

FINANCIAL MARKETS LAW COMMITTEE

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7 July 2003

Dear Ms. Hansen

Financial Markets Law Committee Issue 56 – Emergency Powers Legislation

I am writing to you in your capacity as chair of the Financial Markets Lawyers Group (the “**Group**”).

I understand that the Group has very kindly offered to assist the Financial Markets Law Committee (the “**FMLC**”) in its research into the legal aspects of the extent of preparedness in the wholesale financial markets, including the possible need for new legislation, in the event of a major operational disruption. I am writing to take you up on that kind offer.

By way of background, the UK Treasury on 25 February 2003 published a consultation paper on measures that might be taken by the City of London in an emergency, “The financial systems and major operational disruption”¹. This sought views both on strengthening of private sector “market-based” approaches to major disruption and on whether new statutory powers to suspend obligations and to direct “financial infrastructure” entities might be useful in extreme circumstances.

The FMLC decided to consider these issues. It concluded that arguments for and against the proposed legislation cannot be assessed without a clearer understanding of forms of contracts currently used in market dealings and powers available to public authorities. Therefore, the FMLC decided to conduct an analytical exercise – a “gap analysis” – to identify whether and, if so, where there are gaps in preparedness.

The members of the FMLC may be found on its website at www.fmlc.org. The FMLC organises some of its work through Working Groups, on which both FMLC members and experts drawn from across the wholesale financial markets sit. For information I enclose a list of people who are in this working group, named the Emergency Powers Legislation Working Group. I am the secretary of the Emergency Powers Legislation Working Group, and it is my responsibility to gather together the relevant information and co-ordinate the drafting of the report based on our findings.

The issues that we would respectfully request you to address are set out in the Questionnaire and Requests attached to this letter. We appreciate that they might not be easy to answer unless they have already been addressed. However, we understand that responses to contingencies have been considered in both legal and non-legal spheres globally and are therefore hopeful that it will not be too onerous a task for your group to make a contribution to this project.

I am writing in similar terms to the other international wholesale financial markets points of contact, namely the European Financial Markets Lawyers Group, the Hong Kong Monetary Authority and the Swiss National Bank.

¹ At http://www.hm-treasury.gov.uk/consultations_and_legislation/major_operational_disruption/consult_operationaldis_index.cfm

A list of the names of the partners and their professional qualifications is open to inspection at the above office. The partners are solicitors, registered foreign lawyers or registered European lawyers. The firm is regulated by the Law Society.

Please refer to www.linklaters.com/regulation for important information on the regulatory position of the firm.

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Could I therefore please ask for any material the Group may have which would answer or go towards answering the range of questions set out in the attached Questionnaire and Requests? All materials can be posted to Simon McKnight, FMLC Emergency Powers Legislation Working Group Secretary, c/o Linklaters, One Silk Street, London EC2Y 8HQ, or emailed to simon.mcknight@linklaters.com.

Thank you very much in advance for the assistance of the Group.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. McKnight', with a stylized flourish at the end.

Simon McKnight
FMLC Emergency Powers Legislation Working Group Secretary

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ISSUE 56 – EMERGENCY POWERS LEGISLATION

Questionnaire and Requests

Contracts

- 1** Please identify in general terms how the contract law of your jurisdiction deals with cases where performance of the contract or the operation of some other material term (e.g. the setting of a rate or price using market inputs) may be impossible because of supervening events (such as operational disruption). Is there a general doctrine which excuses or allows delayed performance because of impossibility, hardship, change of circumstances or other similar events?

- 2** We are interested in identifying key standard form contracts used in your markets (e.g. for derivatives, repos, foreign exchange). In relation to these, we would be interested in examples of how they address the following issues:
 - 2.1** the definition of business day;
 - 2.2** disruptions which affect the ability to fix a rate or price relevant to the contract;
 - 2.3** disruptions which prevent settlement of obligations;
 - 2.4** any general force majeure provisions; and
 - 2.5** any general provision concerning illegality of performance.

Powers

- 3** What emergency powers are available to public authorities (including regulators) in your financial centre? In particular, we should be interested to know:
 - 3.1** whether the powers include any power to suspend performance of obligations or to declare an emergency public holiday or give directions to the infrastructure bodies referred to below;
 - 3.2** whether the powers are general or specific and whether they contain any safeguards;
 - 3.3** whether the powers are exercisable immediately or only upon regulations being made;
 - 3.4** who is entitled to exercise the powers and for what purposes; and
 - 3.5** what benefits, limitations or disadvantages are thought to apply to the powers?

A copy of the relevant powers would be helpful.

- 4 To what extent were those powers exercised (if at all) after the events of 11 September 2001 or in any case of a natural disaster affecting the financial system, how and by whom were the powers exercised and what were the consequential effects?
- 5 Is there any experience in your financial centre to indicate that there are any gaps or deficiencies in the emergency powers available to public authorities (including regulators) for dealing with a major disruption to the financial system and what particular lessons can be usefully learnt for the future?
- 6 To what extent did public authorities (including regulators) in your financial centre seek to liaise with equivalent authorities in other financial centres in responding to the above disruption and with what success?

Infrastructure bodies

- 7 Please supply copies of all laws, regulations, rules or other principal agreements which govern the operation of exchanges, clearing houses, payments systems, securities settlement systems and other similar organisations (together "**infrastructure bodies**") which are located in your country, particularly where they relate generally to (a) the effect of a force majeure or other disruptive event or (b) co-operation with other infrastructure bodies, whether in your country or abroad.
- 8 To what extent were those laws, regulations, rules or other agreements used (if at all) by infrastructure bodies to deal with the problems raised following the events of 11 September 2001 or any other major disruptive event (such as a hurricane, typhoon or earthquake) and what were the consequential effects?
- 9 Is there any experience in your financial centre to indicate that there are any gaps or deficiencies in the emergency powers available to infrastructure bodies and to suggest particular lessons that can be usefully learnt for the future?
- 10 Are there any other groups or organisations which act as co-ordinators (either formally or informally) of infrastructure bodies in your jurisdiction?

General

- 11 Are you aware of any other published materials (e.g. official reports, journal articles) which have considered the issues which we are considering? If you are, please could you provide either a copy of such materials or provide us with appropriate citations so that we may obtain copies of them.

Respondents should note that we are more than happy to receive information by way of internet references and to receive information and answers piecemeal, rather than waiting until all answers are

available. This Questionnaire and Requests is also available on the Financial Markets Law Committee website at www.fmlc.org under "work in progress".

Responses and materials should be sent by post to: Simon McKnight, FMLC Emergency Powers Legislation Working Group Secretary, c/o Linklaters, One Silk Street, London EC2Y 8HQ, or emailed to simon.mcknight@linklaters.com.