impact on the opinions expressed in this Opinion Letter of Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties.
- 1.11 We have not been responsible for advising any party to the Opinion Documents other than LCH for the purposes of this Opinion Letter and the delivery of this Opinion Letter to any person other than LCH to whom a copy of this Opinion Letter may be communicated does not evidence the existence of any relationship of client and *avocat* between us and such person.
- 1.12 This Opinion Letter is confined to matters of French law in force as at the Opinion Date (including any EU law applicable in France), as applied and interpreted according to French case law published as at the Opinion Date. We express no opinion on EU law as it affects or would be applied in any jurisdiction other than France.
- 1.13 We assume no duty to update this Opinion Letter or inform LCH or any other person to whom a copy of this Opinion Letter may be communicated of any change in French law (including, in particular, applicable case law), or the legal status of any party to the Services, or any other circumstance that occurs, or is disclosed to us, after the Opinion Date, which might have an impact on the opinions given in this Opinion Letter.
- 1.14 This Opinion Letter is given in respect of the laws of this jurisdiction in force as at the Opinion Date.
- 1.15 In this Opinion Letter, some French legal concepts are expressed in English and not in French. The concepts concerned may not be identical to those described by the English terminology employed. Those concepts accordingly have the meaning that French law gives them, irrespective of whether they are accompanied by their translation into French.

2. ASSUMPTIONS

2.1 Assumptions relating to the application of foreign laws in relation to the Agreements and each Contract

We have assumed the following with regard to the application of foreign laws:

2.1.1 the Agreements and each Contract are legal, valid, binding and enforceable against both Parties under their governing laws and that there are no provisions of the laws of any jurisdiction (apart from France) which would be contravened by the execution of the Agreements and each Contract; and

2.1.2 the Deed of Charge creates a valid and perfected security interest over the Collateral under its governing law and the governing law where the Collateral is located, such security interest being enforceable against the grantor thereof and any third parties under such law. The Deed of Charge and the Security Deed benefit from the provisions of the UK legislation having implemented the Collateral Directive in its current state immediately prior to the Effective Brexit Date.

2.2 Assumption relating to the application of EMIR in relation to the Agreements and each Contract

We have assumed that the Agreements and each Contract are fully compliant with the provisions of EMIR.

2.3 Assumptions relating to both Parties

We have assumed the following with regard to each Party:

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

2.3.2 each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents and has otherwise complied with all applicable laws and regulations required to enable it to lawfully enter into and perform its obligations under the Agreements and the Contracts and to ensure the legality, validity, enforceability and admissibility in evidence of the Agreements and each Contract in France;

2.3.3 each Party has entered into the Agreements and each Contract in good faith, for the benefit of each of them respectively, on arms' length commercial terms;

2.3.4 the execution and performance of the Agreements and each Contract are in each Party's corporate interest;

- 2.3.5 any determination due to be made by a Party in accordance with the Agreements will be made in a commercially reasonable manner;
- 2.3.6 the obligations assumed under the Agreements and the Contracts are "mutual" (*récioproques*) between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it and solely entitled to the benefit of obligations owed to it; accordingly, and without limitation, no opinion is expressed where a Relevant Clearing Member is acting as agent for another person, or is a trustee, or in respect of which a Relevant Clearing Member has a joint interest (including partnership) or in respect of which a Relevant Clearing Member's rights or obligations or any interest therein have been assigned, charged, attached, garnished or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order;
- 2.3.7 all obligations arising under the Agreements and/or any Contract can only be settled through a payment in cash (*règlement en espèces*) or a delivery of financial instruments (*livraison d'instruments financiers*);
- 2.3.8 none of the provisions of the Agreements are affected by fraud (*fraude*) or are pursuing a fraudulent purpose;
- 2.3.9 there exists no other agreement or instrument (including instructions or clearing notices) amending or otherwise affecting or being inconsistent with the provisions of each of the Opinion Documents;
- 2.3.10 each Contract registered with LCH is or gives rise to an "instruction" within the meaning of article L. 330-1 of the Financial Code and a "transfer order" under the Finality Directive; and
- 2.3.11 none of the Parties is entitled to claim in relation to itself or its assets immunity from suit, attachment, execution or other legal process.
- 2.4 **Assumptions relating to LCH**

We have assumed the following with regard to LCH:

- 2.4.1 for the purposes of the Finality Directive Regime, LCH qualifies as a system within the meaning of article L. 330-1-I-4° of the Financial Code, further to having been recognised by ESMA as a 3RCCP pursuant to article 25 of EMIR and homologated by an order (*arrêté*) of the

Minister of Economy pursuant to article D. 330–4 of the Financial Code;¹

2.4.2

- (a) LCH is not insolvent for the purposes of any insolvency law and is not subject to any form of resolution under the laws of any jurisdiction other than France; and
- (b) the Agreements and each Contract have been entered into prior to the commencement of any insolvency procedure or resolution under the laws of any jurisdiction in respect of LCH.

2.5 **Assumptions relating to the Relevant Clearing Member**

We have assumed the following with regard to the Relevant Clearing Member:

2.5.1 at the time at which the Agreements and each Contract are entered into, and any payment, delivery or transfer of Collateral is effected, the Relevant Clearing Member:

- (a) is not subject to any Insolvency Proceedings;
- (b) is not subject to any Resolution Measure or Pre-Resolution Measure (in respect of which please refer to paragraph 3.2.1(d)), Early Intervention Measure (in respect of which please refer to paragraph 3.2.1(e)) or Conservatory Measure (in respect of which please refer to paragraph 3.2.1(f)) or any similar measure or procedure under the laws of any jurisdiction;
- (c) has not ceased its payments (*cessation des paiements*) within the meaning of article L. 613–26 of the Financial Code (in respect of a French Credit Institution)² or article L. 631–1 of the

¹ In this respect, we note: (i) the decision of the board of supervisors of the ESMA of 25 September 2020 to recognise LCH as a Tier 2 CCP pursuant to article 25 of EMIR (as extended until 30 June 2025 by the decision of 22 March 2022); (ii) the Commission implementing decision (EU) 2020/13/08 of 21 September 2020 (as amended by the Commission implementing decision (EU) 2022/174 of 8 February 2022) determining, for a limited period of time (from 1 January 2021 to 30 June 2025), that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent; and (iii) the order of the French Minister of Economy dated 17 November 2020 providing that the systems operated by LCH Limited are homologated under article L. 330–1–I–4^o of the Financial Code.

² Pursuant to article L. 613–26 of the Financial Code, a credit institution is in a state of cessation of payments when it cannot ensure the performance of its payment obligations immediately or in a near future (*à terme rapproché*).

- Commercial Code (in respect of a French Investment Firm)³ and is not deemed to have ceased its payments further to a decision of the judge made in accordance with article L. 631–8 of the Commercial Code;
- (d) does not face difficulties that it is unable to overcome within the meaning of article L. 620–1 of the Commercial Code; and
 - (e) is not in any other analogous situation as contemplated by the laws of any jurisdiction other than France;
- 2.5.2 the Clearing Member has been validly admitted as a clearing member (*adhérent compensateur*) of the Clearing Services, pursuant to and in accordance with article L. 440-2 of the Financial Code and Title II (*Membership*) of the Rulebook;
- 2.5.3 the Clearing Member is a participant in the system operated by LCH pursuant to and in accordance with article L. 330-1 of the Financial Code;
- 2.5.4 if the Relevant Clearing Member is constituted in the form of a limited liability company (*société anonyme*), and if:
- (a) a shareholder holding more than 10% of the voting rights in the Relevant Clearing Member (be it a company or an individual) (a "**Qualifying Shareholder**") or a company having a controlling interest (within the meaning of article L. 233–3 of the Commercial Code) in a corporate Qualifying Shareholder (a "**Controlling Company**") is, directly or indirectly, a party to any of the Agreements; or
 - (b) a party to any of the Agreements is or acts on behalf of a member of the board of directors (*conseil d'administration*), of the executive board (*directoire*) or of the supervisory board (*conseil de surveillance*) as the case may be, the managing director (*directeur général*), a deputy managing director (*directeur général délégué*) of the Relevant Clearing Member, a Qualifying Shareholder or a Controlling Company; or
 - (c) a member of the board of directors (*conseil d'administration*), of the executive board (*directoire*) or of the supervisory board (*conseil de surveillance*) as the case may be, the managing director (*directeur général*), a deputy managing director

³ Pursuant to article L. 631–1 of the Commercial Code, a company is in a state of cessation of payments when it cannot pay its due debts (*passif exigible*) with its available assets (*actif disponible*).

(*directeur général délégué*) of the Relevant Clearing Member, a Qualifying Shareholder or a Controlling Company has an indirect interest in any of the Agreements; or

- (d) any member of the board of directors (*conseil d'administration*), of the executive board (*directoire*) or of the supervisory board (*conseil de surveillance*) as the case may be, the managing director (*directeur général*) or any deputy managing director (*directeur général délégué*) of the Relevant Clearing Member is also an owner, an unlimited partner (*associé indéfiniment responsable*), a manager (*gérant*), a member of, as relevant, the board of directors (*conseil d'administration*), the executive board (*directoire*) or the supervisory board (*conseil de surveillance*), or more generally a director (*dirigeant*) of any other parties to any of the Agreements,

then such Agreements have been entered into in the ordinary course of business on normal terms (*opération courante conclue à des conditions normales*); and

2.5.5 if the Relevant Clearing Member is constituted in the form of a limited stock partnership (*société en commandite par actions*), and if:

- (a) a Qualifying Shareholder or a Controlling Company is, directly or indirectly, a party to any of the Agreements; or
- (b) a party to any of the Agreements is or acts on behalf of a member of the supervisory board (*conseil de surveillance*), the manager (*gérant*) of the Relevant Clearing Member, a Qualifying Shareholder or a Controlling Company; or
- (c) a member of the supervisory board (*conseil de surveillance*), the manager (*gérant*) of the Relevant Clearing Member, a Qualifying Shareholder or a Controlling Company has an indirect interest in any of the Agreements; or
- (d) any member of the supervisory board (*conseil de surveillance*), the manager (*gérant*) of the Relevant Clearing Member is also an owner, an unlimited partner (*associé indéfiniment responsable*), a manager (*gérant*), a director (*administrateur*), a managing director (*directeur général*), a member of the executive board (*membre du directoire*) or a member of the supervisory board (*conseil de surveillance*) of any other parties to any of the Agreements,

then, such Agreements have been entered into in the ordinary course of business on normal terms (*opération courante conclue à des conditions normales*).

2.6 Assumptions relating to the Collateral

We have assumed the following with respect to the Collateral:

- 2.6.1 each Relevant Clearing Member has the capacity, power and authority to create the security interests constituted by the Collateral Arrangements;
- 2.6.2 each Party, when posting Collateral pursuant to the Collateral Arrangements, has full legal title to such Collateral at such time, free and clear of any lien, claim, charge or encumbrance or any other interest of the posting Party or of any third person;
- 2.6.3 all Collateral transferred pursuant to the Collateral Arrangements is freely transferable and capable of being subject to the security interest provided for in the Collateral Arrangements and all acts or things required by the laws of any jurisdiction to be done to ensure the validity and enforceability *vis-à-vis* third parties of such security interest will have been effectively carried out;
- 2.6.4 the collateral securities transferred pursuant to the Deed of Charge are: (i) constituted solely of book-entry securities within the meaning of article 2(1)(g) ("*book entry securities collateral*") of the Collateral Directive; and (ii) financial securities (*titres financiers*) within the meaning of article L. 211-1-II of the Financial Code⁴ issued under French law or equivalent instruments issued under other laws, within the meaning of article L. 211-41 of the Financial Code⁵; and that each investor interest arising thereunder is recorded in fungible book-entry form in an account maintained by a financial intermediary located in the United Kingdom;
- 2.6.5 at any time, LCH, acting as chargee under the Deed of Charge, maintains continued possession over the Charged Property;

⁴ Article L. 211-1-II of the Financial Code is a MiFID II-based provision which refers to the following securities: (i) equity securities issued by companies limited by shares (*sociétés par actions*); (ii) debt securities, with the exception of bills of exchange (*effets de commerce*) and cash vouchers (*bons de caisse*); and (iii) units or shares of collective investment undertakings. This provision aims to cover the financial instruments specified in paragraphs (1) to (3) of Section C, Annex I of MiFID II.

⁵ The reference to article L. 211-41 of the Financial Code is meant to cover financial securities which are: (i) issued under a law other than the law of this jurisdiction; and (ii) deemed to be equivalent to those listed in article L. 211-1-II of the same code.

- 2.6.6 the provision of Collateral to LCH can be evidenced in writing or by electronic means and any other durable medium and that such evidencing permits the identification of the Collateral as such (provided that, for this purpose, it is sufficient to prove that the Collateral taking the form of book-entry securities has been credited to, or forms a credit in, the relevant account and that the cash Collateral has been credited to, or forms a credit in, a designated account); and
- 2.6.7 any enforcement of the Collateral will be made on normal market terms (*conditions normales de marché*).

3. STATEMENT OF OPINION

3.1 Membership

General

Please opine on the ability of a Relevant Clearing Member to enter into the LCH Agreements and if there is anything which would prevent a Relevant Clearing Member from performing its obligations under the LCH Agreements. In particular, please can you answer the following:

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

The limitations imposed by the constitutional documents of the Relevant Clearing Member and the restrictions limiting the capacity of the legal representatives of a Relevant Clearing Member to enter into the Agreements on behalf of the Relevant Clearing Member are discussed in paragraph 3.1.3 below.

On the assumption that the Relevant Clearing Member is duly authorised to provide custody services for financial instruments (*tenue de compte-conservation d'instruments financiers*)⁶, as part of its licence as French Credit Institution or French Investment Firm, there are no specific statutory limitations or regulatory requirements which would limit the capacity of an appropriately authorised Relevant Clearing Member to enter into the Agreements for the purpose of receiving clearing services.

⁶ Even though this service is qualified as an "Ancillary Service" under MiFID II (and, as a result, is not subject to licensing requirements under MiFID II), French law requires that French Investment Firms and French Credit Institutions are expressly authorised to provide this service (article L. 542-1 of the Financial Code).

- 3.1.2 **Would LCH be deemed to be domiciled, resident or carrying on business in France 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?**

Based on the assumption set out in paragraph 2.4.1 above, LCH will be authorised to provide clearing services to clearing members in France without being required to be licensed in France. Moreover, it is worth noting that, alongside EU central counterparties authorised under article 17 of EMIR, 3RCCPs: (i) are eligible for mandatory clearing of OTC derivative contracts pursuant to article 4(3) of EMIR; and (ii) qualify as a "qualifying central counterparty" (or QCCP) under article 4(1)(88) of Regulation (EU) no. 575/2013 of the European Parliament and of the Council of 26 June 2013 (as amended) (CRR).

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

Our response given below is solely limited to French Credit Institutions and French Investment Firms established (*constitués*) in the form of a limited liability company (*société anonyme*) or a limited stock partnership (*société en commandite par actions*) and is not meant to provide a comprehensive response on the capacity of all various legal forms of companies incorporated in France.

(a) Corporate existence

It is advisable that LCH requests from any entity applying to become a Relevant Clearing Member a recent (usually not older than 14 days) "K-bis" extract (*extrait K-bis*) (the "**K-bis Extract**") established by the commercial and companies registry (*registre du commerce et des sociétés*). The K-bis Extract:

- (i) is the sole official document evidencing that a company is validly existing in France; and
- (ii) discloses whether a company is subject to Insolvency Proceedings (please however refer to our qualification in paragraph 4.2 below).

(b) *Capacity*

A company's capacity and powers are generally defined by its articles of association (*statuts*). Transactions falling outside the scope of the company's capacity and powers could be *ultra vires*, but third parties are protected since an agreement entered into by a legal representative of a company is enforceable against such company even if:

- (i) such agreement appears to contradict the company's corporate object (*objet social*)⁷, except if the third party knew (or could not ignore due to the circumstances) that the agreement contradicted the company's corporate object; or
- (ii) the relevant legal representative has not complied with express restrictions provided for in the articles of association, even if the third parties were aware of the relevant restrictions⁸.

In the light of the above, it is advisable that LCH requests a copy of the articles of association (*statuts*) of each applicant Relevant Clearing Member and checks whether any express restriction to enter into the Agreement(s) is provided for. If restrictions are identified, it will be necessary to obtain a certified copy of the document evidencing the approval of the relevant body of the company (*e.g.* minutes of the board of directors (*conseil d'administration*) or the supervisory board (*conseil de surveillance*)).

(c) *Signing Authority*

The authority to represent and bind a Relevant Clearing Member lies solely with the legal representatives of such Relevant Clearing Member (as such legal representatives are mentioned in the K-bis Extract), unless a valid delegation (*délégation de pouvoirs*) has duly been granted to another person by way of a power of attorney (*pouvoir*). In the latter case, LCH should request a duly certified copy of the relevant power of attorney of each person representing the Relevant Clearing Member.

⁷ Articles L. 225-56 and L. 225-64 of the Commercial Code (in respect of companies in the form of *sociétés anonymes*) and article L. 226-7 of the Commercial Code (in respect of companies in the form of *sociétés en commandite par actions*).

⁸ Cass. com., 2 juin 1992, RJDA 8-9/92 no. 836: decision rendered in respect of a company constituted as a *société à responsabilité limitée* but considered as relevant for any other company with limited responsibility, just as a *société anonyme* or a *société en commandite par actions*.

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

French law does not provide for any specific formalities to be complied with for the conclusion of the Agreements between LCH and a Relevant Clearing Member.

There are no regulatory filings or notifications which need to be made under French law upon the conclusion of the Agreements.

3.1.5 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)?

Pursuant to the Civil Code and the eIDAS Regulation, which is directly applicable in France, an electronic signature has, subject to certain conditions, the equivalent legal effect of a handwritten signature. To be considered as an equivalent of a handwritten signature, an electronic signature must rely on a reliable process of identification guaranteeing its link with the act to which it is attached. Such condition being satisfied, electronic signatures are generally deemed valid and enforceable for executing documents and can also be used before courts or in legal proceedings to prove the identity of the signatory.

However, the abovementioned principle is subject to the following exclusions / restrictions.

- (a) Electronic documents (and thus electronic signature) cannot be used for certain categories of documents: (i) private deeds relating to family law or the law of succession; or (ii) private deeds relating to personal or real security, whether under civil law or commercial law, unless they are entered into by a person for the purpose of his or her professional activity⁹.
- (b) There are also situations where an electronic signature may not be an appropriate method of execution or special rules may apply and further analysis will be required (e.g. where the document

⁹ Article 1175 of the Civil Code.



needs to be filed with a registry which may require an original executed in wet ink, if there are any cross-border issues that may impact the required form of signature of the document or the transaction, if the document is required to be authenticated, notarised or apostilled, where there are any tax or stamp duty reasons as to why a hard copy is required or the place of execution of the document is important for tax purposes, if the envisaged operation involves public authorities, if there are restrictions on the use of electronic signature in one party's corporate documents).

Finally, please note that there are various forms of electronic signatures that are subject to different rules and conditions (in particular regarding the presumption of reliability¹⁰):

- (i) the simple electronic signature¹¹;
- (ii) the advanced electronic signature¹²; and
- (iii) the qualified electronic signature¹³.

Therefore, each time it is envisaged to use an electronic signature process, it is advisable to first identify the form of electronic signature that will be used and what the applicable regime is.

It is worth noting in this respect that the qualified electronic signature, which presents the highest level of reliability, requires notably the verification of the identity of the signatories by a qualified trust service provider through a physical meeting, or remotely, using electronic identification means, for which a physical presence of the natural person

¹⁰ Under French law, an electronic signature is presumed to be reliable, unless it is proven otherwise, if it meets the requirements of the qualified electronic signature pursuant to the eIDAS Regulation. Reliability of other forms of electronic signatures are not presumed and will need to be proved in case it is challenged.

¹¹ A simple electronic signature is a signature that is in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign but which does not present the characteristics of the advanced electronic signature and of the qualified electronic signature.

¹² An advanced electronic signature is an electronic signature that meets a number of requirements set out in the eIDAS Regulation (*e.g.* it must be uniquely linked to the signatory, capable of identifying the signatory, created using electronic signature creation data that the signatory can, with a high level of confidence, use under the signatory's sole control, linked to the data signed therewith in such a way that any subsequent change in the data is detectable).

¹³ A qualified electronic signature is an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.

or of an authorised representative of the legal person is necessary and which meets the requirements set out in the eIDAS Regulation.

3.1.6 Would the courts of France uphold the contractual choice of law set out in Regulation 51?

(a) *Choice of law*

The contractual choice of English law to govern the LCH's Rulebook set out in Regulation 51 should be upheld by French courts on the basis that, pursuant to article 3(1) of Rome I Regulation, the parties may freely choose the governing law (including the law of a non-EU member state) of their contract (*lex contractus*), provided that evidence as to the content of such law is duly adduced.

(b) *Limitations to the choice of law governing the Agreements (lex contractus)*

As stated above, French courts will generally recognise the *lex contractus* in accordance with article 3(1) of Rome I Regulation. They may, however:

- (i) give effect to mandatory provisions of the law of the country where the obligations arising out of the Agreements have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the Agreements unlawful (article 9(3) of Rome I Regulation)¹⁴;
- (ii) apply overriding mandatory provisions of French law (article 9(2) of Rome I Regulation) irrespective of the choice of English law under the Agreements;
- (iii) refuse to apply English law to the Agreements, to the extent the application of such law is manifestly incompatible with French public policy (article 21 of Rome I Regulation);
- (iv) have regard to the law of the country in which performance takes place in relation to the manner of

¹⁴ In accordance with article 9(1) of Rome I Regulation, mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under Rome I Regulation.

performance and the steps to be taken in the event of defective performance (article 12(2) of Rome I Regulation); and

- (v) apply the provisions of the law of another country which cannot be derogated from by agreement, if English law was chosen to govern the Agreements but all elements relevant to the situation at the time that the Agreements were entered into were located in a country other than England or Wales (article 3(3) of Rome I Regulation).

In addition, it should be noted that the scope and effect of a choice of law made by the parties is likely to be limited by specific situations, in particular in the context of insolvency proceedings¹⁵.

3.1.7 Will the courts of France uphold an English arbitration award?

France has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the Geneva Convention on International Commercial Arbitration of 21 April 1961. As a general rule, enforcement of a foreign arbitration award is rarely denied as France is an "arbitration-friendly" jurisdiction.

