

Legal Opinion

To: LCH.Clearnet Limited

Date: 12 June 2014

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

Dear Sirs

You have asked us to provide advice in respect of the laws of Portugal ("**this jurisdiction**") in response to certain specific questions raised in by LCH Clearnet Limited ("**LCH**") in relation to membership, insolvency, security, set-off & netting and client clearing. The relevant questions are set out in full in Section 3 of this 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 Portuguese Companies that are Financial Institutions and all references to a "**Relevant Clearing Member**" in this advice shall be construed accordingly, although there are no specific regulatory restrictions under Portuguese law on which entities may be eligible to become clearing members. For these purposes:

- (a) a reference to "**Portuguese Company**" is a reference to a company which is incorporated in Portugal and registered under the Companies Code (as defined below) as a limited liability company ("*sociedade de responsabilidade limitada*"), comprising both joint stock companies ("*sociedades anónimas*") and private limited companies ("*sociedades por quotas*")⁽¹⁾; and
- (b) A reference to a "**Financial Institution**" is a reference to a credit institution (including a bank), or to a financial company (including an investment firm or a broker) as defined in and incorporated under the Banking Regime (as defined below);

⁽¹⁾ Although under Portuguese law, there are other types of companies available, such as "*sociedades em comandita por acções*", those are not generally used in business in Portugal (namely within the financial sector) and are therefore not addressed in this opinion.



- 1.2 We confirm that our advice is applicable to each of the LME Service, the SwapClear Service, the RepoClear Service, the EquityClear Service, the LCH Enclear OTC Service, the Turquoise Derivatives Service, the Nodal Service, the ForexClear Service, the NLX Service and the FEX Service.
- 1.3 In this advice:
- (a) 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;
 - (b) a reference to "**EMIR Decree-Law**" is a reference to Decree Law no. 40/2014, dated of March 18, implementing aspects of EMIR in Portugal;
 - (c) a reference to the "**Parties**" is a reference to LCH and a single Relevant Clearing Member to which this advice refers to, and a reference to a "**Party**" is a reference to either of them;
 - (d) a reference to "**Financial Collateral Act**" is a reference to Decree Law 105/2004, dated of May 8, as amended, implementing Directive 2002/47/EC, of the European Council and of the Parliament, dated of June 6, on financial collateral agreements, and Directive 2009/44/CE, of the Parliament and of the European Council, dated May 6;
 - (e) a reference to the "**Securities Code**" is a reference to the *Código dos Valores Mobiliários*, i.e., the Portuguese Securities Code, approved by Decree-law no. 486/99, dated November 13, as amended, which implements, inter alia; part of Directive nº 93/22/CE, dated May 10, on investment services on securities markets and the Settlement Finality Directive;
 - (f) a reference to the "**Companies Code**" is a reference to the *Código das Sociedades Comerciais*, approved by Decree-Law 268/86, dated 2 September, as amended;
 - (g) a reference to the "**Banking Act**" is a reference to the *Regime Geral das Instituições de Crédito e Sociedades Financeiras*, i.e., the legal regime of credit institutions and financial companies (including investment firms), approved by Decree-Law 298/92, dated December 31, as amended;
 - (h) a reference to the "**Civil Code**" is a reference to the *Código Civil*, approved by the Decree-Law 47.344, dated November 25, 1966, as amended;
 - (i) a reference to the "**Insolvency Act**" is a reference to the "*Código da Insolvência e da Recuperação de Empresas*" (i.e. the Insolvency and Reorganisation Code) approved by Decree-Law 53/2004, dated March 18, as amended;
 - (j) a reference to the "**Settlement Finality Act**" is a reference to Decree-Law 221/2000, dated March 9, as amended, which implements part of the Settlement Finality Directive;

- (k) a reference to the "**Settlement Finality Directive**" is a reference to Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, as amended;
 - (l) a reference to the "**Netting Act**" is a reference to Decree-Law 70/97, dated April 3;
 - (m) a reference to the "**Winding Up Act**" is a reference to Decree Law no. 199/2006, dated October 25, as amended, that regulates the liquidation and reorganization measures of Financial Institutions, which implements Directive nº 2001/24/CE, dated April 4;
 - (n) a reference to the "**CMVM**" is a reference to the *Comissão do Mercado de Valores Mobiliários*, i.e., the Portuguese Securities and Exchange Commission;
 - (o) a reference to the "**Bank of Portugal**" is a reference to the Central Bank of the Portuguese Republic, which is, *inter alia*, the authority with exclusive competence to supervise and decide on the application of restructuring and insolvency of Financial Institutions;
 - (p) 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
 - (q) headings are for ease of reference only and shall not affect interpretation of this advice.
- 1.4 For the purposes of preparing our advice we have only reviewed the following documents (the "**Opinion Documents**"):
- 1.4.1 General Regulations, Procedures, Default Rules, Settlement Finality Regulations of LCH in the form provided to us by Clifford Chance LLP on 9 June 2014 (the "**LCH's Rulebook**");
 - 1.4.2 standard form template version of the Relevant Clearing Membership agreement to be entered into between LCH and each Relevant Clearing Member, which incorporates LCH's Rulebook (the "**Clearing Membership Agreement**");
 - 1.4.3 standard form template version of the agreement entitled "*Charge by Clearing Member – Charge Securing Own Obligations*" (draft dated April 14 2014) (the "**Deed of Charge**" and together with the Clearing Membership Agreement, the "**LCH Agreements**"); and
 - 1.4.4 standard form template version of the agreement entitled "*Security Deed*" to be entered into by each Relevant Clearing Member in favour of each client provided by Clifford Chance LLP and dated December 17 2013 (the "**Security Deed**");
- 1.5 We have reviewed the Opinion Documents in connection with the instructions to counsel dated 22 October 2013 (the "**Instructions**") and the Services Description (as defined in the Instructions).



- 1.6 Our advice is given in respect of the specific questions raised by Clifford Chance as set out in Section 3 below.
- 1.7 Our advice is given in respect of obligations (a) arising under the LCH Agreements and the Security Deed ("**LCH Documents**") to which LCH is a party, including Contracts (as defined in the LCH Rulebook), which have been duly registered by LCH; (b) which are legal, valid, binding and enforceable; and (c) 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.
- 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 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 (other than the Security Deed) or by operation of law.
- 1.8 This advice is given on the basis that LCH and the Relevant Clearing Member Client are not themselves insolvent for the purposes of any insolvency law and are not subject to any insolvency proceeding (both at the time the Opinion Documents are entered into or at any time thereafter).
- 1.9 This advice relates solely to matters of Portuguese law (as in force at the date hereof) and does not consider the impact of any laws (including insolvency laws) other than Portuguese law, even where, under Portuguese law, any foreign law falls to be applied. This advice and the opinions given in it are governed by Portuguese law and relate only to Portuguese law as applied by the Portuguese courts. We express no opinion on the laws of any other jurisdiction.
- 1.10 Further to the entry into force of EMIR, and considering that certain aspects of its regime were left to the EU Member States, the Portuguese Government approved the EMIR Decree-Law whereby it (i) sets forth the authority of each of the Portuguese financial regulators for the supervision of financial counterparties, non-financial counterparties and central counterparties under EMIR, (ii) establishes a set of penalties for violations of EMIR by financial counterparties and non-financial counterparties, and (iii) and establishes rules for the incorporation and acquisition of qualifying shareholdings in central counterparties with statutory seat in Portugal. It has entered into force on April 17 2014.
- 1.11 We do not opine on the enforceability of any final sum certified as payable to and we do not express any view as to the enforceability of the Default Arrangements in relation to any action which LCH may seek to take outside this jurisdiction.

2. **ASSUMPTIONS**

For the purposes of this opinion, we have assumed the following:



- 2.1 When the Deed of Charge and/or the Security Deed includes a charge or security interest over securities, (i) such securities are not integrated in a centralised system managed by an entity with establishment in Portugal, or (ii) such securities are not integrated in a centralised system, but are deposited/registered with a custodian whose establishment is not located in Portugal;
- 2.2 That the object of the Deed of Charge and of the Security Deed is either “financial instruments” in book entry form and/or “cash” as set out in the Financial Collateral Act (as defined above);
- 2.3 That (i) each Contract is legal, valid, binding and enforceable under English law (as the law which governs them), and that (ii) the compliance with all relevant perfection requirements and the effectiveness of the collateral arrangements provided for under the Deed of Charge and the Security Deed under the law of any jurisdiction(s) other than this jurisdiction that are relevant to those matters are binding.
- 2.4 That each Party is duly incorporated and has the capacity, power and authority under all applicable laws to enter into each Contract and to perform its obligations under each Contract and that each Party has taken all necessary steps to enter into, execute, deliver, be bound by and perform each Contract, and that such steps have not been revoked or superseded.
- 2.5 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents and has otherwise complied with all applicable laws and regulations required to enable it lawfully to enter into and perform its obligations under the LCH Documents and to ensure the legality, validity, enforceability and admissibility in evidence of each Contract in this jurisdiction.
- 2.6 That the LCH Documents are entered into by the Relevant Clearing Member prior to the formal commencement of any Insolvency Proceeding in respect of that Relevant Clearing Member.
- 2.7 That each Party acts in accordance with the powers conferred by the LCH Documents; 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 each Contract in accordance with their respective terms.
- 2.8 That LCH is at all material times a recognised clearing house under all the laws and regulations applicable to it.
- 2.9 That the Relevant Clearing Member is a Portuguese Company which is a Financial Institution.
- 2.10 That the Relevant Clearing Member has all the necessary authorisations, licences and permits to carry out its activities and rendering its services.
- 2.11 That the contractual rights and obligations established pursuant to and by each Contract which is governed by a law other than Portuguese law are not capable of being avoided for any reason other than as mentioned in paragraphs 3.3.1 or 4 below.
- 2.12 That there are not and will not be any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of any Opinion Document.



