

ISSUE 56: EMERGENCY POWERS LEGISLATION
Note of a meeting held at Lehman Brothers, 27 June 2003 at 10.30 a.m.

Present:

Bill Tudor John, FMLC (Chair)

Pauline Ashall, Linklaters

Peter Beales, LIBA

Mark Evans, Travers Smith Braithwaite

Piers Le Marchant, Lehman Brothers

Richard Slater, Slaughter and May

Megan Butler, FSA

Keith Clark, Morgan Stanley

Geoffrey Yeowart, Lovells

Laurence Walton, Euronext Liffe

Maurits Talen, CREST

Martin Thomas, FMLC

Chris Bates, Clifford Chance

David Bloom, HSBC

Jeffrey Golden, Allen & Overy

Roger Jones, APACS

Mark Kalderon, Freshfields Bruckhaus Deringer

Keith Luckhoo, IMA

Tim Herrington, Clifford Chance

Simon McKnight, Linklaters (Secretary)

Patrick Davis, IPE

Unable to attend:

William Courtenay, London Stock Exchange

Patricia Duncan, FOA

Marc Leppard, IPE

Julie Patterson, IMA

Richard Metcalfe, ISDA

Andrew Lamb, London Clearing House

Mark Topfer, London Metal Exchange

Ian Annetts, Allen & Overy

Richard Tredgett, Allen & Overy

Alastair FitzSimons, CREST

Diarmuid O'Hegarty, London Metal Exchange

Simon Dodds, Deutsche Bank

Simon Hills, BBA

James Tree, Association of Foreign Banks

Michael Raffan, Freshfields Bruckhaus Deringer

Scott Sullivan, Deutsche Bank

Background

On 25 February 2003, HM Treasury published a consultation paper on "The financial system and major operational disruption". Its primary purpose was to seek views on whether new statutory powers should be sought to help deal with extreme events such as a major terrorist attack or natural disaster. The paper also asked for views on whether more could be done to strengthen private sector, market-based approaches to these issues, for example increased use of 'force majeure' clauses. Two types of statutory power were suggested – a power to suspend obligations (without preventing any two parties who wish to discharge their bilateral obligations from doing so) and a power to allow the authorities to direct providers of market infrastructure. The latter would confer the ability to instruct recognised exchanges, clearing houses and payment systems to close, to remain open, or to revise certain rules. The proposals generated a substantial market response. The majority of respondents argued that more time was needed in order to decide whether legislative proposals were required, and, if so, in what form.

Following discussions on this topic at meetings of market participants on 13 and 31 March 2003, the FMLC invited interested parties to form a working group to analyse the legal background to HM

Treasury's consultation paper. The view of the FMLC was that arguments for and against proposed legislation cannot be assessed without a detailed analysis of the current position.

Summary of discussion

On 19 June, HM Treasury announced the establishment of a Task Force, chaired by Sir Andrew Large, Deputy Governor of the Bank of England, to consider what steps should be taken, if any, to supplement or modify existing powers. The Task Force has been asked to produce interim recommendations by November 2003 and a final report by February 2004.

The FMLC Working Group will proceed in coordination with the Task Force. The members of the Task Force have not yet been established, but it was noted that members of the FMLC Working Group might be approached to sit on the Task Force, or on its own working groups. It did not seem that this would create any conflicts of interest. Bill Tudor John has agreed to be a member of the HMT Task Force.

The FMLC Working Group's role is to identify gaps in the law and market practice as it stands, whereas the Task Force's is to advise on policy decisions based on the findings of the FMLC Working Group.

It was agreed that as the work of the FMLC will be referred to by the Task Force, it would be sensible for the FMLC's strands of analysis to exactly mirror those of the Task Force.

The strands of analysis will be:

- what is the effect of contracts currently used as standard in UK and international wholesale financial markets (including those which establish the rules of exchange and other infrastructure bodies), as regards events of default, "force majeure", definitions of business days and similar issues and how do they interrelate? This is the **contracts** strand.
- what powers are currently available to UK and relevant international public authorities (such as the ECB)? This is the **powers** strand.
- how do UK and international wholesale financial market centres and legal systems interlink? This is the **infrastructure** strand.

Sub-groups of the working group will be established to assume primary responsibility for each strand. Draft terms of reference are to be circulated shortly.

There was some discussion as to which overseas markets are important for the purposes of this analysis. The obvious ones include New York, Hong Kong and Tokyo. It was noted that Europe as a whole is not critical, although financial centres within it might be. Euronext, Euroclear and Clearstream must be considered.

There are likely to be situations where the effects of disruptive events depend on how extreme they are.

The FMLC Working Group decided that the gap analysis is to be based on the hypothesis of one cataclysmic event, to avoid excessive complexity. However, the possibility of a sequence of more minor events leading to major disruption was noted, and should be considered at the end of the analysis.

Follow-up

In the common expectation that a substantial amount of knowhow is already available on this topic (and many of those present at the meeting confirmed that they have useful information), all parties

were encouraged to contribute anything of interest (regardless of whether it is a perfectly written discussion or a rough memo). The success of the gap analysis depends on the receipt of suitable information.

Three sub-groups will be established, each one dealing with one strand of the discussion. Details of these sub-groups will be circulated as soon as they have been organised.

Members of the FMLC Working Group should therefore:

1. indicate in which, if any, of the three sub-groups they would be most willing to participate; and
2. search for and provide all relevant material available within their respective organisations.

Linklaters were thanked for making available for this Working Group Simon McKnight, who will act as Secretary to the group. **All materials should be sent (electronically whenever possible) to him as well as to Martin Thomas.**

Martin Thomas

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