The enforcement order of an award is delivered by the Paris *Tribunal judiciaire*. An enforcement order rendered by the French courts may only be challenged on appeal proceedings on the following grounds, pursuant to article 1520 of the French *code de procédure civile*:

- (a) if the arbitral tribunal has wrongly upheld or declined jurisdiction; or
- (b) if the arbitral tribunal was irregularly constituted; or
- (c) if the arbitral tribunal has not rendered its award in accordance with the mission conferred upon it; or
- (d) if due process has not been respected; or

¹⁵ Please see for example article 7.1 of the EU Insolvency Regulation on the scope of the *lex fori concursus* or article 12 of the same regulation on the law governing the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market.

- (e) if recognition or enforcement of the award would be contrary to French international public policy (*ordre public international*) (please refer to paragraph 3.1.8 for more details).

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

French courts may refuse to apply a foreign law, recognise the validity of contractual obligations governed by a foreign law or an international/foreign arbitral award on the ground that it would be contrary to French international public policy (*ordre public international*). French international public policy refers to the French public policy doctrine as applied in private international matters which may to a certain extent also encompass French *lois de police* (mandatory rules of territorial application).

We draw your attention to the fact that French law does not provide for a definition of French international public policy. The scope and the content of French international public policy are determined by French courts *ex-post* (*i.e.* at the time of the French court's decision) and on a case-by-case basis. Such a determination reflects a very unpredictable vision of what French courts consider to be public policy in international matters as there is no general theory that may sustain the analysis.

3.2 Insolvency, Security, Set-off and Netting

3.2.1 Please identify the different types of insolvency proceedings and pre-insolvency reorganisation, restructuring and/or resolution 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 and Rule 5 of the Default Rules? Are any other events or procedures not envisaged in Rule 3 and Rule 5 of the Default Rules relevant?

We believe that no other events or procedures in addition to those envisaged in Rule 3 and Rule 5 of the Default Rules are relevant in respect of Relevant Clearing Members. Please find below the list of Pre-Insolvency Proceedings and Insolvency Proceedings. Please also refer to our observations regarding powers of the supervisory and resolution authorities in respect of a Relevant Clearing Member facing financial difficulties as set out in paragraphs 3.2.1(c) through 3.2.1(h) below (which include, in particular, Resolution Measures).

(a) *Pre-insolvency proceedings*

The following pre-insolvency proceedings, which may affect a Relevant Clearing Member in France generally (the "**Pre-Insolvency Proceedings**"), are set out in the French Insolvency Law:

- (i) *mandat ad hoc*, as provided for in article L. 611-3 of the Commercial Code. The commencement of a *mandat ad hoc* proceeding does not entail an automatic stay of payments or actions being taken against the entity in question; and
- (ii) conciliation proceeding (*procédure de conciliation*), as provided for in article L. 611-4 of the Commercial Code. The commencement of a conciliation proceeding does not entail an automatic stay of payments or actions being taken against the entity in question. Conciliation proceedings only bind the parties to the conciliation agreement and remain confidential, save that where the conciliation agreement is acknowledged by the court (*homologué*) the terms thereof are no longer confidential.

In both cases, pursuant to article 1343-5 of the Civil Code the competent court can order a stay or deferral of payments for a period of up to two years if a creditor has commenced legal action against the debtor.

(b) *Insolvency Proceedings*

The only bankruptcy, composition, rehabilitation (*e.g.* liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Relevant Clearing Member would be subject in France, which are set out in the French Insolvency Law, are the following (together, the "**Insolvency Proceedings**"):

- (i) safeguard proceeding (*procédure de sauvegarde*) ("**Safeguard Proceeding**") governed by articles L. 620-1 *et seq.* of the Commercial Code¹⁶;

¹⁶ Safeguard Proceedings are only available to any person who, although not unable to pay its debts ("*cessation de paiements*") (a debtor is 'unable to pay its debts' when it is unable to pay its debts when due with its available cash and assets it has available that can be immediately converted into cash, or

- (ii) accelerated safeguard proceeding (*procédure de sauvegarde accélérée*) ("**Accelerated Safeguard Proceeding**") governed by articles L. 628–1 *et seq.* of the Commercial Code¹⁷;
 - (iii) rehabilitation proceedings (*redressement judiciaire*) ("**Judicial Rehabilitation Proceeding**") governed by articles L. 631–1 *et seq.* of the Commercial Code¹⁸; and
 - (iv) judicial liquidation (*liquidation judiciaire*) ("**Judicial Liquidation Proceeding**") governed by articles L. 640–1 *et seq.* of the Commercial Code^{19 20}.
- (c) *Special considerations regarding French Credit Institutions and French Investment Firms*

French Credit Institutions and French Investment Firms are subject to the supervision and control of the ACPR (or, as applicable, the ECB, in which case it is vested under French law

with respect to credit institutions, when it is unable to meet its current liabilities, immediately or in the near future), establishes that it is facing difficulties which it cannot overcome. The purpose of Safeguard Proceedings is to facilitate, at an early stage of the difficulties, a consensual restructuring in the framework of formal proceedings, triggering a stay of payments and any further action being taken against the Clearing Member. If recovery is possible the court decides on a safeguard plan which provides for the rehabilitation and continuation of the operations of the debtor. At the request of the debtor concerned and to the extent that such debtor is eligible for a Safeguard Proceeding, the court orders the commencement of the observation period ("*période d'observation*") allowing continuation of the operations of the debtor under the protection of the court (the observation period can last for up to 12 months).

- ¹⁷ Accelerated Safeguard Proceedings enable a debtor meeting certain thresholds to impose a pre-packaged restructuring plan (negotiated with a majority of creditors in the framework of a confidential conciliation proceeding) on dissenting creditors, without affecting the position of its trade creditors. The relevant debtor may, under certain conditions, request the opening of an Accelerated Safeguard Proceeding whose effects are limited to financial creditors, which include, among other, French Credit Institutions.
- ¹⁸ Judicial Rehabilitation Proceedings are available to French Clearing Members which are in a state of cessation of payments but appear viable. The opening of a Judicial Rehabilitation Proceeding triggers a stay of payments and actions.
- ¹⁹ Judicial Liquidation Proceedings are available to French parties which are in a state of cessation of payments and for which recovery through a rehabilitation plan is not possible. The competent court appoints a liquidator who exercises all the powers of the management and a representative of the creditors. In a Judicial Liquidation Proceeding the court realises the assets.
- ²⁰ Please note that, pursuant to article L. 641–2 of the Commercial Code, the simplified judicial liquidation (*liquidation judiciaire simplifiée*) is available to debtors who do not own any immovable asset and do not exceed specific thresholds set out by decree. Article D. 641–10 of the Commercial Code provides that this proceeding is only available to debtors whose total balance-sheet did not exceed Euro 750,000 for the last financial year and who did not have more than 5 employees during the 6-month period prior to the opening of the proceeding.



with the same supervisory powers as the ACPR). Pursuant to article L. 613–27 of the Financial Code, Insolvency Proceedings (as well as conciliation proceedings as referred to in paragraph 3.2.1(a)(ii) above) may be opened against a Relevant Clearing Member being a French Credit Institution or a French Investment Firm only with the prior consent of the ACPR (*avis conforme*). In accordance with article L. 612–34 of the Financial Code, the ACPR may, among other things, appoint a provisional administrator (*administrateur provisoire*) either at the request of the directors (*dirigeants*) of the Relevant Clearing Member or upon its own initiative when the management of such Relevant Clearing Member cannot be pursued under normal conditions or when it has been subject to disciplinary sanctions. Such provisional administrator shall manage the activities of the Relevant Clearing Member. If a Judicial Liquidation Proceeding is opened against a French Credit Institution, the ACPR may also appoint a liquidator (*liquidateur*). As the case may be, the liquidator may be entrusted with all powers of administration, management and representation of the Relevant Clearing Member.

(d) *Resolution Measures*

(i) **Conditions for the adoption of Resolution Measures**

A Relevant Clearing Member, being a French Credit Institution or a French Investment Firm, may be subject to Resolution Measures ordered by the resolution authority²¹ if the following conditions are met²²:

- (A) such Relevant Clearing Member is failing or likely to fail. That member will be considered as such if²³:

²¹ Being the Resolution College (*Collège de résolution*) of the ACPR or, as applicable, the Single Resolution Board, pursuant to Regulation (EU) no. 806/2014 of the European Parliament and of the Council of 15 July 2014 (the "SRMR"). For more details in this respect, please refer to paragraph 3.2.1(h) (*Single resolution mechanism*) below.

²² Article L. 613–49–II of the Financial Code.

²³ Article L. 613–48–II of the Financial Code.

- (1) it does not fulfil the conditions under which the maintenance of its licence is conditioned;
 - (2) it is unable to pay its debt or is likely to be unable to pay its debt whether immediately or in the near term;
 - (3) it requires extraordinary public financial assistance (except in order to avoid or remedy a serious disturbance in the economy and preserve financial stability upon certain conditions being met²⁴); or
 - (4) the value of its assets is lower than the value of its liabilities;
- (B) there is no reasonable prospect that any alternative measure would prevent the failure of the French Clearing Member within a reasonable timeframe; and
- (C) a Resolution Measure is necessary, having regard to the finality of Resolution Measures, set forth in article L. 613-50-I of the Financial Code²⁵, and a Judicial Liquidation Proceeding would not enable to achieve such finality.
- (ii) **Summary of the main types of Resolution Measures**

Without purporting to be exhaustive on this matter, the Resolution Measures (which are governed by articles L. 613-49 *et seq.* of the Financial Code implementing BRRD) may notably include²⁶:

²⁴ Article L. 613-48-III of the Financial Code.

²⁵ These objectives are the following: (i) ensure the continuity of critical functions of the French Clearing Member; (ii) avoid significant negative effects on the financial stability; (iii) protect the resources of the French State by reducing as much as possible the recourse to exceptional public financial aids; and (iv) protect the funds and assets of the clients, in particular those of the depositors covered by the deposit guarantee scheme (*mécanisme de garantie des dépôts*) and of the investors covered by the securities guarantee scheme (*mécanisme de garantie des titres*).

²⁶ For an exhaustive list of the Resolution Measures, please refer to articles L. 613-51 *et seq.* of the Financial Code.

- (A) the appointment by the resolution authority of a special administrator (*administrateur spécial*)²⁷;
- (B) the transfer to: (i) a bridge institution (*établissement-relais*) (the "**Bridge Institution**")²⁸; (ii) a third party (the "**Receiving Entity**")²⁹; (iii) an asset management vehicle (*structure de gestion des actifs*)³⁰ (the "**Vehicle**") wholly or partially owned by one or more public authorities; or (iv) the deposit guarantee scheme and resolution fund (*fonds de garantie des dépôts et de résolution*)³¹ of all or part of the Relevant Clearing Member's shares, assets, rights and obligations (the "**Transfer**"). Save for the Transfer to a Vehicle or to the deposit guarantee and resolution fund, it is further provided that, in case of Transfer, outstanding agreements relating to the business, assets, rights or obligations so transferred shall remain executory and may not be terminated merely as a result of such transfer, notwithstanding any contractual or statutory provisions to the contrary³²;
- (C) in case of Transfer, a release of all security interests over financial instruments, rights, assets or commitments so transferred (a "**Security Interest Release**")³³;
- (D) a write-down or conversion of all or part of the Relevant Clearing Member's liability under

²⁷ Articles L. 613-51-1 *et seq.* of the Financial Code.

²⁸ Articles L. 613-53 *et seq.* of the Financial Code.

²⁹ Articles L. 613-52 *et seq.* of the Financial Code.

³⁰ Articles L. 613-54 *et seq.* of the Financial Code.

³¹ Article L. 613-64 of the Financial Code.

³² Articles L. 613-52 and L. 613-53-3 of the Financial Code.

³³ Article L. 613-56-2 of the Financial Code. Since the Effective Brexit Date, because English law is the law of a non-EU member state, French Credit Institutions and French Investment Firms falling within the scope of BRRD as implemented under French law are, as a general rule, required to insert in their legal documentation a clause recognising the resolution authority's power to release security interests over financial instruments, rights, assets or commitments transferred under a Transfer.

which the resolution authority may decide to exercise the write-down or conversion powers set forth in articles L. 613-55 *et seq.* of the Financial Code (the "**Bail-In Measure**");³⁴

- (E) a suspension of: (i) any obligation to pay and/or any obligation to deliver financial instruments³⁵; and/or (ii) any termination rights, and therefore close-out netting rights, in relation to any liability or contract entered into by the Relevant Clearing Member until 0:00 (midnight) at the latest on the business day following the day of publication of the resolution authority's decision³⁶. Please note that the resolution authority can suspend any obligation to pay and/or any obligation to deliver financial instruments until 0:00 (midnight) at the latest on the business day following the day of publication of such decision in a pre-resolution context upon certain conditions being met (including notably to determine that the conditions for the opening of a resolution proceeding are met or to choose the appropriate resolution actions or to ensure the effective

³⁴ Since the Effective Brexit Date, because English law is the law of a non-EU member-state, French Credit Institutions and French Investment Firms falling within the scope of BRRD as implemented under French law are, as a general rule, required to insert a bail-in recognition clause into those contracts they are party to, under which liabilities eligible to a Bail-In Measure arise (article L. 613-55-13 of the Financial Code implementing article 55 of BRRD, it being noted that the said recognition clause would not however be required if the resolution authority so decides in accordance with the relevant regulatory technical standards set out by the Commission Delegated Regulation (EU) no. 2016/1075). However, as Clearing Members, they would not be subject to that bail-in recognition clause requirement in respect of financial liabilities arising from their participation in a system mentioned in article L. 330-1 of the Financial Code (it being noted that LCH will qualify as such a system based on our assumption in paragraph 2.4.1 above) provided that said financial liabilities have a remaining maturity of less than seven (7) days towards the system, the system's operator or another participant, as such liabilities are excluded from the scope of the Bail-In Measure (article L. 613-55-1-I-6^o of the Financial Code).

³⁵ Article L. 613-56-4 of the Financial Code. Since the Effective Brexit Date, because English law is the law of a non-EU member state, French Credit Institutions and French Investment Firms falling within the scope of BRRD as implemented under French law are, as a general rule, required to insert in their legal documentation a clause recognising the resolution authority's power to suspend any obligation to pay and/or any obligation to deliver financial instruments.

³⁶ Article L. 613-56-5 of the Financial Code. In this respect, please note that although this provision does not expressly refer to the suspension of close-out netting rights strictly speaking, a suspension of the termination rights (under article L. 613-56-5 of the Financial Code) and the payment of the net amount (under article L. 613-56-4 of the Financial Code) could achieve the same result. In addition, since the Effective Brexit Date, because English law is the law of a non-EU member state, French Credit Institutions and French Investment Firms falling within the scope of BRRD as implemented under French law are, as a general rule, required to insert in their legal documentation a clause recognising these powers granted to the resolution authority.

application of one or more resolution tools) (the "**Pre-Resolution Measures**")³⁷;

- (F) for the purposes of a Transfer (but only in respect of the Bail-In Measure, to the extent it is also a derivative as referred to in paragraphs 4 through 10 of Section C of Annex I of MiFID II) an acceleration of financial contracts (*contrats financiers*) within the meaning of article L. 613-34-1-12° of the Financial Code³⁸;
- (G) the suspension of the termination rights of any contract³⁹;
- (H) a modification or an amendment to the contractual term of a contract to which the Relevant Clearing Member would be a party⁴⁰, including a financial contract (*contrats financiers*) within the meaning of article L. 613-34-1-12° of the Financial Code (the "**Amendment Tool**"); and/or
- (I) a restriction of the right of secured creditors of the Relevant Clearing Member from enforcing security interests in relation to any assets of such French Credit Institution or French Investment Firm until 0:00 (midnight) at the latest on the business day following the day of publication of the resolution authority's decision⁴¹.

In addition to the foregoing please note that: (x) article L. 613-50-3-I of the Financial Code provides that the provisions of articles L. 211-36-1 through L. 211-38 of the Financial Code, shall not impede the application of the Resolution Measures; and (y) to the extent that the party subject to Resolution Measures continues to comply with its main obligations set out in an agreement (e.g. such as, in particular,

³⁷ Article L. 613-56-8 of the Financial Code

³⁸ Article L. 613-56-3-I of the Financial Code.

³⁹ Article L. 613-56-5 of the Financial Code.

⁴⁰ Article L. 613-56-3-II of the Financial Code.

⁴¹ Article L. 613-56-2-II of the Financial Code.

payment, delivery of financial instruments and guarantees) the other party may not exercise the rights of termination, suspension, amendment and netting included in such agreement on the basis of any Resolution Measure being triggered⁴².

(iii) **Protections from Resolution Measures**

However, the effects of Resolution Measures may be subject to the following limitations or attenuations set out in the Financial Code:

- (A) in accordance with article L. 613-57-I of the Financial Code, when taking a Resolution Measure, the resolution authority must ensure that no shareholder or creditor incurs losses in the Resolution Measure greater than it would have suffered in a Judicial Liquidation Proceeding;
- (B) in respect of certain Resolution Measures, and in particular: (i) the suspension of payments and/or delivery of financial instruments and/or the suspension of termination rights mentioned above; and (ii) the restriction of the exercise by secured creditors of certain of their rights (as mentioned above), the resolution authority shall have regard to the impact the exercise of that power might have on the orderly functioning of financial markets;
- (C) neither: (i) the use of the Amendment Tool; nor (ii) a Transfer made in relation to part, but not all, of the assets, rights and obligations of the entity being subject to Resolution Measures shall affect the functioning and the rules of a system governed by article L. 330-1 of the Financial Code⁴³;
- (D) the Financial Code provides for an exception to the Security Interest Release for systems

⁴² Article L. 613-50-4 of the Financial Code. Since the Effective Brexit Date, because English law will be the law of a non-EU member state, French Credit Institutions and French Investment Firms falling within the scope of BRRD as implemented under French law are, as a general rule, required to insert in their legal documentation a clause recognising the stay of such rights.

⁴³ Article L. 613-57-2 of the Financial Code.

governed by article L. 330-1 of the Financial Code, or their operators or equivalent systems, central banks, clearing houses or central counterparties in respect of pledged assets or assets provided as margin or security by the person subject to Resolution Measures⁴⁴;

- (E) in relation to a Transfer, except if the decision made by the resolution authority is based on article L. 613-57-1-V of the Financial Code, the resolution authority shall not be authorised to transfer part of the rights and obligations secured by a title transfer financial collateral arrangement within the meaning of article L. 613-34-1-18° of the Financial Code but shall transfer them all⁴⁵;
- (F) the Financial Code provides for an exclusion from the scope of the Bail-In Measure of certain liabilities which notably include (and subject to other conditions set forth in the Financial Code):
 - (i) secured deposits and liabilities, up to the value of the guarantee or the collateral respectively;
 - (ii) liabilities to French Credit Institutions and French Investment Firms (including therefore a Relevant Clearing Member), excluding entities that are part of the same group, with an original maturity of less than seven days; and
 - (iii) liabilities with a remaining maturity of less than seven days, owed to systems or operators of systems governed by article L. 330-1 of the Financial Code or their participants and arising from the participation into such a system⁴⁶;
- (G) the suspension of payment obligations and delivery of financial instruments and Pre-Resolution Measures shall not apply to payment and delivery obligations owed to systems or

⁴⁴ Article L. 613-56-2 of the Financial Code.

⁴⁵ The decision made by the resolution authority to derogate from such prohibition to transfer part, but not all, of these rights and obligations, shall be made notably for the purposes of enabling the French deposit and resolution scheme (*Fonds de garantie des dépôts et de Résolution* (FGDR)) to provide its guarantee under such scheme (and in particular to make the funds available to the guaranteed clients of the French Credit Institution or the French Investment Firm subject to the relevant Resolution Measures).

⁴⁶ Article L. 613-55-1-I-6° of the Financial Code.

operators of systems governed by article L. 330–1 of the Financial Code, participants to such systems, or to central banks, clearing houses or central counterparties⁴⁷; and

- (H) the suspension of termination rights, and therefore of close–out netting rights, shall not apply to payment and delivery obligations owed to systems or operators of systems governed by article L. 330–1 of the Financial Code, central banks, clearing houses or central counterparties⁴⁸.

(e) *Early Intervention Measures*

The relevant supervisory authority⁴⁹ may also decide to apply Early Intervention Measures in respect of a Relevant Clearing Member when the conditions set forth in article L. 511–41–5 of the Financial Code are met (which aim to implement the provisions of BRRD in this respect, and in particular articles 27 *et seq.* of BRRD). Without purporting to be exhaustive, such conditions are notably set out as follows: because of a rapid deterioration of its financial or liquidity condition, including an increasing level of leverage, non–performing loans or concentration of exposures, the relevant entity is in breach or likely to be in breach of the specific regulations listed therein. In accordance with article L. 511–41–5–II of the Financial Code, Early Intervention Measures notably include (but are not limited to) requiring a French Credit Institution or a French Investment Firm to: (i) change its business strategy; (ii) change its legal or operational structures; and/or (iii) draw up a plan for negotiation on restructuring of debt with some or all of its creditors according to the recovery plan. In accordance with article L. 613–45 of the Financial Code, the relevant resolution authority may also require a Relevant Clearing Member to search for potential buyers in order to prepare for the implementation of certain Resolution Measures, where applicable. In accordance with the provisions of article L. 613–45–1–I of the Financial

⁴⁷ Articles L. 613–56–4 and L. 613–56–5–I of the Financial Code; and article L. 613–56–8 of the Financial Code respectively.

⁴⁸ Article L. 613–56–5–I of the Financial Code.

⁴⁹ The ACPR or, as the case may be, under the Single Supervisory Mechanism, the ECB, notably in accordance with Regulation (EU) no. 1024/2013 of the European Parliament and of the Council of 15 October 2013 and BRRD.

Code, termination and netting rights (and therefore close-out netting rights) shall not be exercised by the counterparty of the Relevant Clearing Member on the sole ground of an Early Intervention Measure.

(f) *Conservatory Measures*

Pursuant to article L. 612-33-I of the Financial Code, when the solvency or the liquidity of a French Credit Institution or a French Investment Firm, or the interests of their clients, members or beneficiaries are, or are likely to be, compromised, the relevant supervisory authority could take conservatory measures (the "**Conservatory Measures**") which include, among others, the following measures:

- (i) limit or temporarily prohibit the relevant entity from carrying out certain transactions, including taking deposits;
- (ii) suspend, restrict or temporarily prohibit the relevant entity from freely disposing of its assets, it being specified that, in order to implement such Conservatory Measure, the relevant supervisory authority may order⁵⁰:
 - (A) to any issuer or depository to refuse performing any transaction relating to accounts or securities (*comptes ou titres*) belonging to the relevant entity and paying dividends and interests relating to such securities, or to obtain the prior approval of a controller (*contrôleur*) for performing such transactions; and/or
 - (B) a transfer of the funds, securities and values (*fonds, titres et valeurs*) of the relevant entity, within the timeline and upon the conditions set out by the relevant supervisory authority, to a blocked account opened with the *Banque de France* in the name of such entity, it being noted that such account could be debited only with the express consent of the relevant supervisory authority (or of any person appointed by it) and for a specified amount only; and

⁵⁰ Article R. 612-32 of the Financial Code.