- 2.13 That no obligation is to be performed in a jurisdiction other than England.
- 2.14 That, where the seat of the arbitration is not specified in the LCH Agreements, such seat will not be located in Portugal.
- 2.15 That any arbitration agreement included in the LCH Agreements or in the relevant Exchange Rules / the Relevant Rules are valid and enforceable regarding the participants / parties in any prospective arbitration pursuant to the same under English law (as the law applicable to the merits), the law applicable to the relevant arbitration agreement and the law of the seat of arbitration.
- 2.16 Where the General Regulations refer to arbitration under the relevant Exchange Rules / the Relevant Rules, we assume that such Rules (or at least the respective provisions dealing with arbitration) will be communicated to the Members upon entering the Clearing Membership Agreement and that such Rules' provisions dealing with arbitration will remain unchanged throughout the duration of the Clearing Membership Agreement.
- 2.17 That the Exchange Rules or relevant ATP Market Rules and Link Agreements are valid, enforceable and legally binding pursuant to all applicable jurisdictions, including in this jurisdiction.
- 2.18 That the process set out in Regulation 33 for prospective arbitrations is compatible with the rules applicable to the arbitration (LCIA or others).
- 2.19 That the Clearing House is always a formal party to all arbitration proceedings; even if it chooses not to actively participate in them.
- 2.20 That the LCH Documents are carried out and have been entered into by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.21 That the obligations assumed under the LCH Documents are 'mutual' between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party.
- 2.22 That the Relevant Clearing Members and LCH have properly executed a Clearing Membership Agreement, Security Deed and Deed of Charge and that each of the Opinion Documents is executed by the relevant parties thereto in substantially the same form as the agreements reviewed by us as described in paragraph 1.4 above and LCH's Rulebook (which is incorporated as part of the Clearing Membership Agreement) is in the same form as the draft version of the Rulebook provided to us by Clifford Chance LLP on June 9 2014.
- 2.23 Each Relevant Clearing Member has the capacity, power and authority to create the security constituted by the relevant LCH Documents and that each Relevant Clearing Member has the capacity, power and authority to enter into and to exercise its rights and to perform its obligations under the relevant LCH Documents.



- 2.24 All acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreements under the laws of any jurisdiction other than Portugal have been duly fulfilled, performed and effected.
- 2.25 That the Charged Property (as defined in the Deed of Charge) and the Charged Assets (as defined in the Security Deed) constitute financial collateral (as defined in the Financial Collateral Act).
- 2.26 Title to the Securities (as defined in the Deed of Charge or applicable in the context of the Security Deed) and title to the financial instruments that are included in the concept of Charged Assets (as defined in the Security Deed) 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 Deed of Charge or in the Security Deed) is located in England & Wales ("**Account**").
- 2.27 Until such time as the security interest created by the Deed of Charge or the Security Deed has been released, the Securities (as defined in the Deed of Charge) or the Charged Assets (as defined in the Security Deed) will be held by LCH in accordance with the terms of the LCH Documents.
- 2.28 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 Securities (as defined the Deed of Charge).
- 2.29 That LCH constitutes a settlement system for the purposes of the Settlement Finality Directive, the Settlement Finality Act and the Securities Code.

3. **ADVICE**

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in Section 4 (Qualifications) below, we make the following statements of opinion. These statements of opinion are summary conclusions on specific questions which you have raised.

3.1 **MEMBERSHIP**

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

The limitations imposed by the articles of association and the applicable law of this jurisdiction to a Relevant Clearing Member and the restrictions limiting the capacity and authority of directors or other representatives of a Relevant Clearing Member to enter into the LCH Agreements and the Security Deed on behalf of the Relevant Clearing Member are discussed at Section 3.1.3 below.

There are no specific statutory limitations or specific regulatory requirements which would limit the capacity of a Relevant Clearing Member to enter into the LCH Agreements and the Security Deed.

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

Assuming that LCH will not have any permanent establishment (a branch, a representation office or other type of physical establishment or personnel) in Portugal and that there will be no other connections with this jurisdiction except for the fact that the Relevant Clearing Member is established in the this jurisdiction, LCH would not be deemed to be resident or established in this jurisdiction from a regulatory or corporate law perspective.

It may be considered, however, that LCH is carrying on business in this jurisdiction on a cross-border basis. From a regulatory perspective, Portuguese law only regulates and requires the need for a prior authorisation procedure in respect of clearing houses' management companies which are established in this jurisdiction and the rules in article 258(2) of the Securities Code provide that the authorisation and exercise of their activities by central counterparties are defined by EMIR and its delegated regulations. Therefore, the approval and recognition of these entities according to EMIR should apply and suffice for the provision of services cross-border into Portugal.

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

Relevant Clearing Member's capacity

According to the Civil Code and the Companies Code, a Portuguese Company ⁽²⁾ has broad capacity and powers, which comprise all the rights and obligations necessary or convenient to fulfil its corporate purpose, as far as these are not forbidden by law or contrary to their nature of legal entity (as opposed to individuals).

Limitations to such Portuguese Company's corporate purpose or object imposed by contracts or by any company's resolutions do not limit the Portuguese Company's capacity (although the corporate bodies have the obligation of not breaching those limitations).

In addition, any acts practiced by the managers or directors on behalf of the Portuguese Company and within the powers and authority granted to them by law, will bind the Portuguese Company, irrespectively of limitations or restrictions to their powers included in the articles of association or company's resolutions, except when the relevant counterparty was or should be aware of such limitations upon entering into an agreement with the Portuguese Company³ and if the partners or

(2) Please note that, while some of the considerations under this response are applicable to other types of companies, this opinion only covers joint stock companies and private limited companies incorporated under the Companies Code, as per the definition of Portuguese Company above.

(3) Please note that the publication or registration of the company's articles of association is insufficient to prove that the relevant counterparties were aware of any limitations or restrictions of the powers of directors or managers.



shareholders of the company failed to expressly or tacitly support the actions of the manager or of the director in question.

With reference to guarantees or security interests, please note that pursuant to the Companies Code, the granting of guarantees to other entities' debts or liabilities is considered to be outside the scope of the Portuguese Company's capacity and powers, except when there is a justified corporate interest that leads to and justifies the provision of such guarantees ⁽⁴⁾.

When there is a control or group relationship between guarantor and the guaranteed companies, it is assumed that the required justified interest exists, without the need for demonstration and transactions that consist in the provision of guarantees to the company's debt is considered valid and within its scope.

In light of the above, generally, Relevant Clearing Members would have the capacity to enter into the LCH Agreements. With reference to the Deed of Charge and the Security Deed, they entail the constitution of guarantees. Given that these documents are executed to secure the Relevant Clearing Member's debts or liabilities under the LCH Agreements, there are no capacity restrictions regarding their execution.

Corporate Approvals/Signing Authority

The management or the board of directors, as applicable, have exclusive authority to bind, respectively, private limited companies and joint stock companies. Should the articles of association not provide otherwise, the Portuguese Company is bound by the signature of the majority of its managers or board members, with the indication of their capacity.

The articles of association usually regulate this matter, expressly establishing who and under which terms they may bind the Portuguese Company. The articles of association may establish that the Portuguese Company is bound by the signature of one director, by the joint signature of a certain number of directors, by the signature of an attorney duly appointed and within the powers granted or by a combination of these signatories.

The representation powers attributed by law or by the articles of association may be delegated by mandate to an attorney (by power of attorney) or by delegation of powers by the management or by the board of directors to one or more managers or directors.

Due Execution

Any contract (such as the LCH Agreements and the Security Deed) may be executed on behalf of a Portuguese Company by a person acting under its authority on the terms described above. Managers, directors and attorneys bind the Portuguese Company by signing the relevant document and indicating their capacity.

Relevant Documents

⁽⁴⁾ This rule shall not apply in the case of guarantees issued by companies which corporate purpose includes the issue of guarantees on behalf of third parties, as in the case of banks, and these guarantees are issued in the normal course of such business.

In order to ascertain the Relevant Clearing Member capacity and the authority of the LCH Agreements and Security Deed signatories' powers and authority, LCH should request the following documents from each Relevant Clearing Member (as applicable):

- (i) updated commercial registry certificate or the password allowing access to online registration certificate;
- (ii) updated articles of association;
- (iii) board of directors resolution, deciding on the execution of the LCH Agreements and the Security Deed (if applicable), if there is delegation of powers for execution of the same ⁽⁵⁾;
- (iv) power of attorney, if the LCH Agreements and the Security Deed (if applicable) are executed by an attorney.

Although LCH is not legally required to verify the evidence of signatories' powers and authority, it shall do so in order to ensure that the Relevant Clearing Member is duly bound by the LCH Agreements.

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

With reference to the capacity, authority and due execution of the LCH Agreements by a Portuguese Company, please refer to the previous question 3.1.3 above. It should be noted that the relevant formalities should be assessed and verified pursuant to English law. Likewise, given that the Deed of Charge and the Security Deed are governed by English law and assuming that the security interest created pursuant to the same is a financial collateral ⁽⁶⁾, the relevant Portuguese conflicts of law rule sets out that the requirements regarding the execution of a financial collateral arrangement in respect of the book entry securities shall be defined by the law of the country where the Account (in which the relevant registry is made) is located, which we understand to be England and Wales.

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

Choice of Law

The provisions of Council Regulation (EC) 593/2008, dated of June 17 2008, apply to Portugal. According to article 12 of said regulation, the choice of English law to govern the LCH Agreements set

⁽⁵⁾ Please do note that the articles of association of private limited companies generally set out that it is up to the shareholders to resolve on matters relating to the granting of security interests – in this case, the relevant shareholders' resolution should also be requested.

