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LCH Limited
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1 January 2021

Dear Sirs

Responses to Instructions to Counsel - Membership, Insolvency, Security, Set-off & Netting and Client Clearing (Evolution Phase III)

You have asked us to provide advice in respect of the laws of The Netherlands in response to certain specific questions raised by LCH Limited ("LCH") in relation to membership, insolvency, security, set-off and netting and client clearing in light of the UK's exit from the EU with effect from 1 January 2021 ("**Brexit**"). The relevant questions are set out in full in Section 4 of this advice, together with the corresponding responses. Terms not otherwise defined in this advice shall have the meaning ascribed to such terms in LCH's Rulebook (as defined below).

1. TERMS OF REFERENCE

1.1 Our advice is given in respect of Clearing Members which are Dutch Companies, Dutch Credit Institutions and Dutch Investment Firms and all references to a "**Relevant Clearing Member**" in this advice shall be construed accordingly. For these purposes:

- (a) a reference to a "**Dutch Credit Institution**" is a reference to a company that is validly incorporated under the laws of this jurisdiction as a public limited

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liability company (*naamloze vennootschap, or N.V.*), a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid, or B.V.*) or a cooperative (*coöperatie*) and has a license to engage in the business of a bank pursuant to article 2:12 of the DFSA;¹

- (b) a reference to a "**Dutch Company**" is a reference to a company which is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap, or N.V.*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid, or B.V.*) and has its COMI in The Netherlands at all relevant times (not being a Dutch Credit Institution, a Dutch Insurance Company (or an affiliate or parent company of a Dutch Insurance Company), a Dutch Investment Firm, a BRRD Entity or any other regulated entity such as an investment company or the manager or custodian of an investment fund), but which has a licence to act as a clearing member pursuant to article 2:5 of the DFSA to allow it to engage in the business of acting as a clearing member;²
- (c) a reference to a "**Dutch Insurance Company**" is a reference to a company that is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap, or N.V.*), a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid, or B.V.*) or a mutual insurance association (*onderlinge waarborg maatschappij*), and that has a license to engage in the business of an insurance company pursuant to article 2:31 DFSA; and
- (d) a reference to an "**Dutch Investment Firm**" means an investment firm (*beleggingsonderneming*) as defined in article 1:1 DFSA that is validly incorporated under the laws of this jurisdiction as a public limited liability company (*naamloze vennootschap, or N.V.*) or a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid, or B.V.*) and that has a license under articles 2:99 and 2:5 of the DFSA and has its COMI in this jurisdiction at all relevant times.

¹ This advice therefore does not cover Dutch banks which are "opt-in" banks which have a license pursuant to article 3:4 DFSA. No such "opt-in" banks are currently registered with the DNB probably because the "opt-in" license provides no pan-EU passporting rights. The small number of previously existing "opt-in" banks seem to have relinquished their licenses and obtained full banking licences.

² We note that, according to the on-line DNB register of "*clearinginstellingen*", at present there are no Dutch entities that have this licence. Dutch Credit Institutions automatically have this licence.

1.2 For the avoidance of doubt, this opinion does not extend to:

- i. any sovereign, quasi-governmental or other public sector entities (including local government entities);
- ii. any partnerships or foundations;
- iii. any pension funds;
- iv. any religious entities (*kerkgenootschappen*);
- v. any insurance companies (including Dutch Insurance Companies);
- vi. any individuals (whether or not acting in the conduct of a profession or trade);
- vii. any international or supranational organisations;
- viii. any collective investment schemes, such as investment funds or investment companies, organised or incorporated under Dutch or foreign law (and including their management companies);
- ix. any trusts; or
- x. any regulatory authorities, central banks or central counterparties.

1.3 We confirm that our advice is not limited to any specific Services offered by LCH but it is not applicable to Services offered by FCM Clearing Members in respect of FCM Contracts and therefore does not deal with the FCM Rulebook or the FCM Regulations. This advice also does not address the effectiveness of the custodial segregation provisions of the LCH Rulebook. These provisions are addressed in our opinion letter to LCH dated 9 June 2017.

1.4 In this advice:

- (a) a reference to the "**AFM**" means the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*);
- (b) a reference to the "**BA**" means the Dutch Bankruptcy Act (*Faillissementswet*);
- (c) a reference to "**BRRD**" means the EU Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms;

- (d) a reference to the "**BRRD Act**" means the provisions incorporated into the DFSA and the BA that implemented the BRRD into Dutch law;
- (e) a reference to a "**BRRD Entity**" means a type of entity that can be subjected to the Resolution Powers under the BRRD Act and/or the SRMR and includes: (i) a Dutch Credit Institution (not being an "opt-in" bank as referred to in article 3:4 DFSA; i.e. an undertaking that does not meet the requirements for a bank but has voluntarily applied for a licence as a Dutch Credit Institution³) and (ii) a Dutch Investment Firm which is subject to the initial capital requirement of article 28(2) of EU Directive 2013/36/EU of the European Parliament and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (a "**BRRD Investment Firm**");
- (f) a reference to the "**Clearing Membership Agreement**" means a Clearing Membership Agreement (as defined in LCH's Rulebook) which is substantially in the form appended as Appendix 3 of this opinion letter;
- (g) a reference to the "**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;
- (h) a reference to a "**Client Contract**" is a reference to a Contract (as defined in LCH's Rulebook) that has been entered into on behalf of a Clearing Client (as defined in LCH's Rulebook);
- (i) a reference to the "**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 of LCH (in particular those set out in Section 4 (*Collateral*) of the Procedures of LCH's Rulebook) and the relevant instruction(s) through LCH's Collateral Management System;

³ No such "opt-in" banks are registered with the DNB as the "opt-in" license provides no pan-EU passporting rights. All previous "opt-in" banks have relinquished their licenses and obtained full banking licences.

- (j) a reference to the "**Collateral Directive**" means EU Directive 2002/47/EC of the European Parliament and the Council of 6 June 2002, on financial collateral arrangements, as amended by EU Directive 2009/44/EC;
- (k) a reference to "**COMI**" means an entity's centre of main interests, as defined in article 3(1) EUIR;
- (l) a reference to "**Commencement Time**" means in respect of Insolvency Proceedings, 00.00 hours of the day of the judgment of bankruptcy or moratorium;
- (m) a reference to the "**DCC**" means the Dutch Civil Code (*Burgerlijk Wetboek*);
- (n) a reference to the "**Deed of Charge**" means a deed of charge entered into between a Clearing Member and LCH in respect of all Charged Property transferred to LCH by that Clearing Member which is substantially in the form appended as Appendix 1 of 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);
- (o) a reference to the "**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;
- (p) a reference to the "**DFSA**" means the Dutch Financial Supervision Act (*Wet op het financieel toezicht*), together with all its implementing and subordinate decrees and regulations;
- (q) a reference to the "**DNB**" means the Dutch Central Bank (*De Nederlandsche Bank N.V.*);
- (r) a reference to the "**EEA**" means the European Economic Area;
- (s) a reference to "**EMIR**" is a reference to Regulation (EU) No 648/2012 of the European Parliament and the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (as amended and including any technical standards made thereunder);

- (t) a reference to the "**EUIR**" is a reference to the EU Council Regulation No. 2015/848 on insolvency proceedings (recast), which applies to all Regulation States;
- (u) a reference to the "**FCA Rules**" mean the rules in Book 7 of the Dutch Civil Code and in the BA that implemented the Collateral Directive into Dutch law;
- (v) a reference to a "**Financial Collateral Arrangement**" means an arrangement defined as such in the Collateral Directive or the FCA Rules, as the case may be, where the parties thereto are qualifying parties for the purposes of such rules and the charged or transferred assets are "financial collateral" as defined by the Collateral Directive or the FCA Rules, as the case may be;
- (w) a reference to "**Insolvency Proceedings**" shall mean either (i) bankruptcy (*faillissement*), as referred to in and governed by title I of the BA, or (ii) moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA (which cannot be applied in respect of Dutch Credit Institutions);
- (x) a reference to an "**Insolvency Representative**" means in relation to Insolvency Proceedings: a liquidator (*curator*) during a bankruptcy (*faillissement*), or an administrator (*bewindvoerder*) during a moratorium of payments (*surseance van betaling*);
- (y) a reference to "**LCH's Rulebook**" or to the "**LCH Rulebook**" means the General Regulations dated July 2020, the Procedures, the Default Rules dated May 2020, the Settlement Finality Regulations dated December 2019 and the Product Specific Contract Terms and Eligibility Criteria Manual dated May 2020 all as published on LCH's website as at the date of this opinion;
- (z) a reference to "**Nationalisation Measures**" means nationalisation measures within the meaning of Chapter 6 of the DFSA (*bijzondere maatregelen*) in respect of a Dutch Credit Institution or a Dutch Investment Firm;
- (aa) a reference to the "**Parties**" is a reference to LCH and a single Relevant Clearing Member to which this advice applies, and a reference to a "**Party**" is a reference to either of them;
- (bb) a reference to "**Regulation Proceedings**" is to the types of main insolvency procedures that are possible in this jurisdiction, as permitted under Annex A EUIR (and which includes winding up by the court, creditors' voluntary winding up, administration and company voluntary arrangements);

- (cc) a reference to the "**Regulation State**" means this jurisdiction and the other member states of the European Union (save for Denmark);
- (dd) a reference to "**Reorganisation Measures**" means solely in respect of BRRD Entities, the exercise of any Resolution Power by DNB as the national resolution authority for The Netherlands acting either (i) independently or (ii) upon the instructions of the SRB in respect of those BRRD Entities which fall within the scope of the SRMR;⁴
- (ee) a reference to "**Resolution Powers**" means: (a) the sale of business power (article 3A:28 DFSA/article 24 SRMR); (b) the bail-in power (article 3A:44 DFSA/article 26 SRMR) by means of which liabilities owed by a BRRD Entity may be wholly or partially written down, cancelled or modified; (c) the bridge institution power (article 3A:37 DFSA/article 25 SRMR); (d) the asset separation power (article 3A:41 DFSA/article 25 SRMR); (e) the pre-resolution mandatory write-down or conversion power (article 3A:17 DFSA/article 21(1) SRMR) pursuant to which DNB may write down or convert certain of the BRRD Entity's Tier 1 and Tier 2 capital instruments prior to or at the same time as exercising any other Resolution Power;
- (ff) a reference to "**Resolution Safeguards**" means: those provisions from the BRRD Act that provide that (A) the taking of certain Resolution Powers or ancillary powers shall not adversely affect a BRRD Entity's rights and obligations relating to its participation in a System (which includes any security interests granted to a System), or (B) the DNB shall not exercise certain other Resolution Powers or ancillary powers in respect of the security interests granted to a System, an operator of a System or a central counterparty (or any

⁴ The SRMR applies to:

- a. Credit institutions (i.e. banks and certain other deposit-takers), as defined in EU Regulation 575/2013 of the European Parliament and the Council of 26 June 2013, on prudential requirements for credit institutions and investment firms and amending EMIR ("**CRR**"), in participating member states of the European Union;
- b. Parent undertakings, including financial holding companies and mixed financial holding companies, established in one of the participating member states of the European Union, when subject to consolidated supervision carried out by the ECB in accordance with the SSM Regulation establishing the single supervisory mechanism; and
- c. Investment firms and financial institutions (each as defined in the CRR) established in participating member states when they are covered by the consolidated supervision of the parent undertaking carried out by the ECB in accordance with the SSM Regulation.

assets provided to them as margin) by a BRRD Entity or the termination rights of a System, an operator of a System or a central counterparty; or (C) the exercise of certain other Resolution Powers or ancillary powers shall not adversely affect: security arrangements⁵, set-off arrangements⁶, netting arrangements⁷ or title transfer financial collateral arrangements.⁸

- (gg) a reference to "**Rome I**" means Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations;
- (hh) a reference to the "**Security Deed**" means the Security Deed (as defined in LCH's Rulebook) which is substantially in the form appended as Appendix 2 of this opinion letter;
- (ii) a reference to the "**Segregated Pool Rules**" means articles 49f to 49h of the *Wet giraal effectenverkeer* which became effective as from 1 April 2016 and introduced so-called "*segregated derivatives pools*" that aim to protect Clearing Clients from the insolvency of their (Dutch) Clearing Members, regardless of whether and where the derivatives transactions are ultimately cleared;
- (jj) a reference to the "**Settlement Finality Directive**" or the "**SFD**" means Directive 98/26/EC (as amended) of the European Parliament and the Council of 19th May 1998 on settlement finality in payment and securities settlement systems;
- (kk) a reference to the "**SFD Rules**" means the rules of the BA, the DFSA and the DCC that implemented the Settlement Finality Directive into Dutch law;

⁵ Defined as arrangements under which a person has by way of security an actual or contingent interest in the assets or rights (that are subject to partial property transfer), irrespective of whether that interest is secured by specific assets or rights or by way of a security right on a totality of assets or similar arrangement (i.e. a floating charge; article 3A:1 DFSA), It is highly likely that the Deed of Charge will be regarded as a security arrangement

⁶ Defined as an arrangement under which two or more claims or obligations owed between the affected institution and a counterparty can be set off against each other (article 3A:1 DFSA).

⁷ As defined in article 2(1)(98) BRRD, which includes "close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim".

⁸ These safeguards originate in articles 68(4), 69-71 and 76-80 BRRD.