- (iii) order the transfer of all or some of the credit portfolios or of the deposits of a French Credit Institution⁵¹.

Article L. 612–33–II of the Financial Code also provides in this respect that, when the relevant supervisory authority considers that the Early Intervention Measures are not sufficient: (i) to put an end to any major breaches (*graves violations*), by notably a French Credit Institution or a French Investment Firm of any applicable laws; or (ii) to restore such entity's financial soundness, the relevant supervisory authority may decide to revoke one or several of the effective managers and/or members of the board of directors, supervisory board or any equivalent corporate body.

Further, in accordance with article L. 612–34–1–I of the Financial Code, when the Conservatory Measures are not sufficient to remedy the situation of, among others, a French Credit Institution or a French Investment Firm, the relevant supervisory authority may also decide to appoint one or several temporary administrators (*administrateurs temporaires*), to assist or replace any effective directors (*dirigeants effectifs*), board members (*administrateurs*) or any other person exercising equivalent functions within such French Credit Institution or French Investment Firm. Such temporary administrators (*administrateurs temporaires*) may exercise any and all of the powers of the persons they temporarily replace.

It should also be noted that, in accordance with article L. 612–33–1 of the Financial Code, when the activities of an entity subject to the relevant supervisory authority's supervision (which would include French Credit Institutions and French Investment Firms) are likely to affect the financial stability, as well as in case of emergency as referred to in Regulation (EU) no. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory

⁵¹ Please note, though, that an almost identical provision of this article relating to insurance companies (which was providing that the ACPR could order the transfer of all or some of the insurance portfolios), has been ruled as being anti-constitutional by the French *Conseil constitutionnel* on 6 February 2015 (no. 2014–449) and has thus been abolished. The French *Conseil constitutionnel* has decided that such provision breaches the constitutional right to property because it does not give any chance to the relevant entity to transfer or assign the relevant portfolios itself for a prior period. Similar conclusions could be reached with respect to the transfer of credit portfolios or deposits of French Credit Institutions.

Authority (the "EBA Regulation")⁵², the relevant supervisory authority may take a Conservatory Measure consisting in limiting or suspending certain activities carried out by such entity.

When taking Conservatory Measures, the relevant supervisory authority must apply a contradictory procedure, except that, in the event of emergency, the relevant supervisory authority could take Conservatory Measures on a provisional basis, upon a contradictory procedure being initiated immediately further to such measures being taken in order to decide whether the relevant Conservatory Measure should be suspended, adapted or confirmed.⁵³

Please though note that the French law provisions relating to Conservatory Measures do not provide for any limitations or mitigations measures similar to those relating to Resolution Measures.

(g) *Articulation between Resolution Measures, Pre-Resolution Measures, Early Intervention Measures, Conservatory Measures and Insolvency Proceedings*

Resolution Measures, Pre-Resolution Measures, Early Intervention Measures, Conservatory Measures and Insolvency Proceedings may pursue different objectives and provide for certain overlapping provisions. In this respect, the following must be pointed out:

- (i) if the resolution authority reaches the conclusion that the conditions for the opening of a resolution proceeding are not met, it must notify such conclusion to the supervisory authority, who must then assess whether: (i) Conservatory Measures should be taken with respect to the relevant entity; or (ii) a judicial liquidation proceeding (*procédure de liquidation judiciaire*) should be opened with respect to such entity⁵⁴;

⁵² The existence of an emergency situation is determined by the Council in accordance with the procedure and the criteria set out in article 18 of the EBA Regulation, which refers to "adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union".

⁵³ Article L. 612-35 of the Financial Code.

⁵⁴ Article L. 613-49-IV of the Financial Code.

- (ii) as regards the articulation between Insolvency Proceedings and Resolution Measures, in particular:
 - (A) pursuant to article L. 613-49-II of the Financial Code, the opening of a resolution procedure is decided by the resolution authorities further to its determination that such a procedure is necessary to reach the resolution objectives⁵⁵ and that a normal insolvency proceeding does not permit to meet such objectives;
 - (B) article L. 613-27 of the Financial Code confers upon the resolution authority the power to decide whether or not an Insolvency Proceeding may be opened against a Relevant Clearing Member being a French Credit Institution or a French Investment Firm by giving its prior consent (*avis conforme*) or by requesting itself the opening of a judicial liquidation proceeding (*procédure de liquidation judiciaire*); and
 - (C) in case of the use of the Transfer Tool, the Bridge Institution or, as applicable, the residual entity, is wound down and its liabilities would be discharged pursuant to insolvency proceedings.⁵⁶

Finally, it must be noted that termination and netting rights (and therefore close-out netting rights), shall not be exercised by LCH on the sole ground of the implementation, with respect to a Relevant Clearing Member, of a Resolution Measure, a Pre-Resolution Measure, an Early Intervention Measure or a Conservatory Measure, provided that the essential obligations of the contract (including payment and delivery obligations, and the provision of collateral) continue to be performed⁵⁷.

(h) *Single resolution mechanism*

It should be noted that since 1 January 2016, French Credit Institutions considered as being "significant" (within the meaning given to such term in article 6 of Council Regulation (EU) no. 1024/2013 of 15 October 2013 conferring

⁵⁵ As set out in article L. 613-50-I of the Financial Code.

⁵⁶ Articles L. 613-52-4 and L. 613-53-4 of the Financial Code.

⁵⁷ Article L. 613-45-1 of the Financial Code, cross-referring to article L. 613-50-4-I and II of the same code.

specific tasks on the European Central Bank ("ECB") concerning policies relating to the prudential supervision of credit institutions) are subject to the Single Resolution Mechanism set forth in the SRMR. The decision to open a resolution proceeding under BRRD with respect to "significant" credit institutions (including those French Credit Institutions that qualify as such) will be made by the Single Resolution Board (instead of the relevant national authority, *i.e.* the ACPR with respect to French Credit Institutions) in the first place, whilst the implementation of measures deriving therefrom will be within the responsibility of the national resolution authorities (*i.e.* the ACPR with respect to the relevant French Credit Institutions) under the aegis of the SRB.

3.2.2 Would the Deed of Charge be effective in the context of Insolvency Proceedings or Pre-Insolvency Proceedings 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?

(a) *Choice of law*

In an international context, the question of the validity and perfection of a security interest from a French law perspective is subject to the application of several conflicts of laws rules. Pursuant to article 3(1) of Rome I Regulation, the parties may freely choose English law to govern the Deed of Charge and a French court may give effect to such choice (the *lex contractus*). Based on article 3 of the Civil Code, French case law traditionally holds that rights *in rem* created over assets located in France are exclusively governed by French law, as being the *lex rei sitae* (or *lex situs*)⁵⁸. Accordingly, French case law⁵⁹ draws a distinction between the "acquisition" and the "content" of the right *in rem*, where the *lex situs* determines the scope and prerogatives of the holder of the right *in rem*, whilst the acquisition thereof, which results from a contractual document, is subject to the *lex contractus*. Notwithstanding such distinction,

⁵⁸ Cass. Civ. 1, 3 February 2010, no. 08-19293.

⁵⁹ Cass. Civ. 1, 21 July 1987, no. 85-16098.

it must also be noted that the effectiveness (*opposabilité*) of a security interest against third parties is also traditionally subject to the completion of the perfection formalities prescribed by the *lex situs*.

(b) *Recognition of the choice of law governing the Deed of Charge (lex contractus)*

As stated above, French courts will generally recognise the validity of the obligation to create a security interest under an agreement in accordance with article 3(1) of Rome I Regulation. French courts may, however:

- (i) give effect to mandatory provisions of the law of the country where the obligations arising out of the Deed of Charge have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the Agreement unlawful (article 9(3) of Rome I Regulation);
- (ii) apply overriding mandatory provisions of French law (article 9(2) of Rome I Regulation) irrespective of the choice of English law under the Deed of Charge which is the case of article 3 of the Civil Code as interpreted by French courts, which provides that the *lex situs* is solely applicable to rights *in rem* created over movables located in France as aforesaid in paragraph (a) above ;
- (iii) refuse to apply English law to the Deed of Charge, to the extent the application of such laws is manifestly incompatible with French public policy (article 21 of Rome I Regulation);
- (iv) have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (article 12(2) of Rome I Regulation); and
- (v) apply the provisions of the law of another country which cannot be derogated from by agreement, if English law was chosen to govern the Deed of Charge but all elements relevant to the situation at the time that the Deed of Charge was entered into were located in a country other than England or Wales (article 3(3) of Rome I Regulation).

In addition, it should be noted that the scope and effect of a choice of law made by the parties is likely to be limited or contained by special conflict of laws rules applicable to specific matters and/or to specific situations, in particular in the context of insolvency proceedings⁶⁰.

(c) *Validity and perfection of the Deed of Charge under the lex situs*

The determination of the *lex situs* depends on the locality of the Collateral. Several provisions of French law provide for specific rules which determine such locality, as detailed below. As a result of such provisions, the filing, registration and perfection requirements to be met for the creation of the security interest under the Deed of Charge shall be determined by the law of the jurisdiction where the assets comprised in the scope of the Deed of Charge are situated, *i.e.* English law.

(i) **Under the Finality Directive Regime**

The provisions of article L. 330-2-IV of the Financial Code, which aim to implement the Finality Directive, notably state that the rights of the beneficiary of a collateral arrangement on certain assets such as financial instruments "*issued on the grounds of a foreign law and recorded on a register, account, central securities depository or a foreign law-governed centralised deposit system which are located in a member State of the European Economic Area or in the State whose law governs the involved system referred to in 2°, 3° or 4° of I of article L. 330-1 and are transferred or provided as collateral to satisfy payment obligations arising from the participation to a system*" shall be determined by the law of the state of such registration, which, in relation to the Deed of Charge, means English law and that French Insolvency Law shall not impede the application of such rule.

Article L. 330-2-III of the Financial Code further provides that French Insolvency Law or any equivalent provisions governing judicial or amicable proceedings opened outside France as well as any civil enforcement proceeding or the exercise of an opposition right (*droit*

⁶⁰ Please refer to footnote n°15.

d'opposition) shall not impede the application of the provisions of article L. 330-2 of the Financial Code (which includes the conflict of laws rule provided for by article L. 330-2-IV of the Financial Code mentioned above).

(ii) **Under the Collateral Directive Regime**

Article L. 211-39 of the Financial Code having implemented article 9(1) of the Collateral Directive further provides that: "*the rights and obligations of the collateral giver, of the beneficiary or of any third party, relating to a collateral arrangement set out in I of article L. 211-38 in respect of securities, shall be governed by the law of the State where the account in which these securities are deposited or provided as collateral is maintained.*" This provision applies to collateral arrangements taking the form of either a title transfer or a security interest when financial obligations arise from contracts entered into within the framework of a system as set out in article L. 211-36-I-3° of the Financial Code. Such provision (as well as article 9(1) of the Collateral Directive) does not specify whether or not the reference to state (or country) where the account is maintained shall be understood as a reference to an EU member state. In the absence of specification, we believe that such reference should include any third country.

Article L. 211-40 of the Financial Code further provides that the provisions of French Insolvency Law, or those governing all equivalent judicial or amicable proceedings instituted on the basis of foreign laws, shall not impede the application of the above provision.

Although it has not been implemented under French law, article 9(2) of the Collateral Directive gives indications as to the scope and content of the rights and obligations relating to a collateral arrangement referred to in article 9(1) of that directive, which meet the following criteria: "*(a) the legal nature and proprietary effects of book entry securities; (b) the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book entry securities collateral under such an arrangement, and more generally the completion of the steps necessary to render such an arrangement and provision effective*

against third parties; (c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred; and (d) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event."

(iii) **Under the Credit Institution WUD Regime**

Since the Effective Brexit Date, the collateral protections laid down by articles L. 613-31-5° and L. 613-6-I-1° of the Financial Code, respectively implementing article 24 (*Lex rei sitae*) and article 21 (*Third parties' rights in rem*) of the Credit Institution WUD are not available because of English law having become the law of a non-EEA member state.

(d) *Risk of stay on the enforcement of the security interest granted by a Relevant Clearing Member to LCH under the Deed of Charge*

The opening of Insolvency Proceedings or Pre-Insolvency Proceedings in France against a Relevant Clearing Member which granted a security interest under the Deed of Charge in favour of LCH should not prevent LCH from enforcing such Deed of Charge in accordance with its terms, as a result of the following sets of provisions which derogate from the French Insolvency Law, as described below.

(i) **Pursuant to the Collateral Directive Regime**

Although the Deed of Charge is governed by English law, we believe that it would benefit from the provisions of articles L. 211-38 *et seq.* of the Financial Code as such provisions do not require that a financial collateral arrangement securing Financial Obligations necessarily be subject to French law, provided that the conditions set out in article L. 211-38 of the same code are met. Such article allows a collateral taker to enforce a financial collateral arrangement even when the collateral provider is subject to insolvency proceedings under the French Insolvency Law. Article L. 211-40 of the Financial Code further provides that the French Insolvency Law shall not impede the application of the provisions of articles L. 211-38 *et seq.* of the Financial Code.

(ii) **Pursuant to the Finality Directive Regime**

Article L. 330–2–I of the Financial Code allows the operating rules of a system referred to in article L. 330–1 of the Financial Code to require from its participants collateral capable of being enforced pursuant to the provisions of the aforementioned article L. 211–38 of the same code.

(iii) **Pursuant to the Credit Institution WUD Regime**

As mentioned in paragraph 3.2.2(c)(iii) above, the provisions of articles L. 613–31–5° and L. 613–6–I–1° of the Financial Code shall not apply since the Effective Brexit Date.

Regarding the effects of Resolution Measures in this respect please refer to our observations set out in paragraph 3.2.1(d) above.

3.2.3 Would LCH have the right to take the actions provided for in the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but not at this stage considering those actions specifically provided for in the Client Clearing Annex to the Default Rules) in the event that a Relevant Clearing Member was subject to Insolvency Proceedings or Pre-Insolvency Proceedings? Is it necessary or recommended that LCH should specify that certain Insolvency Proceedings and/or Pre-Insolvency Proceedings 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 Pre-Insolvency Proceedings to which the answer applies and briefly explain your reasoning.

To determine the impact of opening of Pre-Insolvency Proceedings and Insolvency Proceedings on the validity, enforceability and effectiveness of the actions provided for in the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but not at this stage considering those actions specifically provided for in the Client Clearing Annex to the Default Rules), a French court would apply the French Insolvency Law except to the extent specifically provided otherwise, in particular under the sets of rules referred to in paragraphs (a) and (b) below.

(a) *Under the Finality Directive Regime*

Pursuant to the Finality Directive Regime (see in particular article L. 330-1-II of the Financial Code), when Insolvency Proceedings are instituted against a participant in an interbank settlement system or a settlement system for financial instruments mentioned in paragraphs 1 to 4° of article L. 330-1 of the Financial Code (thus including a system designated and notified as such to the European Commission by an EEA member state, as well as a third country clearing house recognised as a system pursuant to article L. 330-1-I-4° of the Financial Code), the rights and obligations deriving from its participation or linked to its participation in the said system are determined by the law governing such system. In the same vein, article L. 330-2-IV of the Financial Code provides that where financial instruments governed by a foreign law are recorded with, among other things, a central depositary or a centralised deposit system, governed by foreign laws and located notably in an EEA member state or in the state in which the third country clearing house recognised as a system pursuant to article L. 330-1-I-4° of the Financial Code is located, and are provided as collateral security to meet payment obligations arising from the participation to a system mentioned in article L. 330-1 of the Financial Code, the determination of the rights of the beneficiaries of such collateral security shall be governed by the laws of that state where such record is made.

Finally, pursuant to article L. 330-2-III of the Financial Code, the French Insolvency Law⁶¹ shall not impede (*faire obstacle*) any application of the operating rules, the framework agreement or the model agreement governing any system which provide for the establishment, allocation, enforcement and use of the property or rights provided by way of guarantee. Hence, no participant's creditor may avail himself of any rights over such security, even on the grounds of such Insolvency Proceedings.

(b) *Under the Credit Institution WUD Regime*

- (i) With respect to a Relevant Clearing Member being a French Credit Institution or a French Investment Firm, in accordance with article L. 613-31-5-4° of the Financial

⁶¹ As well as the equivalent provisions governing any judicial or amicable proceedings instituted outside France and any civil enforcement proceedings or exercise of a right to object (*droit d'opposition*).

Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements and accordingly an Insolvency Proceeding would have no effect on such netting arrangements, without prejudice to the application of Resolution Measures (as to which please refer to paragraph 3.2.1(d) above).

Since the Effective Brexit Date, the question may be raised as to whether such provision refers to the law of an EEA Member State or extends to the law of any third country as well. In the absence of any precise indication set out in such provision (to the contrary of certain other provisions where express references are made to an EEA Member State and/or its laws⁶²), we are of the view that the law of a third country state (such as the UK since the Effective Brexit Date) would qualify for article L. 613-31-5-4^o of the Financial Code.

- (ii) In addition, pursuant to article L. 613-31-6-I-4^o of the Financial Code, the adoption of reorganisation measures or the opening of liquidation proceedings against a French Credit Institution or a French Investment Firm shall not affect the rights of creditors to demand the set-off of their claims against the claims of such French Credit Institution or French Investment Firm, where such set-off is permitted by the law applicable to the French Credit Institution or French Investment Firm's claim, without prejudice to the application of Resolution Measures (as to which please refer to paragraph 3.2.1(d) above). Further, since set-off may involve the enforcement of the Deed of Charge, pursuant to article L. 613-31-6-I-1^o of the Financial Code implementing article 21 (*Third parties' rights in rem*) of the Credit Institution WUD, the *in rem* rights created by the Deed of Charge in favour of LCH, if any, would not be affected by the opening of an Insolvency Proceeding against a French Credit Institution or a French Investment Firm (please refer to paragraph 3.2.2(c) above).

⁶² See for instance articles 24 and 25 of the Credit Institution WUD.

The same question as above is raised further to the Effective Brexit Date. However, in this case, it is worth noting that such provision implements article 23 of the Credit Institution WUD, which provision is itself substantially identical to article 9 of the EU Insolvency Regulation. Such latter provision has been commented in the Virgos Schmit report⁶³ which seems to suggest that the law referred to in such provision should be the law of a Member State. If such interpretation were to be followed by a court and applied *mutatis mutandis* in the context of the Credit Institution WUD, then the set-off protection offered by such provision might not be available to LCH since the Effective Brexit Date.

- (iii) Finally, pursuant to article L. 613-31-5-5° of the Financial Code, where, by an act concluded after the adoption of a reorganisation measure or the opening of winding-up proceedings, a French Credit Institution or a French Investment Firm disposes, for consideration, of financial instruments or rights in such instruments the existence or transfer of which presupposes their being recorded in a register, an account or a centralised deposit system held or located in a Member State, the validity of that act shall be governed by the law of the Member State within the territory of which or under the authority of which that register, account or deposit system is kept. Since the Effective Brexit Date, such provisions no longer apply.

(c) *Under the Collateral Directive Regime*

- (i) In respect of a Relevant Clearing Member, the Collateral Directive Regime, which derogates from the French Insolvency Law, may also apply, together with the Finality Directive Regime (please refer to paragraph 3.2.2(c)(ii) above).
- (ii) Close-out netting in respect of Contracts, as provided for in the Default Rules, will benefit from the Collateral

⁶³ In the context where the EU Insolvency Regulation was originally scheduled to be an international convention instead of an EU legal instrument. See the M. Virgos and E. Schmit report on the Convention of Insolvency Proceedings of 3 May 1996, paragraph 110: "the laws of a Contracting State [i.e. the Member States] applicable to that agreement will continue to govern set-off of claims covered by the agreement and incurred prior to the opening of the insolvency proceedings".

Directive Regime to the extent the conditions set out in paragraph 3.2.2(c)(ii) are met.

(d) *Conclusion*

In the light of paragraphs (a) to (c) above, LCH would, to the extent permitted by the relevant applicable law in respect of the Finality Directive Regime and the Credit Institution WUD Regime (*i.e.* English law), have the right to take the actions provided for in the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8) in the event that a Relevant Clearing Member was subject to Insolvency Proceedings and/or Pre-Insolvency Proceedings, although since the Effective Brexit Date the question of the benefit of the Credit Institution WUD Regime (in particular in respect of the right of set-off provided therein) is an unclear area of law.

Further, given the above analysis, we believe that it is not necessary that LCH specifies that certain Insolvency Proceedings and/or Pre-Insolvency Proceedings will constitute an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules.

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

The French Insolvency Law provides for a fraudulent conveyance period (*période suspecte*) which may be extended by the insolvency court up to eighteen months⁶⁴ backward from the judgement initiating a Judicial Rehabilitation Proceeding or Judicial Liquidation Proceeding (the "**Suspect Period**"). Article L. 632-1 of the Commercial Code provides for the automatic voidness (*nullités de droit*) of certain transactions or payments falling during the Suspect Period, which include for instance, notably imbalanced transactions, payment by way

⁶⁴ Up to twenty-four months in respect of gratuitous transactions.

of non-customary means of payment, payment of debts which are not due and payable, creation of security interests as security for pre-existing debts, *etc.* Article L. 632-2 of the same code, also gives discretion to the court to declare void (*nullité facultative*) any transaction or payment, where (during the Suspect Period), at the time it was entered into or made, the creditor had knowledge of the state of insolvency (*état de cessation des paiements*) of its counterparty.

However, pursuant to article 12 of the EU Insolvency Regulation, "*the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market*". Such provision is aimed at setting aside the *lex concursus* (in our case, French law) which would normally be applicable in accordance with article 7 of the EU Insolvency Regulation in order to preserve general confidence in such systems or financial markets⁶⁵.

Further, the Credit Institution WUD Regime's exclusion regarding transactions carried out within the framework of payment and settlement systems which remain subject to the Finality Directive⁶⁶ remain applicable, including on and after the Effective Brexit Date.

With respect to the Finality Directive Regime, please refer to paragraph 3.3.4(b) below.