⁽⁶⁾ Under Portuguese law, such requirements are related to (i) the nature of the parties to the relevant agreement (ii) the object of said arrangement, (iii) the dispossession of the encumbered assets and (iv) the evidentiary requirements. From the LCH Documents, we understand that, regardless of Portuguese law not being the governing law of the Deed of Charge, all those requirements (except for one) will be complied with, given that (i) one of the parties is an institution subject to prudential supervision and the other is a legal person, (ii) the object of the Deed of Charge are financial instruments – as per the definition of the Financial Collateral Act, and (iii) the agreement is entered into in written form. Furthermore, Portuguese law requires that dispossession occurs – by means of the registry of the relevant encumbrance in the Accounts, thus providing control over the charged assets to LCH). The effective requirements under English law should be assessed in Clifford Chance's legal opinion regarding the LCH Agreements.

out in Regulation 51 will be upheld by the Portuguese Jurisdiction, as the Parties are located in European Union Member States (7).

Jurisdiction – judicial courts

The jurisdiction agreement set out on Regulation 51 complies with article 23 of the Regulation (EC) 44/2001 and does not violate or derogate any exclusive jurisdiction arising from article 22 of said regulation. In any case, please do note that Portuguese courts have exclusive jurisdiction over the following matters: validity of the incorporation, the nullity or the dissolution of companies or other legal persons, or associations (of natural or legal persons), or the validity of the decisions of their corporate bodies, provided that the relevant legal person has its seat located in this jurisdiction.

Furthermore, pursuant to article 94 of the Portuguese Civil Procedural Code, a jurisdiction clause is only valid if:

- (a) It does not refer to a non-disposable right;
- (b) Is accepted by the Court to which the jurisdiction of the case is attributed by the parties;
- (c) The jurisdiction choice is justified by a serious interest of the parties or at least of one part and does not constitute a serious inconvenience for the other party;
- (d) It does not violate or derogate the rules on exclusive jurisdiction of the Portuguese Courts.

Assuming that English courts will accept jurisdiction on the case, the jurisdiction agreement set out on Regulation 51 complies with said conditions, may be considered justified by a serious interest of - at least - one party and does not violate or derogate any rule on exclusive jurisdiction of the Portuguese Courts. Nevertheless, please bear in mind that there are certain matters (similar to the ones referred above in respect of EU legislation) regarding which the Portuguese courts have exclusive jurisdiction.

It is worth noting that any party may oppose to the Jurisdiction of the English Courts by alleging that such jurisdiction choice constitutes a serious inconvenience for itself. Even though this is a matter subject to the Court's discretion, Portuguese Courts tend to disregard this argument when the same is exclusively based on financial grounds.

In any case, and in what regards the insolvency and reorganisation proceedings of a Portuguese Company, it should be noted that such proceedings will always be subject to Portuguese courts.

Jurisdiction – arbitral courts

(7) However, the same regulation also provides that, inter alia, the following matters shall be governed by the corresponding personal law of the relevant company: (i) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organization or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body, and (ii) the question whether a corporate body is able to bind a company or other body corporate or unincorporated, in relation to a third party. Please refer to question 3.1.3 with regards to the capacity of the Portuguese Company and to the manner of binding it.



The Portuguese Arbitration Act recognises the *competenz-competenz* principle (according to which it is up to the Arbitral Tribunal to determine first hand whether or not it has jurisdiction over a specific dispute) including the so-called “negative effect” of the arbitration convention.

In practical terms, this means that if an action is brought before a Portuguese court in a matter regarding which there is an arbitration convention, said court shall, upon request of the respondent (that has to be filed with its first submission on the merits, as this is not a matter that the Tribunal can consider *ex officio*), uphold the arbitration convention unless said convention clearly is (i) null and void, (ii) inoperative or (iii) incapable of being performed. In this regard it should be noted that under Portuguese law, and unless the Parties agree otherwise, the law applicable to the arbitration convention is that of the place of arbitration.

In the case referred to in the previous paragraph, the fact that the issue is pending before a judicial court, does not prevent arbitral proceedings from commencing or continuing or an arbitral award from being rendered.

Pursuant to this jurisdiction, anti-arbitration injunctions are not possible in Portugal, i.e. the invalidity, incompatibility or unenforceability of an arbitration convention cannot be the object of an autonomous action or interim measure proceedings brought before the judicial court, with the objective to hinder the constitution or the operation of an arbitral tribunal.

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

Judgement of the English Courts

To produce effects in Portugal, including for purposes of enforcement, a judgment of a judicial English court has to be recognized first, by means of court proceedings. There is no revision on the merits of the decision and there are limited grounds (mostly procedural) that can be invoked to try to avoid recognition.

According to articles 34 and 35 of Regulation (EC) no. 44/2001, a judgment given in a Member State is not recognized by the Portuguese Courts, *inter alia*, if:

1. Such recognition is manifestly contrary to public policy in the Member State in which recognition is sought (please refer to 3.1.7 below);
2. It was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
3. If it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;



4. If it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;
5. The judgment is given in violation of the exclusive jurisdiction rules arising from article 22 of said regulation.

Furthermore, and according to article 980 of the Portuguese Civil Procedural Code, a judgment given by a foreign court is only effective and enforceable by Portuguese Courts if ⁽⁸⁾:

- (i) there are no doubts regarding the authenticity of the document containing the judgment, nor about the judgment's intelligibility;
- (ii) the judgement is final and not subject to further appeals, according to the English law, where the judgment was rendered;
- (iii) the English courts competence was not claimed fraudulently in order to waive the applicable Portuguese laws and that the case submitted did not belong to the exclusive competence of the Portuguese Courts;
- (iv) the exceptions of "*lis pendens*" and of "*condition of res judicata*", cannot be alleged based on a case pending or judged on a Portuguese Court, except if the foreign court prevented the jurisdiction;
- (v) the defendant was duly notified of the judgement, under the terms of English law, and in the judgement the adversarial nature of proceedings was complied with, including the principle of the equality of the parties;
- (vi) the judgement rendered is not incompatible with the international public policy of the Portuguese jurisdiction.

English arbitration award

To produce effects in Portugal, including for purposes of enforcement, a foreign arbitral award has first to be recognized. The process for recognition of a foreign arbitral award in Portugal is inspired by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "**New York Convention**") and as such it is a fairly simple process, especially if the other party does not object. There is also no revision on the merits of the decision and there are limited grounds (mostly procedural) that can be invoked to try to avoid recognition.

The interested party has to file an application for recognition including:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original arbitration agreement or a duly certified copy thereof;

⁸ Portuguese Courts tend to consider the unfulfilment of these requirements as a violation of the Portuguese public order.



(c) Certified translations of these documents.

Pursuant to article 56 of the Portuguese Arbitration Act, the recognition and enforcement can only be refused:

(a) At the request of the party against whom the award is invoked, if that party furnishes to the competent court where recognition or enforcement is sought, proof that:

- One of the parties to the arbitration convention was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was issued; or
- The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise not granted the opportunity to present its case; or
- The award deals with a dispute not comprised in the arbitration convention or contains decisions going beyond the scope of the arbitration convention; if however the decisions in the award on matters submitted to arbitration can be separated from those not so submitted, the part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced separately; or
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that:

- The recognition or enforcement of the award would lead to a result manifestly incompatible with the international public policy of the Portuguese State; or
- The subject matter of the dispute cannot be subject to arbitration under Portuguese law.

In respect of (b) second bullet above (arbitrability), under the Portuguese Arbitration Act any dispute regarding economic interests or regarding which the parties are entitled to conclude a settlement on the legal matter at issue may be submitted to arbitration unless exclusively submitted by special law to State court jurisdiction (such as insolvency or some enforcement proceedings) or to compulsory arbitration (i.e. arbitration without consent).

The grounds under (b) above can be raised by the judge *ex officio*, i.e. even if the party against whom recognition is sought does not raise them.

The arbitral agreements at stake

Regulation 33 contains three separate arbitral agreements depending on the subject matter of the dispute:



- (a) Regulation 33 (a) to (c) refers disputes arising from or in relation to any Cleared Exchange Contract, any EquityClear Contract, or any LCH EnClear OTC Contract for physical delivery ("Physical LCH EnClear Contract") or in relation to these Regulations relating to the clearing of Cleared Exchange Contracts, EquityClear Contracts or Physical LCH EnClear Contracts to arbitration under the Relevant Rules. Details of the proceedings, such as seat, language, number of arbitrators, type of proceedings are not specified;
- (b) Regulation 33 (d) to (f) refers disputes arising from or in relation to any Turquoise Derivatives Cleared Exchange Contract (including a dispute concerning Member compliance with the Exchange Rules) or in relation to these Regulations relating to the clearing of a Turquoise Derivatives Cleared Exchange Contracts to arbitration under the LCIA Rules, seated in England, 3 arbitrators, in English;
- (c) Regulation 33 (g) to (i) refers disputes arising from or in relation to any LCH EnClear OTC Contract or in relation to these Regulations relating to the clearing of an LCH EnClear OTC Contract regarding which there is not at the time such dispute arises an arbitration agreement to arbitration under the LCIA Rules, seated in England, 3 arbitrators, in English.

In addition, Regulation 32 (d) provides for arbitration pursuant to relevant Exchange Rules.

Despite these differences, the process specifically set out in Regulation 33 for these three different arbitrations is identical.