- (ll) a reference to the "**SFTR**" means Regulation 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 (as amended and including any technical standards made thereunder);
- (mm) a reference to the "**SRB**" means the single resolution board established under the SRMR which will be responsible for determining whether an entity within the scope of the SRMR meets the conditions for it to be placed under resolution;
- (nn) a reference to the "**SRMR**" means Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010;
- (oo) a reference to "**SSM Regulation**" means Regulation (EU) No. 1024/2013 of the European Parliament and of the Council of 15 October 2013;
- (pp) a reference to the "**System**" means a system within the meaning of article 212a(b) of the BA, being (i) a system designated by the Dutch Ministry of Finance pursuant to article 212d of the BA; or (ii) a formal arrangement governed by the laws of a member state of the European Union which has been notified by such member state to the Commission of the European Communities as a system within the meaning of the Settlement Finality Directive; or (iii) any third country (i.e. non-EU and non-EEA) system that is subject to supervision by a regulatory or supervisory authority established in a State, other than an EU Member State, whose central bank (or other monetary authority) holds capital in the Bank for International Settlements;
- (qq) a reference to the "**Systems Carve-out**" has the meaning set out in paragraph 4.2.1(g) and a reference to a "**System Security Interest**" has the meaning set out in paragraph 4.2.2(a);
- (rr) a reference to "**this jurisdiction**", the "**Relevant Jurisdiction**" and to "**The Netherlands**" is a reference to the part of the Kingdom of The Netherlands located in Continental Europe (excluding, for the avoidance of doubt, any overseas nations forming part of the Kingdom of The Netherlands such as Aruba, Curacao, and St. Maarten and any overseas special municipalities such as Saba, St. Eustatius and Bonaire);

- (ss) a reference to the "**WHOA**" means the Act on Court Approved Pre-Insolvency Restructuring Schemes (*Wet Homologatie Onderhands Akkoord*) which is due to enter into effect on 1st January 2020 and "**WHOA Proceedings**" means composition proceedings as regulated under the WHOA;
- (tt) a reference to the "**WUDCI**" means the EU Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (as amended);
- (uu) unless the context otherwise requires, a reference to a "paragraph" is a reference to a paragraph in this advice and a reference to a "Section" is a reference to a section in this advice; and
- (vv) headings are for ease of reference only and shall not affect the interpretation of this advice.

1.5 The bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Relevant Clearing Member could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this advice, are:

- 1.5.1 bankruptcy (*faillissement*), as referred to in and governed by title I of the BA;
- 1.5.2 other than in respect of Dutch Credit Institutions: moratorium of payments (*surseance van betaling*) as referred to in and governed by title II of the BA;
- 1.5.3 solely in respect of Dutch Credit Institutions and BRRD Investment Firms: Reorganisation Measures;
- 1.5.4 solely in respect of Dutch Companies⁹ and Dutch Investment Firms: WHOA Proceedings.

2. SCOPE OF THE OPINION

2.1 This opinion letter relates solely to matters of Dutch law and does not consider the impact of any laws (including insolvency laws) other than Dutch law, even where, under Dutch law, any foreign law falls to be applied. This opinion letter and the opinions given in it are governed by Dutch law and relate only to Dutch law as applied by the Dutch courts as at today's date. All non-contractual obligations and any other

⁹ Not relevant for this opinion letter as we have established that no Dutch corporate entity currently holds a license under article 2:5 DFSA.

matters arising out of or in connection with this opinion letter are governed by Dutch law. We express no opinion in this opinion letter on the laws of any other jurisdiction.

2.2 For the purposes of preparing our advice we have reviewed electronic versions of the following documents (collectively referred to as the "**Opinion Documents**"):

2.2.1 LCH's Rulebook;

2.2.2 the Clearing Membership Agreement to be entered into between LCH and each Relevant Clearing Member;

2.2.3 the Deed of Charge to be entered into between LCH and each Relevant Clearing Member as a "**Chargor**"; and

2.2.4 the Security Deed to be entered into by way of deed poll by each Relevant Clearing Member in favour of each of its Clearing Clients, pursuant to which the Relevant Clearing Member grants a security interest in favour of each of its Clearing Clients over receivables from LCH in respect of assets and positions held in an account with LCH on the relevant Clearing Client's behalf (together with the Clearing Membership Agreement and the Deed of Charge, the "**LCH Agreements**").

2.3 We have also reviewed a copy of the ESMA Board Decision of 21 September 2020 granting recognition to LCH Limited as a third country CCP under Chapter 4 of title III of EMIR¹⁰ (the "**ESMA Recognition Decision**"), the on-line register of BIS members showing that the Bank of England holds shares in the capital of the BIS and we have reviewed the Opinion Documents in connection with the instructions to counsel provided to us on 24 July 2018 (the "**Instructions**") and the Service Description (as defined in the Instructions).

2.4 Our advice is given only:

(a) in respect of the specific questions raised by you in the Instructions;

¹⁰ Commission Implementing Decision (EU) 2020/1308 of 21 September 2020 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 (OJ, L306/1).

- (b) in respect of obligations (a) arising under the Opinion Documents; and/or (b) arising under the Contracts between LCH and a Relevant Clearing Member, which have been duly registered for clearing by LCH;
- (c) in respect of obligations which are legal, valid, binding and enforceable;
- (d) in respect of obligations which are "mutual" between the Parties in the sense that each Party is personally and solely liable as regards obligations owing by it and is the sole and beneficial owner of obligations owed to it;¹¹
- (e) on the basis that LCH is not itself insolvent for the purposes of any insolvency law and is not subject to any insolvency proceedings or reorganisation measures;
- (f) on the basis of the assumptions set out in Paragraph 3 and subject to the reservations and qualifications set out in Paragraph 5 and 6 to this opinion letter.

2.5 As Dutch lawyers we are not qualified to assess the meaning and consequences of the terms of the Opinion Documents under their governing laws and we have made no investigation into such laws as a basis for the opinion expressed hereafter and do not express or imply any opinion thereon. Accordingly, our review of the Opinion Documents has been limited to the terms of such documents as these appear on the face thereof without reference to English law and this advice and the opinions given in it:

- (a) relate solely to matters of Dutch law, excluding tax laws, and do not consider the impact of any laws (including insolvency laws) other than Dutch law, even where, under Dutch law, any foreign law falls to be applied;
- (b) are governed by Dutch law and relate only to Dutch law in force at the date hereof as applied and interpreted according to published case-law of the Dutch

¹¹ Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest or in respect of which a Party'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 by order. 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.

courts or, where expressly stated, duly constituted arbitral tribunals with their seat in this jurisdiction and authoritative literature;

- (c) express and describe Dutch legal concepts in English and not in their original Dutch terms; therefore, this advice is issued and may only be relied upon on the express condition that it shall be governed by, and that all words and expressions used herein shall be construed and interpreted in accordance with, the laws of this jurisdiction.

2.6 We are not expressing any opinion as to any matters of fact or any commercial, accounting, capital adequacy or other non-legal matter or on the ability of the Relevant Clearing Member to meet its financial or other obligations under the Opinion Documents and this opinion letter does not discuss or confirm the financial merits or the practical feasibility of the obligations envisaged in the Opinion Documents.

2.7 Furthermore, we express no opinion as to:

- (a) whether any Relevant Clearing Member has good legal or other title to the assets or rights which are expressed to be subject to the security interests purported to be created by the Deed of Charge or the Security Deed, or as to the existence or value of any such assets or rights;
- (b) whether any other creditor of, or claimant in respect of, the Relevant Clearing Member or its assets could assert superior title in respect of the Charged Property (as defined in the Deed of Charge), or Charged Assets (as defined in the Security Deed) for example on the grounds of its prior acquisition of an interest in the Charged Property or Charged Assets, its acquisition of legal title to the Charged Property or Charged Assets or its having a fixed charge interest over the Charged Property or Charged Assets;
- (c) the enforceability of any final close-out amount or other sum certified as payable to LCH by a Relevant Clearing Member (as described at the end of our response in paragraph 4.2.6);
- (d) the enforceability of the Default Arrangements in relation to any action which LCH may seek to take outside this jurisdiction;
- (e) any matters relating to indirect clearing;
- (f) the validity or enforceability of any provisions of the LCH Agreements, the General Regulations, the Default Rules or the Procedures of LCH save for those specifically referred to herein; or

- (g) in relation to any obligations or entitlements which may arise between Clearing Members *inter se*, between Clearing Members and any persons other than LCH or between a Relevant Clearing Member and any of its indirect clients.

3. ASSUMPTIONS

In giving this advice, we have, with your permission, assumed:

Corporate Matters/Due Authorisations/Due Execution

- 3.1 that each Party is duly incorporated as a legal entity and has the capacity (corporate, regulatory or otherwise), power and authority under all applicable laws (including those of this jurisdiction) to enter into the LCH Agreements and each Contract, to create the security interests contemplated thereby and to exercise its rights and perform its obligations under the LCH Agreements and each Contract and that each Party has taken all necessary steps to authorise, enter into, execute, deliver, be bound by and perform the LCH Agreements and each Contract, and that such steps have not been revoked or superseded.
- 3.2 that each Party (other than LCH) has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents and has otherwise complied with the laws of this and any other jurisdiction required to enable it lawfully to enter into and perform its obligations under the LCH Agreements and the Contracts and to ensure the legality, validity, enforceability and admissibility in evidence of the LCH Agreements and each Contract in this and any other jurisdiction.
- 3.3 that the LCH Agreements and each Contract are entered into by the Relevant Clearing Member prior to the formal commencement of any Insolvency Proceeding or Reorganisation Proceeding in respect of that Relevant Clearing Member.
- 3.4 that the Relevant Clearing Members and LCH have duly and properly authorised and executed the LCH Agreements and that the executed LCH Agreements are in substantially the same form as the LCH Agreements reviewed by us.
- 3.5 the LCH Agreements have been entered into, and each of the Contracts referred to therein are carried out, by each of the Parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and that the execution and performance of the LCH Agreements and the Contracts are in the Relevant Clearing Member's corporate interest.

Performance, Amendment & Voidability

- 3.6 that each Party acts in accordance with the powers conferred by the LCH Agreements; and that (save in relation to any non-performance leading to the taking of action by LCH under the Default Rules) each Party performs its obligations under the LCH Agreements and each Contract in accordance with their respective terms.
- 3.7 that there are not and will not be any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the LCH Agreements and/or any Opinion Document and that no provision of LCH's Rulebook overrides or is inconsistent with any LCH Agreement.

Foreign Law Aspects

- 3.8 the due compliance with all matters (including, without limitation, the obtaining of the necessary consents, licences, approvals and authorisations, the making of the necessary filings, lodgments, registrations and notifications and the payment of stamp duties and other taxes) under any law (other than that of this jurisdiction) as may relate to or be required in respect of:
- (a) the LCH Agreements and their lawful execution;
 - (b) any security interest purported to be created by the Deed of Charge or the Security Deed;
 - (c) the parties to the LCH Agreements (including the Relevant Clearing Member) or other persons affected thereby;
 - (d) the performance or enforcement of the LCH Agreements by or against the parties (including the Relevant Clearing Member) or such other persons; and
 - (e) the creation of valid and legally binding obligations of all parties to the LCH Agreements (including the Relevant Clearing Member) enforceable against such parties in accordance with their respective terms.
- 3.9 that under the laws of England to which they are expressed to be subject and under all other relevant laws (other than those of this jurisdiction):
- (a) the LCH Agreements and each Contract constitute and will at all times constitute the valid and legally binding obligations of all parties thereto (including the Relevant Clearing Member) enforceable against them in accordance with their respective terms;

- (b) the Deed of Charge is effective to create a valid security interest in favour of LCH over the Charged Property that is purported to be created thereby, as the case may be;
- (c) the Security Deed is effective to create a valid security interest in favour of each Relevant Clearing Member's Clearing Clients over the Charged Assets that are purported to be created thereby, as the case may be;
- (d) the Deed of Charge and the Security Deed constitute a Financial Collateral Arrangement;
- (e) the claims of a Relevant Clearing Member against LCH for the return of the Charged Assets which are charged in favour of each Clearing Client under the Security Deed are existing and not future claims on the Commencement Time of the Relevant Clearing Member's Insolvency Proceedings, and such charge is effected and perfected prior to such Commencement Time;
- (f) the Relevant Clearing Member is obliged (pursuant to LCH's Rulebook) to enter into a Security Deed in respect of each of its Clearing Clients in the absence of an Exempting Client Clearing Rule, in relation to amounts due to it from LCH, and that it will give notice to LCH once it has entered into such Security Deed;
- (g) the netting and default management procedures incorporated in LCH's Rulebook are valid and enforceable;
- (h) each Client Contract under the LCH Agreements is capable of being terminated, closed out, liquidated and/or ported in the manner envisaged by the Default Arrangements and capable of having a net sum determined in accordance with the Default Arrangements; and
- (i) the choice of English law as the governing law of the Opinion Documents is a valid and binding selection.

3.10 that the courts of this jurisdiction will, in giving effect to the choice of law provisions of the Opinion Documents, apply English law correctly.

Settlement Finality Directive

3.11 that LCH qualifies as a "payment or settlement system" within the meaning of article 12 EUIR, is validly authorised under English law as a CCP and that ESMA will continue to grant LCH recognition decisions substantially identical to the ESMA Recognition Decision.

3.12 that the UK incorporates a legal regime which is exactly equivalent to the current regime which implements the Collateral Directive and the Settlement Finality Directive.

Security Interests

3.13 that each Relevant Clearing Member has the capacity, power and authority to create the security interests constituted by the relevant LCH Agreements.

3.14 that the Charged Property and the Charged Assets constitute financial collateral (as defined in the FCA Rules) being either "cash" (i.e. money credited to an account in any currency or similar claims for the repayment of money, as defined in article 2(1)(d) of the Collateral Directive and article 7:51(d) DCC) or "book entry securities" (i.e. any "financial instruments"¹², title to which is evidenced by entries in a register or account maintained by or on behalf of an "intermediary" (although such term is not defined in the Collateral Directive, we assume that LCH would qualify as an "intermediary" as a matter of English law) as defined in article 2(1)(g) of the Collateral Directive and article 7:51(e) DCC); and that such monies and book entry securities are held in cash accounts or securities accounts operated, maintained and administered in England and Wales.

3.15 that title to the Securities (as defined in the Deed of Charge) is evidenced by entries in a register or account maintained by or on behalf of an "intermediary" and that the "relevant account" (each as defined in the FCA Rules) is located in England and Wales.

