

Annex 4

Report of the Contracts Working Group

30 October 2003

Report of the Contracts Working Group

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Letter from Working Group Chairman

Sir Andrew Large
Deputy Governor of the Bank of England
Chairman: Taskforce on Major Operational Disruption in the Financial System

Dear Sir Andrew,

I am pleased to submit to you, on behalf of the Contracts Working Group of the Task Force on Major Operational Disruption in the Financial System, this report, setting out our analysis, observations and conclusions. We have been assisted in the course of our work by the work of the Financial Markets Law Committee (FMLC) generally, and particularly by the detailed and careful review and analysis performed by the FMLC's Contracts Sub-group.

Through the years, financial markets have weathered disruptions and significant challenges, including the horrific events of 11 September 2001. There is, however, no basis for complacency and we believe the Government is pursuing a prudent course through its review of existing powers and current practices. Our financial markets play a vital role — as core components of the broader international markets and as a source of capital for our own economy. A disruption to the UK's financial markets is a matter of concern to everyone interested in continued growth and prosperity. In any disruption to the financial markets the objective must be to facilitate the continued operation, or resumption, of the markets.

Scope of the work

The Contracts Working Group has structured its report on the key elements it has considered in fulfilling its terms of reference: possible legislative solutions; the relationship between contracts and material operational disruption; wholesale financial market contractual issues and retail financial market contractual issues.

Our consideration of legislative solutions included an evaluation of the powers of suspension and direction proposed by HM Treasury in February's consultation paper "The financial system and major operational disruption." It is the view of the Working Group that the proposed powers would be inappropriate in the event of a temporary major operational disruption, which is the type of event assumed by the Working Group, and inadequate in the event of a major operational disruption of longer duration.

Gap analysis

The FMLC's report contains a description of current market practices, conventions and standards. Members of our Working Group participated in the FMLC's Contracts Sub-group and we endorse the FMLC Report. Our report indicates that many risks are well-known and understood. Contractual techniques have been identified, as described in our report, that provide the essential tools necessary to enable contracting parties to address risks, including many risks which will be relevant in a major operational disruption.

The fact that we believe an appropriate tool kit exists, however, should not be misunderstood to represent complacency on the part of the Working Group. Our view is that contracting parties, industry associations and others should ensure that they have considered whether their contract appropriately addresses risks consequent on a major operational disruption.

Our report refers to the UK's "financial markets" not only to reflect differences between wholesale and retail financial markets, but also to reflect the fact that each of these markets is a collection of differing markets. For example, the wholesale financial markets include: equity, debt, derivatives and commodities markets; the retail financial markets will include the markets for banking services, such as current accounts, mortgages and insurance. Each of these markets

will deal with risks which differ from those present in other markets. In many cases, these market differences explain the differences in contracts. Certainly, not all the techniques we discuss in our report would be appropriate in all contracts.

What is essential, however, is that documentation for each of these markets addresses relevant risks, including the risk of a major operational disruption, appropriately. The FMLC report includes a “Checklist for Contracts” which we have repeated in our report to underscore the need to ensure that contracts reflect deliberate risk assessment and allocation. Parties that rely on standard contracts, such as the ISDA Master Agreements, should ensure that they are using the most recent versions which, in many cases, will reflect amendments made to address risks from a major operational disruption.

International comparisons

The UK’s financial markets are interconnected with financial markets around the globe. The FMLC report sets out the results of their examination of measures in other relevant jurisdictions. This international dimension limits the ability of legislative and regulatory measures to address major operational disruption. Market participants must continue to have the primary responsibility for addressing risks in their arrangements, contractual or otherwise.

One important observation we would make is the high-degree of co-operation among market participants in the wake of the 11 September 2001 attacks. A great many parties, including financial services firms, market infrastructure providers and regulators, worked together to achieve the overriding objective of resumption of the markets. We have adopted in our report the distinction made in the FMLC report between “system insiders” and “system outsiders”. In the event of a major operational disruption, the nature of the broader relationships among contracting parties arguably could be more important than the specifics of contractual agreements among them.

Potential options for appropriate ex ante and ex post measures

We do not believe that legislative or regulatory measures are necessary ex ante. However, it may be that a modernisation of Section 1 of the Banking and Financial Dealings Act 1971 would provide an additional tool to facilitate, through non-coercive means, the creation of a suitable “breathing space” for the markets in some circumstances. As noted, the markets already employ a variety of techniques appropriate to, and effective in, addressing risk. The use of techniques should continue actively to be reviewed by parties to ensure that their contracts address relevant risks, including the risk of major operational disruption.