Concerning financial transactions and collateral benefiting from the Collateral Directive Regime, pursuant to article L. 211-40 of the Financial Code, the provisions of the law governing Insolvency Proceedings (including the provisions relating to the Suspect Period) do not impede (*faire obstacle à*) the close-out netting process as well as the posting and the enforcement of financial collateral. If such provision indeed insulates the performance of the close-out netting process (including all calculations and valuations in connection therewith)⁶⁷, the management of financial collateral (including, margin calls resulting in

⁶⁵ In this respect, the Virgos Schmit report states that "*the aim of this provision is to avoid any modification of the mechanisms for regulating and settling transactions provided for in payment or settlement systems or on the organized financial markets operating in Contracting States, in the event of insolvency of a party to a transaction which would otherwise result if the "lex concursus" applied. The relevant mechanisms include closing out contracts and netting, and insofar as the security is situated in that Contracting State, the realization of securities*".

⁶⁶ Paragraph 25 of the preamble of the Credit Institution WUD.

⁶⁷ Article L. 211-36-1 of the Financial Code.

the collateral being topped up) and its enforcement⁶⁸ from insolvency risk in relation to a Relevant Clearing Member, such provisions do not immunise against the risk of voidness in relation to any new transactions being entered into between such Relevant Clearing Member and LCH during the Suspect Period. Concerning the specific question of position porting and the return of the Client Clearing Entitlement by LCH, please refer to the legal discussion set out in paragraph 3.3.4 below.

Further, although an extensive interpretation of article L. 211–40 of the Financial Code may lead to the conclusion that the rules pertaining to the nullification of transactions and payment concluded or made during the Suspect Period shall be entirely disapplied in respect of financial transactions and collateral governed by the provisions of articles L. 211–36 *et seq.* of the Financial Code, this cannot be asserted with complete certainty. Articles L. 211–36 to L. 211–40 of the Financial Code derive from the Collateral Directive, which states in its article 8(1) that: "*Member States shall ensure that a financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided [...] in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures*" and in its article 8(3) that: "*where a financial collateral arrangement contains (a) an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or (b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, Member States shall ensure that the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that [...] the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral*".

Considering that the EU member states have the duty to implement the provisions of the Collateral Directive without diminishing their import, it is reasonable to consider that article L. 211–40 of the Financial Code

⁶⁸ Article L. 211–38 of the Financial Code.

shall exclude application of article L. 632–1 of the Commercial Code, which provides for an automatic nullity of certain transactions entered into or performed during Suspect Period and, therefore, that the operations of the netting provision (and in particular, set–off) would not be avoided on the basis of said article L. 632–1 of the Commercial Code.

However, article 8 of the Collateral Directive also states that "*this Directive leaves unaffected the general rules of national insolvency law in relation to the avoidance of transactions entered into during the prescribed period [...]*" (namely, the Suspect Period). In addition, recital n°16 of the Collateral Directive makes it clear that the directive: "*does not prejudice the possibility of questioning under national law the financial collateral arrangement and the provision of financial collateral as part of the initial provision, top–up or substitution of financial collateral, for example where this has been intentionally done to the detriment of the other creditors (this covers inter alia actions based on fraud or similar avoidance rules which may apply in a prescribed period)*".

Therefore, it cannot be excluded that article L. 211–40 of the Financial Code does not intend to overrule article L. 632–2 of the Commercial Code, which provides for a potential nullity of non–gratuitous acts (*actes à titre onéreux*) if the counterparty of the debtor (*i.e.* the Relevant Clearing Member being subject to Insolvency Proceedings) was aware, at the time of conclusion of such acts, that the debtor was in the state of cessation of payment (*cessation de paiement*).

3.2.5 Is there relevant netting legislation in France that, in the context of Insolvency Proceedings or Pre–Insolvency Proceedings in respect of a Relevant Clearing Member, might apply as an alternative to the relevant arrangements set out in the Default Rules?

If LCH takes action under the Default Rules with respect to one or more Contracts to achieve a discharge of such Contracts, French law will recognise and give effect to such action to achieve a discharge of the Parties' rights and obligations under each such Contract and to calculate a net sum payable in respect of all such Contracts so discharged, for the reasons and in the conditions set out in paragraph 3.2.3 above.

The same applies to the enforcement of the Deed of Charge in respect of Collateral located (or deemed to be located) in the same jurisdiction as the law governing LCH as a settlement–delivery system for financial instruments (please refer to the assumption set out in paragraph 2.4.1), for the reasons and in the conditions set out in paragraph 3.2.2 above.

Regarding the effects of Resolution Measures in this respect please refer to our observations set out in paragraph 3.2.1(d) above.

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

The net termination amount contemplated by the Default Rules may be expressed in any currency other than the Euro. However, in case of a judgement initiating an Insolvency Proceeding against a Relevant Clearing Member under the French Insolvency Law, LCH will have to file a claim with the relevant insolvency officer (*mandataire judiciaire*), if a net termination amount is owed to it. If denominated in a currency other than Euro, such claim would have to be converted into Euro at the rate of exchange prevailing at the date of such judgment.

3.3 Client Clearing

3.3.1 Please opine on the availability and effectiveness of any law, regulation or statutory provision (having the force of law) in France 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 3.3.8 to 3.3.10.

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

In the absence of an Insolvency Proceeding or Pre-Insolvency Proceeding, the declaration of a Relevant Clearing Member to be in Default and the portability of the Client Contracts and Account Balance

of that Relevant Clearing Member will be exclusively governed by the Client Clearing Arrangements.

This results from article 12 of Rome I Regulation, pursuant to which the law determined to be applicable to a contract will govern the interpretation and performance of the contract as well as the consequences of a breach of contract (including the assessment of damages and termination) and the statutory limitations on bringing suit for a breach. With respect to the Client Clearing Arrangements, this entails that the laws of England govern the contractual remedies provided to the parties by the Client Clearing Arrangements. Therefore, if these remedies are enforceable in accordance with the terms of the Client Clearing Arrangements under the laws of England, this will be recognised by the courts of France in accordance with, and subject to the limitations set out in Rome I Regulation (please refer to paragraph 3.1.6 above).

Regarding the effects of Resolution Measures in this respect, please refer to our observations set out in paragraph 3.2.1(d) above.

Default Outside Insolvency Proceedings or Pre-Insolvency Proceedings

3.3.2 If LCH were to: (i) declare a Relevant Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Pre-Insolvency Proceedings 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?

Based, in particular, on the assumption made in paragraph 2.1.1 above, but subject to the exclusion from the scope of this Opinion Letter set out in paragraph 1.10.6 above, in any proceedings taken in France for the enforcement of the porting arrangements as described in the Default Rules, the French courts would give effect to such arrangements. Therefore, neither the French Relevant Clearing Member nor any of its creditors may successfully claim against LCH for the amount of the Account Balance.

This conclusion is also supported by article 48(5) of EMIR, which is of a direct application in the French legal system, and which expressly provides that: (i) "*where assets and positions are recorded in the records and accounts of a CCP as being held for the account of a defaulting clearing member's clients in accordance with Article 39(2), the CCP shall, at least, contractually commit itself to trigger the*

procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member designated by all of those clients, on their request and without the consent of the defaulting clearing member."; and (ii) *"If the transfer to that other clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients"*. For the sake of completeness, please note that, with respect to French CCPs, this provision is reflected in article L. 440–9 of the Financial Code.

Brexit should not affect the conclusion above.⁶⁹ This is because it is a condition to the recognition as 3RCCP that the relevant third country central counterparty complies with legally binding requirements which are equivalent to the requirements laid down in Title IV of EMIR,⁷⁰ which include article 48(5). As a result, we believe that a French court would not refuse on the ground of overriding mandatory provisions of French law (within the meaning of article 9 of Rome I Regulation) to give effect to the provisions of LCH's Rulebook providing for the closing out and the porting of the positions operated in accordance with such third country requirements, because such requirements would be deemed equivalent to those of article 48(5) of EMIR pursuant to the relevant recognition decision of the EU Commission.

Regarding the effects of Resolution Measures in this respect please refer to our observations set out in paragraph 3.2.1(d) above.

3.3.3 If LCH were to: (i) declare a Relevant Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Pre-Insolvency Proceedings 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?

Our conclusion set out in paragraph 3.3.2 above equally applies *mutatis mutandis* to the return of the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client.

⁶⁹ Assuming that a French court would be competent.

⁷⁰ Article 25(6) of EMIR.

Insolvency-related Default

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

(a) *Mechanisms provided for in LCH's Rulebook*

Pursuant to the Default Rules, including in particular the Client Clearing Annex to the Default Rules, the Contracts of Clearing Clients may be: (i) transferred to a Backup Clearing Member, together with the Account Balances (a process known as "porting"); or (ii) closed-out and liquidated in conjunction with the return of the Client Clearing Entitlement to the Clearing Client (or to the Defaulter for the account of the Clearing Client).

It is important to note that in both cases, the Relevant Clearing Member is "deprived" of any entitlement to the collateral posted by it (in the form of either the Account Balance or the Client Clearing Entitlement) which in the case of porting is transferred to the Backup Clearing Member, whilst in the case of close-out is returned to the Clearing Client (or to the Defaulter for the account of the Clearing Clients).

In order to prevent the return of the Client Clearing Entitlements or the operation of the porting mechanism from being challenged under anti-deprivation principles or other similar principles of insolvency law, LCH intends to rely on either:

- (i) any law, regulation or statutory provision (having the force of law) of a governmental authority, the effect of which is to protect the operation of the LCH Rules, including in particular the Client Clearing Annex of the Default Rules, from challenge under the insolvency laws applicable to the Relevant Clearing Member (any such provision, an "**Exempting Client Clearing Rule**"); or
- (ii) if no Exempting Client Clearing Rule would apply to a Relevant Clearing Member, the Security Deed (as defined below). Clearing Members in respect of whom a suitable Exempting Client Clearing Rule is not available

and who wish to offer client clearing are required to enter into a security deed (the "**Security Deed**") in favour of each of their Clearing Clients. Under the terms of the Security Deed, the Relevant Clearing Member grants a security interest in favour of its Clearing Client over the receivable from LCH in respect of assets and positions held in an account with LCH on the relevant Clearing Client's behalf.

LCH Rulebook permits LCH to designate a Clearing Member as an "Exempt Client Clearing Member" if, in its sole determination, an Exemption Client Clearing Rule would apply to a Relevant Clearing Member upon it becoming a Defaulter.⁷¹

If a Relevant Clearing Member were designated as an Exempt Client Clearing Member, then the operation of the Client Clearing Annex of the Default Rules should be capable of being protected from challenge under the French Insolvency Law, being the law applicable to the Relevant Clearing Member upon its insolvency, and the entering into of a Security Deed would not be necessary.

If a Clearing Member does not qualify as an Exempt Client Clearing Member, then pursuant to General Regulation 11(d), it must enter into a Security Deed in respect of each Clearing Client which is an Individual Segregated Account Client, Affiliated Omnibus Segregated Clearing Client or Identified Omnibus Segregated Clearing Client.

(b) *Protection of the Finality Directive Regime*

Article L. 330-1-II of the Financial Code, which implements article 8 of the Finality Directive, provides that when Insolvency Proceedings are instituted against a participant in an interbank settlement system or a settlement system for financial instruments mentioned in paragraphs 1 to 4° of article L. 330-1 of the Financial Code (thus including a system designated and notified as such to the European Commission by an EEA member state, as well as a third country clearing house recognised as a system pursuant to article L. 330-1-I-4° of the Financial Code), the rights and obligations deriving from its participation or linked to its participation in the said system are determined by the law governing such system. Such article aims

⁷¹ General Regulation 11(b).



to protect the orderly operation and the finality of settlements in payment and clearing systems by allowing such a system to rely on its relevant governing law to determine the effects of the insolvency of a participant.

We are therefore of the opinion that, in the event of Insolvency Proceedings being commenced against a Relevant Clearing Member, such that it is designated as a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event), the effect of the Finality Directive is that the rights and obligations arising from, or in connection with, the participation of that Relevant Clearing Member within the Clearing House System would be determined by the application of substantive English insolvency law, being the law governing that system.

We are therefore also of the opinion that, provided that substantive English insolvency law gives effect to the provisions in the Client Clearing Annex to the Default Rules entitling LCH to either port the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member or to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such Clearing Client, irrespective of the existence and/or enforceability of a Security Deed entered into between the Clearing Member and its Clearing Clients, if LCH were to seek to port the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member or to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such Clearing Client, neither an insolvency officer appointed in respect of the Defaulter, nor any other person, could successfully challenge the actions of LCH and claim for the amount of the Account Balance, to the extent that such challenge is not possible under substantive English insolvency law.

(c) *Protection under the Collateral Directive Regime*

It should further be noted that it is unclear whether LCH would benefit from the protection of the Collateral Directive Regime with respect to porting and the return of the Client Clearing Entitlement, as such regime does not contemplate transactions which would mould such actions:

- (i) as regard porting, we do not believe that, absent contractual amendments to LCH's legal documentation, the porting process could qualify as a transfer of contract (*cession de contrat*) under article L. 211-37 of the

Financial Code. Therefore, in order to benefit from such provision, it would in our view be necessary for LCH to amend the documentation to which the Defaulter and the relevant Backup Clearing Member are (or would be) parties so as to structure the porting between both members as a transfer of contract; and

- (ii) concerning the return of the Client Clearing Entitlement, the operation could take the form of: (i) either an assignment to the Clearing Client of the Defaulter's future receivable against LCH for the return of assets and positions held in the Defaulter's account; or (ii) a security financial collateral arrangement over such receivable (which is actually the purpose of the Security Deed, as to which please see our observations in paragraph 3.3.8 below).
- (d) *Protection under EMIR (article L. 440–9 of the Financial Code)*

Since the Effective Brexit Date, EMIR is no longer directly applicable to LCH, thereby entailing that it is unclear whether or not LCH benefit from the provisions of article 48(5) thereof. There would be some arguments to support the view that the implementation of the Default Rules should not be challenged by a French insolvency court, because, as LCH would qualify as a 3RCCP, the implementation of the Default Rules by LCH is made pursuant to legally binding requirements under English law which are equivalent to the requirements laid down in Title IV of EMIR,⁷² which include article 48(5). However, given the absence of express statutory exception to French insolvency laws to that effect, this conclusion is subject to some uncertainty. It is indeed unclear whether article L. 440-9 of the Financial Code, which specifies the scope of article 48(7) of EMIR, applies to non-French CCPs, given the uncertainty of the scope of *ratione personae* application of article L. 440–1 of the same code, which is understood as establishing the legal framework of French CCPs (*i.e.*, those the rules of which are approved by the AMF).

⁷² Article 25(6) of EMIR. See the Commission implementing decision (EU) no. 2022/174 of 8 February 2022 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) no. 648/2012 of the European Parliament and of the Council.

Regarding the effects of Resolution Measures in this respect please refer to our observations set out in paragraph 3.2.1(d) above.

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

We understand from the provisions of the Client Clearing Annex to the Default Rules that, if porting does not take place, then LCH shall close-out the Client Contracts and calculate the entitlement to Collateral, being the "Client Clearing Entitlement", of the Defaulter in respect of each Clearing Client. LCH will then take instruction from those Clearing Clients who are Individual Segregated Account Clients, Custodial Segregated Clients, Identified Omnibus Segregated Clearing Clients and Affiliated Omnibus Segregated Clearing Clients and either: (i) pay the Client Clearing Entitlements to the Defaulter for the account of the relevant Clearing Clients; or (ii) pay the Client Clearing Entitlement directly to the relevant Clearing Client (subject to execution of documentation required by LCH). In each case this applies to both Clearing Clients who are exercising their rights under a Security Deed and Clearing Clients of an Exempt Client Clearing Member, following acceleration of its "Undertaking to Pay and Deliver", as provided for in the LCH Rulebook. In respect of all Non-Identified Omnibus Segregated Clearing Clients, an "Aggregate Omnibus Client Clearing Entitlement" will always be returned to the Defaulter for the account of the relevant Clearing Clients.

In this respect, our opinion expressed at paragraph 3.3.4 above would equally apply.

Regarding the effects of Resolution Measures please refer to our observations set out in paragraph 3.2.1(d) above. Please note that the porting of the Client Contracts and related Account Balance might be affected, in particular, in case of the following Resolution Measures:

- (a) the Transfer which must not affect the outstanding agreements relating to the transferred business, assets, rights or obligations, that must remain executory (please see paragraph 3.2.1(d)(ii)(B) above), although we note that:

- (i) where a Transfer is made in relation to part, but not all, of the assets, rights and obligations of the creditors of the Relevant Clearing Member, such Transfer may not affect the functioning of a system referred to in article L. 330-1 of the Financial Code;⁷³ and
 - (ii) the resolution authority cannot provide for a Transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred, where such liability or encumbrance benefits in particular a system referred to in article L. 330-1 of the Financial Code or a central clearing counterparty, when such liability or encumbrance relates to a guarantee (including by way of margin) to any of such beneficiary;⁷⁴ and
- (b) the prohibition to exercise the termination and close-out netting rights on the sole ground of a Resolution Measure (please see paragraph 3.2.1(d)(ii) above).

Pre-Insolvency Proceedings

3.3.6 If: (i) following the implementation of Pre-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 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?

Subject to our development in paragraph 3.2.1(d) above relating to Resolution Measures, the conclusion set out in paragraph 3.3.4 above equally applies to Pre-Insolvency Proceedings, as well as, more generally, to any civil enforcement proceedings (*procédures civiles d'exécution*) or the exercise by any person of a right to object or appeal (*droit d'opposition*).

3.3.7 If: (i) following the commencement of Pre-Insolvency Proceedings, a Relevant Clearing Member was designated a Defaulter (whether

⁷³ Article L. 613-57-2 of the Financial Code.

⁷⁴ Article L. 613-56-2-II of the Financial Code.

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?

Subject to our development in paragraph 3.2.1(d) above relating to Resolution Measures, the conclusion set out in paragraph 3.3.5 above equally applies to Pre-Insolvency Proceedings.

Security Deed

3.3.8 Would the Security Deed provide an effective security interest under French law over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client?

If and to the extent the Security Deed qualifies as a financial collateral agreement under the Collateral Directive Regime (specifically article L. 211-38 of the Financial Code), the Security Deed would provide an effective security interest under French law over the Account Balance or Client Clearing Entitlement which would be enforceable notwithstanding Pre-Insolvency Proceedings and Insolvency Proceedings affecting the Defaulter.

In order to qualify for the Collateral Directive Regime, the Security Deed shall secure financial obligations owed by the Defaulter to its Clearing Clients and such financial obligations shall themselves comply with the requirements set forth in article L. 211-36 of the Financial Code.

In our opinion, however, LCH will be able to rely upon the existence of the relevant Exempting Client Clearing Rule and will not need to require those Relevant Clearing Members to which that rule applies to enter into a Security Deed.

3.3.9 Are there any perfection steps which would need to be taken under French law in order for the Security Deed to be effective?

It is reminded that the perfection formalities in relation to an *in rem* security interest are governed by the *lex situs* (i.e. English law in our case, assuming the pledged assets are situated within the territory of the United Kingdom).

Besides, the formalities prescribed by article L. 211–38 of the Financial Code shall be complied with in order to benefit from the Collateral Directive Regime.

However, as mentioned above in paragraph 3.3.8, in our opinion, LCH should be able to rely upon the existence of the relevant Exempting Client Clearing Rule and should not need to require those Relevant Clearing Members to which that rule applies to enter into a Security Deed.

3.3.10 Is there any risk of a stay on the enforcement of the Security Deed in the event of Insolvency Proceedings or Pre-Insolvency Proceedings being commenced in respect of a Relevant Clearing Member?

If and to the extent the Security Deed qualifies as a financial collateral benefiting from the Collateral Directive Regime, then its enforcement will not be subject to stay in the event of Insolvency Proceedings or Pre-Insolvency Proceedings being commenced in respect of a Relevant Clearing Member.

However, as mentioned above in paragraph 3.3.8, in our opinion, LCH should be able to rely upon the existence of the relevant Exempting Client Clearing Rule and should not need to require those Relevant Clearing Members to which that rule applies to enter into a Security Deed.

Regarding the effects of Resolution Measures, please refer to our observations set out in paragraph 3.2.1(d) above. The enforcement of the Security Deed might be affected, in particular, in case of the following Resolution Measures:

- (a) the Transfer which must not affect the outstanding agreements relating to the transferred business, assets, rights or obligations, that must remain executory (please see paragraph 3.2.1(d)(ii)(B) above), although we note that:
 - (i) where a Transfer is made in relation to part, but not all, of the assets, rights and obligations of the creditors of the Relevant Clearing Member, such Transfer may not affect the functioning of a system referred to in article L. 330–1 of the Financial Code⁷⁵; and

⁷⁵ Article L. 613–57–2 of the Financial Code.

- (ii) the resolution authority cannot provide for a Transfer to take effect free from any liability or encumbrance affecting the financial instruments, rights, assets or liabilities transferred, where such liability or encumbrance benefits in particular a system referred to in article L. 330-1 of the Financial Code or a central clearing counterparty, when such liability or encumbrance relates to a guarantee (including by way of margin) to any of such beneficiary;⁷⁶ and
- (b) the prohibition to exercise the termination and close-out netting rights on the sole ground of a Resolution Measure (please see paragraph 3.2.1(d)(ii) above).

General

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

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

3.4 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.

3.4.1 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

⁷⁶ Article L. 613-56-2-II of the Financial Code.

clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.

Pursuant to article 12 of the EU Insolvency Regulation, in case of an Insolvency Proceeding being opened against a Relevant Clearing Member, the *lex concursus* (in our case French law) would be set aside in favour of the law of the Member State governing the system (*i.e.* in our case, English law) with regards to the rights and obligations of the Relevant Clearing Member towards the system and *vice versa*, as described below.

Furthermore, including since the Effective Brexit Date, LCH benefits from the provisions of article L. 330-1-II of the Financial Code, which implements article 8 of the Finality Directive into French law, providing that when Insolvency Proceedings are instituted against a participant in an interbank settlement system or a settlement system for financial instruments mentioned in paragraphs 1 to 4° of article L. 330-1 of the Financial Code (thus including a system designated and notified as such to the European Commission by an EEA member state, as well as a third country clearing house recognised as a system pursuant to article L. 330-1-I-4° of the Financial Code), the rights and obligations deriving from its participation or linked to its participation in the said system are determined by the law governing such system. Such article aims to protect the orderly operation and the finality of settlements in payment and clearing systems by allowing such a system to rely on its relevant governing law to determine the effects of the insolvency of a participant. Based on the assumption above that LCH qualifies as a system (as to which please refer to paragraph 2.4.1 above), and subject to French international public policy rules (as to which please refer to paragraph 3.1.8 for more details), the issue raised by question 3.4.1, and those raised by questions 3.4.2 and 3.4.3 below should be determined in accordance with English law.