The conditions arising out of article 56 (a) of the Portuguese Arbitration Act are not particular to Portuguese law (they are standard and common to most arbitration friendly countries, including England) and are generally procedural or refer to a law other than Portuguese law. Thus, provided the arbitration complies with basic procedural principles and with the applicable *lex arbitri* (the law applicable to the arbitration as opposed to that applicable to the merits of the dispute) they will in principle not stand in the way of the recognition / enforcement of the arbitral award.

Regarding the "arbitrability under Portuguese law" requisite set out in article 56 (b), provided the conditions set out in the law are complied with (please see above), this will also not affect the recognition / enforcement of an award.

Thus, the main specific problem that the recognition / enforcement of an arbitral award rendered pursuant to Regulation 33 or Regulation 32 (d) may face is that the Portuguese judicial courts conclude that its results are manifestly incompatible with the international public policy of the Portuguese State (please see 3.1.7 below).

While the issue of enforcement of decisions in general is outside of the scope of our opinion, in the context of the possibility of an award pursuant to Regulation 33 being upheld or not by the Portuguese courts, there are two specific aspects that we believe should be taken into consideration in any prospective arbitration so as to maximise the effectiveness of the process set out therein:

- Although from Regulation 33 (b) (v), (e) (v) and (h) (v) it appears that the Clearing House will necessarily always be a party to any arbitration pursuant to said Regulation, Regulation 33 (b) (iv),



(e) (iv), (h) (iv) and (i) suggest otherwise.

- Also, regarding Regulation 33 (c), (f) and (i) (*"the liability of the Clearing House to the first party shall be deemed to be a foreseeable consequence of the breach by the second party and the Clearing House shall be entitled to be indemnified in respect of such liability by the second party"*) if this liability / entitlement to indemnification is not included in the condemnation part of the arbitral award, it will not be directly enforceable. This is so even if the first part of this provision is verified (i.e. that there is one/more awards pursuant to which the Clearing House is found liable to one of the parties to the arbitration ("the first party") in respect of a breach of a specific contract and the other party to the arbitration ("the second party") is found liable to the Clearing House in respect of such breach of that same contract, which has been matched by the Clearing House). In other words, in case this is not addressed in the arbitral award and save for voluntary compliance with this provision by the second party, a second arbitral award may be needed in order to enforce said provision.

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

The international public policy of the Portuguese State is composed of the fundamental principles of the Portuguese legal system, and is by definition an evolving, mutating concept. Only serious violations of the said principles are considered to be a violation of Portuguese international public policy. Thus, the simple violation of a mandatory legal provision alone will not necessarily entail a violation of the Portuguese international public policy.

There is no readily available list of the public policy principles of the Portuguese State which, if violated, would render a foreign judgment/arbitral award unenforceable (typically available higher courts decisions tend to discuss international public policy in the context of family law and of procedural rights).

Despite the above, examples of what might constitute violations of Portuguese international public policy are the application of punitive damages or of liquidated damages that far exceed damages incurred or an "*ad eternum*" binding obligation. Regarding arbitration specifically, and according to the wording of the law, the threshold to be met in order for an arbitral award not to be recognised / enforced is relatively high: a simple violation of the Portuguese international public policy will not suffice, it will be necessary that the recognition or enforcement of the award leads to a result that is manifestly incompatible with the Portuguese international public policy. Also, in addition to not being (at least currently) very receptive to allegations of breaches of public policy in business transactions, Portuguese courts are – at least for the time being – generally arbitration friendly.

This being said, we cannot rule out that the recognition / enforcement of an arbitral award rendered pursuant to Regulation 33 or to Regulation 32 (d) (or of a judicial decision) will not in certain cases lead to a result that may lead the Portuguese courts to avail themselves of the public policy safeguard.

In this regard, the fact that in its wording the process set out in Regulation 33 seems to be – presently – very innovative for Portuguese standards (even if in practice it appears to be very akin to consolidation



of two different proceedings in one single arbitration with claims between multiple parties) may make it more prone to breach of public policy arguments.

We have identified one main issue as potentially problematic in terms of public policy in what concerns the arbitration agreements and which may also apply in the context of foreign judicial judgements, namely that LCH may be perceived as having more "procedural" rights than the Relevant Clearing Member (for instance, the exclusive right to elect that arbitration takes place according to a certain process or between certain parties). This applies with the necessary adaptations in the context of judicial proceedings (to the extent that LCH has an exclusive right to take proceedings in any court of competent jurisdiction other the courts of England). While the fact that one of the parties has more rights or even exclusive rights *per se* is not necessarily a breach of public policy, depending of the circumstances of the case it may in some instances be deemed as such.

3.2 INSOLVENCY, SECURITY, SET-OFF AND NETTING

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

The Insolvency and Reorganisation Measures applicable to companies in general in this jurisdiction are the following:

- (a) "*Processo de Insolvência*" (Insolvency Proceeding), regulated by the Insolvency Act, consisting of a global enforcement proceeding aiming at (i) the liquidation of the insolvent debtor's assets for the satisfaction of its creditors or (ii) the satisfaction of such creditors in accordance with an Insolvency Plan which may provide, inter alia, for the reorganisation of a business being part of the insolvency estate. This proceeding is not applicable to credit institutions, financial companies, investment firms and insurance companies, although certain provisions governing respective winding up and the liquidation of the insolvent's estate are applicable in the context of the special proceedings to which such entities are subject, if such provisions do not conflict with special legislation to which these institutions are subject to;
- (b) "*Processo Especial de Revitalização*" or "*PER*", also regulated by the Insolvency Act, which was created to enable the reorganization of a company in financial difficulties. This process consists of a request in court – based on a joint declaration between the company and at least one of its creditors – to initiate negotiation efforts in view of approving a revitalization plan aiming to recover the company's financial health;
- (c) The "*SIREVE*" process ruled by Decree-Law nr. 178/2012 dated 3 of August. SIREVE aims to obtain, by extrajudicial means, an agreement between the company and all or some of its creditors (public and private), representing at least 50% of all its creditors, in order to allow the recovery of the insolvent company. Any company in a financial distressed situation or in an imminent or actual insolvency situation, according to the regime regulated by the Insolvency Act may apply to the



IAPMEI (Public Institute for the Support of Small and Medium-sized Enterprises) requesting to initiate a SIREVE process.

The Insolvency Act is applicable to credit institutions, financial companies and investment firms only to the extent that there is no incompatibility with the specific provisions laid down in the Winding Up Act. Banks and financial companies are not subject to the general reorganisation proceedings that are applicable to companies (described above in (b) and (c)). In this jurisdiction, the only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Financial Institution could be subject, and which are relevant for the purposes of this Opinion Letter, are as follows:

- (a) the reorganisation of credit institutions, financial companies and investment firms ("*Saneamento de Instituições de Crédito e Sociedades Financeiras*"), regulated by the Banking Act, as applicable, and consisting of extraordinary measures for the composition or reorganisation of credit institutions, financial companies and investment firms subject to the prudential supervision of the Bank of Portugal, such as, *inter alia*, following a reorganisation plan, restrictions on the exercise of certain types of activity, restrictions on lending and on the application of funds in certain classes of assets and restrictions on deposit taking;
- (b) the Winding Up Act ("*Processo de Liquidação de Instituições de Crédito e Sociedades Financeiras*"), consisting of a specific proceeding regulating the winding up of credit institutions, financial companies and investment firms subject to the supervision of the Bank of Portugal;
- (c) In the event that the extraordinary measures determined and imposed by the Bank of Portugal fail to succeed in stabilising the financial situation of the relevant entity, the Bank of Portugal may decide on the revocation of such entity's authorisation to carry out the respective activities. This revocation has the same effect as a declaration of insolvency in respect of a company, in particular, in what concerns the subsequent winding up and estate liquidation proceedings. The Winding Up Act grants the Bank of Portugal exclusive legitimacy and jurisdiction to implement reorganisation measures and start winding up proceedings against credit and financial institutions authorised by the Bank of Portugal, including branches of such credit institutions established in other Member States. Furthermore, the Winding Up Act provides that the implementation of reorganisation measures or the opening of winding up proceedings decided by the competent judicial or administrative authorities of another Member State shall be recognised in Portugal without any review, confirmation or any similar formality.

In February 10, 2012, with the enactment of Decree-Law 31-A/2012, Bank of Portugal was granted with further powers to deal with the deterioration of the financial situation of banks and other financial institutions. The Bank of Portugal may now decide to apply the following measures to a credit institution that is failing or on the verge of failing: (i) sale of all or part of the institution's business to another financial institution in Portugal, (ii) transfer of all or part of the financial institution's business to a



transition bank ⁽⁹⁾. In case of partial sale or transfer, the credit or business related to a certain counterparty is transferred in its entirety. The activation of these measures triggers a 48 hour stay of the early termination and close-out rights under any netting arrangement. This 48 hour limit is effective as of the moment when the suspension is notified to the counterparty or when the Bank of Portugal makes its decision public (whichever comes earliest). However, these provisions do not apply when the early termination is agreed in Financial Collateral agreements or regarding transactions which are settled through settlement systems.

Once the liquidation of the relevant entity is decided, the winding-up proceeding of credit institutions, financial companies and investment firms will follow the rules established generally under the Insolvency Act, save for proceedings involving other European Union jurisdictions and certain matters for which specific rules are established, as better described in questions below.

References made in Rule 5 (e), (i), (j), (k), (l), (m), (n), (o), and (p) generally apply and can be a general reference to the Portuguese Insolvency Procedures and Reorganisation measures.

As mentioned above, the Insolvency and Reorganisation Measures that apply to Financial Institutions are under the powers and supervision of the Bank of Portugal, and as such, though one can find such powers and faculties listed in the rules above mentioned, we advise LCH to include a special reference to any action such as reorganisation measure or winding up procedure against or in respect of the Clearing Member which is taken by the Bank of Portugal

Finally, we confirm that the above described different types of Insolvency Proceedings and Reorganisation Measures are the only available in the jurisdiction in order to deal with Insolvency or Reorganisation of Portuguese Companies including Financial Institutions.

