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Our reference: 70-40560473.PCDB/RCFC

24 January 2014

Copy to:
The International Swaps and Derivatives
Association
One Bishops Square
London
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Dear Sirs

IAS 32 Opinion relating to clearing members in Hong Kong – SwapClear Service of LCH.Clearnet Limited

You have asked us to give an opinion as to the laws of the Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**" or "**this jurisdiction**") in relation to certain netting and set-off provisions in the Rules of LCH.Clearnet Limited (the "**CCP**") in respect of its SwapClear Service (the "**Service**"), as such provisions apply between the CCP and clearing members incorporated in this jurisdiction (each a "**Clearing Member**"). This opinion does not apply to any clearing services or transactions other than in respect of the Service.

We understand that your requirement is for the enforceability and validity of such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion for the purposes of demonstrating compliance with International Accounting Standard 32 ("**IAS 32**") and the clarification amendments made to IAS 32 in December 2011 and effective on 1 January 2014.

References herein to "**this opinion**" are to the opinion given in Section 3.

1. TERMS OF REFERENCE

1.1 This opinion is given in respect of the Netting Provisions and the laws of this jurisdiction in force as at **30 September 2013**.

HKG-1-1020223-v4

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- 1.2 This opinion is given only in respect of Clearing Members which are Hong Kong Banks.
- 1.3 The insolvency proceedings ("**Insolvency Proceedings**") which may apply to a Clearing Member which is a Hong Kong Bank under the laws of this jurisdiction are:
- (a) the appointment of one or more provisional liquidators;
 - (b) a winding-up by the court pursuant to Section 177(1) or (2) of the Companies Ordinance; or
 - (c) a scheme of arrangement pursuant to Section 166 of the Companies Ordinance.
- 1.4 This opinion is given in respect of any transaction which shall have been cleared through the Service and which shall have been registered pursuant to the CCP Documentation.
- 1.5 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.6 We do not opine on the enforceability of any net obligation resulting from any netting or set-off, whether pursuant to the Netting Provisions or otherwise.
- 1.7 This opinion relates solely to matters of Hong Kong law and does not consider the impact of any laws (including insolvency laws) other than Hong Kong law, even where, under Hong Kong law, any foreign law falls to be applied. We express no opinion in this opinion on the laws of any other jurisdiction.
- 1.8 We express no opinion as to any provisions of the CCP Documentation or the Rules other than those to which express reference is made in this opinion except insofar as any such provision relates to the effectiveness of the Netting Provisions.
- 1.9 We do not express any opinion as to any matters of fact.
- 1.10 **Definitions**

Terms used in this opinion and not otherwise defined herein shall have the meanings ascribed to them in the Rules. In this opinion:

- (a) "**Applicable Amount**" means each amount identified as such in the Annex payable to or by a Clearing Member by or to the CCP.
- (b) "**Banking Ordinance**" means the Banking Ordinance, Chapter 155 of Hong Kong;
- (c) "**Bankruptcy Ordinance**" means the Bankruptcy Ordinance, Chapter 6 of Hong Kong;

- (d) **"BAU Netting Provisions"** means the rules identified as such in the Annex;
- (e) **"CCP Default Netting Provisions"** means the rules identified as such in the Annex;
- (f) **"CCP Documentation"** means the documents, agreements, acts and other things pursuant to which the Rules are made contractually binding between the Parties;
- (g) **"Commencement Point"** means, in respect of a winding-up of a Hong Kong Bank, the time the relevant petition is presented to the court for the winding-up of the Hong Kong Bank (if a winding-up order is made pursuant to the petition), provided that, if before the presentation of a petition for winding-up, the Hong Kong Monetary Authority has given a direction that such of the affairs, business and property of the Hong Kong Bank as are specified in the direction are to be managed by a special manager pursuant to Section 52(1)(C) of the Banking Ordinance, the Commencement Point shall be deemed to be the time such direction was given by the Hong Kong Monetary Authority;
- (h) **"Companies Ordinance"** means the Companies Ordinance, Chapter 32 of Hong Kong;
- (i) **"Conveyancing and Property Ordinance"** means the Conveyancing and Property Ordinance, Chapter 219 of Hong Kong;
- (j) **"Default Proceedings"** means default proceedings taken by the CCP pursuant to the Default Rules;
- (k) **"Default Rules"** means those parts of the CCP Documentation which provide for the taking of action by the CCP in the event of a Clearing Member appearing to be unable, or likely to becoming unable, to meet its obligations in respect of one or more Transactions between the CCP and the Clearing Member;
- (l) **"Hong Kong Bank"** means a Hong Kong Company which is an "authorized institution" under the Banking Ordinance;
- (m) **"Hong Kong Company"** means a company which is incorporated under the Companies Ordinance;
- (n) **"Member Default Netting Provisions"** means the rules identified as such in the Annex;
- (o) **"Netting Provisions"** means the BAU Netting Provisions, the CCP Default Netting Provisions and the Member Default Netting Provisions;
- (p) **"Party"** means the CCP or a Clearing Member and a reference to **"Parties"** is a reference to the CCP and a particular Clearing Member;