3.16 that until such time as either the Charged Property or Charged Assets have been released or discharged from the security interests purported to be created by the Deed of Charge or the Security Deed, as applicable, the Charged Property and Charged Assets will be held by LCH in accordance with the terms of the LCH Agreements.

3.17 that LCH at all times exercises its rights under the LCH Agreements and does not waive any requirement for it to consent to the withdrawal of any Charged Property.

¹² 'financial instruments' means shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing (as defined in article 2(1)(e) of the Collateral Directive).

- 3.18 that all Collateral transferred is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of Collateral will have been effectively carried out.
- 3.19 that each Party which receives Collateral from the other Party by way of outright transfer does not treat that Collateral in any manner which could indicate that the other Party retains any proprietary interest therein.
- 3.20 that the security interests purported to be created pursuant to the Deed of Charge and the Security Deed constitute "rights in rem" for the purpose of the exceptions in article 21(1) WUDCI and article 8 EUIR under all applicable laws (other than the laws of this jurisdiction).

4. **OPINION**

On the basis of the foregoing terms of reference and assumptions and subject to the reservations set out in Section 5 and the qualifications set out in Section 6 below, we make the following statements of opinion. These statements of opinion are summary conclusions on specific questions which you have raised.

4.1 **Membership**

Would LCH be deemed to be domiciled, resident or carrying on business in the Relevant Jurisdiction by virtue of providing clearing services to a Relevant Clearing Member? If so, would LCH be required to obtain any additional licenses or any additional registrations 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?

Other than article 25 EMIR, the domestic laws of this jurisdiction do not provide for a direct (detailed) regulatory framework regarding central counterparties ("CCPs") such as LCH. The question whether LCH would be deemed to be domiciled, resident or carrying on business in this jurisdiction by virtue of providing clearing services to a Relevant Clearing Member can therefore not be answered, as Dutch domestic laws do not provide for specific regulations which could be applied directly to LCH. There are also no special local arrangements for the recognition of non-Dutch CCPs.

Notwithstanding the above, CCPs will generally become subject to indirect oversight by the regulator if they act as CCP for transactions executed on a Dutch regulated market or multilateral trading facility ("MTF"). This is because regulations applicable to such regulated markets and MTFs require them to have effective measures and procedures in place for adequate, timely and efficient settlement of transactions

executed on their respective platforms. If any such Dutch regulated market or MTF contracts with a new foreign CCP in order for such CCP to act as such in respect of transactions executed on the relevant platform, such market or MTF is required to notify the AFM and conclude an agreement with the CCP satisfying certain requirements.

The AFM may in practice require that the foreign CCP also signs an agreement with them whereby it directly binds itself to the AFM's and DNB's oversight on securities markets.¹³

The supervisory standards applied by the AFM and DNB in their indirect oversight of CCPs are the CPSS/IOSCO '*Principles for Financial Market Infrastructures*'. A CCP that has been established according to EMIR's provisions will largely satisfy these standards. Supplementary to EMIR, these standards also contain rules which the actual settlement must satisfy. We assume that LCH is fully aware of these standards and will therefore not elaborate any further.

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

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

The only Insolvency Proceedings, Reorganisation Measures and restructuring proceedings to which a Relevant Clearing Member could become subject in this

¹³ The notification requirement only applies to the trading venue. The DFSA requires trading platforms to have effective measures and procedures in place for adequate and timely settlement of transactions executed on the relevant platform. This will be tested by the AFM initially at the time of the license application (i.e. by the platform). Whether the criterion "adequate and timely settlement of transactions" is met in respect of the relevant clearing arrangement will in particular be determined on the basis of the requirements for CCPs included in EMIR and furthermore on the basis of any relevant CPSS/IOSCO standards for CCPs which are not covered in EMIR. In respect of the latter, the DNB has given the following guidance: "A CCP that has been set up according to the EMIR provisions also largely satisfies the CPSS/IOSCO standards for CCPs. Supplementary to the EMIR, these standards also contain rules which the actual settlement must satisfy. For instance, settlement must take place, in so far as possible, on an account held by the CCP and clearing members at a central bank. In addition, a CCP must clearly describe when a settlement is final and, hence, irreversible. Also, a CCP must prevent clients from running extra risk, for instance by failing to ensure the simultaneous settlement of both sides of a transaction." If the platform operator (trading venue) admits *a new CCP* on its platform, this will qualify as a change to the "measures and procedures for adequate and timely settlement of transactions". Such a change must be notified to and pre-approved by the AFM before they become effective. This means that a new clearing agreement between the trading venue and the CCP must not be implemented / cannot become effective without the AFM's approval. The AFM must come to a decision within 6 weeks, save that the term may be extended to 13 weeks if the AFM requests further information (which it may do within 2 weeks following the notification).

jurisdiction are the following (please refer to paragraph 1.5 for an explanation to which entities these proceedings can apply):

(a) Bankruptcy: general overview

Bankruptcy (*faillissement*) is a general attachment on (practically) all of the assets of a debtor, imposed by a judgment of the appropriate Dutch court (*Rechtbank*) for the benefit of the insolvent debtor's collective creditors. The objective of the bankruptcy is to provide for an equitable liquidation and distribution of (the proceeds of) the debtor's assets among its creditors. In practice, however, bankruptcy proceedings also serve as an important instrument for the reorganisation and continuation of businesses in financial distress.

According to the BA, bankruptcy proceedings can be opened in respect of any debtor, natural or legal person, regardless of whether he carries on a business and whether he practises an independent profession or not.

If a bankruptcy proceeding is opened, the debtor loses the right to manage and dispose of his assets with effect from the Commencement Time and the court appoints a liquidator who is charged with the management and realisation of the debtor's assets (including by means of a transfer of (part of) the business as a going concern). The liquidator acts under the general supervision of a supervisory judge (*rechter-commissaris*). For certain acts the liquidator requires the (prior) authorisation of the supervisory judge, e.g. for conducting legal proceedings and for terminating employment and rental contracts.

(b) Moratorium of payments: general overview

Moratorium of payments (*surséance van betaling*) is a court ordered general suspension of a debtor's payment obligations; its objective is to provide an instrument for the reorganisation and continuation of viable businesses in financial distress. It is available only at the request of the debtor and only has effect in respect of ordinary (non-secured and non-preferred) creditors. During the period for which the moratorium of payments has been granted, creditors with non-preferential claims cannot take recourse in respect of the debtor's assets.

Moratorium of payments proceedings can be opened in respect of natural persons carrying on a business or practising an independent profession and juristic persons. The moratorium of payments may be granted by the court for a maximum period of one and a half years and may be prolonged at the request of the debtor (if necessary more than once) with a maximum of one and a half years.

As a result of the granting of a moratorium of payments, the debtor can no longer manage and dispose of its assets without the co-operation or authorisation of a court appointed administrator. Likewise, the administrator cannot act without the co-operation or authorisation of the debtor. The estate is also not liable for obligations incurred without cooperation or authorisation of the administrator. In a moratorium of payments proceeding, the court may appoint a supervisory judge, whose role is limited to regulating certain procedural matters and advising the administrator upon his request.

(c) **WHOA Proceedings**

As of 1st January 2021, a new Dutch law will introduce the possibility of pre-insolvency debt restructuring schemes; insofar as relevant to this opinion, this new tool will be available to Dutch Companies and Dutch Investment Firms. This new law is known as the Act on Court Approved Pre-Insolvency Restructuring Schemes ("**WHOA**" following the Dutch abbreviation). The WHOA's goal is to introduce a restructuring procedure enabling debtors in financial difficulties to restructure at an early stage and avoid insolvency while remaining in control of their business. To use this new procedure, debtors must foresee that they will not be able to continue paying their due and payable debts.¹⁴ Under such circumstances, the debtor or a court appointed restructuring specialist may offer a restructuring plan to the debtor's creditors and shareholders. Before offering a WHOA restructuring plan, the debtor must file a confidential scheme declaration with the competent Dutch court in which it commits to offer a restructuring plan within 2 months (the "**Scheme Declaration**") and it may then simultaneously request the court to order a general or specific stay against creditor action for a period of 4 months (see below). A restructuring plan could propose amendments to debt instruments, payment deferrals, debt-for-equity swaps, haircuts / write-downs of all or certain creditors and termination of executory contracts (where the counterparty did not voluntarily cooperate with a proposal to amend or terminate the contract; see below). Not all of the debtor's creditors need to be covered by the restructuring plan. Creditors are grouped in separate classes (depending on their ranking in an insolvency) that vote separately on the proposed plan. Subject to certain safeguards, creditors who voted against the restructuring plan could be (cross-)crammed down and bound by the restructuring plan if a majority (of 2/3 of the value) of creditors within a class (or a more senior class) vote in favor of such a plan and the court subsequently approves the plan. It is generally held that creditors that have

¹⁴ This means that the debtor must be able to pay its currently due and payable debts, but not those arising in the foreseeable future (looking as much as a year in the future). I.e. there must be no realistic prospect of avoiding future insolvency if the debtor's liabilities are not restructured.

security interests over assets located in other EU Member States or outside the EU are not affected by such a court approved plan (unless they voluntarily cooperate and agree to the plan).

(d) Retroactive Effect Rule

In Insolvency Proceedings, a judgment of bankruptcy or moratorium has retroactive effect as from the Commencement Time and any dispositions of property made or agreements entered into by the Party subject to such proceedings after the Commencement Time (if acting without the consent or cooperation of the Insolvency Representative or the court) are void (the "**Retroactive Effect Rule**").

(e) Reorganisation Measures: BRRD Entities

The BRRD has created a new framework for the resolution of failing credit institutions and investment firms across the European Union. As this was introduced in the form of a European Union directive, it was necessary for the BRRD to be implemented into national law; in The Netherlands this was achieved pursuant to the BRRD Act. The rules that were introduced by the BRRD Act apply to a Relevant Clearing Member that is a Dutch Credit Institution or a BRRD Investment Firm. They contain provisions which, subject to certain limits and conditions, affect the rights of a counterparty to terminate or designate an event of default under a contract, to exercise netting or set-off rights, or to enforce security.

In addition to the BRRD, the SRMR establishes uniform rules and procedures for the resolution of those credit institutions and certain investment firms which are established in member states of the European Union participating in the "single supervisory mechanism"¹⁵ established under the SSM Regulation (that is, member states within the Eurozone) and groups of companies containing such a credit institution or investment firm.

The effect of SRMR and BRRD is that a distinction will have to be made between:

- (i) Dutch Credit Institutions and BRRD Investment Firms for which the SRMR entrusts the SRB with the power to determine a resolution scheme; and
- (ii) less significant Dutch Credit Institutions and BRRD Investment Firms, for which such decision-making shall in principle be the responsibility of DNB as the national resolution authority, using the powers under the BRRD Act.

¹⁵ As defined in article 2(9) of the SSM Regulation.

In the scenario that a group in resolution, containing in scope Dutch Credit Institutions and/or BRRD Investment Firms, includes credit institutions and investment firms established in both SSM and non-SSM member states of the European Union, the resolution process under the BRRD will apply with the SRB representing the national resolution authorities of participating member states of the European Union.

DNB is required to implement the resolution scheme, whether or not this has been devised by the SRB or DNB. In cases where this has been devised by the SRB, the SRB will monitor the relevant institution's resolution and may give instructions to DNB on any aspects of the resolution. In the event that DNB does not comply with the resolution scheme, the SRB will have the power to directly instruct the relevant institution in resolution.

Instead of or prior to any Insolvency Proceedings, a BRRD Entity may be subject to one or more of the Resolution Powers. In relation to termination rights, netting and set-off, the effects of any of the aforementioned Resolution Powers (and other ancillary powers exercisable under the DFSA) are considered in paragraphs 4.2.2 (b), 4.2.3 (g) and 4.3.6 below.

(f) Insolvency Events of Default

Although this is a matter to be determined under English law, we believe that the events specified in Rule 5 under (i) to (p) of the Default Rules adequately refer to Insolvency Proceedings and Rule 5 under (j) and (k) can be read to refer to certain actions or steps taken during WHOA Proceedings. Reorganisation Measures, WHOA Proceedings and Nationalisation Measures do not qualify as insolvency proceedings under Dutch law. Certain measures that may be taken during Reorganisation Measures or WHOA Proceedings such as bail-in or debt write-down, debt-for-equity swaps, mandatory write-down or conversion of capital instruments may, although ultimately depending on the interpretation under English law and the Default Rules, be covered by Rule 5.

(g) Carve-Out from Dutch Insolvency Law: Special Regime for Dutch members of Payment and Settlement Systems

If Reorganisation Measures (or WHOA Proceedings insofar as BRRD Investment Firms are concerned) are incapable of saving an ailing Dutch Credit Institution or BRRD Investment Firm, normal Insolvency Proceedings may follow. At that stage there is also protection available for Systems, System operators and central counterparties. This protection follows from the Settlement Finality Directive.

The law applicable to the Insolvency Proceedings and Reorganisation Measures of a Relevant Clearing Member is in principle that of this jurisdiction (*lex fori concursus*)¹⁶ and such Insolvency Proceedings and Reorganisation Measures must in principle be given extraterritorial effect by all other Regulation States.

An exception to the applicability of the Dutch *lex fori concursus* is provided by:

- (i) article 212e BA, which states that the effects of Insolvency Proceedings in respect of "participants" (which term includes Dutch Credit Institutions, Dutch Investment Firms and Dutch Companies) on their rights and obligations under or in connection with their participation in a System shall be determined exclusively by the law governing that System.¹⁷ There is no clear guidance in Dutch legal literature on the scope of the "rights and obligations" of a participant that are subject to this conflict of law rule. In our view, article 212e BA must be interpreted widely (according to its purpose) to cover all rights and obligations that derive from participating in the relevant System and the operation of the arrangements governing that System; and
- (ii) article 12 EUIR which contains a similar rule applicable to the Insolvency Proceedings of Dutch Companies which participate in a "payment or settlement system";

(together the "**Systems Carve-out**").