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

Pursuant to the Deed of Charge, the Relevant Clearing Member agrees to grant, in favour of LCH, a first ranking security over certain specified Securities (as defined in the Deed of Charge). The Securities are rendered subject to the charge by submission of the appropriate details to LCH as provided in 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. Securities are released from the charge when the chargor submits a release instruction to LCH (as provided at Section 4 of the LCH Procedures) to LCH and LCH discharges the charge under clause 4(1) of the Deed of Charge by redelivering the securities specified in the release instruction to the relevant Relevant Clearing Member.

⁽⁹⁾ A Transition Bank is a credit institution that has the nature of a Bank and that is 100% owned by the Resolution Fund. Transition Banks are created by resolution of the Bank of Portugal.



Security Interest

Insofar as the Deed of Charge is regarded as a financial collateral arrangement under English law, any issue relating to proprietary effects, requirements for perfecting the collateral arrangements and for rendering them effective against third parties, and the steps required for realisation of the collateral, would be governed by the domestic law of the country in which the "relevant account in which the collateral is registered" (as defined in the Financial Collateral Act) is maintained.

Enforcement of Security Interest

In accordance with the Portuguese conflicts of law rules, the formalities required for the enforcing the security interest created under the Deed of Charge following the occurrence of any default in payment or failure to discharge any Secured Obligation, including in relation to any Insolvency Proceedings with respect to the Relevant Clearing Member, should be assessed under the law governing the Deed of Charge, i.e., English law.

However, it should be noted that, in accordance with articles 17 to 20 of the Financial Collateral Act:

- (a) unless those are intentional detrimental acts ⁽¹⁰⁾, financial collateral arrangements may not be voided on the sole basis that they have come into existence, or the fact that financial collateral has been provided, in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event;
- (b) unless those are intentionally detrimental acts, in the context of winding-up proceedings or reorganisation measures, financial collateral arrangements are enforceable under their agreed terms and conditions;
- (c) in the course of such winding-up proceedings or reorganisation measures, the early termination of the financial collateral arrangements and the setting-off of the obligations derived therefrom shall not be affected by the opening or development of such proceedings or measures.
- (d) Security interests that are constituted after the beginning of the Insolvency Proceedings or Reorganisation Measures remain effective against third parties as long as the beneficiary demonstrates that it did not have knowledge nor should have knowledge of the existence of the said Insolvency Proceedings or Reorganisation Measures.

Further, the Winding Up Act (article 32) determines that the law applicable to the exercise of property rights or any other right over financial instruments which existence or transaction require its inscription on a centralized system, register or deposit or account is the Law of the Member State of the centralized system, of register or deposit or of the account.

⁽¹⁰⁾ Under Portuguese law, detrimental acts are defined as any acts which reduce, frustrate, make more difficult, endanger or delay the creditors' satisfaction.



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

As per the exercise of the rights to set-off in the event that a Relevant Clearing Member is subject to Insolvency Proceedings or Reorganisation Measures, this jurisdiction's legislation sets forth the following:

- (i) As a general principle, the Insolvency Act establishes that the declaration of insolvency following the opening of Insolvency Proceeding in Portugal does not affect the right of creditors to set off their claims against the claims of the insolvent debtor, where such netting is permitted by the law applicable to the insolvent debtor's counterclaim (article 286 of the Insolvency Act).
- (ii) Indeed, the concept of "*compensação*" as used in article 286 of the Insolvency Act (and which is also the Portuguese term used in the Portuguese version of the EU Insolvency Regulation (As defined below) where the English version thereof uses the term "set-off") includes the so-called "*compensação contratual*", a general concept of Portuguese law that, in our view, includes both set-off and close-out netting.
- (iii) We further support this view on the fact that, in interpreting article 286 of the Insolvency Act, as well as the internal legislation implementing article 6 of the EU Council Regulation 1346/2000 dated May 29, 2000, on Insolvency Proceedings ("**EU Insolvency Regulation**"), a Portuguese court would likely give consideration to the fact that the legislation enacted in Portugal in connection with **(a)** the adoption of special legal provisions aimed at insulating the netting arrangements against the opening of an insolvency or reorganisation proceeding in Portugal and **(b)** the implementation of relevant European legislation on this matter in Portugal (such as, for instance, Directive 2002/47/EC dated June 6, 2006, on financial collateral arrangements), generally interprets and construes netting and close-out provisions as expressing the idea of "*compensação contratual*".
- (iv) Although there are no relevant court precedents on this point, the published scholars' opinion available in Portugal accepts that the typical close-out netting provisions correspond to a form of contractual set-off ("*compensação contractual*") and, as a result, accepts that article 286 of the Insolvency Act applies to such type of contractual arrangements and the published scholars' opinion may be persuasive guidance for a court applying the relevant law.



- (v) Moreover, even if the set-off ("*compensação contratual*" for the purposes of Portuguese law) is challenged on grounds that it breaches the rules of the Insolvency Act relating to voidness, voidability or unenforceability of any acts detrimental to all creditors, the Insolvency Act also provides that such rules shall not be applicable to the extent that the party to the agreement benefiting from the operation provides evidence that, under the law applicable to the operation, there are no means of challenging it (art. 287 of the Insolvency Act).
- (vi) In light of the above, in an Insolvency Proceeding opened in Portugal against an insolvent party, a Portuguese court would, in our opinion, look into the insolvency regulations of the law chosen by the parties to govern the contract or, as the case may be, the clearing agreement to ascertain whether under each such law the solvent party would be entitled to exercise its rights under the netting provisions notwithstanding the opening of an Insolvency Proceeding. Furthermore, if under the governing law of the contract or, as the case may be, the clearing agreement (other than Portuguese law) there are no means of challenging the set off provisions, the Portuguese rules relating to voidness, voidability or unenforceability of any acts detrimental to all creditors shall not be applicable.
- (vii) Furthermore, the Netting Act strengthens the conclusions reached above, for transactions involving certain types of instruments. Under the Netting Act, the laws of this jurisdiction generally allow for the enforceability of netting provisions relating to financial instruments identified in the article 2, i.e. securities, futures and forward contracts on currencies, interest rates and exchange rates, swaps, options, and any other contracts of an analogous nature (hereinafter "**Financial Instruments**") in insolvency (i.e. such netting provisions may be opposable against the insolvency estate and other creditors), provided the following conditions are met: a netting arrangement whereby the parties, in their capacity as parties to contracts relating to Financial Instruments with similar rights and obligations, have agreed to net and set off their mutual obligations should one of the parties be declared insolvent or subject to reorganisation measures.

The preceding conclusions reached in relation to the validity and enforceability of the set off provisions are further strengthened where the insolvent party is a Financial Institution, as a result of specific provisions dealing with set-off and netting. Article 31 of the Winding-Up Act establishes that the adoption of recovery measures or filing of liquidation proceedings shall not prejudice the rights of creditors to net their credits against credits of the insolvent credit institution, provided such right is recognised by the law applicable to such insolvent credit institution's counterclaim. Moreover, article 33 of the Winding-up Act establishes that netting agreements shall be exclusively governed by the law applicable thereto, which means that Portuguese substantive law will not apply to the effectiveness and enforceability of such netting agreements. Also, the rules relating to voidness, voidability or unenforceability of legal acts detrimental to all the creditors, as provided under Portuguese law, shall not apply when a person who has benefited from a legal act detrimental to all the creditors provides evidence that *(i)* the said act is subject to the law of a Member State (other than Portugal) and *(ii)* the law of that Member State does not allow any means of challenging that act in the relevant case.



There is however a specific provision in the Banking Act that determines that any of the measures approved by the Bank of Portugal (as described above in 3.2.1) pursuant to article 145-L (1) cause the suspension, for 48 hours, after summoned or, if prior, the announcement that publicizes the decision of the Bank of Portugal, of the right of early termination, agreed in set-off or netting agreements, when the exercise of that right is based on the application of any of the referred measures (as described above in answer 3.2.1). Nevertheless this provision is set aside whenever early termination is agreed upon by the parties in financial collateral arrangements and does not affect the Settlement Finality Directive.

Regarding early automatic termination, in this jurisdiction, declaration of insolvency determines that all the obligations of the insolvent party that are not subject to a condition shall *ope legis* become immediately due and payable.

Further, the Insolvency Act establishes as mandatory the rules governing the effects of a declaration of insolvency in the ongoing contracts of the relevant insolvent party. Under article 119(2) of the Insolvency Act, a contractual provision stipulating that the insolvency of a party gives the other party a right to a specific compensation, or otherwise a right to terminate the contractual arrangements deviating from the mandatory provisions of the Insolvency Act, shall in principle be considered null and void. This means, accordingly, that under the laws of this jurisdiction there are effective limitations to contractual provisions (i) establishing the insolvency of a party as a termination event and/or (ii) stipulating contractual effects stemming from such termination which deviate from the general rules enshrined in the Insolvency Act.

However the Insolvency Act itself establishes a deviation to this rule, which applies to particular types of contracts. Pursuant to article 119(3) of the Insolvency Act, taking into account the nature and characteristics of the relevant agreement, the insolvency of one party thereto may be qualified as just cause for the termination of such agreement.

Our view is that, considering the particular characteristics, the mechanics and sophistication of the Agreements contemplated thereunder, article 119(3) of the Insolvency Act should apply thereto and, accordingly, a contractual provision establishing the automatic termination and liquidation would be valid and enforceable. Moreover, further evidence that Portuguese law recognizes the peculiar nature of contractual arrangements such as the ones analysed (and, specifically, the peculiar nature of close out netting provisions) and that, as a result, such contractual arrangements fall within the scope of said article 119(3) is given by the Netting Act, which expressly protects and affirms the operation of close out netting provisions in the context of an insolvency.