- (q) **"Rules"** means the rules of the CCP in force as at 30 September 2013;
- (r) **"SISO Point"** means, in respect of a winding-up of a Hong Kong Bank, the time of the making by the court of a winding-up order in respect of the Hong Kong Bank;
- (s) **"Transaction"** means a transaction which shall have been cleared through the Service and which shall have been registered pursuant to the CCP Documentation;
- (t) references to a **"paragraph"** and the **"Annex"** are (except where the context otherwise requires) to a paragraph of and the Annex to this opinion respectively.

2. ASSUMPTIONS

We assume the following:

- 2.1 That each Party has the capacity, power and authority under all applicable law(s) to enter into the CCP Documentation, and to perform its obligations under the Rules.
- 2.2 That each Party has taken all necessary steps and obtained and maintained all authorisations, approvals, licences and consents necessary to execute, deliver and perform the CCP Documentation, and to ensure the legality, validity, enforceability or admissibility in evidence of the CCP Documentation in this jurisdiction.
- 2.3 That the CCP Documentation is legal, valid, binding and enforceable under the law by which it is expressed to be governed.
- 2.4 That the CCP Documentation has been entered into by the Parties prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 2.5 That each payment which is to be netted under the Netting Provisions is due and payable on the date on which the rights under the Netting Provisions are to be exercised.
- 2.6 That the Applicable Amounts arise under legal, valid, binding and enforceable obligations under their governing law.
- 2.7 That each Party performs its obligations under the Rules in accordance with their terms.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the CCP in accordance with the CCP Documentation, there are no other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Rules.

- 2.9 That, in relation to the opinions at paragraph 3.4 as regards the CCP Default Netting Provisions and the Member Default Netting Provisions only, that an applicable event of default has occurred so that such Netting Provisions apply.
- 2.10 That the CCP Documentation has been entered into, and each of the Transactions referred to therein is carried out, by each of the Parties 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.
- 2.11 That the CCP Documentation accurately reflects the true intentions of each of the Parties.

3. OPINION

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

3.1 Recognition of Choice of Law

The choice of law provisions of the CCP Documentation would be recognised under the laws of this jurisdiction, notwithstanding that the CCP is not incorporated in this jurisdiction.

3.2 Set-off prior to Clearing Member default

Prior to the commencement of either Default Proceedings or Insolvency Proceedings in respect of a Clearing Member:

- (i) the BAU Netting Provisions confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP respectively, effective at the election of either Party; and
- (ii) in the event of default of the CCP, the CCP Default Netting Provisions confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP respectively, together with amounts representing Applicable Amounts which are owing but not yet payable by the Clearing Member and the CCP respectively, effective at the election of the Clearing Member.

We are of this opinion because there is no rule of the laws of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the BAU Netting Provisions or the CCP Default Netting Provisions, or which would render such terms ineffective.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Clearing Member or the CCP, as the case may be (in relation to the BAU Netting Provisions) or the Clearing Member (in relation to the CCP Default Netting Provisions).

3.3 Clearing Member Insolvency – Prior to Default Proceedings

Following the commencement of Insolvency Proceedings in respect of a Clearing Member, but prior to the commencement of Default Proceedings by the CCP:

- (i) the BAU Netting Provisions confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP respectively, effective at the election of either Party; and
- (ii) in the event of default of the CCP, the CCP Default Netting Provisions confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP respectively, together with amounts representing Applicable Amounts which are owing but not yet payable by the Clearing Member and the CCP respectively, effective at the election of the Clearing Member.