- 3.4.2 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.**

Please refer to our answer to question 3.4.1 above which would apply hereto *mutatis mutandis*.

- 3.4.3 Are there any circumstances (such as the commencement of Pre-Insolvency Proceedings) 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.

Pre-Insolvency Proceedings might affect the finality of settlement of a Payment Transfer Order or Securities Transfer Order with respect to the relationship between the Relevant Clearing Member and LCH. Please refer to paragraphs 3.2.1(d) through 3.2.1(h) above for more information on the effects of such Pre-Insolvency Proceedings.

However, as described above in paragraphs 3.2.1(d)(iii)(A) to 3.2.1(d)(iii)(H), attention is drawn to the fact that the effects of Resolution Measures are subject to limitations and attenuations set out in the Financial Code, notably in the context of relationships with systems governed by article L. 330-1 of the Financial Code (*e.g.* protection of liabilities owed to such systems⁷⁷, the suspension of payment obligation and delivery of financial instruments⁷⁸, the suspension of termination rights⁷⁹, or further, the transfer of some rights and obligations secured by a title transfer financial collateral arrangement⁸⁰).

For Insolvency Proceedings, please refer to our answer to question 3.4.1 above which would apply *mutatis mutandis*.

4. QUALIFICATIONS

4.1 Avoidance under the Credit Institution WUD Regime

In the context of a Judicial Rehabilitation Proceeding or a Judicial Liquidation Proceeding opened against a French Credit Institution or a French Investment Firm, the voidability of legal acts may be excluded by application of article L. 613-31-7 of the Financial Code pursuant to which the validity of specific legal acts may be challenged if the requirements for doing this in Insolvency Proceedings are met in accordance with the law governing such proceedings, unless the party whose acts are to be challenged provides evidence that the relevant act is governed by the laws of another Member State and cannot be challenged thereunder under the laws of such state in the case at hand.

⁷⁷ See paragraph 3.2.1(d)(iii)(F).

⁷⁸ See paragraph 3.2.1(d)(iii)(G).

⁷⁹ See paragraph 3.2.1(d)(iii)(H).

⁸⁰ See paragraph 3.2.1(d)(iii)(C).

4.2 Accuracy of company search information

K-bis Extracts do not show certain information and may not be wholly reliable. In particular:

4.2.1 A K-bis Extract provided by the commercial and companies registry (*registre du commerce et des sociétés*) does not necessarily reveal whether, as at its date:

- (a) a company has ceased its activities (*cessation d'activité*), is being wound-up (*dissolution*), has been declared null, or has been merged with another; or
- (b) a petition has been filed or an order made for protection (*sauvegarde accélérée*), judicial rehabilitation (*redressement judiciaire*) or judicial liquidation (*liquidation judiciaire*),

as notice of these matters may not have been filed immediately and/or may not have been entered on the record immediately.

4.2.2 A K-bis Extract provided by the commercial and companies registry does not contain any information as to whether a declaration that a company has ceased its payments (*déclaration de cessation des paiements*) has been made after 1 January 2006 or a conciliation proceeding (*procédure de conciliation*) has been commenced or has resulted in an agreement with creditors (*accord amiable*), as notice of such matters is not filed with the commercial and companies registry.

4.2.3 Notice of any change affecting the corporate authority of a company (including the nomination of an *administrateur provisoire*) may not be filed immediately with the commercial and companies registry, and when filed, may not be entered on the record immediately.

4.3 Enforceability of claims

An enforceable obligation is an obligation of a type which the French courts enforce. This does not mean however that a French court would always order the defaulting party to comply with its contractual obligations in accordance with its exact terms, in particular:

4.3.1 depending on the circumstances and the characteristics of a non-monetary obligation, the remedy of specific performance (*exécution en nature*) of that obligation may not be available in a French court, which often will only give remedies culminating in a judgment for the payment of money;

- 4.3.2 the principles concerning inter alia good faith (*bonne foi*) and abuse of rights (*abus de droit*) in the performance of contracts may operate to limit the exercise of rights and powers under the Agreements or in certain cases may operate to impose liability on the party acting in breach of such principles;
- 4.3.3 in respect of payment obligations, a French court has power under article 1343–5 of the Civil Code to grant time to a debtor or reschedule its debts (in either case for a maximum period of two years), taking into account the position of the debtor and the needs of the creditor;
- 4.3.4 enforcement of non–monetary obligations may be restricted by certain general principles of French law including the rules relating to *force majeure* or *exception d'inexécution*;
- 4.3.5 where any obligations of any person are to be performed in jurisdictions outside France, such obligations may not be enforceable under French law to the extent that such performance thereof would be illegal or contrary to public policy under the laws of such jurisdiction;
- 4.3.6 any provision providing for the repayment of costs and expenses which are incurred as a result of the exercise by a party of its rights (which may include costs of litigation) is limited by the power of the court or arbitral tribunal to decide the level of costs and expenses and to set those amounts;
- 4.3.7 the judge in interpreting a contract is not limited to considering its express terms but may also take into account all relevant circumstances; his interpretation cannot, save in exceptional circumstances, be set aside by the French supreme court (*Cour de cassation*);
- 4.3.8 under French law, claims may become barred by effluxion of time (*prescription*) or may be or become subject to a defence of set–off (*compensation*) or counterclaim (*demande reconventionnelle*); and
- 4.3.9 the enforcement in France of obligations of any Relevant Clearing Member under the Agreements and of foreign judgements is subject to French rules of civil procedures. In particular, in order to enforce in France any document in connection with any of the Agreements which is written in English, a certified translation into French of such Agreements will be required.

4.4 Other qualifications

- 1.1.2 Without prejudice to the opinions given in paragraph 3 (*Statement of opinion*) above, we do not opine on the enforceability of any net obligation resulting from the provisions of the Opinion Documents.

- 1.1.3 We express no opinion as to the reliability, authenticity or enforceability of the specific electronic signatures that may be used by LCH.
- 1.1.4 Special rules may apply with regards to electronic signatures in relation to the provision of banking and financial products or services generally. A prior analysis should be conducted on a case-by-case basis in respect of each regulated product or service with a view to identifying any specific requirement in relation to these products / services.
- 4.4.1 The Agreements may need to be translated into French by an official sworn translator (*traducteur juré*) if submitted as evidence in any proceedings before a French court.
- 4.4.2 Pursuant to article R. 621-4 of the Commercial Code, the court decision opening an Insolvency Proceeding enters into effect on the date when such judgment is rendered in public hearing. This has the effect of implementing such judgment as of 00:00 a.m. of such date of entry.
- 4.4.3 A determination, calculation or certificate made by any party might in certain circumstances be held by a French court not to be final, conclusive and binding (for example, if it could be shown to have been incorrect or to have any other unreasonable).
- 4.4.4 No opinion (other than where expressly opined upon herein) is expressed or implied in relation to the accuracy of any representation or warranty given by or concerning any of the parties to the Agreements or any Contract or whether such parties or any of them have complied with or will comply with any covenant or undertaking given by them or the terms and conditions of any obligations binding upon them.
- 4.4.5 Pursuant to article L. 622-28 of the Commercial Code, interest ceases to accrue as of the date of the court decision ordering the commencement of the Insolvency Proceedings. This applies to contractual and statutory rates of interest including penalty interest and increase in rates of interest except in case of interest accruing on loans with a maturity of one year or more or in respect of deferred payment terms contracts with a maturity of one year or more. Under article 1231-5 of the Civil Code, French courts have discretion to decrease or increase the amount of those agreed indemnities, damages and penalties which they regard as manifestly excessive. A French court may in its discretion decline to give effect to any indemnity for legal costs incurred by an unsuccessful litigant.
- 4.4.6 In accordance with article 1343-2 of the Civil Code on compound interest (*anatocisme*), the capitalisation of interest is permitted only where the said interest has accrued for at least one year. However, pursuant to article L. 211-40 of the Financial Code, the provisions of

article 1343–2 of the Civil Code do not prevent an agreement or a master agreement referred to in article L. 211–36–1 of the Financial Code from providing for the capitalisation of due interest.

4.4.7 Three decisions of the French supreme court (*Cour de cassation*) dated 26 September 2012, 25 March 2015 and 7 October 2015 permit to conclude that one–sided jurisdiction clauses may only be effective if they set out an objective basis for the alternative jurisdictions that one party could choose.

4.4.8 In the event that the contractual relationship between LCH and a given Clearing Member has been entered into prior to 17 December 2009, the law applicable to such relationship would be determined in accordance with the rules of the Convention on the law applicable to contractual obligations (80/934/EEC) of 19 June 1980 (the "**Rome Convention**") *in lieu of* Rome I Regulation. As a result, with respect to such agreements, any reference to Rome I Regulation made elsewhere in this Opinion Letter shall be understood as being replaced *mutatis mutandis* by the equivalent provisions set out in the Rome Convention (*e.g.* article 9 of Rome I Regulation is to be replaced by article 7 of the Rome Convention).

4.4.9 Please note that article L. 611–16 of the Commercial Code, introduced into French law by an ordinance dated 12 March 2014 which entered into force on 1 July 2014⁸¹ (the "**Ordinance**"), provides notably that any contractual provision amending the terms of continuation of an executory contract (*contrats en cours*) by reducing the rights, or increasing the obligations, of the debtor solely because of:

- (a) the appointment of a *mandataire ad hoc*, pursuant to article L. 611–3 of the Commercial Code;
- (b) the commencement of conciliation proceedings (*procédure de conciliation*), pursuant to articles L. 611–4 *et seq.* of the Commercial Code; or
- (c) a request for the above purposes,

shall be deemed null and void (*réputée non–écrite*).

Please note that a decision rendered by the French *Cour de cassation* on 14 January 2014 has similar import with respect to Judicial

⁸¹ Ordinance no. 2014–326 of 12 March 2014 reforming the prevention of businesses' difficulties and insolvency proceedings.

Rehabilitation Proceedings and it is likely that French courts would take the same position with respect to other Insolvency Proceedings.

However, we believe that the provisions introduced by the Ordinance, as well as the decision of the French *Cour de cassation* referred to above, should not be interpreted as posing a limitation to the right of a counterparty under a contract benefiting from articles L. 211–36 *et seq.* of the Financial Code to close-out transactions and enforce financial collateral. Indeed, firstly, these provisions were introduced by the Ordinance in Book VI of the Commercial Code which, according to article L. 211–40 of the Financial Code, shall not impede the application of such regime. Although article L. 211–40 predates the Ordinance, it excludes the application of Book VI of the Commercial Code generally, as the same may be modified from time to time and, while it amends Book VI, the Ordinance does not expressly amend the Financial Code. Secondly, article L. 211–40 of the Financial Code is part of those provisions set out in the same code which implement the Collateral Directive. As such directive aims to protect the enforcement of financial collateral and the exercise of bilateral close-out netting from the effects of Pre-Insolvency and Insolvency Proceedings generally, the French implementing provisions shall, within the scope of the Collateral Directive, prevail over conflicting provisions of the French Insolvency Law, even those which may have become effective after the implementation of that directive.

- 4.4.10 Article L. 211–38–II–3° of the Financial Code imposes that the enforcement of collateral is made at normal market conditions (*conditions normales de marché*) in accordance with valuation terms that shall have been agreed upon the Parties in the collateral arrangement.
- 4.4.11 The provision of margin should be evidenced in writing or by electronic means and any other durable medium and such evidencing allows for the identification of the margin (provided that, for this purpose, it is sufficient to prove that the book-entry securities collateral has been credit to, or forms a credit in such relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account).
- 4.4.12 Pursuant to article 1161 of the Civil Code, introduced into the Civil Code by ordinance no. 2016–131 of 10 February 2016 relating to the reform of French contract laws, an agent (*représentant*) may not act on behalf of both parties to a contract and may not itself enter into a contract with the person of whom it is an agent. Albeit such provision has been introduced within the background of the reform of French contract laws and, therefore should *prima facie* apply to contracts governed by French

law, it is unclear whether its application could also be extended by French courts to contracts governed by foreign laws on the grounds of French international public policy. It is also unclear whether this provision should apply to situations where various companies of the same group, acting together (and which, therefore, are parties to a same contract), enter into a contract with a third party.

4.4.13 It should be noted that under French law, articles L. 330–2–III and L. 211–40 of the Financial Code expressly disapply the French Insolvency Law (*i.e.* the Pre-Insolvency Proceedings and the Insolvency Proceedings) which does not include the Resolution Measures, without however specifically providing for the maintenance of the system's operation and its rules in case such Resolution Measures were to be adopted in relation to a French Clearing Member.

4.4.14 We express no opinion as to whether any party has complied with any applicable provisions of the Regulation (EU) no. 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) no. 648/2012 (the "SFTR").⁸² Article 15 of SFTR imposes obligations relating to rights of reuse where these are exercised. SFTR has entered into force on 12 January 2016. Article 15 of SFTR took effect on 13 July 2016.

5. RELIANCE AND COPIES

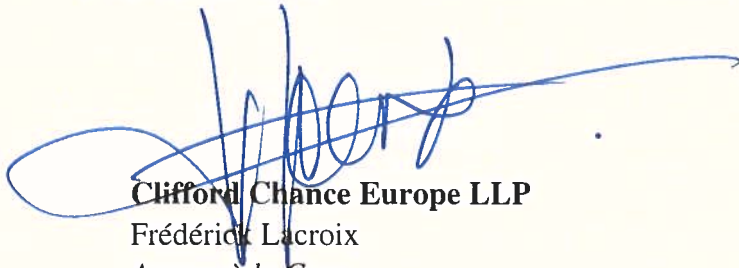
This Opinion Letter is given for the exclusive benefit of the addressee. In this Opinion Letter we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time. It may not, without our prior written consent, be relied on by any other person.

We consent to a copy of this Opinion Letter being made publically available on the addressee's website and being shown to: (i) actual and prospective clearing members and clearing clients; (ii) relevant regulators; and/or (iii) legal counsel appointed by the addressee or any person listed in (i) above to advise on matters of the laws of other jurisdictions, in each case for information purposes only and solely on the basis that we assume no responsibility to any such parties as a result or otherwise.

⁸² OJ EU No L 337 of 23 December 2015, p.^o1.

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

CLIFFORD CHANCE EUROPE LLP

A handwritten signature in blue ink, appearing to be 'Frédéric Lacroix', written over the printed name.

Clifford Chance Europe LLP
Frédéric Lacroix
Avocat à la Cour

**APPENDIX 1
THE CLEARING MEMBERSHIP AGREEMENT**



CLEARING MEMBERSHIP AGREEMENT

DATED

LCH LIMITED

and
("the Firm")

Address of the Firm

THIS AGREEMENT is made on the date stated above

BETWEEN the Firm and LCH LIMITED ("the Clearing House"), whose registered office is at Aldgate House, 33 Aldgate High Street, London, EC3N 1EA.

WHEREAS:

- A The Clearing House is experienced in carrying on the business of a clearing house and undertakes with each Clearing Member the performance of contracts registered in its name in accordance with the Rulebook;
- B The Clearing House has been appointed by certain Exchanges to provide central counterparty and other services in accordance with the terms and conditions of the Rulebook and certain agreements entered into between the Clearing House and such Exchanges;
- C The Clearing House also provides central counterparty and other services to participants in certain over-the-counter ("OTC") markets in accordance with the terms of this Agreement and the Rulebook;
- D The Firm desires to be admitted as a Clearing Member of the Clearing House to clear certain categories of Contract agreed by The Clearing House with the Firm and, the Clearing House having determined on the basis inter alia of the information supplied to it by the Firm that the Firm satisfies for the time being the relevant Criteria for Admission, the Clearing House agrees to admit the Firm as a Clearing Member subject to the terms and conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:-

1 Interpretation and Scope of Agreement

1.1. Unless otherwise expressly stated, in this Agreement:

- (a) "Cash Cover" means cover for margin (within the meaning of that term in the "Definitions" section of the Rulebook) provided in the form of a cash deposit with the Clearing House;
- (b) "Clearing Member" means a Person who has been admitted to membership of the Clearing House and whose membership has not terminated;
- (c) "Contract" means a contract or transaction eligible for registration in the Firm's name by the Clearing House in accordance with the Rulebook;
- (d) "Contribution" and "Contribution to the Default Fund" mean the sums of cash deposited by the Firm as cover in respect of the Firm's obligation to indemnify the Clearing House as provided by clause 9 of this Agreement and the Default Rules;
- (e) "Criteria for Admission" means criteria set out in one or more documents published from time to time by the Clearing House, being criteria to be satisfied by an applicant for admission as a Clearing Member in respect of the Designated Contracts which the applicant wishes to clear with the Clearing House;
- (f) "Default Fund" means the fund established under the Default Rules of the Clearing House to which the Clearing Member is required to contribute by virtue of clause 9 of this Agreement;
- (g) [DELETED]

- (h) "Default Notice" means a notice issued by the Clearing House in accordance with the Default Rules in respect of a Clearing Member who is or is likely to become unable to meet its obligations in respect of one or more Contracts;
 - (i) "Default Rules" means that part of the Rulebook having effect in accordance with Part IV of the Financial Services and Market Act 2000 (Recognition Requirements for Investment Exchange and Clearing Houses) Regulations 2001 to provide for action to be taken in respect of a Clearing Member subject to a Default Notice;
 - (j) "Designated Contract" has the meaning given to it in clause 2.1;
 - (k) "Exchange" means an organisation responsible for administering a market with which the Clearing House has an agreement for the provision of central counterparty and other services to Clearing Members;
 - (l) "Exchange Contract" means any contract which an Exchange has adopted and authorised Exchange Members to trade in under its Exchange Rules and in respect of which the Clearing House has agreed to provide central counterparty and other services;
 - (m) "Exchange Member" means any person (by whatever name called) being a member of, or participant in, a Market pursuant to Exchange Rules;
 - (n) "Exchange Rules" means any of the regulations, rules and administrative procedures or contractual arrangements for the time being and from time to time governing the operation of a Market administered by an Exchange and includes, without prejudice to the generality of the foregoing, any regulations made by the directors of an Exchange or by any committee established under the Rules, and, save where the context otherwise requires, includes Exchange Contracts, and the Rulebook;
 - (o) "Rulebook" means the Clearing House's General Regulations, Default Rules, Settlement Finality Regulations and Procedures and such other rules of the Clearing House as published and amended from time to time;
 - (p) "Market" means a futures, options, forward, stock or other market, administered by an Exchange, or an OTC market, in respect of which the Clearing House has agreed with such Exchange or, in respect of an OTC market, with one or more participants in that market, to provide central counterparty and related services on the terms of the Rulebook and in the case of an Exchange, pursuant to the terms of any agreement entered into with the Exchange;
 - (q) "Person" includes any firm, company, corporation, body, association or partnership (whether or not having separate legal personality) or any combination of the foregoing;
 - (r) "Procedures" means that part of the Rulebook by that name;
 - (s) "Registered Contract" means a contract registered in the Firm's name by the Clearing House in accordance with the Rulebook;
- 1.2. (a) References to "the parties" are references to the parties hereto, and "party" shall be construed accordingly;
- (b) References herein to a clause are to a clause hereof and clause headings are for ease of reference only;
- (c) Unless the context otherwise requires, words (including defined terms) denoting the singular shall include the plural and vice versa;

(d) References to writing include typing, printing, lithography, photography, facsimile transmission and other modes of representing or reproducing words in a visible form; and

(e) References herein to statutes, statutory instruments, the Rulebook, or provisions thereof are to those statutes, statutory instruments, Rulebook or provisions thereof as amended, modified or replaced from time to time.

1.3 This Agreement, the terms of any other agreement to which the Clearing House and the Clearing Member are party which relates to the provision of central counterparty and other services by the Clearing House, the terms of, and applicable to, each and every Registered Contract, the Rulebook and all amendments to any of the foregoing shall together constitute a single agreement between the Clearing House and the Clearing Member and both parties acknowledge that all Registered Contracts are entered into in reliance upon the fact that all such items constitute a single agreement between the parties.

1.4 A person who is not a party to this Agreement shall have no rights under or in respect of this Agreement.

2 Clearing Membership

2.1. The Firm is hereby admitted as a Clearing Member on the terms set out in this Agreement. The Firm shall be eligible to clear such categories of Contract (each a "Designated Contract") as the Clearing House shall from time to time notify to the Firm.

2.2. The Firm warrants that the information supplied by the Firm to the Clearing House in connection with the enquiry conducted by the Clearing House to determine whether the Firm satisfies for the time being the Criteria for Admission was and is at the date of this Agreement true and accurate in all material respects.

2.3. The Firm will ensure that it will at all times satisfy the Criteria for Admission. If at any time it has reason to believe that it no longer satisfies or may cease to satisfy any of such criteria the Firm shall immediately notify the Clearing House of the circumstances.

2.4. The Firm shall give written notice forthwith to the Clearing House of the occurrence of any of the following of which it is aware:-

(a) the presentation of a petition or passing of any resolution for the bankruptcy or winding-up of, or for an administration order in respect of, the Firm or of a subsidiary or holding company of the Firm;

(b) the appointment of a receiver, administrative receiver, administrator or trustee of the estate of the Firm;

(c) the making of a composition or arrangement with creditors of the Firm or any order or proposal in connection therewith;

(d) where the Firm is a partnership, an application to dissolve the partnership, the presentation of a petition to wind up the partnership, or any other event which has the effect of dissolving the partnership;

(e) where the Firm is a registered company, the dissolution of the Firm or the striking-off of the Firm's name from the register of companies;

(f) any step analogous to those mentioned in paragraphs (a) to (e) of this clause 2.4 is taken in respect of such persons as are referred to in those respective paragraphs in any jurisdiction;

(g) the granting, withdrawal or refusal of an application for, or the revocation of any licence or authorisation to carry on investment, banking or insurance business in any country;

- (h) the granting, withdrawal or refusal of an application for, or the revocation of, a license or authorisation by the Financial Conduct Authority, the Prudential Regulation Authority or membership of any self-regulating organisation, recognised or overseas investment exchange or clearing house (other than the Clearing House) under the Financial Services and Markets Act 2000 or any other body or authority which exercises a regulatory or supervisory function under the laws of the United Kingdom or any other state;
 - (i) the appointment of inspectors by a statutory or other regulatory authority to investigate the affairs of the Firm (other than an inspection of a purely routine and regular nature);
 - (j) the imposition of any disciplinary measures or sanctions (or similar measures) on the Firm in relation to its investment or other business by any Exchange, regulatory or supervisory authority;
 - (k) the entering of any judgment against the Firm under Section 150 of the Financial Services and Markets Act 2000;
 - (l) the conviction of the Firm for any offence under legislation relating to banking or other financial services, building societies, companies, credit unions, consumer credit, friendly societies, insolvency, insurance and industrial and provident societies or for any offence involving fraud or other dishonesty;
 - (m) the conviction of the Firm, or any subsidiary or holding company of the Firm for any offence relating to money laundering, or the entering of judgment or the making of any order against the Firm in any civil action or matter relating to money laundering;
 - (n) any enforcement proceedings taken or order made in connection with any judgement (other than an arbitration award or judgement in respect of the same) against the Firm; and
 - (o) any arrangement entered into by the Firm with any other Clearing Member relating to the provision of central counterparty and associated services by the Clearing House of Contracts or transactions entered into by the Firm after the effective date of termination of this Agreement.
- 2.5. The Firm shall give written notice forthwith to the Clearing House of any person becoming or ceasing to be a director of or a partner in the Firm or of the occurrence of any of the following in relation to a director of or a partner in the Firm, if aware of the same:-
- (a) the occurrence of any event specified in clause 2.4 (insofar as it is capable of materially affecting him); or
 - (b) any disqualification order under the Company Directors Disqualification Act 1986 or equivalent order in overseas jurisdictions.
- 2.6. The Firm shall give written notice forthwith to the Clearing House of any change in its name, the address of its principal place of business, registered office or UK office.
- 2.7. The Firm shall give written notice to the Clearing House forthwith upon its becoming aware that any person is to become or cease to be, or has become or ceased to be, a controller of the Firm, and shall in relation to any person becoming a controller of the Firm state:-
- (a) the controller's name, principal business and address;
 - (b) the date of the change or proposed change.