As further comfort, and although there are not, to the best of our knowledge, relevant precedents on this point, we should also stress that there is already published opinion in Portugal taking a position substantially in line with the conclusions reached above.

3.2.4 Is there a “suspect period” prior to Insolvency Proceedings and/or Reorganisation Measures where Contracts with a Relevant Clearing Member could be avoided or challenged and, if so, what are the grounds? What are the risks for LCH in entering into Contracts and in taking Collateral in respect of those Contracts during such a period? Are any special protections or exemptions from the relevant arrangements for avoidance



or challenge available under the law of the Relevant Jurisdiction in respect of contracts in financial markets?

Article 20 of the Winding-Up Act establishes that Portuguese Law that regulates voidness, nullity or the possibility to challenge any detrimental act to the majority of the creditors, is not applicable when the beneficiary of the detrimental acts proves that (a) the detrimental act is regulated by the law of another member estate and (b) the applicable law prohibits challenging the act.

If the jurisdiction law is applicable the Insolvency Act determines that, any acts detrimental (i.e., any acts which reduce, frustrate, difficult, endanger or delay the creditors' satisfaction) to all creditors could be challenged as follows:

- (i) under article 120 of the Insolvency Act, within a period of 2 years preceding the commencement of an insolvency proceeding, any acts detrimental to the insolvent's estate may be terminated for its benefit in the event that the other party acted in bad faith;
- (ii) pursuant to article 121 of the Insolvency Act, irrespectively of the other party acting in bad faith or not, there may also be terminated for the benefit of the insolvent estate: (i) any acts with consideration entered into within the year preceding the commencement of the insolvency proceeding under which the insolvent's obligations highly exceeded the counterparties' obligations, (ii) the creation of rights in rem in respect of pre-existing obligations or in respect of obligations that substitute such pre-existing obligations within the six months preceding the opening of the insolvency proceeding; and (iii) the creation of rights in rem upon constitution of the secured obligations within the sixty days preceding the opening of the insolvency proceeding.

Moreover and in accordance with the legal regime of the Winding Up Act, article 287 of the Insolvency Act determines that the general rules relating to the unenforceability of acts detrimental to all the creditors shall not apply should a beneficiary of these acts provide evidence that the act detrimental to the creditors is subject to a law that does not allow any means of challenging that act.

Finally in what regards specifically the Deed of Charge, and the Financial Collateral arrangement associated to the same, we would highlight the applicable Portuguese provisions set out in the Financial Collateral Act, which establish that such Financial Collateral Arrangement and the corresponding financial collateral shall not, unless those are intentional detrimental acts, be affected by the Insolvency Proceedings of the Relevant Clearing Member. For further details on this matter, please refer to 3.2.2 above.

Also article 285 of the Securities Code determines that in an insolvency or reorganisation procedure the rights and obligations related to such participation will be regulated by the law applicable to the system.

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

Please refer to question 3.2.3 above.

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

Upon a declaration of insolvency by a court ruling on the matter or issue of a liquidation order by the Bank of Portugal, all obligations owed by the Party concerned shall immediately be converted into the lawful currency in this jurisdiction at the then applicable exchange rate.

3.3 CLIENT CLEARING

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

If, and to the extent that, you consider such an Exempting Client Clearing Rule to be available, please (i) assume for the purposes of answering the following Questions that LCH will rely upon the existence of the relevant Exempting Client Clearing Rule and will not require those Relevant Clearing Members to which that Rule applies to enter into a Security Deed; and (ii) ignore Questions 3.1.3 to 3.1.5.

In cases where you do not consider an Exempting Client Clearing Rule to be available, please: (i) assume for the purposes of answering the following Questions that LCH will require Relevant Clearing Members to enter into a Security Deed; (ii) assume that the Security Deed is legal, valid, binding and enforceable under English law (as its governing law) and complies with all relevant perfection requirements under the law of any jurisdiction(s) other than the Relevant Jurisdiction which you consider to be relevant to that matter; and (iii) provide a response to Questions 3.1.3 to 3.1.5.

EMIR sets forth the obligation of CCPs (as defined therein) to, at least, contractually commit itself to trigger the procedures for the transfer of the assets and positions held by the defaulting clearing member for the account of its clients to another clearing member designated by all those clients, on their request and without the consent of the defaulting clearing member. In addition, it sets out that if the transfer to another clearing member has not taken place for any reason within a predefined transfer period specified in its operating rules, the CCP may take all steps permitted by its rules to actively manage its risks in relation to those positions, including liquidating the assets and positions held by the defaulting clearing member for the account of its clients.

According to the principle of the precedence of EU Law, the latter is superior to the national laws of Member States. The principle of the precedence applies to provisions of the Treaty and directly applicable measures of EU institutions (such as the above mentioned regulation). Therefore, Member States may not apply a national rule which contradicts to directly applicable measures of EU law and if a national rule is contrary to a directly applicable EU provision, Member States' authorities, including courts, must apply the EU provision and set aside the conflicting national rule. Do note that the



precedence of directly applicable measures of EU law is to be applied to all national acts, whether they were adopted before or after the European measure in question.

Furthermore, article 8 of the Settlement Finality Directive sets out that 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. This provision has been implemented into Portuguese legislation in article 285 of the Securities Code ⁽¹¹⁾⁽¹²⁾.

Based on the provisions and on the assumptions above and subject to the qualifications below, we are of the opinion that, in the Relevant Jurisdiction, LCH may rely solely on an Exempting Client Clearing Rule to protect the Clients' interest, although there may be arguments to sustain otherwise.⁽¹³⁾

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

A Relevant Clearing Member is contractually bound to the Client clearing arrangements by way of its agreement to the Clearing Membership Agreement. In the absence of the insolvency of a defaulting Relevant Clearing Member, the contractual arrangements supporting the Client clearing arrangements should be effective in their own right.

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

Please refer to our answer to questions 3.3.1. and 3.3.2. above.

⁽¹¹⁾ Although we believe that there may be legal and valid grounds to sustain that this provision will apply regardless of the law governing the relevant system, we would highlight that there is no significant experience in this respect and that, according to more recent Portuguese legislation, the trend has been that of the increase of the powers granted to the Bank of Portugal, in a Financial Institution insolvency or restructuring measures scenario (most of which can be performed in a discretionary basis).

⁽¹²⁾ In any case, and pursuant to the approval of the EMIR Decree-Law (which has come into effect on April 17, 2014), article 6 of the Settlement Finality Act expressly states that if a system operator has provided collateral to another system operator, in connection with an interoperable system, the rights of the system operator that granted the collateral are not affected by possible insolvency proceedings.

⁽¹³⁾ As an example of those arguments, it can be said that it does not result clearly from EMIR how its provisions will apply in case of insolvency of the Relevant Clearing Member (as such regulation only provides for a contractual regime to be applied).



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

Please refer to our answer to question 3.3.1 above regarding the existence, in this jurisdiction, of an Exempting Client Clearing Rule.

Notwithstanding the opinion above in question 3.3.1, and as a matter of caution, please do note that the Portuguese legislation applicable to the insolvency of a Relevant Clearing Member which is a Financial Institution, sets out the following ⁽¹⁴⁾:

With the commencement of Insolvency Procedures in respect of a Relevant Clearing Member ⁽¹⁵⁾, in accordance with the Banking Act certain effects apply immediately, namely (i) the appointment of the insolvency officer and a winding up committee, (ii) the delivery of all relevant documentation to the insolvency officer ⁽¹⁶⁾, and (iii) the apprehension and delivery of the accounting elements and all the assets to the insolvency officer.

The Insolvency Act is only applicable to the insolvency of Financial Institutions if it does not contradict the applicable specific legislation – the Banking Act and the Winding Up Act and provided that the same matter is not expressly regulated by the same specific legislation. Please do note that, where applicable, we have included references to the provisions of the Insolvency Act that would apply to this situation.

According to article 20 of the Winding Up Act, the following matters are determined in accordance with Portuguese Law : (i) the assets that are part of the insolvent state and the destiny to be given to any assets that were acquired after the beginning of the winding up procedure, (ii) the effects of the winding up procedure over the contracts to which the relevant Financial Institution is a party to, (iii) the credits that can be claimed, recognized and ranked and the destiny of the credits that were raised after the beginning of the winding up procedure; (iv) the rules that apply to the distribution and ranking of credits.

The Winding Up Act expressly states that there are certain situations that may not be challenged, *inter alia* the rights of any *in rem* creditors or third parties over physical or immaterial assets (either moveable or real estate assets), that belong to the Financial Institution and that, at the moment of the application of any Reorganisation Measure, are in the territory of another Member State (article 28 of the Winding Up Act). Pursuant to article 29 of the Winding Up Act, the validity of non-gratuitous acts of disposal of financial instruments or any rights over those instruments that took place after the beginning of

⁽¹⁴⁾ Taking into consideration that a Relevant Clearing Member shall be a Financial Institution (as per the assumptions above), we will not address in this legal opinion, the regime applicable to non-Financial Institutions' insolvency.

⁽¹⁵⁾ A decision of the Bank of Portugal to revoke the license of Financial Institutions in Portugal has the effect of the insolvency declaration and is considered the commencement of the Insolvency Procedures.

⁽¹⁶⁾ List of all creditors, list of all pending proceedings, list of all the assets that are rented, annual accounts of the last 3 years and all relevant reports, list of employees.



Reorganisation Measures or Insolvency Procedures should be regulated by the law of the Member State in which the system is based.