Ex post, we continue to believe that the most important contributions to be made by the authorities will be to assist the co-ordination of recovery efforts and to facilitate the provision of necessary liquidity. Communication with and among system insiders will be essential.

Conclusion

I hope that our report, together with the FMLC report, will stimulate further consideration of these matters by contracting parties, industry associations and others. Financial markets are innovative and these energies must be directed to ensuring that risks are addressed.

Yours sincerely,

Keith Clark
Chairman: Contracts Working Group

30 October 2003

1 Summary

1.1 Risk is the essence of financial markets. Without risk-taking, financial markets would not be able to perform their essential economic functions. Growth, development and prosperity depend in part on taking risks. Risk can be managed, mitigated and allocated: processes which occur every day in financial markets, here in the UK and elsewhere around the globe.

1.2 Risk, however, can be problematic where it is not understood and, accordingly, not appropriately addressed. Where the risk is to a consumer, concerns rightly will be heightened, reflecting possible information asymmetries and the possible impact on the consumer. *Caveat subscriptor* and *caveat emptor* are concepts that are well understood and accepted in wholesale financial markets, where equality of bargaining power reasonably may be assumed; these concepts are not, however, so well understood by, or appropriate for, retail markets, where equality of bargaining power is uncommon.

1.3 This distinction between wholesale and retail financial markets is important. Here in the UK, the distinction is well-established and reflected in the different laws, regulations and rules applicable to the different types of transactions. This distinction is equally important in the analysis of the Working Group: practices differ between the wholesale and retail markets, reflecting public policy on investor protection. In accordance with its terms of reference, the Working Group has considered both wholesale market and retail financial market contract issues.

1.4 The vital role played by financial markets makes major operational disruption a matter of concern to all interested in orderly markets, economic health and prosperity. The potential impact of disruptions of significant scale, whatever the causes, encouraged the Government to review its preparedness.

1.5 In a major operational disruption, a principal concern must be whether a contracting party would be prevented from performing its contractual obligations and, if so, whether this would constitute a breach causing potentially serious effects. Breach of contract may attract possible adverse consequences for the defaulting party, depending on the nature and terms of the contract and the circumstances surrounding the breach. In some cases, a party may wish to rely on contractual provisions which excuse a breach of contract

resulting from an operational disruption or other circumstances outside a party's control. In other cases, it may place reliance on contractual techniques which eliminate or mitigate the specific consequences of such a breach.

1.6 Generally, contracts record the deliberate, considered allocation and assumption of risk by the parties. A variety of defensive measures and risk management techniques exist which can provide a basis for addressing in contracts the risks that arise in relation to a major operational disruption. Key examples of these measures and techniques identified by the Working Group (assisted by the work of the Financial Markets Law Committee) include: business day provisions; exclusions and limitations of liability; grace periods; and force majeure clauses. Given the variety of contracts reflecting different markets, different financial instruments, arrangements and transactions, and different circumstances, the Working Party is of the view that it would be neither appropriate nor desirable for all contracts to contain force majeure clauses.

1.7 In considering risks and how to address them, both the specific legal arrangements made by parties and the context of parties' broader relationships must be examined. Where the relationship is between parties who are active participants in the market, and likely to face similar issues in the event of a significant disruption to financial markets — "system insiders" — the parties are more likely to accommodate the interests of other market participants. They also are more likely to be susceptible to regulatory or other pressures ("soft powers") to resolve issues in a fair or accommodating way.

1.8 "System outsiders" do not have this same relationship context, probably are neither subject nor susceptible to the same regulatory (and other) pressures, and may not be as willing to accommodate solutions other than through the strict terms of the relevant contract.

1.9 Many risks are both well-known and well-understood. Some risks, however, will not have been foreseen or encountered previously. Unanticipated risks or unanticipated manifestations of risk, such as those arising from the 11 September 2001 attacks in the United States, may be able to be dealt with through the existing framework using the familiar techniques. In some cases, familiar techniques and practices will need

to be modified, or new techniques developed, to address new risks.

1.10 In February 2003, HM Treasury published a consultation document, “The financial system and major operational disruption” (Cm 5751). The consultation proposed two new powers: a suspension power, intended to enable HM Treasury to provide “breathing space” by suspending certain legal and financial obligations (effectively, a statutory override of contractual and certain other arrangements); and a direction power, empowering HM Treasury to direct financial infrastructure, including exchanges, clearing and settlement systems, and payment systems.