In this clause and in clause 2.9 "controller" means a person entitled to exercise or control the exercise of 20 per cent or more of the voting power in the Firm.

- 2.8. The Firm shall give written notice forthwith to the Clearing House of any change in its business which affects the Firm's ability to perform its obligations under this Agreement.
- 2.9. Where the Clearing House receives notification pursuant to any of clauses 2.3 to 2.8, or the Clearing House reasonably suspects that the Firm may no longer satisfy some or all of the Criteria for Admission or the criteria for clearing a Designated Contract, the Clearing House shall be entitled in its absolute discretion to call for information of whatsoever nature in order to determine whether the Firm continues to satisfy the Criteria for Admission or the criteria for clearing a Designated Contract. Without prejudice to the foregoing, the Clearing House may at any time call for information relating to the affairs (including the ownership) of any controller of the Firm or any person who is to become a controller of the Firm. The Firm shall forthwith on demand supply to the Clearing House information called for under this clause and shall ensure that such information is true and accurate in all respects.
- 2.10. The Firm undertakes to abide by the Rulebook and undertakes at all times to comply with other provisions of Exchange Rules so far as they apply to the Firm.
- 2.11. The Firm undertakes that at all times, to the extent the Firm is required under any applicable law to be authorised, licensed or approved in relation to activities undertaken by it, it shall be so authorised, licensed or approved.
- 2.12. The Firm agrees that in respect of any Contract for which central counterparty services are to be provided to the Firm by the Clearing House in accordance with the Rulebook, including, but not limited to, any contract made by the Firm under Exchange Rules on the floor of a Market (or through a Market's automated trading system) or otherwise, whether with a member of that Market or with a client or with any other person, and including any Contract entered into in an OTC market, the Firm shall contract as principal and not as agent.
- 2.13. The Firm shall furnish financial information to the Clearing House in accordance with the requirements of the Rulebook or such other requirements as the Clearing House may from time to time prescribe.
- 2.14. The Firm undertakes that, in its terms of business with its clients (being clients in respect of whom the Firm is subject to any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money):
- (a) where it is subject to Exchange Rules, it will at all times include a stipulation that contracts made under Exchange Rules with or for them shall be subject to Exchange Rules (including the Rulebook); and
 - (b) that money of such clients in the possession of the Clearing House may be dealt with by the Clearing House in accordance with the Rulebook without exception.
- 2.15. Without prejudice to clause 2.14 the Firm undertakes that its dealings with all its clients or counterparties shall be arranged so as to comply with the requirement that the Firm deals with the Clearing House as principal, and that all sums deposited with the Clearing House by way of Cash Cover (including the Firm's Contribution to the Default Fund) shall be deposited unencumbered and by the Firm acting as sole principal and as legal and beneficial owner.
- 2.16. The Firm undertakes not to assign, charge or subject to any other form of security, whether purporting to rank in priority over, pari passu with or subsequent to the rights of the Clearing House, any Cash Cover provided to the Clearing House, including its entitlement to repayment of its Contribution to the Default Fund or any part of it. Any purported charge, assignment or encumbrance (whether by way of security or otherwise) of Cash Cover provided to the Clearing House shall be void. The Firm shall not otherwise encumber (or seek to encumber) any Cash Cover provided to the Clearing House.

3 Remuneration

- 3.1. The Clearing House shall be entitled to charge the Firm such fees, charges, levies and other dues, on such events, and calculated in accordance with such scales and methods, as are for the time prescribed by the Clearing House and, where relevant, for Exchange Contracts, after consultation with the relevant Exchange.

3.2. The Clearing House shall give the Firm not less than fourteen days' notice of any increase in such fees, charges, levies or other dues.

4 Facilities Provided by the Clearing House

4.1. Provision of Central Counterparty Services

(a) Details of all Contracts to be registered by the Clearing House in the name of the Firm and in respect of which central counterparty services are to be provided shall be provided to the Clearing House in accordance with the Rulebook and any other agreement entered into between the Clearing House and the Firm.

(b) Provided that a Contract meets the criteria for registration of that Contract in the name of the Firm and is a Designated Contract, and subject to the Rulebook, the Clearing House shall enter into a Registered Contract with the Firm in respect thereof. Each such Contract shall be registered in accordance with the Rulebook and the Clearing House shall perform its obligations in respect of all Registered Contracts in accordance with this Agreement and the Rulebook.

4.2. Maintenance of Records

The Clearing House agrees that for a period of ten years after termination of a Registered Contract it shall maintain records thereof. The Clearing House may make a reasonable charge to the Firm for the production of any such records more than three months after registration.

4.3. Information

The Clearing House will provide to the Firm such information at such times as is provided for by the Rulebook.

4.4. Accounts

The Clearing House agrees to establish and maintain one or more accounts for the Firm in accordance with the Rulebook. Accounts will be opened and kept by the Clearing House in such manner as will not prevent the Firm from complying with requirements of any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money and the rules of such regulatory organisation as the Firm may be subject to in respect of their cleared business.

5 Default

In the event of the Firm appearing to the Clearing House to be unable, or to be likely to become unable, to meet any obligation in respect of one or more Registered Contracts, or failing to observe any other financial or contractual obligation under the Rulebook, the Clearing House shall be entitled to take all or any of the steps set out in that regard in the Rulebook, including (but not limited to) the liquidation of all or any of the Registered Contracts.

6 Disclosure of Information

The Firm agrees that the Clearing House shall have authority to disclose any information of whatsoever nature concerning the Firm to such persons as is provided for by the Rulebook.

7 Partnership

If the Firm is a partnership, the liability of each partner in the Firm hereunder and under any Registered Contract shall be joint and several and, notwithstanding an event which would by operation of law give rise to the dissolution of the partnership, or entitle a partner to seek an order to dissolve the partnership, including, but not limited to, the event of the death, bankruptcy, winding-up or dissolution of any such partner, the respective obligations of the Clearing House and all other partners shall remain in full force and effect. If the Firm is a partnership, the Firm undertakes that if any new partner joins the Firm, the Firm shall procure that such new partner becomes jointly and severally liable alongside existing partners in respect of obligations of the Firm to the Clearing House outstanding at the date of such new partner's accession to the Firm.

8 Term

- 8.1. Subject to clause 8.3 either party (provided, in the case of the Firm, that the Clearing House has not issued a Default Notice in respect of the Firm) may terminate this Agreement by giving to the other party notice in writing, such notice to specify the effective date of termination ("the termination date") which shall be a business day not less than three months after the date of the notice, and this Agreement shall, subject to clause 8.2(b), terminate on the termination date. By the close of business on the termination date the Firm shall ensure that all Registered Contracts in the Firm's name have been closed-out or transferred so that there are no open Registered Contracts to which the firm is party at the end of the termination date.
- 8.2. If, under clause 8.1, the Firm has not closed out or transferred all Registered Contracts by the set termination date the Clearing House shall, at its sole discretion, be entitled to:
- (a) liquidate any such Registered Contracts in accordance with the Rulebook; and
 - (b) require that the Firm remains a member of the Clearing House until such time as there are no Registered Contracts in existence to which the Firm is a party and the effective date of termination of this Agreement shall be postponed until such time.
- 8.3. If the Firm is in breach of or in default under any term of this Agreement or the Rulebook, or if the Clearing House has issued a Default Notice in respect of the Firm, or if the Clearing House reasonably determines that the Firm no longer satisfies the Criteria for Admission as a Clearing Member, the Clearing House may in its absolute discretion terminate this Agreement in writing either summarily or by notice as follows.

Any termination by notice under this clause 8.3 may take effect (subject as follows) on the expiry of 30 days or such longer period as may be specified in the notice. A notice given by the Clearing House under this clause may at the Clearing House's discretion allow the Firm a specified period in which to remedy the breach or default or to satisfy the Criteria for Admission as the case may be, and may specify what is to be done to that end, and may provide that if the same is done to the satisfaction of the Clearing House within that period the termination of this Agreement shall not take effect; and if this Agreement has terminated after the Clearing House has allowed the Firm such a period for remedy or satisfaction, the Clearing House shall then notify the Firm of the fact of termination. The Clearing House may, if the Clearing House has issued a Default Notice in respect of the Firm immediately, and in any other case after the effective date of termination, take such other action as it deems expedient in its absolute discretion to protect itself or any other Clearing Member including, without limitation, the liquidation of Registered Contracts but without prejudice to its own rights in respect of such contracts.

- 8.4. Upon the termination of this Agreement for whatever reason the Firm shall unless otherwise agreed cease to be a Clearing Member.

9 Default Fund

- 9.1. In this clause the term "Excess Loss" bears the meaning ascribed to it in the Rulebook.
- 9.2. The Firm, as primary obligor and not surety, hereby indemnifies the Clearing House in respect of any Excess Loss, and undertakes to deposit cash with the Clearing House as collateral for its obligations in respect of such indemnity, in accordance in each case with the Default Rules.

- 9.3. The Firm shall, in accordance with the Default Rules, continue to be liable to indemnify the Clearing House in respect of any Excess Loss arising upon any default occurring before the effective date of termination of this Agreement. Subject thereto, the indemnity hereby given shall cease to have effect on the effective date of termination of this Agreement, unless a Default Notice is issued by the Clearing House in respect of the Firm, in which case the indemnity hereby given shall cease to have effect after the date three months after the date of issue of such Default Notice.
- 9.4. Save as provided expressly by the Default Rules, the Firm shall not be entitled to exercise any right of subrogation in respect of any sum applied in satisfaction of its obligations to the Clearing House under this clause 9.

10 Force Majeure

Neither party shall be liable for any failure in performance of this Agreement if such failure arises out of causes beyond its control. Such causes may include, but are not limited to, acts of God or the public enemy, acts of civil or military authority, fire, flood, labour dispute (but excluding strikes, lock-outs and labour disputes involving the employees of the party intending to rely on this clause or its sub-contractors), unavailability or restriction of computer or data processing facilities or of energy supplies, communications systems failure, failure of a common depository, clearing system or settlement system, riot or war.

11 The Rulebook

In the event of conflict between the Rulebook and the provisions of this Agreement the Rulebook shall prevail.

12 Notices

- 12.1. Any notice or communication to be made under or in connection with this Agreement shall be made in writing addressed to the party to whom such notice or communication is to be given; save that a notice or communication of an urgent nature shall be given or made orally and as soon as reasonably practicable thereafter confirmed in writing in conformity hereto. A notice may be delivered personally or sent by post to the address of that party stated in this Agreement, or to such other address as may have been notified by that party in accordance herewith.
- 12.2. Where a notice is sent by the Clearing House by post it shall be deemed delivered 24 hours after being deposited in the post first-class postage prepaid in an envelope addressed to the party to whom it is to be given in conformity to clause 12.1, or in the case of international mail, on the fourth business day thereafter. In all other cases notices shall be deemed delivered when actually received.

13 Law

- 13.1. This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any action or dispute which may arise herefrom. The Clearing House and the Firm each irrevocably submits to such jurisdiction and to waive any objection which it might otherwise have to such courts being a convenient and appropriate forum.
- 13.2. The Firm irrevocably waives, with respect to itself and its revenues and assets all immunity on the grounds of sovereignty or other similar grounds from suit, jurisdiction of any court, relief by way of injunction, order for specific performance or for recovery of property, attachment of its assets (whether before or after judgement) and execution or enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any proceedings in the courts of any jurisdiction and irrevocably agrees that it will not claim any such immunity in any proceedings.

14 Service of Process

Without prejudice to any other mode of service, and subject to its right to change its agent for the purposes of this Clause on 30 days' written notice to the Clearing House, the Firm (other than where it is incorporated in England and Wales or otherwise has an office in England and Wales) appoints, as its agent for service of process relating to any proceedings

before the courts of England and Wales in connection with the Firm the person in London as notified to the Clearing House in writing with the application for admission.

IN WITNESS whereof the parties hereto have caused this Agreement to be signed by their duly authorised representatives the day and year first before written.

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for **LCH LIMITED**

(Signature)

(Print Name and Title)

for **LCH LIMITED**

LCH LIMITED

Aldgate House 33 Aldgate High Street London EC3N 1EA

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**APPENDIX 2
THE DEED OF CHARGE**

f.

A company whether incorporated in England and Wales or an overseas company.

CHARGE BY CLEARING MEMBER

CHARGE SECURING OWN OBLIGATIONS

Date of Execution:
(to be completed by LCH Limited) _____

Date of Delivery:
(to be completed by LCH Limited) _____

Name and Address of Chargor: _____

Clearing Membership Agreement Date: _____

Chargor's Account: _____

THIS DEED made on the date above-stated **BETWEEN THE ABOVE-NAMED CHARGOR** ("the Chargor") and **LCH LIMITED** ("the Clearing House")

WITNESSES as follows :

1. **Interpretation**

- (1) Any reference herein to:
 - (a) any statute or to any provisions of any statute shall be construed as a reference to any statutory modification or re-enactment thereof and to any regulations or orders made thereunder and from time to time in force; and
 - (b) an agreement or instrument shall be to that agreement or instrument as amended from time to time.
- (2) A reference herein to collateral or cash being "provided" includes the act of (i) transferring, (ii) delivering, or (iii) crediting to an account or effecting, directly or indirectly, any of the foregoing.
- (3) The Clause headings shall not affect the construction hereof.

1A. **The Secured Obligations**

- (1) The Chargor shall pay to the Clearing House all monies (including settlement costs, interest and other charges) which now are or at any time hereafter may be or become due or owing by the Chargor to the Clearing House on the account identified above (or, but only if no account is identified, on all accounts of the Chargor with the Clearing House) and discharge all other liabilities of the Chargor (whether actual or contingent, now existing or hereafter incurred) to the Clearing House on the said account (or, if no account is identified, on all accounts of the Chargor with the Clearing House) in each case when due in accordance with the Clearing Membership Agreement and the Clearing House's Rulebook referred to therein (the Clearing Membership Agreement and the Clearing House's Rulebook as from time to time amended, renewed or supplemented being hereinafter referred to as "**the Agreement**") or, if the Agreement does not specify a time for such payment or discharge, promptly following demand by the Clearing House.
- (2) In the event that the Chargor fails to comply with sub-paragraph (1) above, the Chargor shall pay interest accruing from the date of demand on the monies so demanded and on the amount of all other liabilities at the rate provided for in the Agreement or, in the event of no such rate having been agreed, at a rate determined by the Clearing House (the rate so agreed or determined to apply

after as well as before any judgment), such interest to be paid upon demand of the Clearing House in accordance with its usual practices and to be compounded with principal and accrued interest in the event of its not being duly and punctually paid.

- (3) The monies, other liabilities, interest and other charges referred to in sub-paragraph (1) of this Clause, the interest referred to in sub-paragraph (2) of this Clause and all other monies and liabilities payable or to be discharged by the Chargor under or pursuant to any other provision of this Deed are hereinafter collectively referred to as "**the Secured Obligations**".

1B. **Holding of Collateral**

- (1) The Chargor shall, in accordance with the Procedures, transfer collateral to the Clearing House. Where such collateral takes the form of Securities, the Clearing House shall hold such Securities for the Chargor, subject to the terms of (and including the security constituted by) this Deed.
- (2) From time to time, in accordance with the Procedures and in the context of a transfer of one or more contracts and related cover from one member of the Clearing House to the Chargor at the request of a client of that other member or the Chargor, the Clearing House shall designate that certain Securities which it previously held for a third party are instead held by the Clearing House for the Chargor and form part of the collateral provided by the Chargor in satisfaction of its requirements under the Procedures. Upon such designation, the Clearing House shall hold such Securities for the Chargor, subject to the terms of this Deed.
- (3) The Clearing House will identify in its own books that any Securities referred to in sub-paragraphs (1) or (2) above are held by it for the account of and (as between the Chargor and the Clearing House) belong to the Chargor (subject to the terms of this Deed) and shall be recorded in the Securities Account (as defined below) which shall be subject to the security constituted by this Deed. Where the Clearing House holds any such Securities in an account (including an omnibus account) at any Clearance System or with any Custodian Bank with any other Securities, the Clearing House will take all actions within its control to ensure that such Securities are recorded in accounts with the Clearance System or Custodian Bank (as applicable) in which the Clearing House's own assets are not recorded.
- (4) All Distributions in the form of cash received by the Clearing House on any Securities which are held by the Clearing House for the account of the Chargor in accordance with sub-paragraphs (1) or (2) above and any cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a

title transfer basis) shall be received by the Clearing House for its own account and paid into one or more accounts in the Clearing House's name, with a corresponding and equal credit arising on and being recorded in the Cash Account (as defined below) whereupon such Distributions and other cash so provided to the Clearing House as recorded in the Cash Account shall be held by the Clearing House for the account of the Chargor and shall be subject to the security constituted by this Deed and designated as such in the Clearing House's books and records.

- (5) The Clearing House may hold any Securities pursuant to this Clause 1B (*Holding of Collateral*) in one or more omnibus accounts with a Custodian Bank or Clearance System, as the case may be, together with other Securities which it holds for other third parties which have granted a charge over such assets in favour of the Clearing House in a form substantially the same as this Deed but no other Securities. The Clearing House shall ensure that any such omnibus account with a Clearance System or Custodian Bank is clearly identified as an account relating to Securities held by the Clearing House on behalf of third parties.
- (6) The Clearing House undertakes to the Chargor that it will at all times ensure that, pursuant to the terms governing any account with any Clearance System or Custodian Bank in which any Securities are held for the Chargor, any claim or security interest which that Clearance System or Custodian Bank may have against or over such Securities shall be limited to any unpaid fees owed by the Clearing House to such Clearance System or Custodian Bank in respect of such account.

2. **Charge**

- (1) The Chargor acting in due capacity (as defined in sub-paragraph (3) below) (and to the intent that the security so constituted shall be a security in favour of the Clearing House extending to all beneficial interests in the assets hereby charged and to any proceeds of sale or other realisation thereof or of any part thereof including any redemption monies paid or payable in respect thereof) hereby separately assigns, charges and pledges by way of first fixed security and by way of continuing security to the Clearing House, until discharged by the Clearing House in accordance with this Deed, for the payment to the Clearing House and the discharge of all the Secured Obligations, the Charged Property.
- (2) It shall be implied in respect of sub-paragraph (1) above that the Chargor is charging the Charged Property free from all charges and encumbrances (whether monetary or not) and from all other rights exercisable by third parties (including liabilities imposed and rights conferred by or under any enactment) except for any charge or lien routinely arising in favour of a Custodian Bank or Clearance System and applying to assets held by the Clearing House with that Custodian Bank or Clearance System and any third party's beneficial interest in

the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property.

(3) In this Deed:

"acting in due capacity" in relation to the Chargor means that each of the dispositions of property hereby effected by the Chargor is made with full title guarantee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994 except as expressly permitted or contemplated under this Deed;

"Cash Account" means any account maintained by the Clearing House on its books for the account of the Chargor in which an amount equal to any cash Distributions or cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis) are recorded;

"Charged Property" means at any time all present and future rights, title and interest of the Chargor in and to:

- (i) all Securities from time to time recorded in and represented by the Securities Account and held by the Clearing House for the account of the Chargor in accordance with Clause 1B;
- (ii) all Distributions including without limitation Distributions in the form of cash;
- (iii) all cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis);
- (iv) the Securities Account; and
- (v) the Cash Account;

"Chargor Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Chargor maintains any cash account or securities account;

"Clearance System" shall be construed as a reference to any system from time to time used or constituted for the clearing, collective safe custody or central deposit of securities, and any depository for any of the foregoing;

"Clearing Membership Agreement" means in relation to the Chargor the Clearing Membership Agreement between the Chargor and the Clearing House

having the date specified on the first page of this Deed, as such agreement may be amended and or replaced from time to time;

"Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Clearing House maintains any cash account or securities account;

"Default Notice" has the meaning given to it in the Default Rules;

"Default Rules" has the meaning given to such term in the Clearing Membership Agreement;

"Deed" means this charge made between the Chargor and the Clearing House on the date above-stated, as the same may be amended, supplemented or restated from time to time;

"Distributions" means all rights, benefits and proceeds including, without limitation:

- (a) any dividends or interest, annual payments or other distributions; and
- (b) any proceeds of redemption, substitution, exchange, bonus or preference, under option rights or otherwise,

in each case attaching to or arising from or in respect of any Securities forming part of the Charged Property;

"Procedures" means the one or more documents containing the working practices and administrative requirements of the Clearing House for the purposes of implementing the Clearing House's Rulebook and Default Rules from time to time in force, or procedures for application for and regulation of clearing membership of the Clearing House;

"Receiver" means a receiver, receiver and manager or an administrative receiver as the Clearing House may specify at any time in the relevant appointment made under this Deed, which term will include any appointee made under a joint and/or several appointment by the Clearing House;

"Securities" shall be construed as a reference to bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments, including Distributions in the form of Securities (and without limitation, shall include any of the foregoing not constituted, evidenced or represented by a certificate or other document but by any entry in the books or other records of the issuer, a trustee or other fiduciary thereof, or a Clearance System); and

"Securities Account" means any account maintained by the Clearing House

on its books for the account of the Chargor in which Securities are recorded.