Article 212e BA applies to all proceedings that qualify as insolvency proceedings as defined in article 212a(1) BA, which means "*any collective measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganise it, where such measure involves the suspending of, or the imposing of limitations on, transfers or payments*". Article 212e BA has been declared applicable *mutatis mutandis* to moratorium of payments (article 281g BA). All Insolvency Proceedings therefore apply the Systems Carve-out.

Once Brexit takes effect, item (i) will continue to apply because LCH will qualify as a System, but item (ii) will cease to apply as the wording of article 12 EUIR specifically refers to "*the law of the Member State applicable to that system*". However, item (ii) is

¹⁶ Based upon the provisions of the WUDCI, the BA and the EUIR.

¹⁷ Article 212e implements article 8 of the Settlement Finality Directive pursuant to which "*in the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system*". Article 8 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.

only relevant for Dutch Companies as Relevant Clearing Members and they can also avail themselves of item (i).

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

(a) *Insolvency Proceedings*

We understand that, pursuant to the Collateral Arrangements:

- under the terms of the Deed of Charge, the Relevant Clearing Member agrees to grant, with full title guarantee¹⁸, in favour of LCH a first ranking fixed security over the Charged Property (as defined in the Deed of Charge);
- the Charged Property is rendered subject to the charge by submission of the appropriate details (as provided at Section 4 of the LCH Procedures) by the Relevant Clearing Member to LCH, and by the delivery of securities matching the description to a designated securities account maintained in the name of LCH; and
- Charged Property is released from the charge when the Relevant Clearing Member submits a release instruction to LCH (as provided at Section 4 of the LCH Procedures) and LCH discharges the charge under clause 3(1) of the Deed of Charge by redelivering the Collateral specified in the release instruction to the Relevant Clearing Member.

Relevant statutory provisions protecting the Collateral Arrangements

For as long as LCH qualifies as a System, the collateral security provisions of the SFD Rules will apply to protect the Collateral Arrangements (see our discussion of the System Security Interest and the Systems Carve-out below) and even after Brexit, the

¹⁸ Subject to any other charge or lien arising in favour of a Custodian Bank or Clearance System (each as defined in the Deed of Charge).

FCA Rules will continue to apply to the Collateral Arrangements, because the Deed of Charge is assumed to constitute a Financial Collateral Arrangement (or a combination of arrangements of which a Financial Collateral Arrangement forms part) under English law and it will therefore qualify as such under the laws of this jurisdiction.¹⁹

Security Interest

Because the Deed of Charge should be regarded as a Financial Collateral Arrangement, any question relating to proprietary effects, requirements for perfecting the Deed of Charge and for rendering it effective against third parties, and the steps required for realisation of the Collateral, are governed by English law, being the law of the country in which the "relevant account" (as defined in article 10:141 DCC) is maintained. It is not required for a Financial Collateral Arrangement under the laws of this jurisdiction that the "relevant account" is located in an EU Member State.

Because the "relevant account" is maintained in England, no acts and conditions need to be done or fulfilled under the laws of this jurisdiction in order to ensure the recognition, effectiveness and perfection of LCH's security interest in the Charged Property or to enable LCH to enforce that security interest in accordance with the Deed of Charge.

Enforcement of Security Interests under the Deed of Charge

Following the occurrence of any default in payment or failure to discharge any Secured Obligation (as defined in the Deed of Charge), including in relation to any Insolvency Proceedings with respect to the relevant Relevant Clearing Member, LCH would be entitled under the laws of this jurisdiction to enforce the security interests created under the Deed of Charge.

Pursuant to the Systems Carve-out, if LCH takes action to enforce the security interests purported to be created under the Deed of Charge in accordance with English law, Dutch law and any Insolvency Representative must recognise and give effect to such

¹⁹ Although the FCA Rules dealing with eligible parties to a Financial Collateral Arrangement define "central counterparty, settlement agent or clearing house" by reference to an EU entity, non-EU CCPs do qualify for protection under the FCA Rules because all Relevant Clearing Members based in this jurisdiction are eligible parties under the FCA Rules and these rules treat as eligible an arrangement where only one party is an eligible party (unless such non-eligible party is a natural person not acting in the conduct of a trade or profession).

action.²⁰ Equally, any action for voidness, voidability or unenforceability which may be taken by an Insolvency Representative to set aside the Deed of Charge or any Contracts should be determined under English law.

A statutory stay of execution period (two months with a possible extension of at most two more months) (a "**Statutory Stay**") may be imposed by court order during the bankruptcy and moratorium applicable to a Relevant Clearing Member. However, a Statutory Stay would not affect (a) any security interests granted by a Dutch Credit Institution, a Dutch Investment Firm or any third party security provider in favour of a "participant"²¹ in a System in connection with its participation in the System (a "**System Security Interest**"); or (b) any security interest that qualifies (as a matter of English law) as a Financial Collateral Arrangement within the meaning of the Collateral Directive or (c) any *rights in rem* (which includes security interests) in respect of the following: (i) tangible assets (*goederen*) situated in another EU Member State; (ii) receivables or other contractual rights owed by debtors established or resident in another EU Member State; and (iii) book entry securities booked in accounts operated, maintained and administered in another EU Member State.²²

After Brexit takes effect, the protections under (c) will no longer apply to LCH, but (a) and (b) will continue to protect it from the Statutory Stay and therefore LCH's right to enforce the security interests created under the Deed of Charge will not be subject to any delays resulting from the Statutory Stay.

²⁰ This follows from article 212e of the BA and article 12(1) EUIR. See recital 27 to the EUIR, Comment 120 of the Virgos/Schmidt Report, paragraphs 211-220 of Miguel Virgos & Francisco Garcimartin – The European Insolvency Regulation: Law and Practice (Kluwer, 2004) and paragraphs 8.104, 8.112 and 8.113 of Gabriel Moss, Ian Fletcher & Stuart Isaacs – The EU Regulation on Insolvency Proceedings; A Commentary and Annotated Guide (Oxford University Press, 2002).

²¹ The definition of "participant" includes a central counterparty as well as any bank, investment firm or clearing member (*clearing instelling*).

²² Based on article 8 EUIR and article 21 WUDCI. The latter Directive has been implemented in articles 212u and 213p BA and these apply to Dutch Credit Institutions (other than "opt-in" banks as referred to in article 3:4 DFSA) and BRRD Investment Firms. The EUIR applies to Dutch Companies and Dutch Credit Institutions which are "opt-in" banks as referred to in article 3:4 DFSA and provided these have their COMI in The Netherlands. This advice does not cover "opt-in" banks because no such "opt-in" banks are registered with the DNB. All previous "opt-in" banks have relinquished their licenses and obtained full banking licences. Article 8(1) EUIR provides that, subject to certain exceptions, the opening of insolvency proceedings that are subject to the EUIR will not affect the "*rights in rem*" of creditors or third parties over assets belonging to the insolvent debtor which are situated within the territory of another Regulation State at the time of the opening of the main insolvency proceedings. Article 21 WUDCI (articles 212u/213p BA) provides virtually the same.

(b) *Reorganisation Measures*

In respect of all Charged Property which is provided by the Relevant Clearing Member that is a BRRD Entity in connection with its participation in LCH as a System, LCH can invoke the provisions of the Deed of Charge, enforce its security interest and exercise any rights in respect thereof against the BRRD Entity, regardless of the exercise of any Resolution Power in respect of such BRRD Entity, because for purposes of the Resolution Safeguards the Deed of Charge should in our opinion qualify as (i) a security interest granted by such a BRRD Entity to a System, an operator of a System or a central counterparty (which protects LCH also after Brexit takes effect) and/or (ii) a security arrangement (which protects LCH also after Brexit takes effect). In addition, assuming LCH is fully collateralized by way of the Collateral Arrangements, it is protected from bail-in. For further details, see paragraph 4.2.3 (g) below.

(c) *Financial Collateral Arrangement*

The Deed of Charge should be treated as a Financial Collateral Arrangement under the laws of this jurisdiction provided it also qualifies as such under English law and under the law where the Charged Property is located (assuming it is located outside this jurisdiction). If that is the case, it would follow that the Deed of Charge should benefit from all the protections available to Dutch law Financial Collateral Arrangements.

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

If LCH takes action under Rule 6 and Rule 8 of its Default Rules to achieve a discharge of all of a Relevant Clearing Member's rights and liabilities under or in respect of all Contracts to which it is party or upon which it is or may be liable, the laws of this jurisdiction will 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 and Rule 6 and Rule 8 of the Default Rules would

be legal, valid and enforceable under the laws of this jurisdiction in the event that a Relevant Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures. We are of this view because it follows from our analysis in 4.2.2 (a) and (b) above, i.e. from the protections afforded by the Systems Carve-out and the System Security Interest, the FCA Rules and the Resolution Safeguards. As regards the latter, our reasoning is as follows:

Reorganisation Measures & Resolution Safeguards

As a result of Reorganisation Measures being applied in respect of a Dutch Credit Institution or a BRRD Investment Firm, the BRRD and the BRRD Act may affect the exercise by LCH of certain powers, as outlined below:

- (a) under articles 1:76b/3A:57 DFSA (article 68 BRRD), provided that the BRRD Entity's substantive obligations under the contract, including payment and delivery obligations and provision of collateral, continue to be performed, the taking of a crisis prevention measure, a crisis management measure or the exercise of a resolution tool (all as defined in the BRRD) in relation to a BRRD Entity, or the occurrence of any event directly linked to such measure, cannot constitute an enforcement event for the purposes of the FCA Rules or qualify as insolvency proceedings under the SFD, and shall not make it possible to exercise against the BRRD Entity rights of termination,²³ suspension, modification, netting or set-off, or to enforce security interests.²⁴ To provide a finality safeguard against the adverse effects of crisis prevention measures²⁵ and crisis management measures or the application of a resolution tool, articles 1:76b(4)/3A:57 DFSA provide that the use of such measures or tools shall not affect (i) transfer orders to a System or system operator, a central counterparty or a central bank, (ii) instructions provided to a System or system operator to effect a set-

²³ According to article 2 BRRD this means a right to terminate a contract, a right to accelerate, close out, set-off or net obligations or any similar provision that suspends, modifies or extinguishes an obligation of a party to the contract or a provision that prevents an obligation under the contract from arising that would otherwise arise.

²⁴ This rule also applies to Nationalisation Measures (article 6:5a DFSA).

²⁵ As defined in BRRD: the protection seems relevant mostly in respect of the appointment of temporary administrators or the removal of directors under articles 27-29 BRRD.

off, or any payment, delivery, set-off or other legal act necessary to execute such an instruction or (iii) the exercise and/or performance of rights and obligations arising from the BRRD Entity's participation in the System. These safeguards for finality purposes will continue to benefit LCH after Brexit as a result of LCH qualifying as a System.²⁶

- (b) the DNB has the power to suspend:
- (i) the payment and delivery obligations of a BRRD Entity, but in those circumstances the payment and delivery obligations of the counterparty are also suspended (article 3A:52 DFSA (article 69 BRRD));
 - (ii) the enforcement of security interests over the assets of a BRRD Entity (article 3A:53 DFSA (article 70 BRRD)); and
 - (iii) the termination rights²⁷ of a party to a contract with a BRRD Entity provided that such BRRD Entity's substantive obligations under the contract continue to be performed (article 3A:54 DFSA (article 71 BRRD));

but in each case the suspension may be for a maximum of two business days only, after which it is automatically lifted.

- (c) However, the DFSA provides that:
- (i) a safeguard for settlement finality purposes shall protect transfer orders entered into Systems against the adverse effects of a crisis prevention measure, a crisis management measure or a resolution tool (see paragraph (a) above), but there is no general carve-out from the mandatory default disapplication for the benefit of Systems or central counterparties; however, this will only prevent LCH from exercising its rights under Rules 6 and 8 based solely upon the implementation of a crisis prevention measure, a crisis management measure or a resolution tool while

²⁶ And in addition, it should benefit from these protections because "*central counterparty*" is defined in BRRD by cross-reference to the definition of "CCP" in article 2 EMIR.

²⁷ This rule also applies to Nationalisation Measures (article 6:5a DFSA).

the Relevant Clearing Member continues to perform its substantive obligations towards LCH, including all its payment and delivery obligations and provision of collateral;²⁸

- (ii) the taking of the suspension measures referred to in (b) shall not adversely affect a BRRD Entity's rights and obligations relating to its participation in or any security interests granted to a System, an operator of a System or a central counterparty (or any assets provided to them as margin) or the termination rights²⁹ of a System, an operator of a System or a central counterparty.³⁰ As a result of LCH qualifying as a System, it should continue to qualify for these protections after Brexit.³¹

(d) In addition, the DNB's exercise of the following powers:

- (i) partial property transfers of a BRRD Entity's assets, rights or liabilities;
- (ii) the power to cancel or amend the terms of a contract to which a BRRD Entity is a party; or
- (iii) the power to substitute a transferee entity as a party to such a contract;

shall not:

²⁸ Note that article 68(4) BRRD provides that the exercise of termination, suspension, modification, netting or set-off, or enforcement rights arising as a result of an event *other than a crisis prevention measure, a crisis management measure or an event directly linked to any such measure*, will not be impeded.

²⁹ This rule also applies to Nationalisation Measures (article 6:5a DFSA).

³⁰ Articles 69(4), 70(2) and 71(3) BRRD. The exception from the suspension of the payment and delivery obligations in favour of CCPs in article 3A:52 DFSA is not a literal translation of article 69(4) BRRD, but refers to "*payment and delivery obligations that have led to transfer instructions, set-off instructions or payment, delivery, set-off or other legal acts arising from such set-off instruction, to Systems or system operators, central counterparties, and central banks, or that have led to rights and obligations of a BRRD Entity under resolution arising from or in connection with its participation in a System*". It is in our view an oversight that the final sentence omits participation in a central counterparty. The safeguards under article 70(2) and 71(3) BRRD have been literally transposed.

³¹ And in addition, it should benefit from these protections because "central counterparty" is defined in BRRD by cross-reference to the definition of "CCP" in article 2 EMIR.