We are of this opinion because there is no rule of the laws of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the BAU Netting Provisions or the CCP Default Netting Provisions, or which would render such terms ineffective.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Clearing Member or the CCP, as the case may be (in relation to the BAU Netting Provisions) or the Clearing Member (in relation to the CCP Default Netting Provisions).

However, in the event of a winding-up of a Clearing Member under the laws of this jurisdiction, there would be a mandatory Statutory Insolvency Set-Off of amounts owing between the Parties (as described in paragraph 4.2.1 below). The effect of Statutory Insolvency Set-Off would be, subject to the other comments in this paragraph and paragraph 4.2, to aggregate and set off all Applicable Amounts together with all other amounts owing between the Parties so that only a single net sum is due, notwithstanding that the BAU Netting Provisions and/or the CCP Default Netting Provisions may provide for a net amount to be payable in respect of Transaction that are registered in the Clearing Member's client account and a separate net amount to be payable in respect of all other Transactions.

Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-off, so that the BAU Netting Provisions and/or the CCP Default Netting Provisions may be overridden to the extent they are inconsistent with Statutory Insolvency Set-off.

3.4 Clearing Member Insolvency – Default Proceedings

If Default Proceedings are commenced by the CCP against a Clearing Member, the Member Default Netting Provisions will confer a legally enforceable right to set off all Applicable Amounts payable by the Clearing Member and the CCP respectively,

together with amounts representing Applicable Amounts which are owing but not yet payable by the Clearing Member and the CCP respectively, effective at the election of the CCP.

We are of this opinion because there is no rule of the laws of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the Member Default Netting Provisions, or which would render such terms ineffective.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the CCP.

However, in the event of a winding-up of a Clearing Member under the laws of this jurisdiction, there would be a mandatory Statutory Insolvency Set-Off of amounts owing between the Parties (as described in paragraph 4.2.1 below). The effect of Statutory Insolvency Set-Off would be, subject to the other comments in this paragraph and paragraph 4.2, to aggregate and set off all Applicable Amounts together with all other amounts owing between the Parties so that only a single net sum is due, notwithstanding that the Member Default Netting Provisions may provides for a net amount to be payable in respect of Transaction that are registered in the Clearing Member's client account and a separate net amount to be payable in respect of all other Transactions.

Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-off, so that the Clearing Module Netting Provision may be overridden to the extent they are inconsistent with Statutory Insolvency Set-off.

3.5 Conditions

There are no rules of law of this jurisdiction which would require the fulfilment of any conditions before the exercise of rights of set-off under the Netting Provisions. It is not the case, as far as the laws of this jurisdiction are concerned, that such rights are enforceable only on the occurrence of some future event.

4. QUALIFICATIONS

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

4.1 Contractual set-off

Except as expressly stated in this paragraph 4, a contractual provision for set-off (and/or netting) will be effective and binding on a Party which is a Hong Kong Company unless and until that Party is wound-up in this jurisdiction and then only to the extent that such contractual provision does not contravene or infringe a mandatory rule of insolvency law.

4.2 Liquidation: Statutory Insolvency Set-Off

4.2.1 *Mandatory insolvency rules of set-off*

Section 35 of the Bankruptcy Ordinance, which is made applicable to Hong Kong Companies by Section 264 of the Companies Ordinance, provides that, in a winding-up of a Hong Kong Company (the Insolvent Party), where there have been mutual credits, mutual debts or other mutual dealings between the Insolvent Party and any other person, any amount owing by that Insolvent Party to that other person shall be set off against any amount owing by that other person to the Insolvent Party, and only the balance shall be owing by that Insolvent Party or, as the case may be, that other person.

Set-off pursuant to Section 35 of the Bankruptcy Ordinance ("**Statutory Insolvency Set-Off**") is mandatory and occurs automatically at the SISO Point. It is not possible for parties to contract out of Statutory Insolvency Set-Off. Accordingly, a contractual set-off provision between the Insolvent Party and another person will be effective in the winding-up of that Insolvent Party only if, and to the extent that, such set-off provision is not inconsistent with Statutory Insolvency Set-Off. However, any set-off (pursuant to a contractual set-off provision) that took effect prior to the SISO Point will generally not be affected by Statutory Insolvency Set-Off (although if the set-off took effect during a specified period ending at the SISO Point, then it may be affected by Statutory Insolvency Set-Off in the circumstances described in paragraph 4.2.4 below); and Section 35 of the Bankruptcy Ordinance does not entitle a liquidator to require the payment by the Solvent Party to the Insolvent Party of the gross amount that had been the subject of such set-off (pursuant to a contractual set-off provision).