However, the Banking Act empowers the Bank of Portugal to transfer assets of the Financial Institutions that are under Reorganisation Measures or Insolvency Proceedings. The regime grants exclusive power of supervision and decision to the Bank of Portugal to (i) commence Reorganisation Measures in respect of a Financial Institution and (ii) to revoke the licence (which would trigger Insolvency Proceedings) of the Financial Institution, in order to ensure the continuity of rendering of essential financial services, prevent systemic risk, safeguard the tax payers' relevant interests and safeguard of the deposits. Those measures can include the partial or complete transfer of the activity to other institution that is authorized to develop the same activity, or the partial or complete transfer of the activity to one or more transition banks.

Article 33 of the Winding Up Act determines that netting agreements are exclusively regulated by the law that applies to the relevant contract. In addition, where Portuguese Law is the law governing the settlement system or clearing house, the irrevocability or effectiveness of any orders given nor the finality of the netting and set-off of Transactions made in accordance with the rules of that system shall not be affected to the extent that (i) the transfer orders were entered into the system before the declaration of insolvency or before the decision to submit the relevant participant to a reorganisation measure ("**Opening of an Insolvency Proceeding**"), or that (ii) the orders were entered into the system after the Opening of an Insolvency Proceeding, provided that such orders were carried out on the day of the Opening of an Insolvency Proceeding and the settlement agent, the central counterparty or the clearing house can prove that they were not, nor should have been, aware of the Opening of Insolvency Proceedings against the relevant participant. However, as discussed above at 3.3.1, these protections are provided only where Portuguese Law is the law governing the relevant system or clearing house.

Despite the fact that, as discussed above at 3.3.1 above, there are arguments which suggest that the actions referred to in questions 3.3.4 to 3.3.7 taken by a non-Portuguese clearing house should be similarly protected (ie. that the actions should not be able to be challenged by an insolvency officer or any other person), in our opinion the powers provided under the Banking Act are intended to reinforce the power of supervision and decision making authority of the Bank of Portugal in restructuring or insolvency situations of Financial Institutions ⁽¹⁷⁾. Accordingly, we cannot discard the possibility that an insolvency officer and/or the Bank of Portugal would seek to challenge the actions discussed at 3.3.4 to 3.3.7; however, we believe that there are strong arguments that such actions would be upheld and not successfully challenged by an insolvency officer and/or the Bank of Portugal.

3.3.5 *If (i) following the commencement of Insolvency Proceedings, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the*

⁽¹⁷⁾ By way of background, the power to create a transition Bank is a recent amendment to the Banking Act (dated February 10, 2012). There enactment of such power reinforces the decision making powers of the Bank of Portugal.



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?

Please refer to our answer to 3.2.3 and 3.3.4 above, as we consider that the Client Clearing entitlement as a close out netting provision.

As mentioned before in this legal opinion, it is our opinion that the enforceability of the Netting Provisions in this jurisdiction shall not be affected, should their intended operation be triggered by the opening of an Insolvency Proceeding in Portugal. As a general principle, the Insolvency Act establishes that the declaration of insolvency following the opening of an Insolvency Proceeding in Portugal does not affect the right of creditors to net their claims against the claims of the insolvent debtor, where such netting is permitted by the law applicable to the insolvent debtor's counterclaim (article 286 of the Insolvency Act). This means that, to the extent English laws (i.e. the laws applicable to the Agreements) allow the enforcement of the Netting provisions if an insolvency event occurs, then the Netting Provisions will be recognized and enforced in an Insolvency Proceeding started in Portugal.

Indeed, and as mentioned above in answer 3.2.3. the concept of "*compensação*" as used in article 286 of the Insolvency Act (and which is also the Portuguese term used in the Portuguese version of the EU Insolvency Regulation where the English version thereof uses the term "set-off") includes the so-called "*compensação contratual*", a general concept of Portuguese law that, in our view, includes both set-off and close-out netting (and, accordingly, the Netting Provisions, including the parts dealing with close-out netting and set-off).

Moreover, even if the operation of the Netting Provisions ("*compensação contratual*" for the purposes of Portuguese law) is challenged on grounds that they breach the rules of the Insolvency Act relating to voidness, voidability or unenforceability of any acts detrimental to all creditors, the Insolvency Act also provides that such rules shall not be applicable to the extent that the Party to the Agreement benefiting from the operation of the Netting Provisions provides evidence that, under the insolvency regulations of the law governing the Agreement (other than Portuguese law) there are no means of challenging that operation of the Netting Provisions upon the opening of an Insolvency Proceeding (article 287 Insolvency Act).

The Netting Act further strengthens the conclusions reached above, for transactions involving certain types of instruments. Under the Netting Act, the laws of this jurisdiction generally allow for the enforceability of netting provisions relating to financial instruments identified in the article 2 of the Portuguese legal framework applicable to netting arrangement, as enshrined in the Netting Act, i.e. securities, futures and forward contracts on currencies, interest rates and exchange rates, swaps, options, and any other contracts of an analogous nature ("**Financial Instruments**") in insolvency (i.e. such netting provisions may be opposable against the insolvency estate and other creditors), provided the following conditions are met: a netting arrangement whereby the parties, in their capacity as parties to contracts relating to Financial Instruments with similar rights and obligations, have agreed to net and set off their mutual obligations should one of the parties be declared insolvent or subject to reorganisation measures.



Finally, article 31 of the Winding-Up Act establishes that the adoption of recovery measures or filing of liquidation proceedings shall not prejudice the rights of creditors to net their credits against credits of the insolvent credit institution, provided such right is recognised by the law applicable to such insolvent credit institution's counterclaim. Moreover, article 33 of the Winding-up Act establishes that netting agreements shall be exclusively governed by the law applicable thereto, which means that Portuguese substantive law will not apply to the effectiveness and enforceability of such netting agreements. Also, the rules relating to voidness, voidability or unenforceability of legal acts detrimental to all the creditors, as provided under Portuguese law, shall not apply when a person who has benefited from a legal act detrimental to all the creditors provides evidence that *(i)* said act is subject to the law of a Member State (other than Portugal) and *(ii)* the law of that Member State does not allow any means of challenging that act in the relevant case. Article 32 of the Winding Up Act also determines that the law of the Member State of the centralized system, of register, or deposit will apply to any rights over financial instruments which existence or transmission requires the inscription on a centralized system, register, deposit or account.

The consequence of the above would be, in our opinion, that, upon the opening in Portugal of a reorganisation or an winding up proceeding against a bank, credit institution or financial company that is a Clearing Member, the validity and enforceability of the Netting Provisions, (even if not permitted under Portuguese law) would nevertheless be upheld by the Bank of Portugal and, where applicable, the relevant court, in the same circumstances where the operation of the Netting Provision would be permitted under the law chosen to govern the Agreement.

Further, if Portuguese law would apply to the System, the Settlement Finality Act, determines the irrevocability of liquidation that is done in a payment system, namely in a scenario of insolvency or any similar measure and is applicable to Payment systems and to participants in Payment systems. Article 3 of the Settlement Finality Act determines that transfer orders, netting or set off are effective if they were introduced in the system before the opening of the insolvency or reorganisation procedure. As per this law, the opening of an insolvency procedure is the moment where the competent authority will issue any decision that limits, suspends or terminates the fulfilment of obligations or collaterals associated to the obligations. After the beginning of the insolvency procedure, and until the end of the day, the transfer orders will be effective if the liquidation agent, CCP or clearing house show that they were not aware of the existence of the insolvency procedure.

Finally it is our opinion that the result of the return of the Client Clearing Entitlement, as defined in the instructions, is not to be considered as an asset of the insolvent (or under reorganisation measure, as the case may be) institution. As such, and although we can never exclude the possibility of challenge, we believe there are legal grounds to sustain the desegregation /separation of these amounts from the insolvent assets. Having said so, in order to avoid challenging and difficulties in returning the Client Clearing Entitlement to the relevant Clearing Client we advise that the return should be done directly to the account of such client, unless specific instructions are received by the Bank of Portugal or the relevant court.



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

Please refer to our answer to 3.3.4 above.

3.3.7 ***If (i) following the commencement of Reorganisation Measures, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for 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?***

Please refer to our answer to 3.3.5 above.

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

Notwithstanding the fact that we consider that there is an applicable Exempting Client Clearing Rule, please find herein below the framework applicable to the Security Deed under the laws of this jurisdiction which can be used to further mitigate any risk of the unenforceability of the Exempting Client Clearing Rule.

The Financial Collateral Act sets out objective and subjective requirements for the granting of financial collateral, as well as requires the compliance with certain formalities in order for it to be valid and enforceable under Portuguese law.

In the case under analysis, and provided that the Client of the Relevant Clearing Member are legal persons, we are of the opinion that the security interest provided under the Security Deed would comply with the relevant subjective requirements.

On the other hand, for the purpose of benefiting from the regime foreseen in the Financial Collateral Act, the Security Deed should satisfy the following objective requirements:

- (a) the obligations secured by the Financial Collateral under the Security Deed and the object of such arrangements shall only be the settlement of cash ⁽¹⁸⁾ and the delivery of financial instruments ⁽¹⁹⁾;

⁽¹⁸⁾ Which shall mean money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits.

⁽¹⁹⁾ Which shall include securities, money market instruments and claims relating to or rights in or in respect of any of the foregoing.



- (b) the granting of such Financial Collateral under the Security Deed and its object shall be duly registered in the relevant account ⁽²⁰⁾, thus its beneficiary or someone acting on its behalf having control over the encumbered assets.