- pursuant to article 76 BRRD (article 3A:60 DFSA) adversely affect: security arrangements, set-off arrangements, netting arrangements or title transfer financial collateral arrangements.³² Commission Delegated Regulation 2017/867 makes clear that any arrangement between a BRRD Entity and a central counterparty which is covered by a default fund should be regarded as a protected "netting agreement" under Art 76(2)(d), and provides in its recitals that "*Resolution authorities should therefore be obliged to protect all types of arrangements referred to in article 76(2) of BRRD which are linked to counterparty's activity as a CCP*" (Rec 6). This appears to cover all products which are subject to clearing, and not only derivatives.³³ It is highly likely that the Deed of Charge will be regarded as a security arrangement and that Rules 6 and 8 will be regarded as a netting arrangement.

³² For this safeguard assets and liabilities include transactions, ancillary rights vis-a-vis the BRRD Entity and, in relation to security provided under the abovementioned agreements on assets of the BRRD Entity, other security rights or ancillary rights on such assets. In order to implement articles 77 - 79 BRRD, article 3A:61 DFSA also stipulates that, in the event of an envisaged transfer of assets or liabilities, termination or modification of an agreement, or the substitution of the BRRD Entity as a party to an agreement with respect to title transfer financial collateral arrangements, netting arrangements, set-off arrangements, or any agreement connected therewith, DNB will (i) only transfer assets and liabilities under such agreements jointly, (ii) not amend or terminate the rights and obligations (such as set-off rights) protected under such arrangement, (iii) not substitute the BRRD Entity by the recipient of the assets and liabilities. In respect of a security arrangement, or the assets and liabilities under such security arrangement, DNB may not (i) transfer any asset securing the liability without the corresponding secured liability and "the benefit of the security", (ii) transfer the secured liability without the benefit of the security, (iii) transfer the benefit of the security without the secured liability or (iv) terminate or modify the security arrangement as a result of which the liabilities would not be secured anymore.

³³ Commission Delegated Regulation (EU) 2017/867 further specifies the security, set-off and netting arrangements that are to be protected under article 76 BRRD. In summary, it provides for the following with respect to security, set-off and netting arrangements:

(a) security arrangements shall include (i) arrangements stipulating guarantees, personal securities and warranties, (ii) liens and other real security interests and (iii) certain specific securities lending transactions;

(b) set-off arrangements shall include set-off arrangements relating to rights and liabilities arising under financial contracts or derivatives, and set-off arrangements *linked to the counterparty's activity as a central counterparty* or related to rights and obligations towards Systems or other payment or securities settlement systems and are linked to their activity as payment or securities settlement systems; and

(c) netting arrangements shall include contractual netting agreements relating to rights and liabilities arising under financial contracts or derivatives, and contractual netting arrangements where the arrangements are *linked to the counterparty's activity as a central counterparty* or related to rights and obligations towards Systems or other payment or securities settlement systems and are linked to their activity as payment or securities settlement systems.

- pursuant to article 80 BRRD (article 3A:59 DFSA) adversely affect the rules or the operations of Systems and cannot lead to the reversal of transfer orders that have already been entered into such System or modify or negate the enforceability of transfer orders, netting, the use of funds, securities or credit facilities or the protection of collateral security all as required by the SFD.

(e) Bail-in

As regards derivative exposures, bail-in must follow close-out – that is, obligations arising under derivative instruments may not be bailed in until the relevant derivatives have been closed out (article 49 BRRD).³⁴ Article 44(2)(b) BRRD excludes 'secured liabilities' from bail-in³⁵ and in our view bilateral contracts between Relevant Clearing Members and LCH under the Opinion Documents are secured liabilities for this purpose. The power to close-out derivatives (article 63(1)(k) BRRD) is only given in order to apply bail-in to the net amount (if owing by the BRRD Entity), but if (a) there is no such amount because of full collateralisation or (b) that amount is itself secured (including secured by a financial collateral arrangement), close-out of such derivatives positions is not possible, because there is nothing to bail-in post-close-out. Therefore, if LCH as a non-EU CCP has a net exposure to a BRRD Entity and such exposure is fully collateralised, there should be no possibility for the DNB to exercise its close-out and hence bail-in powers.

In our opinion, it is not necessary or recommended under the laws of this jurisdiction that LCH should specify that certain Insolvency Proceedings and/or Reorganisation Measures will constitute an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules.

³⁴ Art 49 BRRD is expressed to apply to all derivatives, not only those entered into with EU-authorized or recognised CCP's,

³⁵ Art 2(1)(67) BRRD defines secured liabilities as follows: "*any liability where the right of the creditor to payment or other form of performance is secured by a charge, pledge or lien, or collateral arrangements including liabilities arising from repurchase transactions and other title transfer collateral arrangements*".

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

Preferences and Transactions at an Undervalue

Apart from a statutory reversal of the burden of proof (in relation to LCH's knowledge of prejudicial effect) in favour of the liquidator in bankruptcy for certain types of "suspect transactions"³⁶ entered into one year prior to the judgment date for the Relevant Clearing Member's bankruptcy proceedings (*faillissement*), there are no "suspect periods" in relation to the voidable preference challenges under the insolvency laws of this jurisdiction.

In addition to the above, upon the bankruptcy of a Relevant Clearing Member the liquidator has the power to nullify and claw back any contractually required payments and collateral transfers made by the Relevant Clearing Member before the date the Relevant Clearing Member was declared bankrupt in the event that:

- (a) LCH knew, at the time of such transfer, that a petition for the Relevant Clearing Member's insolvency had been filed with the court; or
- (b) such transfer resulted from concerted action of LCH and the Relevant Clearing Member aimed at preferring the former to the detriment of the Relevant Clearing Member's other creditors.

³⁶ Such suspect transactions include:

- (i) payments of or providing collateral for debts that are not yet due and payable;
- (ii) transactions by the debtor (if a company) with or for the benefit of a group company; and
- (iii) transactions at an undervalue.

However:

- under the EUIR,³⁷ and the WUDCI,³⁸ in order to protect the insolvent party's counterparty, a claim by the liquidator in bankruptcy for nullification on the basis of voidable preference will only be successful if it would *also* be possible under the insolvency rules of the law of a Regulation State governing the preferential transaction itself, in this case English law; this rule will continue to protect LCH post-Brexit, because according to Supreme Court (*Hoge Raad*) case-law it constitutes a generally applicable rule of Dutch private international law (i.e. regardless of whether the governing law is that of a Regulation State);³⁹
- under the Systems Carve-out, any action by the liquidator in bankruptcy for voidness, nullification or unenforceability in respect of transactions or security rights pertaining to a System should be determined exclusively by English law;
- under the Segregated Pool Rules, any action for nullification of the porting of Client Contracts or the payment of the Client Clearing Entitlement (including the associated transfer of non-cash Collateral) directly to the Clearing Client on the basis of voidable preference (whether before or during bankruptcy proceedings) is ruled out.

After Brexit takes effect:

- (i) the EUIR and WUDCI will continue to protect LCH as long as English law (as the governing law of the Opinion Documents) prevents successful nullification;
- (ii) the Segregated Pool Rules will continue to protect LCH as long as LCH qualifies as a CCP within the definition of article 2(1) EMIR; and
- (iii) the Systems Carve-out will continue to provide protection to LCH in addition to those under (i) and (ii) above.

If LCH can prove that it is not possible under English law for a local insolvency representative to set aside the LCH Agreements, any Contracts or any posting of

³⁷ Article 16.

³⁸ Article 30(1) WUDCI, applicable to a Dutch Credit Institution and a BRRD Investment Firm (implemented as article 212ee BA (as regards bankruptcy)).

³⁹ HR 24 oktober 1997, *NJ* 1999, 316 (*Gustafsen/Mosk*)

Collateral thereunder in favour of LCH, then the liquidator in bankruptcy of a Relevant Clearing Member could not do so either.⁴⁰

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

Other than article 25 WUDCI⁴¹ and the Resolution Safeguards for the benefit of Systems, central counterparties, netting arrangements, security arrangements and Financial Collateral Arrangements, there is no legislation that (a) has a bearing on the set-off or netting of Contracts between LCH and a Relevant Clearing Member in the context of Insolvency Proceedings or Reorganisation Measures and (b) might apply as an alternative to the relevant arrangements set out in the Default Rules.

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

It is not possible to obtain a payment from the Insolvency Representative in a currency other than the lawful currency of this jurisdiction. Therefore, in the event of Insolvency Proceedings in this jurisdiction, any close-out amount payable by the Relevant Clearing Member should be filed with the Insolvency Representative in its equivalent in Euro (converted at the exchange rate prevailing on the Commencement Time of the

⁴⁰ These articles therefore entitle LCH to prove that under English law no such nullification is allowed or that the conditions for nullification are not met. See: ECJ 16 April 2015, JOR 2016/169 [*Lutz/Bauerle*]; ECJ 15 October 2015, JOR 2016/170 [*Nike European Operations Netherlands BV v. Sportland Oy (in liquidation)*]; ECJ 8 June 2017, JOR 2017/250 [*Vinyly Italia SpA, in liquidation v. Mediterranea di Navigazione SpA*].

⁴¹ Article 25 WUDCI has been implemented in article 212ff BA (for bankruptcy) and article 3:252 DFSA (for Reorganisation Measures) in respect of a Dutch Credit Institution or a Dutch Investment Firm. If the Netting Provisions of Rules 3, 5, 6 and 8 are together regarded as a "netting agreement" within the meaning of article 25 WUDCI, then in the event such Insolvency Proceedings or Reorganisation Measures are commenced, the effectiveness of such Netting Provisions will be determined solely by the governing law of LCH's Rulebook (i.e. English law), even if such governing law is not that of an EU Member State, but without prejudice to the default disapplication effect of article 68 BRRD (articles 1:76b/3A:57 DFSA) and the suspension power under article 71 BRRD (article 3A:54 DFSA) (see paragraph 4.2.3 above).

Article 25 WUDCI refers to the *lex contractus* as "solely" governing a netting agreement, which implies that the insolvency rules of the law governing the netting agreement exclusively determine its validity and effectiveness in the Insolvency Proceedings of a Dutch Credit Institution or a Dutch Investment Firm. There are strong arguments, by which we are persuaded, that article 25 WUDCI is a *lex specialis* derogating from the general Dutch and WUDCI rules in respect of set-off, but not from the mandatory default disapplication and the suspension power under articles 1:76b/3A:57 and 3A:54 DFSA respectively (see paragraph 4.2.3 above).

Insolvency Proceedings (articles 133/260 BA)). The BA is unclear as to whether an official exchange rate is to be used, or a rate determined e.g. by the terminating party.

4.3 Client Clearing

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

If, and to the extent that, you consider such an Exempting Client Clearing Rule to be available, please (i) assume for the purposes of answering the following Questions that LCH will rely upon the existence of the relevant Exempting Client Clearing Rule and will not require those Relevant Clearing Members to which that Rule applies to enter into a Security Deed; and (ii) ignore Questions 4.3.8 to 4.3.10.

In cases where you do not consider an Exempting Client Clearing Rule to be available, please: (i) assume for the purposes of answering the following Questions that LCH will require Relevant Clearing Members to enter into a Security Deed; (ii) assume that the Security Deed is legal, valid, binding and enforceable under English law (as its governing law) and complies with all relevant perfection requirements under the law of any jurisdiction(s) other than the Relevant Jurisdiction which you consider to be relevant to that matter; and (iii) provide a response to Questions 4.3.8 to 4.3.10.

Please see our response to question 4.3.4 below.

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

(a) Porting under the LCH Rulebook

Prior to analysing the rights of a Relevant Clearing Member or other person to successfully challenge the actions of LCH, we summarise our understanding of the term "porting" as used herein as follows:

"Porting" includes the transfer of Client Contracts of a Relevant Clearing Member (by way of novation) to a Backup Clearing Member, together with the Account Balances pursuant to the Default Rules, including the Client Clearing Annex. In such case, 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) as it is transferred to the Backup Clearing Member. The term "Account Balance" as defined in the General Regulations means such part of the collateral granted by the Relevant Clearing Member which is attributable to the relevant client account held by the Relevant Clearing Member on behalf of such client and which is attributed by LCH to the relevant client.

Collateral granted in this context means either security over cash which is granted by way of outright title transfer or, with respect to non-cash collateral granted under the Deed of Charge, any cash amounts after realisation of the relevant security interest that exceed the Relevant Clearing Member's obligations to LCH.

(b) Contractual law analysis

In addition, a Relevant Clearing Member is contractually bound to the Client Clearing Arrangements by way of its agreement to the Clearing Membership Agreement. As regards the contractual obligations arising under or pursuant to the Opinion Documents, the choice of English law to govern these Opinion Documents will be binding upon a Relevant Clearing Member and will be recognised in this jurisdiction and English law would accordingly be applied by the Dutch courts as a result of Rome I. Pursuant to article 12 of Rome I, the governing law will determine the interpretation and performance of the contract as well as the consequences of nullity or 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 Opinion Documents, this entails that in principle the laws of England govern the contractual remedies provided to the parties thereby, including the transfer or termination and re-establishment of Contracts as a contractual matter and the agreement on the scope and preconditions for release of collateral as a contractual matter. Therefore, if these remedies and measures are enforceable in accordance with

the terms of the Opinion Documents under the laws of England, this will in principle be recognised by the Dutch courts.

(c) Challenges

The Segregated Pool Rules (discussed in more detail in 4.3.4 below), which will continue to apply post-Brexit, will in our opinion prevent such challenges by either the Relevant Clearing Member or other persons. In addition, it is commonly held by authoritative literature that outside Insolvency Proceedings, legal acts that are governed by a non-Dutch law can only be successfully challenged (on the grounds of voidable preference; see paragraph 4.2.4 above for the insolvency rules) by a debtor's creditor(s) if this is allowed under the laws which govern the relevant legal act (*lex causae*).⁴² As with the conflict rule for challenges during Insolvency Proceedings (see paragraph 4.2.4), there is no requirement that the *lex causae* must be the law of an EU Member State.