4.2.2 *Mutuality*

Statutory Insolvency Set-off applies only where there have been, and in respect of, mutual credits, mutual debts or other mutual dealings between the Insolvent Party and another person. Accordingly, in the winding-up of a Hong Kong Company, Statutory Insolvency Set-off will not apply to credits, debts or dealings between the Parties that are not "mutual".

"Mutuality" generally exists where each Party is personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it. Circumstances in which the requisite mutuality will not be established include, without limitation:

- (a) where a Party is acting as agent for another person, in which case sums owed by (or to) the agent acting in its capacity as such are not mutual with sums owed to (or by) it arising from obligations such Party incurs as principal;

- (b) where a Party is acting as a trustee, in which case sums owed by (or to) the trustee acting in its capacity as such are not mutual with sums owed to (or by) it arising from obligations such Party incurs in its own interest;
- (c) where a Party has a joint interest, in which case sums owed by (or to) that Party jointly with another person are not mutual with sums owed to (or by) that Party acting in its own interest; and
- (d) where a Party's rights or obligations or any interest therein have been assigned or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order of the court.

Accordingly, where such mutuality does not exist in respect of any amounts owing between the Parties, such amounts will not be included in any Statutory Insolvency Set-Off.

4.2.3 *Secured obligations*

Where an amount owed by a Hong Kong Company in winding up (the Insolvent Party) is a secured obligation owed to the other Party (the Solvent Party), the better view is that the amount of such secured obligation which may be included in any Statutory Insolvency Set-Off will be limited to the amount which the Solvent Party elects to prove for in the winding-up. Except where the Solvent Party has elected to waive its security, such provable amount will be limited to the amount by which the secured obligation exceeds the proceeds (or expected proceeds) of enforcement of the security (net of the costs and expenses of enforcement). Where the secured obligation is itself a net sum, Statutory Insolvency Set-Off would not impair the calculation of that net sum.

4.2.4 *Obligations incurred after certain times*

In the winding-up of a Hong Kong Company (the Insolvent Party), an obligation (a "**Post-Notice Obligation**") incurred by such Insolvent Party during a relevant period will not be included in any aggregation or set-off pursuant to the Netting Provisions or Statutory Insolvency Set-Off, if the Post-Notice Obligation (looked at in isolation) gives rise to an amount owing by such Insolvent Party to the other Party (the Solvent Party).

The relevant period referred to above the period between (i) the date on which the Solvent Party has notice of the winding-up petition and (ii) the SISO Point.

However, this would not affect the aggregation or set-off of the obligations of the Parties in respect of (i) any obligation incurred before such Solvent Party had notice of the winding-up petition and (ii) any Post-Notice Obligation

(looked at in isolation) giving rise to an amount owing to such Insolvent Party by such Solvent Party.

4.2.5 *Contingent debts*

Section 34 of the Bankruptcy Ordinance provides that contingent debts owing by a Hong Kong Company in winding up (the Insolvent Party) to another person are provable and that an estimate can be made by the liquidator of the value of such contingent debts. However, these provisions do not apply to contingent debts owing to the Insolvent Party. Accordingly, if a debt to the Insolvent Party remains contingent, the fact that nothing is "due" in respect of it, whether by way of an estimate of its value or otherwise, means that it cannot be brought into account in a set-off, unless the contingency is fulfilled during the course of the winding-up proceeding. *Re Daintrey* [1900] 1 QB 546 is authority for the proposition that, in such circumstances (the fulfilment of the contingency), the debt would be subject to Statutory Insolvency Set-Off. The position in *Re Daintrey* was followed by the Supreme Court of Hong Kong (as it was then known) in *William Young v Bank of Credit and Commerce (in liquidation)* [1993] HKCU 346.

4.3 Liquidation: Reviewable transactions

4.3.1 *Unfair preference*

Pursuant to Section 50 of the Bankruptcy Ordinance and Section 266B of the Companies Ordinance, anything done or suffered by a Hong Kong Company (including the transferring of property and the undertaking of obligations) within a specified period ending at the Commencement Point of the winding-up of that Hong Kong Company may be set aside as an unfair preference.