1.11 Major financial markets, such as the London markets, are international. Not all contracts in any given market will be governed by the same law, limiting the legal and practical benefits that may be achieved through the use of the proposed legislative measures. It is the view of the Working Group that the proposed powers would be inappropriate in the event of a temporary major operational disruption — the type of event assumed by the Working Group — and inadequate in the event of a major operational disruption that is of longer duration.

1.12 In some circumstances, the ability to declare an unscheduled “bank holiday” under the Banking and Financial Dealings Act 1971 could possibly prove useful. Although the direct effects of the declaration of a bank holiday under the Act are limited, the Working Group believes the signalling effect of such a declaration may prove useful in providing a “breathing space”.

1.13 Having reviewed key typical contracts used in the wholesale financial markets, the Working Group believes that the contractual risk management mechanisms currently available provide the ability for contracting parties to address and manage risks appropriately. Room for improvement remains, however, and the Working Group encourages contracting parties, industry associations, and others to deliberately consider these issues in the drafting and/or negotiation process, including the impact of a major operational disruption and whether, in such an event, the contract provides an appropriate solution. The full list of matters which the Working Group believes should be considered is set out in Annex 4A.

1.14 The Working Group believes that, even in an event of major operational disruption, the preference

should be to enable those who can perform their contract to do so and to facilitate, to the greatest extent possible, the return of the markets to normalcy. No basis for intervention that provides an excuse for non-performance has been identified by the Working Group. Contracting parties, however, should consider the impact of a major operational disruption on their own bargain and take steps to ensure the contract addresses such risks appropriately.

2 Terms of reference

2.1. The terms of reference for the Working Group are to advise the Task Force on the adequacy of contracts, including existing force majeure clauses and market conventions (including contracts in over-the-counter (OTC) markets and between direct and indirect market infrastructure members) in minimising the impact of major operational disruption in the UK financial services sector and the need for, and possible form of, a legislative response.

3 Conduct of the review

3.1 The Working Group met three times in working sessions. It considered the work done by the Financial Markets Law Committee in its report and commissioned three further pieces of analysis, namely, consideration of: (a) the effects of a major operational disruption in the retail financial system; (b) contracts relating to service providers to the financial markets; and (c) the effect of major operational disruption on bank-to-bank arrangements. The Working Group considered the reports generated in all these areas and discussed at length the approach that should be taken to these matters. That approach is summarised in this report.

3.2 The Contracts Sub-group of the Financial Markets Law Committee (FMLC) has assisted the Working Group through review and analysis of relevant contractual provisions found in typical standard documents. Although a complete review of all contracts found in financial markets was impracticable, the FMLC’s Contract Sub-group’s work considered contracts that are used in a large number of transactions in the wholesale financial markets and a representative sample of contracts used in retail financial services.

3.3 The members of the Working Group are set out in Annex 4F.

4 Assumptions made by the Working Group

4.1 In the course of its review, the Working Group has been guided by several basic assumptions, including about the nature of major operational disruptions. Two broad types of major operational disruption scenario were considered by the group: those that are temporary and those that are not.

The nature of the disruption

4.2 For the purposes of its review, the Working Group defined a temporary major operational disruption as one that is not of long duration — a matter of days — and from which recovery is possible practically. As part of this scenario, it is assumed that public policy objectives place a high value on maintaining or restoring confidence and getting “back to business as usual”, and this would translate into concerted action to achieve the resumption of operation of markets as quickly as possible. These assumptions ground the conclusion that what is needed is the least possible interference with the markets and, at most, a temporary “breathing space” to facilitate the effecting of necessary repairs to infrastructure, the gathering and analysis of intelligence about the state of the markets and the appropriate dissemination of information to facilitate the resumption of business on a co-ordinated basis.

4.3 The implications for contracts of a non-temporary major operational disruption have not been considered by the Working Group. Contracts should reflect the realistic and reasonable assumptions made by the contracting parties about the nature of risks and the allocations of those risks among the parties. It is not realistic to expect contracting parties to attempt to address all risks through the contract, especially where the manifestation of the risk effectively challenges the broader framework of the civil society in which we live and conduct business. Major operational disruptions that are not temporary can be expected to raise an unimaginable range of fundamental issues; financial markets issues would need to be addressed appropriately in the context of these broader issues.