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

No; please see our analysis and conclusions in paragraph 4.3.2 above and the description of the Segregated Pool Rules in paragraph 4.3.4 below.

4.3.4 ***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***

⁴² Asser/Kramer & Verhagen 10-III 2015/397. Dutch law does not provide for a conflict of laws rule regarding voidable preference challenges outside insolvency. There is also no Supreme Court case law. What we have stated here is the conflict of laws rule supported in authoritative literature.

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

We understand the following to be the case under the Opinion Documents:

- (a) Pursuant to the Default Rules, including in particular the Client Clearing Annex to the Default Rules⁴³, 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).
- (b) 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 it is returned to the Clearing Client (or to the Defaulter for the account of the Clearing Clients).
- (c) 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 Rulebook, 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**")⁴⁴; or
 - ii. if no Exempting Client Clearing Rule would apply to a Relevant Clearing Member, the Security Deed. Clearing Members in respect

⁴³ The relevant rules are General Regulation 11 and Rules 6 to 9 of the Client Clearing Annex (set out in Schedule 1 to the Default Rules).

⁴⁴ The LCH Rulebook permits LCH to designate a Clearing Member as an "**Exempt Clearing Member**" if, in its sole determination, an Exempting Client Clearing Rule would apply to a Relevant Client Clearing Member upon it becoming a Defaulter (General Regulation 11(b)).

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.

- (d) In accordance with the provisions of the Client Clearing Annex an Exempt Client Clearing Member must either:
- i. pay or deliver to or to the order of LCH the Account Balances of those of its Clearing Clients whose contracts are ported to a Backup Clearing Member; or
 - ii. pay or deliver to or to the order of LCH the Client Clearing Entitlements of its Individual Segregated Account Clients, Affiliated Omnibus Segregated Clearing Clients and Identified Omnibus Segregated Clearing Clients whose contracts are closed out and liquidated,

which obligations constitute an "Undertaking to Pay and Deliver" between the Exempt Client Clearing Member and LCH and are secured under the Deed of Charge.⁴⁵ The Undertaking to Pay and Deliver applies to those Clearing Clients who are Individual Segregated Account Clearing Clients and those Clearing Clients that are all Identified Omnibus Segregated Clearing Clients or Affiliated Omnibus Segregated Clearing Clients comprising a single Omnibus Segregated Account who have appointed a single Backup Clearing Member.⁴⁶ It does not apply to Non-Identified Omnibus Segregated Clearing Clients. For these Clearing Clients an "Aggregate Omnibus Client Clearing Entitlement" will always be returned to the Defaulting Clearing Member, regardless of whether the Defaulting Clearing Member is an Exempt Clearing Member.⁴⁷

- (e) 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 would be capable of being protected from challenge under the insolvency laws of the Netherlands, being the laws applicable

⁴⁵ General Regulation 11(c)

⁴⁶ Paragraphs 6 and 8, Client Clearing Annex

⁴⁷ Paragraph 9.3, Client Clearing Annex

to the Insolvency Proceedings and Reorganisation Measures applicable to a Relevant Clearing Member, and the entering into of a Security Deed would not be necessary.

- (f) If a Clearing Member does not qualify as an "Exempt Clearing Member" then 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 and deliver evidence to LCH of the Clearing Member having entered into such Security Deed.⁴⁸ The Security Deed is intended to provide the Clearing Client with a right vis-à-vis LCH, which is not affected by the insolvency of a Defaulter, such that an Insolvency Representative of the Defaulter could not claim against LCH for the payment it has made to the Backup Clearing Member, following instructions from the Clearing Client to LCH that it wishes porting to occur, of the amount originally due to that Relevant Clearing Member.

We understand that substantive English insolvency law (in particular Part VII of the Companies Act 1989; "**Part VII**") would give effect to the provisions in the LCH Rulebook 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. Part VII would therefore operate for English law purposes as an Exempting Client Clearing Rule (for which we refer you to the English law opinion letter provided by Clifford Chance London).

We consider:

- (A) it highly probable that the Systems Carve-out, which is applicable to Relevant Clearing Members, would give effect to any Exempting Client Clearing Rule available under English law (as the law governing LCH as System); and
- (B) that the Segregated Pool Rules qualify as an Exempting Client Clearing Rule available under Dutch law.

⁴⁸ General Regulation 11(d)

The Systems Carve-out will apply post-Brexit; as long as LCH qualifies as a System, and the effect of the Systems Carve-out would be that Dutch law must refer to English substantive law with respect to effects of Insolvency Proceedings of Relevant Clearing Members (see paragraph 4.2.1(g) above) given that the Opinion Documents (including the account relationships of all collateral accounts) are governed by English law. On this basis, provided the arrangements of the Opinion Documents are effective and allow the distinction of a Client's assets from any other assets as a matter of English law (as to which we express no opinion), neither porting of assets related to Accounts which are segregated under the Opinion Documents nor the porting of Client Contracts and the Account Balance of a Clearing Client to a Backup Clearing Member would be affected by the opening of Insolvency Proceedings if the arrangements providing for segregation and portability as between LCH, the Defaulter, its Client and the Backup Clearing Member are valid and all transfers are validly made as a matter of English law.

The Segregated Pool Rules apply in case:

- the Relevant Clearing Member is a Dutch Credit Institution, a Dutch Company or a Dutch Investment Firm;
- such a Relevant Clearing Member is entering into the Client Contracts as intermediary for the Clearing Client's account (and not as principal for its own account);⁴⁹
- the Client Contracts correspond (economically) to the Clearing Client's transactions with the Relevant Clearing Member;
- the Client Contracts qualify as a "financial instrument" listed under items (4) through (10) of Annex I to MiFID II;
- the Client Contracts are cleared with a CCP as defined in article 2(1) EMIR which can be established outside the EU.

If the Segregated Pool Rules apply, then, both prior to and during the Relevant Clearing Member's Insolvency Proceedings, the rights and assets arising from the Client Contracts (including margin provided in respect thereof) are:

- not available to the Relevant Clearing Member's general creditors;

⁴⁹ Consequently, the Segregated Pool Rules do not apply to a Relevant Clearing Member's own account positions.

- available solely (as recourse) to satisfy the Clearing Client's claims against the Relevant Clearing Member arising from the corresponding transactions;
- available to Clearing Clients who have elected individual segregation without any commingling with the positions or assets of other Clearing Clients;

and in addition:

- (i) the porting of Client Contracts to a Backup Clearing Member together with the Account Balances is immune from challenge based on voidable preference (or anti-deprivation) rules;
- (ii) the liquidator in bankruptcy is required by law to cooperate with the porting process;
- (iii) the Segregated Pool Rules would protect the return of the Client Clearing Entitlement (the balance of the liquidation proceeds) directly to the relevant Clearing Client or, alternatively, to the Relevant Clearing Member for the account of the relevant Clearing Client; neither the Client Clearing Entitlement nor the payment to the Relevant Clearing Member forms part of the Relevant Clearing Member's general insolvency estate and would be held solely for the benefit of the relevant Clearing Client(s); and
- (iv) attachments (by creditors of the Relevant Clearing Member or by the Clearing Client itself) on any rights or assets relating to the Client Contracts are expressly prohibited.

Consequently, we are of the opinion that:

- (i) 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 Systems Carve-out would be that the rights and obligations arising from, or in connection with, the participation of that Relevant Clearing Member within the LCH System would be determined by the application of substantive English insolvency law, being the law governing that System and accordingly, Part VII, which operates as an Exempting Client Clearing Rule, would apply to the Defaulter;

- the effect of the Segregated Pool Rules would be that LCH would be entitled to port the Relevant Contracts and Account Balances 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).
- (ii) if LCH were to seek to port the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member, neither an Insolvency Representative 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, because both (a) such challenge is not possible under substantive English insolvency law (for which we also refer you to the English law opinion letter provided by Clifford Chance London) and (b) the Segregated Pool Rules apply and thereby prevent such challenge; and
- (iii) to the extent that this is not the case, and notwithstanding that the mechanism of the Security Deed is intended to operate only in the absence of an Exempting Client Clearing Rule, the use of the Security Deed (as well as, or as an alternative to, reliance on the Systems Carve-out and/or the Segregated Pool Rules) would prevent the porting of the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member from being challenged under Dutch insolvency law.
- 4.3.5 ***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 the following to be the case under the Opinion Documents:

- (a) If porting does not take place, then pursuant to the Client Clearing Annex LCH shall close out the contracts and calculate the entitlement to

collateral, being the "**Client Clearing Entitlement**", of the Defaulter in respect of each Clearing Client.⁵⁰

- (b) LCH will then take instruction from those Clearing Clients who are Individual Segregated Account 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).
- (c) 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 LCH's Rulebook.
- (d) 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 Clients⁵¹.

On the basis of paragraph 4.3.4 above, we are of the opinion that an Exempting Client Clearing Rule would apply to a Relevant Clearing Member, in particular where the requirements of the Segregated Pool Rules are satisfied.

Accordingly, we are of the opinion that if LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client directly, or to the Defaulter for the account of such client, then neither an Insolvency Representative appointed to the Defaulter nor any other person could successfully challenge the actions of LCH and claim for the amount of Client Clearing Entitlement either because (a) such challenge is not possible under substantive English insolvency law (for which we also refer you to the English law opinion letter provided by Clifford Chance London) and/or (b) the Segregated Pool Rules apply and thereby prevent such challenge.

To the extent that this is not the case, and notwithstanding that the mechanism of the Security Deed is intended to operate only in the absence of an Exempting Client Clearing Rule, the use of the Security Deed (as well as, or as an alternative to, reliance

⁵⁰ Paragraph 9, Client Clearing Annex

⁵¹ Paragraph 9.3, Client Clearing Annex

on the Systems Carve-out and the Segregated Pool Rules) would, subject to the assumptions set out herein, prevent the return of the Client Clearing Entitlement to the relevant Clearing Client, or to the Defaulter for the account of such Clearing Client, from being challenged under Dutch insolvency law.

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

The only type of Reorganisation Measures which are relevant to this opinion are Resolution Powers which may be exercised in respect of BRRD Entities (which excludes Dutch Companies). In the absence of any Insolvency Proceedings, the pre-insolvency analysis under paragraph 4.3.2 applies and even if the DNB would exercise the Resolution Powers, LCH can, as a result of the Segregated Pool Rules and the Resolution Safeguards (both prior to and after Brexit), invoke the provisions of the Opinion Documents to port the Client Contracts and Account Balances of a Clearing Client to a Backup Clearing Member and exercise any rights in respect thereof against the Relevant Clearing Member.

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

The answer given in 4.3.6 applies here as well.

4.3.8 *Would the Security Deed provide an effective security interest under the laws of the Relevant Jurisdiction over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client? Would the Security Deed constitute a Financial Collateral Arrangement (or equivalent) under the laws of the Netherlands?*

In our opinion, it is highly probable that under the laws of this jurisdiction LCH will be able to rely upon the existence of two Exempting Client Clearing Rules (see 4.3.4 above). Nonetheless, the entry into of the Security Deed by a Relevant Clearing Member and the creation of the security interest thereunder, being a charge in favour of each Clearing Client of a Relevant Clearing Member, would offer an additional mechanism for preventing the porting of the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member, or the return of the Client Clearing Entitlement to the relevant Clearing Client (or to the Defaulter for the account of such Clearing Client) from being challenged under Dutch insolvency law.

It is questionable whether the Systems Carve-out, designating English law as the governing law in respect of a Relevant Clearing Member's participation in a System such as LCH in particular during such Relevant Clearing Member's Insolvency Proceedings, also captures the mechanism of the creation of the security interest under the Security Deed. Certain Member States have implemented the Settlement Finality Directive in a way which extends its scope to the indirect participants, but The Netherlands did not.

However, subject to our assumptions in Section 3 above, the claims against LCH for the return of the Account Balances and the Client Clearing Entitlement as charged in favour of the Clearing Clients under the Security Deed (whether enabling porting to a Backup Clearing Member or payment by LCH to the Clearing Clients) and the creation of such a security interest will not be affected by Insolvency Proceedings or Reorganisation Measures in respect of the Relevant Clearing Members, save as set out in paragraph 5 below.⁵² Consequently, LCH can, subject to the applicable procedures, either port the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member, or return the Client Clearing Entitlement to the relevant Clearing Client (or to the Defaulter for the account of such Clearing Client).

Based on our assumptions stated above, and assuming that the relevant Clearing Clients are qualifying parties for the purpose of the FCA Rules, the courts of this jurisdiction should, in our view, treat the Security Deed as a Financial Collateral Arrangement although we have some doubts whether the claims against LCH for the return of the Account Balances and the Client Clearing Entitlement as charged in favour of the

⁵² Dutch conflict of laws provisions on the creation of a security interest over claims refer to English law because no assets located in The Netherlands or governed by its laws are the subject of the security interest to be created under the Security Deed.

Clearing Clients under the Security Deed are eligible collateral for purposes of such FCA Rules. We refer to assumption 3.15 above and qualification 6.1 below.

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

No, there are none.

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

No, particularly if the Security Deed constitutes a Financial Collateral Arrangement; please refer to our opinion under paragraphs 4.2.2(a) and (b), 4.3.5 and 4.3.6 above.

4.3.11 *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 advice which we wish to draw to your attention.

4.4 Settlement Finality

4.4.1 *On the basis that LCH will no longer receive protections pursuant to the Settlement Finality Directive (or on the basis that it will not receive the protections as contemplated in Recital 7 of the Settlement Finality Directive), would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect finality of settlement of transfers of funds or securities (or both) from the Relevant Clearing Member to LCH? If so, please clarify from which point in time and in which circumstances finality protections in respect of such transfers would be lost.*

Because LCH will continue to qualify as a System under the SFD, the protections against the Retro-active Effect Rule in respect of a Relevant Clearing Member (which is a Dutch Credit Institution, or a Dutch Investment Firm) will continue to apply in Insolvency Proceedings (see paragraph 6.3.3(c)) as will the protections against crisis prevention and crisis management measures, substitutions, partial property transfers and cancellation/modification of existing contracts during Reorganisation Measures (see paragraph 4.2.3(a) to (d) above). More concretely, this will have the following beneficial effects:

- Insolvency Proceedings: the settlement finality and irrevocability of transfer orders and any deliveries, set-off, close-out etc needed to give effect to transfer orders will be assured. Any such transactions that would otherwise constitute "transfer orders" under the SFD and that are entered into or executed by LCH after the Commencement Time will not be automatically void and the Insolvency Representative will not be entitled to reclaim any cash amounts or securities involved.