The specified period is: (a) in the case of an unfair preference given to a person who is an associate (as defined in the Bankruptcy Ordinance), two years and (b) in any other case of an unfair preference, six months.

The thing done or suffered will be liable to be set aside if at the time it was done or suffered that Hong Kong Company was insolvent or became insolvent in consequence of the thing done or suffered and that thing has the effect of putting any of that Hong Kong Company's creditors or a surety or guarantor of any of that Hong Kong Company's debts or other liabilities in a better position, in the event of that Hong Kong Company's winding-up, than that person would have been in if the thing had not been done. However, the court cannot make such an order if it is satisfied that the Hong Kong Company which gave the preference was not influenced to give it by a desire to put that person in such better position.

For the purposes of Section 50 of the Bankruptcy Ordinance, a Hong Kong Company is insolvent if it is unable to pay its debts when they fall due or if the

value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

If a Transaction is entered into on arm's length terms and at then prevailing market rates, and the amount of any additional margin in respect of such Transaction is calculated in good faith, taking into account the additional market and credit risks associated with such Transaction, then is it unlikely that such Transaction or the provision of such additional margin will constitute an unfair preference.

4.3.2 *Extortionate credit transactions*

Pursuant to Section 264B of the Companies Ordinance, the liquidator of a Hong Kong Company may apply to set aside an extortionate transaction which occurred within three years prior to the Commencement Point of the winding up involving the provision of credit to that Hong Kong Company. A transaction will be extortionate if, having regard to the risk accepted by the party providing the credit (i) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit, or (ii) it otherwise grossly contravenes ordinary principles of fair dealing. A court would presume, unless the contrary is proved, that such a transaction is extortionate.

4.3.3 *Disclaimer of unprofitable contracts*

Section 268 of the Companies Ordinance entitles the liquidator, in a winding-up of a Hong Kong Company (the Insolvent Party), to disclaim an unprofitable contract with the leave of the court. A liquidator may therefore, following the Commencement Point of the winding-up of that Insolvent Party, seek to disclaim any contract entered into by that Insolvent Party, if the liquidator considers that contract to be an unprofitable contract. If any contract is so disclaimed, any damages or injury suffered by the other Party (the Solvent Party) as a result may be claimed by such Solvent Party as a debt in the winding-up of the Hong Kong Company.

However, any liability or obligation which was incurred by the Insolvent Party prior to such Commencement Point and which has become payable or due to be performed or discharged on or before such Commencement Point will not be affected by such disclaimer; and Section 268 of the Companies Ordinance does not entitle a liquidator to:

- (a) recover any sum paid by the Insolvent Party to the Solvent Party before such Commencement Point; or
- (b) disclaim any contract so as to determine, or release the Insolvent Party from, any liability or obligation of the Insolvent Party in respect of any amount that became due and payable by it before such Commencement Point.

In addition, Section 268 of the Companies Ordinance does not entitle a liquidator of the Insolvent Party to disclaim a contract:

- (i) if and to the extent that automatic termination has been effective to convert into an amount due and payable any liability or obligation which, but for the operation of automatic termination, would have been required to be discharged or performed by the Insolvent Party at some future time; or
- (ii) if and to the extent that (A) the Solvent Party has properly exercised an effective right to close-out any liability or obligation which, but for such close-out, would have been required to be discharged or performed by the Insolvent Party at some future time; and (B) such close-out has become effective (so as to produce an amount due and payable) before the time at which the liquidator seeks to disclaim the relevant contract.

Moreover, even if a liquidator of the Insolvent Party, with the leave of the court, is able to disclaim a contract which has not been effectively closed-out at the time at which the liquidator seeks to disclaim such contract, the amount representing the damages or injury suffered by the Solvent Party would be provable in the winding-up of the Insolvent Party, and would therefore be mandatorily included in the Statutory Insolvency Set-Off between the Parties.