We understand that the obligations secured by and the object of the Security Deed are either “cash” or “financial instruments”, as those terms are defined in the Financial Collateral Act (following the analysis of the Instructions and of the Security Deed), and, as such:

- (i) the conflicts of law provision included in the Financial Collateral Act (regarding book entry securities) sets out that the qualification and patrimonial effects of the collateral, as well as the requirements regarding the execution of the same Collateral Arrangement and the formalities to be complied with in respect of its effects vis-à-vis third parties shall be regulated by the laws of the jurisdiction in which the relevant registry is made (which we understand to be English law);
- (ii) the conflicts of law provision included in the Portuguese Civil Code (regarding, *inter alia*, in rem security interests over assets or credits) sets out that the *in rem* regime shall be defined by the law of the State in which the relevant assets or rights are located (which we understand to be English law);

As a consequence, and given that English law recognises and accepts that the Security Deed creates a valid and effective security interest over the relevant financial instruments or cash (as referred above), the same shall be accepted as a valid security interest in this jurisdiction.

Please do note, however, that if the Client of the Clearing Member is a natural person or if the object of the Security Deed is something other than cash or financial instruments (in the concept of the Financial Collateral Act), the provisions of the Financial Collateral Act shall not apply ⁽²¹⁾, given the requirements set out in such diploma. In that event, and given that English law recognises and accepts that the Security Deed creates a valid and effective security interest over the Charged Assets (as defined in the Security Deed), the same shall be accepted as a valid security interest in this jurisdiction, in accordance with article 46 of the Portuguese Civil Code.

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

Please refer to our answer to 3.3.8 above.

⁽²⁰⁾ Please note that for the Financial Collateral Act provisions to apply, the following formalities shall be complied with (depending on the secured assets): (i) if book-entry securities, the relevant registry should be made in the account of the collateral provider (or, if voting rights are granted to the collateral taker, in the account of said collateral taker); and (ii) if cash, the relevant registry should be made in the collateral provider account. Do note that such compliance is not a validity or effectiveness requirement, but rather a pre-requisite for the Financial Collateral Act to apply (implementing article 3(2) of the Financial Collateral Directive).

⁽²¹⁾ If the Security Deed was granted pursuant to Portuguese law, this would probably – in these circumstances – qualify as a civil pledge, i.e., it would still constitute an *in rem* security interest but certain faculties vested on the beneficiary of the Security Deed would not generally be permitted upon enforcement (such as taking possession of the Charged Assets upon enforcement) and, in an insolvency scenario, the enforcement procedures would be subject to a stay.

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

Assuming that the Security Deed is considered to be a financial collateral arrangement⁽²²⁾, this jurisdiction determines that:

- (a) unless those are intentional detrimental acts, financial collateral arrangements may not be reversed on the sole basis that they have come into existence, or the fact that financial collateral has been provided, in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event;
- (b) unless those are intentionally detrimental acts, in the context of winding-up proceedings or reorganisation measures, financial collateral arrangements are enforceable under their agreed terms and conditions;
- (c) in the course of such winding-up proceedings or reorganisation measures, the early termination of the financial collateral arrangements and the setting-off of the obligations derived therefrom shall not be affected by the opening or development of such proceedings or measures.
- (d) Security interests that are constituted after the beginning of the Winding Up Proceedings or Reorganisation Measures are effective against third parties as long as the beneficiary demonstrates that it did not have knowledge nor should have knowledge of the existence of the said Winding Up Proceedings or Reorganisation Measures.

Moreover, article 284 of the Securities Code determines that collateral – pledge and rights deriving from repo and other similar contracts – provided to secure the obligations arising from the functioning of a settlement system will not be affected by the commencement of an insolvency procedure or recovery measure of the Clearing Member. ⁽²³⁾In addition, such article sets out that if the financial instruments which are the object of the relevant collateral are registered with a centralised system located in a State Member, the rights of the collateral beneficiary are ruled by the law of such State Member, provided that the collateral is registered with such system.

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

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

⁽²²⁾ Please do note that, should the Security Deed not be considered to be a financial collateral arrangement, the enforcement of such security interest will be suspended in an insolvency scenario.

⁽²³⁾ Under EMIR Decree-Law (which has come into effect on April 17, 2014), article 284 (5) has further extended this regime to the cases when the operator of the settlement system provides collateral to another system operator, under an interoperable system, and the latter becomes insolvent.



4. QUALIFICATIONS

4.1.1 We express no opinion as to:

- (a) whether a Relevant Clearing Member has good legal or other title to the assets or rights which are expressed to be subject to a security interest under the Deed of Charge or the Security Deed, or as to the existence or value of any such assets or rights;
- (b) whether the Deed of Charge or the Security Deed breaches any other agreement or instrument;
- (c) the validity or effectiveness of any security interest over any asset or right which is situated outside Portugal or governed by a foreign law;
- (d) compliance of the LCH Agreements and the Security Deed with the Portuguese Standard Contracts Act, approved by Decree Law 446/85, dated October 25, as amended, as we have assumed that no consumers are parties to the LCH Documents;
- (e) enforcement proceedings, injunctions or any interim measures in respect of the LCH Agreements and the Security Deed, following the recognition of a foreign judgement or foreign arbitral award, or whether the LCH Agreements and the Security Deed constitute enforcement titles ("*títulos executivos*") under Portuguese law;
- (f) the provision of investment services or ancillary services (as defined in the Securities Code) in this jurisdiction (such as the reception, transmission or execution of order, the registry of securities) by LCH or by the Relevant Clearing Member (including any regulatory authorisations, licenses or registries necessary for the performance of the same);
- (g) any regulatory requirements, including reporting duties imposed on the Relevant Clearing Member in connection with the LCH Documents or with the provision of clearing services to Clients in this jurisdiction other than any requirements which breach could affect its capacity to enter into the LCH Documents;
- (h) the application to or compliance by the Relevant Clearing Member or LCH with any laws and regulations that may be relevant when performing the LCH Documents, such as, without limitation, data protection, banking secrecy or anti-money laundering and terrorist financing rules.

4.1.2 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 being capable of being set aside as a result of any fraud, misrepresentation or any bribe or corrupt conduct.
- 4.1.3 In this Opinion Letter "enforceable" means that an obligation is of a type which the Portuguese courts may enforce. It does not mean that those obligations will be enforced in all circumstances in accordance with the terms of the LCH Agreements and/or the Security Deed.
- 4.2 Whether or not a security arrangement constitutes a financial collateral arrangement constitutes a question of fact, and we express no opinion as to whether or not the Deed of Charge or the Security Deed constitutes a financial collateral arrangement. If the security interest created under the Deed of Charge or the Security Deed is characterised as a non-financial collateral arrangement (civil pledge) then the risks set out below might apply:
- (a) The appropriation of the secured assets would not be permitted, thus such assets having to be sold or transferred by means of judicial or extra-judicial proceedings;
 - (b) The protection conferred by the Financial Collateral Act in a reorganisation or insolvency scenario would not be extended to such security arrangements (which would, then, fall under the general regime of the Insolvency Act); and
 - (c) in an insolvency scenario all judicial enforcements (*inter alia*, of security interest, if applicable) are stayed.
- 4.3 A security financial collateral arrangement requires that the relevant "financial collateral" (as defined in the Financial Collateral Act) is in the "possession or control" (as such terms are used in the Financial Collateral Act) of the collateral-taker, which in the case of the Deed of Charge is LCH and in the case of the Security Deed is the Client, or another entity on behalf of the relevant collateral-taker.
- 4.4 Whilst there is no conclusive authority, for the purposes of this opinion we are of the view that in light of the fact that (i) the Securities (as defined in the Deed of Charge) are held by LCH (either held by a Clearance System (as defined in the Deed of Charge) on behalf of, for the account of, to the order of or under the control or direction of LCH or under the control or direction of a Custodian Bank (as defined in the Deed of Charge) for the account of the Clearing House) , or or (ii) the Charged Assets (pursuant to the Security Deed) are held by LCH, and that the Relevant Clearing Member is prohibited from or assigning (by way of security or otherwise) or creating any other proprietary interest in its rights under the Deed of Charge and the Security Deed, the relevant conditions that have to be met in order to establish "possession" or "control" for the purposes of the Financial Collateral Act are present.

- 4.5 In some circumstances a Portuguese court may accept proceedings commenced before it, notwithstanding the provisions of the Opinion Documents providing that the courts of England have jurisdiction in relation to the subject matter of those proceedings.
- 4.6 Being a Civil Law legal system, Portuguese Legal system does not follow the rule of precedent; therefore, Portuguese Judges are not bound by judicial precedents and decide on a case-by-case basis. As a consequence, in some cases Portuguese Courts may have a different opinion than the one given in this Opinion Letter.
- 4.7 There is no relevant experience in a court of law regarding the Insolvency Proceedings or reorganisation measures of Financial Institutions in Portugal, especially there is no experience in respect of the insolvency of a Financial Institution which is also acting as a Clearing Member. As a consequence, the opinions given above in respect of such matters have not yet been tested and the court's interpretation may differ from the one given in this Opinion Letter.
- 4.8 We have for the purposes of this opinion letter interpreted the Bank of Portugal and CMVM's requirements without enquiring as to any specific interpretation that the Bank of Portugal and/or CMVM (as applicable) may have. Definitive interpretation is a matter for the Bank of Portugal or CMVM (as applicable).

This advice is given pursuant to the terms of our letter of engagement and for the exclusive benefit of the addressee. It may not, without prior written consent, be relied on by any other person. We consent to a copy of this advice being made publically available on its website and to it being shown to relevant regulators of LCH and/or any counsel appointed by the addressee to advise on matters of the laws of other jurisdictions, for information purposes only and solely on the basis that we assume no responsibility to any such parties as a result or otherwise.

Yours faithfully

A.M.Pereira, Sáragga Leal, Oliveira Martins, Júdice & Associados, RL