- Reorganisation Measures:
 - there will continue to be finality protection against the adverse effects of crisis prevention measures⁵³ and crisis management measures or the application of a resolution tool, for (i) transfer orders to LCH (see 6.2.3(g)(a)), (ii) instructions to effect a set-off, or any payment, delivery, set-off or other legal act necessary to execute such an instruction and for (iii) the exercise and/or performance of rights and obligations arising from the BRRD Entity's participation in the System.⁵⁴

 - there will continue to be finality protection against the adverse effects of partial property transfers, cancellations or amendments of contracts or substitutions of contract counterparties, meaning that in those circumstances there could be a reversal of transfer orders received by LCH or the enforceability of such orders, of netting, of the use of funds, securities or credit facilities or the protection of collateral security (article 80 BRRD) (see paragraph 4.2.3(d)).

4.4.2 ***Can settlement of transfers of funds or securities (or both) be subject to challenge in your jurisdiction? What would constitute the grounds for such challenge? For example, will only post-petition transactions or transactions at an undervalue be likely to be vulnerable to challenge? In relation to such challenges, would the underlying transactions be deemed to be voided automatically or would the underlying transaction be voidable and require challenge by the insolvency officer?***

⁵³ As defined in BRRD: the protection seems relevant mostly in respect of the appointment of temporary administrators or the removal of directors under articles 27-29 BRRD.

⁵⁴ Articles 1:76b(4)/3A:57 DFSA.

Other than the Retro-active Effect Rule and the risks arising from certain measures under BRRD against which insufficient finality protection is provided (see paragraph 4.4.1 above) challenges could be based on voidable preference, but would in that case be determined in accordance with English law both before and during Insolvency Proceedings (see 4.2.4 and 4.3.2 (c) above) and during Reorganisation Proceedings (article. 3:251 DFSA). In addition, all insolvency challenges by the Insolvency Representative will be subject to English law pursuant to the Systems Carve-out.

- 4.4.3 ***On the basis that LCH will no longer receive the protections pursuant to the Settlement Finality Directive (or on the basis it will not receive the protections as contemplated in Recital 7 of the Settlement Finality Directive), are there any circumstances (such as the commencement of Reorganisation Measures) which might give rise to a loss of finality protections before the commencement of Insolvency Proceedings? If so, please clarify from which point in time and in which circumstances finality protections would be lost?***

The protections against crisis prevention measures⁵⁵ and crisis management measures or the application of a resolution tool, for (i) instructions to effect a set-off, or any payment, delivery, set-off or other legal act necessary to execute such an instruction and for (ii) the exercise and/or performance of rights and obligations arising from the BRRD Entity's participation in the System will not be lost (see paragraphs 4.2.3(a) and 4.4.1 above),⁵⁶ nor will those against partial property transfers, cancellations or amendments of contracts or substitutions of contract counterparties under article 80 BRRD (see paragraphs 4.2.3(d) and 4.4.1 above) because LCH will not lose its SFD protections by virtue of qualifying as a System.

⁵⁵ As defined in BRRD: the protection seems relevant mostly in respect of the appointment of temporary administrators or the removal of directors under articles 27-29 BRRD.

⁵⁶ Articles 1:76b(4)/3A:57 DFSA.

5. RESERVATIONS

5.1 Effectiveness of Security

Our opinions are subject to:

- (a) any asset being capable of forming the subject of a security interest and not otherwise being personal to a Relevant Clearing Member;
- (b) the creation of such security interest not requiring any authorisation, consent or fulfilment of any other pre-condition or formality which has not been satisfied, obtained or done; and
- (c) any relevant contract comprised in such security interest being capable of being set aside as a result of any fraud, misrepresentation or any bribe or corrupt conduct.

5.2 Enforceability of claims

5.2.1 the terms "*enforceable*", "*enforceability*", "*valid*", "*legal*", "*binding*" and "*effective*" (or any combination thereof) where used above, mean that the obligations assumed by the relevant party under the relevant document are of a type which the laws of this jurisdiction generally recognise and enforce; they do not mean that these obligations will necessarily be enforced in all circumstances in accordance with their terms; in particular, enforcement before the courts of this jurisdiction will in any event be subject to:

- (a) the degree to which the relevant obligations are enforceable under their governing law (if other than Dutch law) and to the availability under such governing law of defences such as, without limitation, set-off (unless validly waived), fraud, misrepresentation, force majeure, unforeseen circumstances, undue influence, duress, error, abatement and counter-claim;
- (b) the nature of the remedies available in the Dutch courts (and nothing in this opinion letter may be taken as indicating that specific performance or injunctive relief would be available as remedies for the enforcement of such obligations);
- (c) the acceptance by such courts of jurisdiction;

- (d) prescription or limitation periods (within which suits, actions or proceedings must be brought);
- (e) sanctions implemented or effective in this jurisdiction under the Sanctions Act 1977 (*Sanctiewet 1977*), the General Customs Act (*Algemene Douanewet*), or the Economic Offences Act (*Wet Economische Delicten*),

5.2.2 in addition and except as set out in paragraphs 4.2 and 4.3 above our opinion is subject to and limited by the provisions of any applicable bankruptcy, insolvency, moratorium and other similar laws of general application (including Reorganisation Measures) relating to or affecting generally the enforcement of creditors' rights and remedies from time to time in effect (including, except as set out in paragraph 4.2.4 above, the doctrine of voidable preference within the meaning of Section 3:45 of the Dutch Civil Code and/or Section 42 et.seq. of the BA and any emergency measures that may be taken by the Dutch government or any of its regulatory agencies under the Dutch Financial Relations Emergency Act (*Noodwet Financieel Verkeer*) or under articles 1:28 or 1:29 of the DFSA).

5.3 Application of foreign law

We express no opinion:

- 5.3.1 on the binding effect of the choice of law provisions in the Opinion Documents insofar as they relate to non-contractual obligations arising from or connected with the Opinion Documents.
- 5.3.2 as to whether a Relevant Clearing Member has created a valid security interest over any asset or right which is situated (or deemed to be located) outside England (including those situated outside this jurisdiction or governed by a foreign law).

6. QUALIFICATIONS

6.1 Financial Collateral Arrangements: Qualifying Parties & Qualifying Collateral

Collateral held Outside the Netherlands

- 6.1.1 Financial Collateral Arrangements will only benefit from the FCA Rules outlined in paragraph 6.1.5 below if at least one of the parties falls within one

of several specified categories⁵⁷ and the other party is not an individual acting in a private capacity. It is not entirely clear when – in an international transaction – the eligibility requirements of the FCA Rules are applicable. An argument can be made that where the property law aspects of the Collateral are governed by the law of another jurisdiction, the limitations as to the qualifying parties imposed by the FCA Rules are not applicable. As mentioned in footnote 19, the eligibility requirements are not relevant in the situation dealt with in this advice.

Qualifying Collateral

6.1.2 The only categories of Collateral which can benefit from the provisions of the Collateral Directive and/or the FCA Rules are cash (if it qualifies as "cash" as defined in article 2(d) of the Collateral Directive) and book-entry securities as defined in article 2(g) of the Collateral Directive. We have assumed in paragraph 2.14 that the Collateral charged under the Deed of Charge qualifies as financial collateral for purposes of the Collateral Directive and that this is also the case under English law.

6.1.3 There is some debate as to whether this requirement is satisfied where a security interest is created over both property which constitutes financial collateral and property which does not constitute financial collateral. However, in our opinion, the better view is that this requirement is satisfied in these circumstances in respect of the financial collateral where any other assets over which security is

⁵⁷ Qualifying parties are the following:

- a public authority, including public sector bodies of member states of the European Union charged with or intervening in the management of public debt;
- a public sector body of an EU member state authorised to hold accounts for customers;
- a central bank, the European Central Bank, the Bank of International Settlements, a multilateral development bank, the International Monetary Fund or the European Investment Bank;
- a financial institution subject to prudential supervision including without limitation banks, administrators (*beheerders*), investment institutions (*beleggingsinstellingen*), securities institutions (*beleggingsondernemingen*) all as defined in article 1:1 of the DFSA;
- a central counterparty, settlement agent or clearing house as defined in article 212a, sub c, d and e of the BA (including institutions regulated under the national law of EU Member States) that are active on the market for futures, options and derivatives and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that include bondholders or holders of other forms of debt instruments or any institutions defined in paragraphs a, b, c of article 52 paragraph 1 of the BA; or
- a private individual acting in the course of a profession or business.

taken (such as rights against a custodian) can be viewed as ancillary to the security over the "financial collateral" itself.

Possession and Control

6.1.4 A security Financial Collateral Arrangement requires that the relevant "financial collateral" (as defined in the FCA Rules) is in the "possession or control" (as such terms are used in the FCA Rules) of the collateral-taker, which we assume is the case in respect of LCH under the Deed of Charge.⁵⁸

Protective Effect of FCA Rules

6.1.5 In case the Deed of Charge falls within the protective scope of the FCA Rules, this would have the following positive results:

- (a) availability of a right of use (*rehypothecation*) in respect of any non-cash Collateral if so agreed between the Relevant Clearing Member and LCH; the question whether the parties may provide for the chargee/collateral taker to use or sell the collateral and keep the proceeds is governed by the law governing the proprietary aspects of the Deed of Charge (see paragraph 4.2.2 (a) above or 6.2.1 below);
- (b) exemption from the Statutory Stay: paragraph 4.2.2(a);
- (c) the Retroactive Effect Rule is partially disapplied: paragraph 6.3.3;
- (d) the automatic termination of powers of attorney is disapplied for those powers of attorney that form part of a Financial Collateral Arrangement: paragraph 6.4.

⁵⁸ The Collateral Directive applies to financial collateral once it has been 'provided' (article 1(5) Collateral Directive). This requires the financial collateral to be delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf (article 2(2) Collateral Directive). On 10 November 2016, the EU Court of Justice rendered a judgment (C-156/15 ECLI:EU:C:2016:851, *Private Equity Insurance Group/Swedbank*) on the interpretation of the requirement of possession or control. On the basis of this judgment, it can be argued that the requirement of possession or control should be interpreted so as to entail that the collateral provider is deprived of the right to dispose over the collateral, save that parties can still agree in line with the Collateral Directive that the collateral provider has a right of substitution (or the right to withdraw) excess collateral. Although this is not entirely certain, in our view, in respect of book entry securities, it is sufficient that the collateral has been credited to the relevant account (article 1(5) Collateral Directive). In any event, concepts such as 'provision' and 'control' of the financial collateral have not appeared in the FCA Rules.

6.2 Conflicts Rule for Security Deed

6.2.1 The proprietary effects, creation and perfection requirements, requirements for rendering the security interest provisions effective against third parties, and the steps required for the enforcement of the Security Deed, will, as a matter of Dutch private international law, be governed by the law applicable to the obligation to create the security interest where the assets being charged concern *in personam* rights and claims. The laws governing the rights and claims themselves only determine whether they are capable of being assigned or encumbered with a security interest and to whom the account bank can validly discharge its debt⁵⁹. Therefore, in relation to the Relevant Clearing Member's *in personam* rights against LCH in respect of the return of the Charged Assets, the proprietary aspects of the Security Deed depend solely upon the law applicable to the obligation on the part of the Relevant Clearing Member to create the security interest.⁶⁰

Ordinarily, such obligation would arise between the parties to the security agreement, i.e. the chargor and the chargee. However, the obligation on the Relevant Clearing Member (chargor) to enter into the Security Deed for the benefit of its Clearing Clients (chargees) arises pursuant to the LCH Rulebook⁶¹ between LCH and the Relevant Clearing Member, rather than the terms of the agreements between a Relevant Clearing Member and its Clearing Clients.⁶² The Security Deed arrangements may nonetheless still fall within article 10:135, but this has not yet been tested in the courts of this jurisdiction.

6.2.2 The courts of this jurisdiction would therefore not necessarily recognize the validity of security interests merely because they are valid under the governing law of the Security Deed. Such courts would determine the validity of a security interest in accordance with the laws applicable to the LCH Rulebook, being

⁵⁹ Art. 14 Rome I.

⁶⁰ In respect of personal claims, the conflict rules of this jurisdiction are derived from article 10:135 DCC. Pursuant to article 10:135 DCC, the law governing the creation of a security interest in respect of a personal claim will be the law governing the obligation to create that security right.

⁶¹ General Regulation 11(d)

⁶² LCH is not a party to these agreements and does not mandate the use of any particular documentation for documenting the transactions between clearing members and their clients.

English law, because these laws are designated by the conflict rules outlined in 6.2.1 above for the proprietary aspects of security interests.

- 6.2.3 Where a first ranking security interest over Collateral has been validly created under English law (in accordance with the principles set out in 6.2.1 above), pursuant to the Security Deed, the beneficiary (i.e. the Clearing Client) will be able to:
- (a) enforce its security interest outside this jurisdiction without the intervention of the courts of this jurisdiction and without any other formalities being required to ensure 'recognition' of its security interests;
 - (b) take recourse against the enforcement proceeds outside this jurisdiction without the involvement of the courts of this jurisdiction and there is no obligation to turn over these proceeds to the Relevant Clearing Member's Insolvency Representative (other than excess proceeds);

Consequently, since the Collateral is located (or deemed located) outside this jurisdiction and to the extent that any receivables are owed by LCH being a debtor established outside this jurisdiction, a Dutch court is not likely to be involved in enforcement measures in connection with such Collateral as those measures will be taken outside this jurisdiction. For these reasons, the enforcement of the security interests purported to be created pursuant to the Security Deed should normally not require any action before the courts of this jurisdiction.

