

FINANCIAL MARKETS LAW COMMITTEE

EMERGENCY POWERS LEGISLATION WORKING GROUP

CHECKLIST FOR CONTRACTS

Those responsible for the terms of contracts used in the wholesale financial markets are recommended to assess the extent to which they are prepared for any major operational disruption by reference to the following questions.

- Is it intended that performance of obligations should be required come what may, subject only to the applicability of general legal principles (such as in English law the doctrine of frustration)?
- If not, is it intended that the contract should adjust the performance of obligations in circumstances that would cover a major operational disruption? Does the contract distinguish credit-related events from those arising from a major operational disruption?
- Does the contract appropriately address the consequences of a failure to perform an obligation, in particular a failure to make a timely payment or delivery, as a result of a major operational disruption (such as termination or close-out rights, liability for damages, and/or rights to collateral)? Does the contract define which transactions would be affected by a major operational disruption and subject to which rights and remedies? Does the contract specify how the obligations to be performed at or from specified offices of the parties would be impacted by a major operational disruption?
- Does the contract adequately provide for the possibility that a major operational disruption may interfere with any prescribed mechanism for determining rates or prices under the contract (including any mechanism for determining a single net amount payable) through fallbacks or other alternatives?
- Does the contract rely on a definition of a business day or similar concept? If so, would it disrupt the operation of the contract if a day, originally scheduled to be a business day, fell outside the definition, including on short notice (or if normal business closed early on, or was interrupted for a significant part of, such a day)?
- Does the contract provide any grace periods or waiting periods either generally, covering defaults or other events, or specifically for major operational disruption? Are the periods adequate to cover a major operational disruption?
- Does the contract allow a party to terminate the contract or exercise other remedies because of a failure by the other party to perform obligations under other, separate contracts which results from an operational disruption? If so, does the contract appropriately protect the party against the risk that this creates or do those other contracts adequately address this risk?
- Could a party's failure to perform its obligations under the contract due to a major operational disruption result in a cross-default under its other contracts? If so, does the contract appropriately protect the party against the risk that this creates or do those other contracts adequately address this risk?
- Are transactions documented under the contract hedged by or otherwise linked to transactions documented under other contracts, in relation to which it would be particularly important to minimise differences between material terms of the contracts (documentation basis risk), for example as regards business day definitions?