3. **Release**

- (1) Upon the Clearing House being satisfied that the Secured Obligations have been irrevocably paid or discharged in full, the Clearing House shall, at the request and cost of the Chargor, release or discharge (as appropriate) all the Charged Property from the security created by this Deed provided that, without prejudice to any remedy which the Chargor may have if the Clearing House fails to comply with its obligations under this Clause, such actions shall be without recourse to, and without any representations or warranties by, the Clearing House or any of its nominees
- (2) The Chargor may, in the circumstances specified in sections 1.1.2 and 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), request that part or all of the Charged Property, or the proceeds thereof, be returned or repaid to, or to the order of, the Chargor. Where, pursuant to such a request, the Clearing House returns or repays any of the Charged Property, or the proceeds thereof, pursuant to sections 1.1.2 or 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), such Charged Property shall be released or discharged (as appropriate) from the security interest created over such Charged Property and the proceeds thereof pursuant to Clause 2(1) with effect from the time such Charged Property, or the proceeds thereof, are transferred by the Clearing House to, or to the order of, the Chargor in accordance with the Procedures.

4. **Income**

Prior to a Default (as defined in Clause 11(1) below), the Clearing House consents to the payment or transfer of any and all Distributions received by the Clearing House in respect of any Charged Property to the Chargor (and upon such payment or transfer, the Distributions shall be released from the security constituted by this Deed) provided that, in the Clearing House's reasonable view, the Clearing House would still have sufficient security, following such payment or transfer, to secure the Secured Obligations.

5. **Voting rights, calls and other obligations in respect of the Securities**

- (1) The Chargor must pay all calls and other payments due and payable in respect of any Securities and must comply with all requests (including requests for information by any listing or other authority), obligations and conditions relating to the Securities. In any case of default by the Chargor in this respect the Clearing House may if it thinks fit make any such payments on behalf of the Chargor (but shall be under no obligation to do so) in which event any sums so paid shall be reimbursed by the Chargor on demand by the Clearing House and until reimbursed shall bear interest in accordance with Clause 1A(2) above.

- (2) The Chargor shall not exercise or be entitled to exercise any voting rights, powers and other rights in respect of the Securities which are held by the Clearing House for the account of the Chargor pursuant to this Deed.

6. **Reinstatement**

If any discharge, release or arrangement is made by the Clearing House in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation, administration or otherwise, without limitation, then the liability of the Chargor and the security created by this Deed will continue or be reinstated as if the discharge, release or arrangement had not occurred.

7. **Warranties and Undertakings**

The Chargor hereby represents and warrants to the Clearing House and undertakes on an ongoing basis that:

- (i) the Chargor is duly incorporated or organised and validly existing under the laws of its jurisdiction of organisation or incorporation;
- (ii) the Chargor and each of its subsidiaries has the power to own its assets and carry on its business as it is being conducted;
- (iii) subject to any legal or equitable interest which any common depository, Clearance System or Custodian Bank may have in any Securities and to any third party's beneficial interest in the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property, the Chargor is and will at all times during the subsistence of the security and security interest hereby constituted, be the sole and lawful owner of, and be entitled to the entire beneficial interest in, the Charged Property free from mortgages or charges (other than as a result of the security created under this Deed, any charge or lien arising in favour of any Clearance System or Custodian Bank and any charge in favour of the Chargor) or other encumbrances and no other person (save as aforesaid) has any rights or interests therein;
- (iv) save as contemplated by Clause 3(2), the Chargor has not sold or agreed to sell or otherwise disposed of or agreed to dispose of, and will not at any time during the subsistence of the security hereby constituted sell or agree to sell or otherwise dispose of or agree to dispose of, the benefit of all or any rights, titles and interest in and to the Charged Property or any part thereof;
- (v) the Chargor has and will at all material times have the necessary power to enable the Chargor to enter into and perform the obligations expressed to be assumed by the Chargor under this Deed;

- (vi) this Deed constitutes legal, valid, binding and enforceable obligations of the Chargor and is a security over, and confers a first security interest in, the Charged Property and every part thereof, effective in accordance with its terms (subject to applicable bankruptcy, resolution, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law));
- (vii) all necessary authorisations and filings to enable or entitle the Chargor to enter into this Deed have been obtained and are in full force and effect and will remain in such force and effect at all times during the subsistence of the security hereby constituted;
- (viii) the execution of this Deed does not violate any agreement to which the Chargor is a party or breach any obligation to which the Chargor is subject and does not conflict with any law or regulation applicable to it (if such conflict would adversely affect the Clearing House's rights under this Deed) or its constitutional documents;
- (ix) it has been and shall at all times remain expressly agreed between the Chargor and each of the Chargor's clients or other persons who are for the time being (or would be, but for the provisions of this Deed) entitled to the entire beneficial interest in all or any parts of the Charged Property that, in relation to any assets from time to time held by the Chargor or delivered to the Chargor for the account of any such client or other person which at any time form part of the Charged Property, the Chargor may, free of any interest of any such client or other person therein which is adverse to the Clearing House, charge or otherwise constitute security over such assets in favour of the Clearing House on such terms as the Clearing House may from time to time prescribe and, in particular but without limitation, on terms that the Clearing House may enforce and retain such charge or other security in satisfaction of or pending discharge of all or any obligations of the Chargor to the Clearing House;
- (x) in no case is the Chargor or the Chargor's client or other person who is for the time being the lawful owner of or person entitled to the entire beneficial interest in any part of the Charged Property, nor will the Chargor, client or other such person be, in breach of any trust or other fiduciary duty in placing or authorising the placing of any Charged Property (or rights, benefits or proceeds forming part of the Charged Property) under this Deed;
- (xi) no corporate actions, legal proceedings or other procedure or steps have been taken in relation to, or notice given in respect of, a composition, compromise, assignment or arrangement with any creditor of the Chargor or in relation to the suspension of payments or moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of, or the appointment of an administrator

to, the Chargor (other than any which will be dismissed, discharged, stayed or restrained within 15 days of their instigation) and no such step is intended by the Chargor (save for the purposes of any solvent re-organisation or reconstruction which has previously been approved by the Clearing House); and

- (xii) the Chargor undertakes to abide by the Procedures as in effect from time to time.

8. **Negative Pledge**

- (1) The Chargor hereby undertakes with the Clearing House that at no time during the subsistence of the security hereby constituted will the Chargor, otherwise than:

- (i) in favour of the Clearing House; or

- (iii) with the prior written consent of the Clearing House and in accordance with and subject to any conditions which the Clearing House may attach to such consent,

create, grant, extend or, except in relation to any charge or lien in favour of any Clearance System or Custodian Bank, permit to subsist any mortgage or other fixed security or any floating charge or other security interest on, over or in the Charged Property or any part thereof. The foregoing prohibition shall apply not only to mortgages, other fixed securities, floating charges and security interests which rank or purport to rank in point of security in priority to the security hereby constituted but also to any mortgages, securities, floating charges or security interests which rank or purport to rank *pari passu* therewith or thereafter.

- (2) Sub-paragraph (1) above does not, during the subsistence of the security hereby constituted, operate to prevent the Chargor from continuing to hold a security interest in the Charged Property previously created in favour of the Chargor, *provided always* that the interest in favour of the Chargor shall rank after the security created by this Deed.

9. **Preservation of Charged Property**

- (1) Until the security hereby constituted shall have been discharged, the Chargor shall ensure, unless required by law or regulation to restrict any transfer (in which case the Chargor shall immediately notify the Clearing House of such restrictions), that all of the Charged Property is and at all times remains free from any restriction on transfer.

- (2) The Chargor shall not, to the extent that the same is within the control of the Chargor, permit or agree to any variation of the rights attaching to or conferred

by the Charged Property or any part thereof without the prior consent of the Clearing House in writing.

- (3) The Clearing House shall not have any right of use or re-hypothecation right, in respect of the Charged Property, whether under Regulation 16 of the Financial Collateral Arrangements (No.2) Regulations 2003, the New York Uniform Commercial Code or any applicable Federal law of the United States or otherwise, *provided that* this provision shall not affect the powers of the Clearing House under Clauses 12 (*Power of Sale*) and 13 (*Right of Appropriation*) or any other rights to enforce the security interest herein created against the Charged Property.

10. **Further Assurance**

- (1) In the case of any part of the Charged Property situated in the United States of America, it is acknowledged and agreed by the Chargor that this Deed shall also constitute a security agreement for the purpose of creating a security interest in the Charged Property under applicable provisions of the Uniform Commercial Code or other applicable laws or regulations of the State of New York. For purposes hereof, "**Charged Property situated in the United States of America**" means: (i) in the case of any securities account and/or securities entitlements or other rights or assets or investment property credited to a securities account as financial assets, a securities account maintained with a securities intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; (ii) in the case of any deposit account and/or any amounts credited to a deposit account, a deposit account maintained with a bank whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; and (iii) in the case of any commodity account or any commodity contract credited to a commodity account such commodity account is maintained with a commodity intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC . In furtherance of the foregoing and without limiting the generality of Clause 2 (*Charge*) above, in order to secure the payment, performance and observance of the Secured Obligations, the Chargor hereby grants to the Clearing House a continuing security interest in, right of set-off against, and an assignment to the Clearing House of all of the Charged Property situated in the United States of America and all rights thereto, in each case whether now owned or existing or hereafter acquired or arising and which shall include, without limitation, all of the Chargor's interests in any deposit accounts, investment property and securities entitlements (as such terms are defined in the Uniform Commercial Code of the State of New York; the "**NY UCC**"), together with all proceeds (as defined in the NY UCC) and products of all or any of the property described above.
- (2) The Chargor undertakes promptly to execute and do (at the cost and expense of the Chargor) all such deeds, documents, acts and things as may be

necessary or desirable in order for the Clearing House to enjoy a fully perfected security interest in the whole of the Charged Property, including without limitation the deposit of the Charged Property with a Clearance System or Custodian Bank (as applicable) and the perfection of pledges or transfers under such laws, of whatever nation or territory, as may govern the pledging or transfer of the Charged Property or part thereof or other mode of perfection of this Deed and the security interest expressed to be created hereby. Without limiting the foregoing, the Chargor agrees with and covenants to the Clearing House that with respect to all Charged Property situated in the United States of America consisting of investment property, money, instruments, securities, securities entitlements, other financial assets and commodity contracts (as defined in the NY UCC), such Charged Property shall be held, maintained or deposited, as applicable, in a securities account or commodity account (in the case of commodity contracts) (such that, in each case, the Clearing House shall become the entitlement holder thereof, as defined in the NY UCC) or a deposit account (as defined in the NY UCC), in the case of Charged Property that may be credited to a Deposit Account, in the name of the Clearing House, or, if permitted by the Procedures, may be maintained and held in the Chargor's name at a Chargor Custodian Bank (whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC) which shall have executed and delivered to the Clearing House an agreement whereby such Chargor Custodian Bank agrees that it will comply with entitlement orders of the Clearing House without further consent by the Chargor. Notwithstanding anything to the contrary herein, in respect of any Charged Property situated in the United States of America, the Clearing House shall comply with all non-waivable requirements of the NY UCC with respect to how the secured party must deal with collateral under its control or in its possession.

11. **Enforcement of Security**

(1) On and at any time:

- (i) if a Default Notice is served on the Chargor in accordance with Rule 3 of the Default Rules; or
- (ii) if the Chargor requests the Clearing House to exercise any of its powers under this Deed,

(each such event a "**Default**"), the security created by or pursuant to this Deed is immediately enforceable and the Clearing House may, without notice to the Chargor or prior authorisation from any court, in its absolute discretion:

- (a) enforce all or any part of the security created by this Deed (at the times, in the manner and on the terms it thinks fit) and take possession of (provided that the Clearing House will not be liable, by reason of entering into possession of any Charged Property, to account as

mortgagee in possession or for any loss on realisation or for any default or omission for which a mortgagee in possession may be liable unless such loss, default or omission is caused by the Clearing House's gross negligence or wilful misconduct) and hold, sell, or otherwise dispose of all or any part of the Charged Property (at the time, in the manner and on the terms it thinks fit); and

- (b) whether or not it has appointed a Receiver, exercise all or any of the powers, authorisations and discretions conferred by the Law of Property Act 1925 (as varied or extended by this Deed) on chargees and by this Deed on any Receiver or otherwise conferred by law on chargees or Receivers.
- (2) The power of sale and other powers conferred by section 101 of the Law of Property Act 1925 on mortgagees, as varied and extended by this Deed, shall arise (and the Secured Obligations shall be deemed due and payable for that purpose) on the date of this Deed and shall be exercisable in accordance with Clause 11(1).

12. **Power of Sale**

- (1) If a Default has occurred, the Clearing House shall have and be entitled without prior notice to the Chargor to exercise the power to sell or otherwise dispose of, for any consideration (whether payable immediately or by instalments) as the Clearing House shall think fit, the whole or any part of the Charged Property and may (without prejudice to any right which it may have under any other provision hereof) treat such part of the Charged Property as consists of money as if it were the proceeds of such a sale or other disposal. The Clearing House shall be entitled to apply the proceeds of such sale or other disposal in paying the costs of such sale or other disposal and (subject to the rights or claims of any person entitled in priority to the Clearing House) in or towards the discharge of the Secured Obligations, the balance (if any) to be paid to the Chargor or other persons entitled thereto. Such power of sale or other disposal shall operate as a variation and extension of the statutory power of sale under section 101 of the Law of Property Act 1925.
- (2) The restriction contained in section 103 of the Law of Property Act 1925 on the exercise of the statutory power of sale shall not apply to any exercise by the Clearing House of its power of sale or other disposal. In favour of a purchaser a certificate in writing by an officer or agent of the Clearing House that either or both of such powers has arisen and is exercisable shall be conclusive evidence of that fact.
- (3) Upon any such default or failure as aforesaid the Clearing House shall also have with respect to any part of the Charged Property situated in the United States of America all of the rights and remedies of a secured party under the NY UCC or any other applicable law of the State of New York and all rights provided

herein or in any other applicable security, loan or other agreement, all of which rights and remedies shall to the full extent permitted by law be cumulative.

13. **Right of Appropriation**

(1) To the extent that any of the Charged Property constitutes "financial collateral" and this Deed and the obligations of the Chargor hereunder constitute a "security financial collateral arrangement" (in each case as defined in, and for the purposes of, the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003 No. 3226), as amended, (the "**Regulations**") the Clearing House shall have the right (at any time following the occurrence of a Default) to appropriate all or any part of such financial collateral in or towards discharge of the Secured Obligations and may exercise such right to appropriate upon giving written notice to the Chargor. For this purpose, the parties agree that the value of such financial collateral so appropriated shall be determined as follows:

- (a) if the financial collateral is listed or traded on a recognised exchange or by reference to a public index, its value will be taken as the value at which it could have been sold on the exchange or which is given in the public index on the date of appropriation; and
- (b) in any other case, the value of the financial collateral will be such amount as the Clearing House reasonably determines having taken into account advice obtained by it from an independent investment or accountancy firm of national standing selected by it.

(2) The parties agree that the method of valuation provided for in this Deed shall constitute a commercially reasonable method of valuation for the purposes of the Regulations.

14. **Immediate Recourse**

The Chargor waives any right it may have of first requiring the Clearing House to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Deed. This waiver applies irrespective of any law or any provision of this Deed to the contrary.

15. **Consolidation of Securities**

Subsection (1) of section 93 of the Law of Property Act 1925 shall not apply to this Deed.

16. **Effectiveness of Security**

(1) This Deed shall be in addition to and shall be independent of every other security which the Clearing House may at any time hold for any of the Secured Obligations. No prior security held by the Clearing House over the whole or any

part of the Charged Property shall merge into the security hereby constituted.

- (2) This Deed shall remain in full force and effect as a continuing security unless and until the Clearing House discharges it.
- (3) Nothing contained in this Deed is intended to, or shall operate so as to, prejudice or affect any bill, note, guarantee, mortgage, pledge, charge or other security of any kind whatsoever which the Clearing House may have for the Secured Obligations of any of them or any right, remedy or privilege of the Clearing House thereunder.

17. **Avoidance of Payments**

If the Clearing House considers that any payment or discharge of the Secured Obligations is capable of being avoided or reduced by virtue of any bankruptcy, insolvency, liquidation or similar laws then such payment or discharge shall not be considered to have been made for the purposes of determining whether the Secured Obligations have been irrevocably paid or discharged in full.

18. **Power of Attorney**

The Chargor hereby irrevocably appoints the Clearing House to be the Chargor's attorney and in the Chargor's name and on the Chargor's behalf and as the act and deed of the Chargor to sign, seal, execute, deliver, perfect and do all deeds, instruments, mortgages, acts and things as may be, or as the Clearing House may consider to be, requisite for carrying out any obligation imposed on the Chargor under Clause 10 (*Further Assurance*) above, or for enabling the Clearing House to exercise its power of sale or other disposal referred to in Clause 12 (*Power of Sale*) above or for carrying out any such sale or other disposal made under such power into effect, or exercising any of the rights and powers referred to in Clause 9 (*Preservation of Charged Property*) above, including without limitation the appointment of any person as a proxy of the Chargor. The Chargor hereby undertakes to ratify and confirm all things done and documents executed by the Clearing House in the exercise of the power of attorney conferred by this Clause.

19. **Receivers and Administrators**

- (1) At any time after having been requested to do so by the Chargor or after this Deed becomes enforceable in accordance with Clause 11 (*Enforcement of Security*) above the Clearing House may by deed or otherwise (acting through an authorised officer of the Clearing House), without prior notice to the Chargor:
 - (a) appoint one or more persons to be a Receiver of the whole or any part of the Charged Property;
 - (b) appoint one or more Receivers of separate parts of the Charged

Property respectively;

- (c) remove (so far as it is lawfully able) any Receiver so appointed; and
 - (d) appoint another person(s) as an additional or replacement Receiver(s).
- (2) Each person appointed to be a Receiver pursuant to sub-paragraph (1) above will be:
- (a) entitled to act individually or together with any other person appointed or substituted as Receiver;
 - (b) for all purposes deemed to be the agent of the Chargor which shall be solely responsible for his acts, defaults and liabilities and for the payment of his remuneration and no Receiver shall at any time act as agent for the Clearing House; and
 - (c) entitled to remuneration for his services at a rate to be fixed by the Clearing House from time to time (without being limited to the maximum rate specified by law including the Law of Property Act 1925).
- (3) The powers of appointment of a Receiver shall be in addition to all statutory and other powers of appointment of the Clearing House under the Law of Property Act 1925 (as extended by this Deed) or otherwise and such powers shall remain exercisable from time to time by the Clearing House in respect of any part of the Charged Property.
- (4) Every Receiver shall (subject to any restrictions in the instrument appointing him but notwithstanding any winding-up or dissolution of the Chargor) have and be entitled to exercise, in relation to the Charged Property in respect of which he was appointed, and as varied and extended by the provisions of this Deed (in the name of or on behalf of the Chargor or in his own name and, in each case, at the cost of the Chargor):
- (a) all the powers conferred by the Law of Property Act 1925 on mortgagors and on mortgagees in possession and on receivers appointed under that Act;
 - (b) all the powers of an administrative receiver set out in Schedule 1 to the Insolvency Act 1986 (whether or not the Receiver is an administrative receiver);
 - (c) all the powers and rights of an absolute owner and power to do or omit to do anything which the Chargor itself could do or omit to do;
 - (d) the power to delegate (either generally or specifically) the powers,

authorities and discretions conferred on it by this Deed (including the power of attorney) on such terms and conditions as it shall see fit. Such delegation shall not preclude either the subsequent exercise or any subsequent delegation or any revocation of such power, authority or discretion by the Receiver itself; and

- (e) the power to do all things (including bringing or defending proceedings in the name or on behalf of the Chargor) which seem to the Receiver to be incidental or conducive to:
 - (i) any of the functions, powers, authorities or discretions conferred on or vested in him;
 - (ii) the exercise of any rights, powers and remedies of the Clearing House provided by or pursuant to this Deed or by law (including realisation of all or any part of the Charged Property); or
 - (iii) bringing to his hands any assets of the Chargor forming part of, or which when got in would be, Charged Property.

- (5) The receipt of the Clearing House or any Receiver shall be a conclusive discharge to a purchaser and, in making any sale or disposal of any of the Charged Property or making any acquisition, the Clearing House or any Receiver may do so for such consideration, in such manner and on such terms as it thinks fit.
- (6) No purchaser or other person dealing with the Clearing House or any Receiver shall be bound to inquire whether the right of the Clearing House or such Receiver to exercise any of its powers has arisen or become exercisable or be concerned with any propriety or regularity on the part of the Clearing House or such Receiver in such dealings.
- (7) Any liberty or power which may be exercised or any determination which may be made under this Deed by the Clearing House or any Receiver may be exercised or made in its absolute and unfettered discretion without any obligation to give reasons.

20. **No liability**

Neither the Clearing House nor any receiver appointed pursuant to this Deed shall be liable by reason of: (a) taking any action permitted by this Deed; or (b) any neglect or default in connection with the Charged Property; or (c) the taking possession or realisation of all or any part of the Charged Property, except in the case of gross negligence or wilful default upon its part.

21. **Remedies, Time or Indulgence**

- (1) The rights, powers and remedies provided by this Deed are cumulative and are not, nor are they to be construed as, exclusive of any right of set-off or other rights, powers and remedies provided by law.
- (2) The obligations of the Chargor under this Deed shall not be affected by any act, omission or circumstance which, but for this provision, might operate to release or otherwise exonerate the Chargor from its obligations under this Deed or affect such obligations including (without limitation and whether or not known to the Chargor or the Clearing House):
 - (a) any unenforceability, illegality, invalidity or non-provability of any obligation of the Chargor or any other person; or
 - (b) any incapacity or lack of power, authority or legal personality or dissolution or change in the members or status of the Chargor or any other person.
- (3) No failure on the part of the Clearing House to exercise, or delay on its part in exercising, any of the rights, powers and remedies provided by this Deed or by law (collectively "**the Clearing House's Rights**") shall operate as a waiver thereof, nor shall any single or partial waiver of any of the Clearing House's Rights preclude any further or other exercise of that or any other of the Clearing House's Rights.
- (4) The Clearing House may in its discretion grant time or other indulgence or make any other arrangement, variation or release with any person not party hereto (irrespective of whether such person is liable with the Chargor) in respect of the Secured Obligations or in any way affecting or concerning them or any of them or in respect of any security for the Secured Obligations or any of them, without in any such case prejudicing, affecting or impairing the security hereby constituted, or any of the Clearing House's Rights or the exercise of the same, or any indebtedness or other liability of the Chargor to the Clearing House.