6.3 Insolvency Proceedings: Retroactive Effect Rule and Finality / FCD Protections

- 6.3.1 Any dispositions by such Relevant Clearing Member of its property made on or after the Commencement Time of Insolvency Proceedings are void except as ordered by the court or as allowed under the FCA Rules or the SFD Rules (see paragraph 6.3.3 (b) and (c) below). Any Collateral acquired by the Relevant Clearing Member, or coming into existence (e.g. any claims in respect of new credit balances on a cash account subject to a Security Interest) after the Commencement Time will therefore not be subject to the Security Interest purported to be effected by the Deed of Charge.
- 6.3.2 As a result of the Retroactive Effect Rule, any assets acquired by the Relevant Clearing Member or coming into existence after the Commencement Time will not be subject to the Deed of Charge except:
- (a) as ordered by the court; or

- (b) in case the Deed of Charge constitutes a Financial Collateral Arrangement and then subject to the limitations discussed in paragraph 6.3.3 (b) below;

6.3.3 The Retroactive Effect Rule:

- (a) does not apply in case the bankruptcy court permits an exception;
- (b) is partially disapplied for Financial Collateral Arrangements and for acts performed pursuant to such arrangements (e.g. transfer of additional Margin) in that:
 - (i) the actual time of the judgment applies, instead of the Commencement Time, to such Financial Collateral Arrangements and acts;
 - (ii) if such Financial Collateral Arrangements or acts were entered into, or took place, on the same day as the judgment opening the Insolvency Proceedings, they are valid provided the other party is able to show that it was not aware, nor should have been aware, of such judgment,
- (c) is partially disapplied with respect to the following, in case a Dutch Credit Institution or a Dutch Investment Firm participates in a System:
 - (i) any transfer order, or any disposition of property in pursuance of such an order, given by a Dutch Credit Institution or a Dutch Investment Firm after the Commencement Time but prior to the judgment opening the Insolvency Proceedings in respect of such Dutch Credit Institution or Dutch Investment Firm shall be valid irrespective of when the order (or the disposition) was carried out;
 - (ii) any payment, delivery, collateral transfer, set-off, close-out, liquidation of collateral or other disposition necessary to give effect to or carry out a transfer order as described at paragraph 6.3.3(c)(i) shall be valid;
 - (iii) any transfer order given by a Dutch Credit Institution or a Dutch Investment Firm shall also be valid even if it was entered onto the System after the judgment opening the Insolvency Proceedings, provided that it was carried out on the same day

and the System's operator neither knew nor ought to have known about the judgment opening the Insolvency Proceedings at the time the transfer order became irrevocable; and

- (iv) any set-off instructions and any payment, delivery, collateral transfer, set-off, close-out, liquidation of collateral or other disposition necessary to give effect to or carry out a transfer order or set-off instruction as described at paragraph 6.3.3(c)(iii) shall also be valid.

6.3.4 A contractual provision that extinguishes one or more of a party's contractual claims for payment *solely* because of (a termination of a contract as a result of) that party becoming subject to Insolvency Proceedings, may be considered void or unenforceable on the basis of conflicting with article 20 BA as an unreasonable deprivation of the insolvent party's assets⁶³. The validity of such a clause depends on the context and circumstances of the case. Although this is not certain, we would hold the view that in the context of the effective porting of Contracts and collateral from a Defaulter to a back-up clearing member, as should be facilitated under EMIR, there is sufficient justification for the validity of a clause that determines the value of ported transactions and collateral as zero.

6.4 Other insolvency issues

6.4.1 Each power of attorney (*volmacht*) and mandate (*lastgeving*) (including, but not limited to, powers of attorney and mandates expressed to be irrevocable and including the Relevant Clearing Member power of attorney contained in Clause 19 of the Deed of Charge and Clause 8.3 of the Security Deed) granted and all appointments of agents made by a Relevant Clearing Member, explicitly or by implication, will terminate by law and without notice upon the Commencement Time with respect to bankruptcy (*faillissement*) and will become ineffective in case a Relevant Clearing Member becomes subject to moratorium of payments (*surseance van betaling*) or the exercise of certain crisis prevention measures, crisis management measures or the exercise of certain Resolution Powers under the BRRD Act or the SRMR.

6.4.2 Notwithstanding the above:

⁶³ Based on: Supreme Court (HR 12 April 2014, JOR 2013/224 [*Liquidators of Megapool v. Laser Nederland*]).

- (a) where the relevant power of attorney or mandate forms part of a Financial Collateral Arrangement, and is necessary to realise the financial collateral, these rules will be disapplied;
- (b) the operation of the SFD Rules should nonetheless ensure that LCH is able to exercise its rights to enforce the security interests created under the Deed of Charge, provided that any such enforcement does not involve the exercise of the power of attorney.

6.5 WHOA Proceedings in respect of Dutch Investment Firms

Mandatory Default Override

6.5.1 Under the new Article 373 BA (introduced under the WHOA), the preparation or proposal of a restructuring plan covered by the WHOA, the appointment by the court of a restructuring expert or any the occurrence of any other event or act directly related or reasonably required for the plan's implementation (e.g. a court ordered stay; see (c) below), shall not *in themselves* allow LCH to invoke contractual or other powers (i) to terminate or dissolve a contract (whether automatic or by notice), (ii) to amend obligations owing to the Dutch Investment Firm or (iii) to suspend the performance of its own obligations towards the Dutch Investment Firm. Events of default clauses that could be triggered by such events cannot be validly invoked against the debtor (the WHOA overrides such contractual provisions). The LCH Rules, by contrast, give LCH what is in effect a discretionary termination right which is not blocked in the same way by Article 373 BA. Furthermore, it is doubtful whether a court outside the EU would give effect to this override particularly in respect of Collateral Arrangements in respect of Charged Assets and Charged Property located in England (assumptions 3.14 and 3.15 above).

Moratorium

6.5.2 If an event of default has occurred allowing LCH to suspend, amend or terminate the LCH Agreements, this and the enforcement of security interests over assets owned by the Dutch Investment Firm can be blocked by a court-ordered stay period (4 months with possible extensions for up to no more than a further 4 months) except with prior court approval, but any such stay order does not affect: (i) creditors who are unaware of the fact that a restructuring plan was being prepared (i.e. had no knowledge of the filing of the Scheme Declaration and had not otherwise been informed by the Dutch Investment Firm) or that a stay order had been issued, (ii) security interests in respect of collateral

located in other EU Member States or in non-EU countries, (iii) security interests in the form of title transfers (as those assets no longer belong to the Dutch Investment Firm) or (iv) normal set-off of mutual obligations between creditor and debtor (as that does not constitute enforcement against the Dutch Investment Firm's assets). We consider (ii) and (iii) to be safe harbors available to LCH (see assumptions 3.9(d), 3.14, and 3.15 and paragraphs 4.2.2(a) and 4.2.2(c)).

- 6.5.3 Even if LCH's termination, suspension, and close-out rights arising from a pre-stay default would be frozen, it can only be required to continue the performance of its obligations if the Dutch Investment Firm provides LCH with collateral security for such continued performance during the stay period. In the event that (a) the Dutch Investment Firm fails to offer or provide such collateral security, this shall allow LCH to exercise its termination, suspension, close-out netting rights, or (b) the collateral security available to LCH becomes (or threatens to become) insufficient during the stay period, LCH can petition the court to allow it to exercise its termination/close-out rights and enforce its security interests forthwith and the court will have no option but to grant a permission in such circumstances.

Contract Termination by the Court

- 6.5.4 if LCH does not agree to a proposal by the Dutch Investment Firm, which has entered into WHOA Proceedings, to amend or terminate an LCH Agreement, the court can allow the unilateral termination of the LCH Agreement (and all transactions thereunder) if such termination is part of the restructuring plan submitted to and approved by it and then only subject to a reasonable notice period being observed by the Dutch Investment Firm.⁶⁴ In the event of such a termination, LCH will be legally entitled to damages, which will be calculated on the basis of the agreed close-out netting arrangements (including the application of any collateral held by the counterparty)⁶⁵; the damages will therefore consist of the amount of LCH's net claim against the Dutch Investment Firm after giving effect to the LCH Agreements' close-out netting procedures

⁶⁴ When it approves the restructuring plan, the court can extend the notice period to a maximum of three months after the approval order, if it deems the period chosen by the debtor to be unreasonable.

⁶⁵ This is because of the 'no creditor worse off' principle enshrined in the WHOA; no creditor can be forced to accept a restructuring plan which means it receives less value (whether in cash or in non-cash awards) than it would have received in case of regular insolvency proceeding (Article 384 BA (new)).

upon the date the termination becomes effective;⁶⁶ this claim can be marked down if it is integrated into the restructuring plan⁶⁷ as LCH would also not have received 100% payment of its net claim in the Dutch Investment Firm's insolvency. It is unlikely that LCH could be affected by this rule because it will be able to exercise its rights under 6.5.1 and 6.5.2 even in the situation that such a proposal was made to it. In addition, it is unclear what benefit the Dutch Investment Firm would seek to obtain by trying to amend the LCH Agreements or any Client Contracts (which will be matched by equal and opposite transactions with its Clearing Clients).

- 6.5.5 Even if WHOA Proceedings were started in respect of a Dutch Investment Firm, LCH can, provided the Dutch Investment Firm acted as an intermediary under the Segregated Pool Rules, invoke the provisions of the Opinion Documents to port the Client Contracts and Account Balances of a Clearing Client to a Backup Clearing Member and exercise any rights in respect thereof against such a Dutch Investment Firm.

6.6 General Qualifications

- 6.6.1 Although, in our opinion, we consider it highly probable that under the laws of this jurisdiction LCH will be able to rely upon the existence of the Exempting Client Clearing Rule and the operation of the Systems Carve-out, neither article 212e BA nor article 12 EUIR have been subject to review by the Dutch courts in this context, and there is therefore no relevant case law. The Dutch and European literature on this subject is highly persuasive towards the view that a Dutch Insolvency Representative should give effect to the operation of the Systems Carve-out and interpret it broadly. We are aware of alternative views which adopt a more cautious approach and on that basis the use of the Security Deed may, subject to the assumptions above, offer an additional mechanism for preventing the porting of the Relevant Contracts and Account Balance of a Clearing Client to a Backup Clearing Member, or the return of the Client Clearing Entitlement to the relevant Clearing Client (or to the Defaulter for the account of such Clearing Client) from being challenged under anti-deprivation

⁶⁶ As this will be difficult to quantify up front given that market value of the positions and the collateral will vary over time, the parliamentary notes indicate that a restructuring plan would normally contain a bandwidth.

⁶⁷ The debtor has a choice to either include the damages in the restructuring plan or not to do so. In the latter case, the damages will need to be paid in full. In the former case it can offer a partial payment, but the counterparty then has the right to contest the restructuring plan as an affected creditor.

principles or other similar principles of Dutch insolvency law. The Segregated Pool Rules also qualify as an Exempting Client Clearing Rule making the use of the Security Deed unnecessary in our view.

- 6.6.2 Any enforcement of the Opinion Documents and of any foreign judgments in this jurisdiction will be subject to the rules of civil procedure as applied by the courts of this jurisdiction; such courts have powers to mitigate the amount of damages, indemnities or penalties provided for in the Opinion Documents (including any agreed costs payable in respect of litigation or collection), to the extent it regards them as manifestly excessive and, if so requested, to make an award in a foreign currency; such courts may also refuse to give effect to any provision in an agreement which would involve the enforcement of foreign revenue or penal laws; enforcement of a judgment for a sum of money expressed in foreign currency against the Relevant Clearing Member's assets located in this jurisdiction would be executed, however, in terms of Euros and the applicable rate of exchange would be that prevailing on the date of payment.
- 6.6.3 Our opinions set forth in paragraph 4.1 are limited to authorisations, licenses consents or approvals of or filings or registrations with or other acts of any court, governmental agency or body of this jurisdiction which apply to transactions of the type provided for in the Opinion Documents.
- 6.6.4 We express no opinion as to whether any Party needs to comply with or as to the consequences of compliance or non-compliance with any applicable provisions of EMIR and any technical standards made thereunder in respect of anything done by it in relation to or in connection with the Opinion Documents. However, article 12(3) of EMIR provides that any infringement of the rules under Title II of EMIR "shall not affect the validity of an OTC derivative contract or the possibility for the parties to enforce the provisions of an OTC derivative contract", consequently any failure by a party to so comply should not make the Opinion Documents invalid or unenforceable.
- 6.6.5 We also express no opinion as to whether any Party needs to comply with or as to the consequences of compliance or non-compliance with any applicable provisions of the SFTR in respect of anything done by it in relation to or in connection with the LCH Agreements. However, article 22(5) of the SFTR explicitly provides that infringement of the reporting requirements in article 4 will not affect the validity of a transaction or the enforceability of its terms or give rise to compensation rights. Consequently, any failure by a Party to the LCH Agreements to so comply with article 4 should not make the LCH

Agreements invalid or unenforceable. In addition, article 15(4) of the SFTR provides that article 15, setting out the conditions for reuse of financial instruments received under a collateral arrangement to be permitted, "does not affect national law concerning the validity or effect of a transaction". Dutch law has recently been amended so that the validity or effectiveness of a security or title transfer collateral arrangement will not be adversely affected if it fails to meet the conditions of article 15 SFTR.

- 6.6.6 If the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the courts of this jurisdiction may recognise the extinction of those claims or liabilities.

7. RELIANCE

This opinion letter is given for the exclusive benefit of the addressee. In issuing 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 prior written consent, be relied on by any other person. We consent to a copy of this opinion letter being made publicly 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.

Yours faithfully,



F.G.B. Graaf
Advocaat
Clifford Chance LLP

Appendix 1
Form of Deed of Charge

Appendix 2
Form of Security Deed

Appendix 3

Form of Clearing Membership Agreement