Other basic assumptions

4.4 Other assumptions made by the Working Group include:

- that parties who enter freely into contracts should honour those agreements;
- that, generally, risk should lie where it falls (ie, *caveat subscriptor* and *caveat emptor*), although the Working Group believes that the requirements of consumer protection may need to modify these principles in certain circumstances in the context of retail financial services contracts;
- that issues of foreseeability and the interpretation of implied terms may impact on how terms of contract are to be treated;
- that force majeure clauses, or like provisions, may be introduced into contracts in a variety of ways;
- that fairness and equity may require providing relief to obligees in certain circumstances, particularly in the retail financial markets;
- that “system insiders” have incentives to behave differently from “system outsiders”; and
- that contracts for financial transactions differ from contracts for provision of services.

5 Legislative measures

5.1 Legislative measures intended to address issues arising in financial markets in the event of a major operational disruption must take account of the international nature of the UK’s financial markets, in particular the debt and derivative markets. Moreover, by referring to “financial markets”, the Working Group acknowledges both the international nature of markets (the New York markets and the UK markets) and the range of actual markets which comprise the broader financial markets, including equity, debt, derivative and commodity. Differences in how these markets may be affected by a major event are apparent from the 11 September 2001 attacks in the United States. The US equity markets, including the New York Stock Exchange, closed (or did not open) on Tuesday, 11 September and reopened on Monday, 17 September; the US debt markets reopened on Thursday, 13 September (closing early).

HM Treasury’s consultation and proposed new powers

5.2 The international nature of the financial markets necessarily limits the efficacy of most legislative measures, including those proposed by HM Treasury in its February 2003 consultation document “The financial system and major operational disruption”. The consultation proposed two new powers: a suspension power and a direction power. The new powers were proposed to assist in promoting order in the financial system in extreme circumstances of operational disruption.

5.3 The suspension power is intended to provide “breathing space” in the markets by suspending certain legal and financial obligations. In effect, this power would amount to a retroactive imposition of a variant of a force majeure clause upon the entirety of contracts in the UK financial markets susceptible to the power. The power is of exceptional scope and the Working Group has grave doubts about the ability to calibrate the power appropriately, or prescribe its application with sufficient precision in the inevitably pressured circumstances of a major operational disruption, so as to achieve the desired result without causing unintended consequences. Moreover, the power can only operate on contracts governed by UK law. The UK’s financial markets are international and a significant amount of business transacted in these markets is subject to contracts governed by the laws of other jurisdictions, limiting the utility of the suspension power and potentially causing damage by imposing a partial “solution” to a market which has many inter-linked elements, thereby causing disequilibrium of effect. Potentially, the most significant impact of an exercise of the proposed suspension power would be the inability of financial institutions to meet their financial obligations outside the UK. Financial institutions may be dependent on the performance of their counterparts in order to meet their own obligations.

5.4 The direction power would enable HM Treasury to issue mandatory instructions to market infrastructure, including exchanges, clearing and settlement systems, and payment systems. In common with the supervision power, the direction power’s efficacy will be limited to the UK jurisdiction and, accordingly, will only operate with respect to UK-based infrastructure. Many transactions which “occur” in the UK’s markets rely on non-UK-based infrastructure which will not be susceptible to the power. For example, many over-the-counter transactions are cleared and settled on Euroclear or Clearnet, both of which are based outside the UK.

5.5 Because the UK’s financial markets are international, involving contracts and infrastructure providers that are not susceptible to the operation of the powers, and because the Working Group believes that official action should be directed toward facilitating the continuing operation or recovery of financial markets in the event of a major operational disruption, the Working Group is unable to conclude that either of the proposed powers is desirable. The Working Group has concluded

that the powers are inappropriate, and potentially harmful, in a temporary disruption, not least because they have an uneven effect and consequently risk creating confusion, and because they are likely to be inadequate, or irrelevant, in the event of a major operational disruption of longer duration.

The draft Civil Contingencies Bill

5.6 The draft Civil Contingencies Bill, published by the Government in June 2003, is intended to provide a single framework for the protection of the UK. The Bill proposes that, in an emergency, the Government may enact special legislative measures to address the emergency. The Government’s regulation-making powers under the Bill are broad and are subject only to limited prohibitions. The definition of the trigger emergency circumstances also is broad and includes serious economic crises (both financial and non-financial in origin), attacks on or disruption to infrastructure (both traditional and electronic) and disruption to the proper functioning of government, public or other vital services. Disruption of the activities of banks and other financial institutions is discussed specifically as a possible emergency, raising the possibility that undefined action may be taken with respect to financial markets through the aegis of civil contingency legislation.