22. **Costs, Charges and Expenses**

All costs, charges and expenses of the Clearing House incurred in the exercise of any of the Clearing House's Rights, or in connection with the execution of or otherwise in relation to this Deed or in connection with the perfection or enforcement of all security hereby constituted shall be reimbursed to the Clearing House by the Chargor on demand on a full indemnity basis together with interest from the date of the same having been incurred to the date of payment at the rate referred to in Clause 1A(2) above.

23. **Accounts**

All monies received, recovered or realised by the Clearing House under this Deed (including the proceeds of any conversion of currency) may in the discretion of the Clearing House be credited to any suspense or impersonal account and may be held in such account for so long as the Clearing House shall think fit (with interest accruing thereon at such rate, if any, as the Clearing House may deem fit) pending their application from time to time (as the Clearing House shall be entitled to do in its discretion) in or towards the discharge of any of the Secured Obligations.

24. **Currency**

- (1) For the purpose of or pending the discharge of any of the Secured Obligations the Clearing House may convert any monies received, recovered or realised or subject to application by the Clearing House under this Deed (including the proceeds of any previous conversion under this Clause) from their existing currency of denomination into such other currency of denomination as the Clearing House may think fit, and any such conversion shall be effected at such commercial spot selling rate of exchange then prevailing for such other currency against the existing currency as the Clearing House may in its discretion determine.
- (2) References herein to any currency extend to any funds of that currency and for the avoidance of doubt funds of one currency may be converted into different funds of the same currency.

25. **Notices**

- (1) Any notice or demand (including any Default Notice) requiring to be served on the Chargor by the Clearing House hereunder may be served on any of the officers of the Chargor personally, or by letter addressed to the Chargor or to any of its officers and left at its registered office or any one of its principal places of business, or by posting the same by letter addressed in any such manner as aforesaid to such registered office or any such principal place of business.
- (2) Any notice or demand (including any Default Notice) sent by post in accordance with sub-paragraph (1) of this Clause shall be deemed to have been served on the Chargor at 10 a.m. Greenwich Mean Time on the business day next following the date of posting. In proving such service by post it shall be sufficient to show that the letter containing the notice or demand (including any Default Notice) was properly addressed and posted and such proof of service shall be effective notwithstanding that the letter was in fact not delivered or was returned undelivered.

26. **Provisions Severable**

Each of the provisions contained in this Deed shall be severable and distinct from one another and if at any time any one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of each of the remaining provisions of this Deed shall not in any way be affected, prejudiced or impaired thereby.

27. **Clearing House's Discretions**

Any liberty or power which may be exercised or any determination which may be made hereunder by the Clearing House may (save where stated to the contrary) be exercised or made in the absolute and unfettered discretion of the Clearing House which shall not be under any obligation to give reasons thereof.

28. **Third Party Rights**

A person who is not a party to this Deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Deed.

29. **Law and Jurisdiction**

This Deed, and any non-contractual obligations arising herefrom, shall be governed by and construed in accordance with English law, and the Chargor hereby irrevocably submits to the non-exclusive jurisdiction of the English courts; provided that with respect to issues arising as a result of the provisions of Clause 10(1) above or the use of this Deed as a security agreement as provided therein, this Deed shall be governed by and construed in accordance with applicable laws of the State of New York.

The Chargor

Executed as a **DEED** by

The Chargor

[CHARGOR NAME]

.....
Signature of Director

.....
Name of Director

.....
Date

.....
Signature of Director/Secretary

.....
Name of Director/Secretary

.....
Date

The Clearing House

LCH Limited

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

Dated _____

and

LCH LIMITED

**CHARGE BY CLEARING MEMBER
SECURING OWN OBLIGATIONS**

**APPENDIX 3
THE SECURITY DEED**

SECURITY DEED

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THIS SECURITY DEED is dated [*Insert Date of Execution*] and made by way of deed poll by [CLEARING MEMBER] in its capacity as chargor (the "**Chargor**").

WHEREAS:

- (A) In order to facilitate the clearing of certain transactions with LCH.Clearnet Limited (the "**Clearing House**"), the Chargor has entered into one or more agreements with one or more of its clients and may enter into further agreements with such clients and/or one or more agreements with further clients, in each case that govern the terms upon which the Chargor will act as Clearing Member in respect of Client Clearing Business of that client (each such agreement, together with any related collateral, security or margining agreement, a "**Clearing Agreement**").
- (B) The Chargor is executing this Security Deed in order to maximise the ability to move positions corresponding to transactions under the Clearing Agreements to Backup Clearing Members upon the occurrence of an Enforcement Event or to provide for certain receivables to be delivered from the Clearing House to the Clients directly.

It is agreed as follows:

1. **DEFINITIONS AND INTERPRETATION**

1.1 **Definitions:**

Capitalised terms used but not defined in this Security Deed including in the Recitals shall have the meaning given to them in the LCH Rules. In addition, the following expressions shall have the following meanings:

"**Associated LCH Transactions**" means, in respect of a Client, the Contracts entered into by the Chargor with the Clearing House on behalf of such Client.

"**Authorisation Date**" means the date falling 6 months after 25 October 2013, unless the Clearing House notifies the Chargor that the Authorisation Date will be a date (the "**New Authorisation Date**") other than the then current Authorisation Date, in which case the Authorisation Date will be such New Authorisation Date. For the avoidance of doubt multiple notifications may be made and the New Authorisation Date specified in the last such notification will be the Authorisation Date.

"**Charge**" means the security interest created or expressed to be created by this Security Deed.

"**Charged Assets**" means the assets subject, or expressed to be subject, to the Charge or any part of those assets.

"**Clearing Agreement**" has the meaning ascribed to such term in Recital (A) to this Security Deed.

"**Clearing Default**" means the Chargor becoming a defaulter for the purposes of Rule 4 of the LCH Default Rules.

"**Clearing House**" has the meaning ascribed to such term in Recital (A) to this Security Deed.

"**Client**" means each of the clients listed in Schedule 2 to this Security Deed being, in each case, a Clearing Client who is party to a Clearing Agreement. For the avoidance of doubt, an individual Clearing Client may be party to more than one Clearing Agreement with the Chargor (due to such Clearing Client (i) receiving Client Clearing Services from the Chargor in respect or more than one Service and/or (ii) being a Clearing Client in respect of whom the Chargor has opened more than one Client Account relating to a Relevant Client Clearing Business), and in each such capacity the relevant Clearing Client will constitute a separate "Client" for the purposes of this Security Deed and will be separately identified (including with details of the relevant Service and details of the LCH identifier for the relevant Client Account) in Schedule 2 to this Security Deed.

"**Effective Date**" means the Authorisation Date or the date of this Security Deed, whichever is later.

"**Enforcement Event**" means the occurrence of a Clearing Default in relation to the Chargor in accordance with the LCH Rules.

"**Insolvency Act**" means the Insolvency Act 1986.

"**LCH Rules**" means the rules, regulations, procedures or agreements (including the LCH General Regulations and the LCH Default Rules), applicable to the Chargor and/or Associated LCH Transactions, in each case as published by the Clearing House and as the same may be amended from time to time.

"**Liabilities**" means all present and future obligations, moneys, debts and liabilities due, owing or incurred by the Chargor to a Client under or in connection with the Transaction Documents.

"**LPA**" means the Law of Property Act 1925.

"**Relevant Account Property**" means, in respect of a Client, the Account Balance relating to such Client, as determined by the Clearing House in accordance with the LCH Rules following an Enforcement Event.

"**Relevant Clearing Agreement**" means, in relation to a Client, the Clearing Agreement to which such Client is a party.

"**Relevant Client Clearing Return**" means, in respect of a Client, the Client Clearing Entitlement relating to such Client, as determined by the Clearing House in accordance with the LCH Rules following an Enforcement Event.

"**Security**" means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.

"Transaction Documents" means this Security Deed and the Relevant Clearing Agreement.

1.2 **Construction:**

1.2.1 Unless a contrary indication appears, any reference in this Security Deed to:

- (a) **"assets"** includes present and future properties, revenues and rights of every description;
- (b) the **"Chargor"**, a **"Client"** or any **"party"** shall be construed so as to include its successors in title and permitted transferees;
- (c) an agreement, confirmation or instrument is to a reference to that agreement or instrument as amended, novated, supplemented, extended, restated (however fundamentally and whether or not more onerous) or replaced;
- (d) a **"person"** includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
- (e) a **"regulation"** includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
- (f) the singular includes the plural and vice versa; and
- (g) a provision of law is a reference to that provision as amended or re-enacted.

1.2.2 Clause and Schedule headings are for ease of reference only.

2. **UNDERTAKING TO PAY**

The Chargor undertakes to pay each of its Liabilities when due in accordance with its terms.

3. **SECURITY**

With effect from the Effective Date, the Chargor, with full title guarantee and as security for the payment of all Liabilities, charges absolutely in favour of each Client all its present and future right, title and interest in and to the Relevant Client Clearing Return and the Relevant Account Property.

4. MULTIPLE DEEDS

This Security Deed shall be treated as if it were a separate deed in favour of each of the Clients listed in Schedule 2 to this Security Deed, as if the Chargor had executed a separate deed in favour of each such Client so that this Security Deed confers rights severally in favour of each Client.

5. RESTRICTIONS AND FURTHER ASSURANCE

5.1 Security

The Chargor agrees that it shall not create or permit to subsist any Security over any Charged Assets except for the Charge.

5.2 Distribution of Charged Property

The Chargor hereby acknowledges and agrees that, following the occurrence of a Clearing Default, the Clearing House shall act in accordance with the LCH Rules and any other laws and regulations applicable to it in determining how the Charged Assets are to be distributed and that such action by the Clearing House shall be without prejudice to any protections afforded to it pursuant to the LCH Rules and any such other laws and regulations.

5.3 Margining

The Chargor agrees that, prior to the operation of Clause 13.1, it shall provide margin in respect of any Associated LCH Transactions to the Clearing House on an Individual Segregated Account basis or an Omnibus Segregated Account basis (as may be agreed between the Chargor and the relevant Client) in accordance with the LCH Rules.

6. PAYMENTS

6.1 No Enforcement Event

Subject as otherwise provided in this Security Deed, and for so long as no Enforcement Event has occurred, the Chargor shall be entitled to receive and retain all payments or transfers made to it in respect of the relevant Client Account in accordance with the LCH Rules. For the avoidance of doubt, the Chargor shall not be entitled to deal with the Charged Assets at any time while the Charge is in effect.

6.2 Post Enforcement Event

Following the occurrence of an Enforcement Event, the Client shall be entitled to receive directly from the Clearing House all Charged Assets and payments or transfers made in respect of a Charged Asset.

7. ENFORCEMENT AND REMEDIES

7.1 Enforcement Event

The Security created on the Effective Date shall only be enforceable, and the powers conferred by Section 101 of the LPA as varied and extended by this Security Deed shall only be exercisable, following the occurrence of an Enforcement Event.

7.2 Power of Sale

The statutory power of sale and the other statutory powers conferred on mortgagees by Section 101 of the LPA as varied and extended by this Security Deed shall arise on the Effective Date of this Security Deed.

7.3 Section 103 LPA

Section 103 of the LPA shall not apply to this Security Deed.

8. PROVISIONS RELATING TO CLIENT

8.1 Client's Rights

At any time after the occurrence of an Enforcement Event, the Client shall have the rights set out in the Schedule hereto.

8.2 Application of Proceeds

Subject to Clause 13.1, all amounts or assets received or recovered by the Client in the exercise of its rights under this Security Deed shall be applied in the following order: (i) in or towards the payment of the Liabilities in such order as the Client thinks fit, but in any case acting in good faith and in a commercially reasonable manner, and (ii) in payment of any surplus to the Chargor.

8.3 Power of Attorney

The Chargor by way of security irrevocably appoints the Client as its attorney (with full power of substitution), on its behalf and in its name or otherwise, in such manner as the attorney thinks fit, but in any case acting in good faith and in a commercially reasonable manner, to exercise (following the occurrence of an Enforcement Event only) any of the rights conferred on the Client in relation to the Charged Assets or under the LPA or the Insolvency Act. The Chargor ratifies and confirms and agrees to ratify and confirm whatever any such attorney shall do in the exercise or purported exercise of the power of attorney granted by it in this Clause 8.3.

9. NOTIFICATION OF NEW AUTHORISATION DATE

- 9.1 The Chargor agrees that the Clearing House may notify the Chargor of a New Authorisation Date by publishing a notification on the Clearing House's website.
- 9.2 The Chargor agrees that notice of a New Authorisation Date will be deemed to have been delivered to the Chargor upon the publication of a notice of such New Authorisation Date on the Clearing House's website.

10. AMENDMENTS TO THE SECURITY DEED

The Chargor may from time to time amend or revoke the terms of this Security Deed without the Client's consent, provided, however, that the Chargor undertakes:

- 10.1 not to amend or revoke this Security Deed without the prior written consent of the Clearing House; and
- 10.2 to amend this Security Deed from time to time in order to reflect such changes as may be prescribed by the Clearing House to the "Security Deed" (as defined in the LCH Rules, and upon which this Security Deed is based) from time to time in accordance with the LCH Rules.

11. ADDITIONAL CLIENTS

The Chargor may, after the date of this Security Deed, grant a charge on the terms of this Security Deed to one or more additional clients. On each occasion when the Chargor wishes to exercise this right, it will execute a further security deed substantially in the form set out in Schedule 3 to this Security Deed (an "**Additional Security Deed**") and will deliver to the Clearing House a copy of such Additional Security Deed, including an annex which sets out the details of the relevant client(s). For the avoidance of doubt, an Additional Security Deed may be given in respect of one or more clients.

12. SAVING PROVISIONS

12.1 **Continuing Security**

Subject to Clause 13, the Charge is continuing security and will extend to the ultimate balance of the Liabilities, regardless of any intermediate payment or discharge in whole or in part.

12.2 **Reinstatement**

If any discharge, release or arrangement (whether in respect of the obligations of the Chargor or any security for those obligations or otherwise) is made by the Client in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation or otherwise, without limitation, then the liability of the Chargor and the Charge shall continue or be reinstated as if the discharge, release or arrangement had not occurred.

12.3 Waiver of Defences

Neither the obligations of the Chargor under this Security Deed nor the Charge will be affected by an act, omission, matter or thing which, but for this Clause 12.3, would reduce, release or prejudice any of its obligations under any Transaction Document or the Charge (without limitation and whether or not known to the Chargor or the Client) including:

- 12.3.1 any time, waiver or consent granted to, or composition with, the Chargor or other person;
- 12.3.2 the release of the Chargor or any other person under the terms of any composition or arrangement with any creditor of any affiliate;
- 12.3.3 the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, the Chargor or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;
- 12.3.4 any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of any Transaction Document or any other document or security; or
- 12.3.5 any insolvency or similar proceedings.

12.4 Immediate Recourse

The Chargor waives any right it may have of first requiring the Client (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Security Deed. This waiver applies irrespective of any law or any provision of a Transaction Document to the contrary.

12.5 Additional Security

The Charge is in addition to and is not in any way prejudiced by any other guarantees or security now or subsequently held by the Client.

13. DISCHARGE OF SECURITY

13.1 Final Redemption

Immediately upon there no longer being any Liabilities remaining (or, if earlier, immediately upon it no longer being possible for an Enforcement Event to occur), the Client shall be deemed to have immediately released, reassigned or discharged (as appropriate) the Charged Assets from the Charge and therefore:

- 13.1.1 the Chargor may retain for its own account; and

13.1.2 the Client shall therefore promptly pay or transfer to the Chargor,

any amounts or other assets received by such party from the Clearing House in respect of the Charged Assets. For the avoidance of doubt, it is acknowledged that the Chargor's rights under this Clause 13 shall constitute an equity of redemption (and therefore a proprietary interest to the extent of such equity of redemption) in the Charged Assets and any amounts or other assets the subject of such rights shall be returned by the Client to the Chargor.

13.2 **Consolidation**

Section 93 of the LPA shall not apply to the Charge.

14. MISCELLANEOUS PROVISIONS

14.1 **Payments**

All payments by the Chargor under this Security Deed (including damages for its breach) shall be made to such account, with such financial institution and in such other manner as the Client may direct.

14.2 **Remedies and Waivers**

No failure to exercise, nor any delay in exercising, on the part of the Client any right or remedy under this Security Deed shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Security Deed are cumulative and not exclusive of any rights or remedies provided by law.

14.3 **Partial Invalidity**

If, at any time, any provision of this Security Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

14.4 **Governing Law**

This Security Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.

14.5 **Jurisdiction**

In relation to any proceedings, each party to this Security Deed irrevocably submits to the exclusive jurisdiction of the courts of England and waives any objection to proceedings in such courts on the grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum. Each such submission is made for the benefit of the other party and shall not affect the right of any party to

take proceedings in any other court of competent jurisdiction nor shall the taking of proceedings in any court of competent jurisdiction preclude any party from taking proceedings in any other court of competent jurisdiction (whether concurrently or not) unless precluded by law.

14.6 **[Agent for Service of Process; Chargor**

The Chargor hereby irrevocably appoints [Name of Agent] of [Address in England] to receive service of process on its behalf as its authorised agent for service of process in England. If for any reason such agent ceases to be such agent for service of process, the Chargor shall forthwith appoint a new agent for service of process in England. Nothing in this Security Deed shall affect the right to serve process in any other matter permitted by law.]

This Security Deed has been delivered on the date stated at the beginning of this Security Deed.

[CHARGOR]

[INSERT APPROPRIATE SIGNATURE BLOCK]

SCHEDULE 1 RIGHTS OF CLIENT

Following the occurrence of an Enforcement Event, the Client shall have the right, either in its own name or in the name of the Chargor or otherwise and in such manner and upon such terms and conditions as the Client thinks fit, but in any case, acting in good faith and in a commercially reasonable manner, and either alone or jointly with any other person:

1. **Take possession:** to take possession of, get in and collect the Charged Assets and to require payment to it of revenues deriving therefrom;
2. **Deal with Charged Assets:** to sell, transfer, assign, exchange or otherwise dispose of or realise the Charged Assets to any person either by public offer or auction, tender or private contract and for a consideration of any kind (which may be payable or delivered in one amount or by instalments spread over a period or deferred);
3. **Borrow money:** to borrow or raise money either unsecured or on the security of the Charged Assets (either in priority to the Charge or otherwise);
4. **Rights of ownership:** to manage and use the Charged Assets and to exercise and do (or permit the Chargor or any nominee of it to exercise and do) all such rights and things as the Client would be capable of exercising or doing if it were the absolute beneficial owner of the Charged Assets;
5. **Claims:** to settle, adjust, refer to arbitration, compromise and arrange any claims, accounts, disputes, questions and demands with or by any person relating to the Charged Assets;
6. **Legal actions:** to bring, prosecute, enforce, defend and abandon actions, suits and proceedings in relation to the Charged Assets;
7. **Redemption of Security:** to redeem any Security (whether or not having priority to the Charge) over the Charged Assets and to settle the accounts of any person with an interest in the Charged Assets; and
8. **Other powers:** to do anything else it may think fit for the realisation of the Charged Assets or incidental to the exercise of any of the rights conferred on the Client under or by virtue of any Transaction Document, the LPA or the Insolvency Act.

SCHEDULE 3 ADDITIONAL SECURITY DEED

THIS SECURITY DEED is dated [*Insert Date of Execution*] and made by way of deed poll by [CLEARING MEMBER] in its capacity as chargor (the "**Chargor**").

WHEREAS:

- (A) In order to facilitate the clearing of certain transactions with LCH.Clearnet Limited (the "**Clearing House**"), the Chargor has entered into one or more agreements with one or more clients (each such agreement, a "**Clearing Agreement**").
- (B) The Chargor has previously entered by deed poll into a security deed dated [.] in favour of certain of its clearing clients (such security deed as amended from time to time, after as well as before the date of this Security Deed, the "**Original Security Deed**").
- (C) The Chargor is executing this Security Deed in order to maximise the ability of one or more additional Client(s) to move positions corresponding to transactions under the Clearing Agreements to Backup Clearing Members upon the occurrence of an Enforcement Event or to provide for certain receivables to be delivered from the Clearing House to the Clients directly.

It is agreed as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions:

- (a) For the purposes of this Security Deed, the following defined terms shall have the following meanings:

"**Client**" means each of the additional client(s) listed in the Annex to this Security Deed. For the avoidance of doubt, an individual Clearing Client may be party to more than one Clearing Agreement with the Chargor (due to such Clearing Client (i) receiving Client Clearing Services from the Chargor in respect or more than one Service and/or (ii) being a Clearing Client in respect of whom the Chargor has opened more than one Client Account relating to a Relevant Client Clearing Business), and in each such capacity the relevant Clearing Client will constitute a separate "Client" for the purposes of this Security Deed (save where the relevant Clearing Client in the relevant capacity is already a client for the purposes of the Original Security Deed or a another security deed entered into prior to the date of this Security Deed on substantially the same terms as this Security Deed) and will be separately identified (including with details of the relevant Service and details of the LCH identifier for the relevant Client Account) in the Annex to this Security Deed.

"**Effective Date**" means the Authorisation Date or the date of this Security Deed, whichever is later;

- (b) Capitalised terms used but not defined in this Security Deed including in the Recitals shall have the meaning given to them in the Original Security Deed.

1.2 Construction:

- (a) Unless a contrary indication appears, any reference in this Security Deed to:
 - (i) "**assets**" includes present and future properties, revenues and rights of every description;
 - (ii) the "**Chargor**", a "**Client**" or any "**party**" shall be construed so as to include its successors in title and permitted transferees;
 - (iii) an agreement, confirmation or instrument is to a reference to that agreement or instrument as amended, novated, supplemented, extended, restated (however fundamentally and whether or not more onerous) or replaced;
 - (iv) a "**person**" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
 - (v) a "**regulation**" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
 - (vi) the singular includes the plural and vice versa; and
 - (vii) a provision of law is a reference to that provision as amended or re-enacted.
- (b) Clause and Schedule headings are for ease of reference only.

2. OPERATIVE PROVISIONS

With effect from the Effective Date, this Security Deed is entered into on the same terms as the Original Security Deed, and each Client listed in the Annex to this Security Deed shall have the same rights and protections (subject to the same conditions and qualifications) as a "Client" under the Original Security Deed.

3. MULTIPLE DEEDS

The Chargor agrees that, where there is more than one Client listed in the Annex to this Security Deed, this Security Deed shall be treated as if it were a separate deed in favour of each such Client, as if the Chargor had executed a separate deed in favour of each such Client.

This Security Deed has been delivered on the date stated at the beginning of this Security Deed.

[CHARGOR]

[INSERT APPROPRIATE SIGNATURE BLOCK]