4.4 Other insolvency issues

- 4.4.1 The court may, in some circumstances, stay Insolvency Proceedings where the court is of the view that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will take into account whether or not this will prejudice creditors whose claims have a close connection with Hong Kong.
- 4.4.2 For the purpose of proving a claim in a winding up, the claim must be expressed in Hong Kong dollars and, to the extent that any amounts are not denominated in Hong Kong dollars, they will be converted into Hong Kong dollars at the midpoint between the selling and buying telegraphic transfer rates of exchange quoted by The Hong Kong Association of Banks on the day the winding-up commenced or, where no such rates are quoted, at an exchange rate determined by the court. Therefore, any provision in the Netting Provisions for the time and rate of conversion of one currency into another may, in the winding up of a Hong Kong Company, be superseded by a conversion, or conversions, at the time and rate specified by the liquidator, determined as described above.
- 4.4.3 It is possible that:
 - (a) the valuation and calculation made to determine the net amount resulting from the set-off implemented under the Netting Provisions;

- (b) any currency conversion rate applied; or
- (c) any other valuation, calculation or determination made or other action or discretionary decision taken under the Netting Provisions,

could be challenged by a liquidator if they were or it was not done fairly or in a manner consistent with applicable law.

- 4.4.4 We express no opinion as to the effectiveness of the Netting Provisions or the Set-Off Provisions in relation to any obligation owing by one Party the benefit of which is acquired by a Hong Kong Company after the winding up of that Hong Kong Company has commenced.

4.5 Disposition to defraud creditors

Under Section 60 of the Conveyancing and Property Ordinance, any disposition by a Hong Kong Company made with the intention to defraud creditors may be set aside (where such fraudulent intention is proved by the person seeking to set aside the disposition). However, Section 60 does not affect the operation of the Bankruptcy Ordinance and the Companies Ordinance in respect of those provisions for the time being in force under which transactions may be avoided for the protection of creditors upon the Hong Kong Company's winding-up.

4.6 Schemes of Arrangement

There is provision in the Companies Ordinance for a scheme of arrangement in respect of a Hong Kong Company to be approved by creditors or, in some cases, shareholders of the Hong Kong Company. The courts will not sanction a scheme of arrangement unless reasonable efforts were made to notify those creditors whose rights would be affected by the scheme of the meeting to approve that scheme. Approval at the creditors' meeting of the terms of a scheme of arrangement does not require unanimity of the affected creditors, whether or not present at the meeting. Such a scheme of arrangement could affect both set-off rights of creditors and the amount of claims which the creditors may have against the Hong Kong Company. However, any such scheme of arrangement could impair the effectiveness of the Netting Provisions only if the aggregation or set-off provided for in the Netting Provisions has not taken place before the coming into effect of such scheme of arrangement. If the aggregation or set-off has taken place before the coming into effect of such scheme of arrangement, that scheme of arrangement could affect only the amount (and other terms) of any resulting net claim.

4.7 Choice of Law

- 4.7.1 The choice of law provisions of the CCP Documentation may be disregarded if their application will be illegal or contrary to public policy or mandatory rules in this jurisdiction.
- 4.7.2 Matters of procedure are, as a general rule, governed by the law of this jurisdiction to the exclusion of the relevant chosen governing law.

- 4.7.3 We express no opinion on the binding effect of the choice of law provisions in the CCP Documentation insofar as they relate to non-contractual obligations arising from or connected with the CCP Documentation.

4.8 General

- 4.8.1 If any creditor ("**the attaching creditor**") of a Party ("**the defendant Party**") were (whether before or after judgment) to attach, execute, levy execution or otherwise exercise a creditor's process (each such process an "**attachment**") over or against any amount owing under the CCP Documentation to the defendant Party by the other Party ("**the debtor Party**"), then the debtor Party would be able, following the date the relevant netting or set-off is to take effect (the "**Relevant Date**"), to exercise its rights under the Netting Provisions against the attaching creditor of the defendant Party in respect of claims which existed at the date of the attachment, including the amount which is the subject of the attachment. However, if a winding-up has commenced or a bankruptcy order has been made in respect of the attaching creditor before the Relevant Date, it may be possible for the liquidator or trustee in bankruptcy of the attaching creditor to claim from the debtor Party the amount which is subject to the attachment free of the debtor Party's rights under the Netting Provisions (so that the claim by the liquidator or trustee in bankruptcy would be for an amount not reduced by the operation of the Netting Provisions). This is because it may be argued that the debtor Party seeks to exercise a set-off right in respect of an amount which has come to be owed by the debtor Party to the attaching creditor rather than to the defendant Party, and a contractual provision which purports to create a right of set-off in respect of non-mutual claims may not be effective in the winding-up or bankruptcy of the attaching creditor.

However, after the commencement of a winding-up or the bankruptcy of the defendant Party any attachment will be ineffective unless the court otherwise orders, and in our view the court would not validate the attachment in order to defeat the rights of the debtor Party under the Netting Provisions.

- 4.8.2 Where any Party is vested with a discretion or may determine a matter, Hong Kong law may require that such discretion is exercised or determination is made reasonably. Any provision in the CCP Documentation providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by a Party. The court may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified.
- 4.8.3 If the effect of proceedings in a forum other than Hong Kong is to extinguish claims or liabilities under the governing law of those claims or liabilities, the court may recognise the extinction of those claims or liabilities.

- 4.8.4 Any provision of the CCP Documentation which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any Party or any other person may be ineffective.
- 4.8.5 Under Hong Kong law, interest imposed upon a Party by the CCP Documentation might be held to be irrecoverable on the grounds that it is a penalty, or to the extent that it accrues on an unsecured debt after the commencement of a winding-up or a bankruptcy in respect of the Party liable to pay such interest; but the fact that such interest was held to be irrecoverable would not of itself prejudice the legality or validity of any other provision of such agreement.
- 4.8.6 While the court has power to give judgment in a currency other than Hong Kong dollars, it has the discretion to decline to do so.
- 4.8.7 A new Companies Ordinance is expected to come into force in March 2014. However, the provisions in the "old Companies Ordinance" relating to the winding-up of a Hong Kong company will remain in that Ordinance, which is to be renamed as the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32). Crucially, Section 264 of Cap. 32, which provides that the same rules with regard to the respective rights of secured and unsecured creditors and to debts provable under the law of bankruptcy shall apply in winding up of insolvency companies, will remain unchanged. Accordingly, we believe there will be no substantive change to the terms of our opinion (including the effect of Statutory Insolvency Set-Off, or the grounds upon which a liquidator may invalidate a transaction) as a result of the coming into force of the new Companies Ordinance.
- 4.8.8 A Securities and Futures (Amendment) Bill 2013 was published in the Hong Kong Gazette on 28 June 2013: the bill is currently being considered by the Bills Committee of the Hong Kong Legislative Council. In addition, we understand that the Bankruptcy Ordinance is currently being reviewed and may be amended; however, we are not aware of any timetable having been set for any amendment to the Bankruptcy Ordinance to come into force. This opinion makes no reference to any proposed changes to any of these Ordinances.
- 4.8.9 This opinion is subject to the effects of United Nations or Hong Kong sanctions or other similar measures implemented or effective in Hong Kong with respect to a Party which is, or is controlled by or otherwise connected with, a person resident in, incorporated or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply.

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

This opinion is given for the benefit of the Futures and Options Association (the "FOA"). This opinion may be disclosed to:

- (a) the International Swaps and Derivatives Association, Inc. ("ISDA")
- (b) such of the FOA's members (excluding associate members) or ISDA's members (excluding associate members) as subscribe to the FOA's opinions library and whose terms of subscription give them access to this opinion (each a "**subscribing member**") and the officers, employees, and professional advisors of such subscribing member;
- (c) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, and professional advisors of such affiliate; and
- (d) the officers, employees and professional advisors of the FOA,

(each a "**Relevant Person**"). Each Relevant Person is authorised to make a copy of this opinion available to its auditors solely as evidential matter in support of their evaluation of a Relevant Person's management's assertion that the requirements of IAS 32 have been met, and a copy of this opinion may be furnished to them in connection therewith. In authorising Relevant Persons to make copies of this opinion available to their auditors for such purpose, we are not undertaking or assuming any duty or obligation to Relevant Persons or their auditors or establishing any lawyer-client relationship with them. Further, we do not undertake or assume any responsibility with respect to financial statements of any Relevant Person.

We accept responsibility only to the FOA in relation to the matters opined on in this opinion.

Yours faithfully

Clifford Chance

ANNEX

Applicable Amount¹	Applicable BAU Netting Provisions	Applicable Member Default Netting Provisions	Applicable CCP Default Netting Provisions
Coupon Payments variation margin	General Regulation 50	Default Rule 6 Default Rule 8 Default Rule 10	Regulation 39A Regulation 5(i)

¹ Terms used in this column have the meanings given to them in the Rules.