5.7 The Working Group agrees that a major operational disruption in financial markets could ground a decision to activate broad civil contingency powers. Any general civil contingency legislation would need to clarify its relationship to financial markets, particularly if ultimately it is concluded that new or additional legislative powers for HM Treasury are appropriate or necessary to address a temporary major operational disruption. Short of a serious public order dimension to a major operational disruption in the UK financial markets, the broad powers contemplated in the draft Bill should not be used with respect to financial markets.

The Banking and Financial Dealings Act 1971

5.8 Section 1 of the Banking and Financial Dealings Act 1971 enables the declaration by the Sovereign of an unscheduled “bank holiday”. The general view is that the declaration under the Act of an unscheduled bank holiday does not amount to a statutory excuse for non-performance of contractual obligations due on a day which turns out to be a bank holiday. If a party is contractually bound to make a payment or perform some other act on a day which turns out to be a bank holiday,

that party remains bound and failure to pay or perform on that day would still amount to a default. An exception to this general rule relates to bills of exchange and cheques.

5.9 The Act's utility is limited. First, as a procedural matter, the declaration can be made only by the Sovereign and not, as is usual, by Ministers for and on behalf of the Crown. The need specifically to refer the matter to the Sovereign for approval and declaration adds a constitutional procedure which may create practical difficulties in the event of a major operational disruption. Second, a declaration under the Act cannot have effect on the day that it is made, so the earliest day that legally could be affected is the next scheduled business day succeeding the day of the declaration. This leaves open the issue of how to address a major operational disruption that occurs during the course of a normal business day in the UK financial markets. Third, the declaration of a "bank holiday" under the Act triggers provisions in numerous other UK statutes and the consequences may be unexpected and undesirable. Acts affected include the Bank of England Act 1998, the Arbitration Act 1996 and the Bills of Exchange Act 1882. The statutes affected that have been identified by the Working Group are listed in Annex 4B.

5.10 The Act may have direct effect where parties to a contract have defined their obligations by reference to "business days" and define this term by reference to the term "bank holiday" and/or to the Act specifically. Many contracts, however, including the specific contracts examined by the Working Group in the preparation of this report, do not define "business day" by reference to "bank holidays" or the Act. Instead, the term is defined by reference to whether banks, markets, exchanges and/or settlement systems are in fact open and whether payments or other deliveries are in fact made or capable of being made. In these circumstances, a declaration under the Act will not have a direct effect on the operation of contracts.

5.11 It is possible, however, that a declaration of an unscheduled bank holiday under the Act would have an indirect effect, signalling to market participants that the day is not being treated as a normal business day. If, as a result of the declaration, banks, markets, exchanges and/or settlement systems decide to close, or do not open, on that day, then "breathing space" will have been made to facilitate recovery of the financial markets. In particular, if UK payment systems were closed for

business on that day, then it is likely that the day would not be a business day for many, if any, purposes.

5.12 Although the Working Group believes that policy should be directed to facilitating performance where it remains possible despite a major operational disruption, the ability to declare a bank holiday may prove useful in some circumstances. The Act's utility in this regard would be enhanced by a considered modernisation of its provisions. Modernisation should simplify the procedure by which a declaration can be made and enable a declaration to have effect with respect to the day on which it is made, even where that business day is already under way. The Working Group believes, however, that any such modernisation should not define the implications or consequences of a bank holiday. New York law provides that, unless expressly or impliedly stated in a contract, obligations due on a day that is a bank holiday may be made on the next succeeding business day. The Working Group has considered this approach and remains of the view that it is not necessary to adopt this approach in the UK. An analysis of the UK and US positions is set out in chapter 6 (particularly in sections 6.4, 6.4.4, and 6.10.2) of the FMLC Report.

5.13 Section 2 of the Act provides certain powers to suspend financial dealings. These powers are clearly public order related and, accordingly, have not been considered by the Working Group.

6 Contractual impact of operational disruption

6.1 Operational disruption is one of the risks that contracting parties should consider when structuring their contracts. An operational disruption may prevent a contracting party from performing its contractual obligations and this may constitute a breach of that contract. This is a particular concern in respect of contracts governed by English law since English law does not contain a workable general exception which excuses non-performance due to hardship or force majeure which would apply in this area. The English law doctrine of frustration is difficult to invoke successfully and does not assist in practice in this area since it is a court-based remedy which is imprecise in its scope and operation.

6.2 While the breach itself may not cause difficulties to a party in default, the consequences of the breach may be adverse. The specific consequences will depend

on the particular terms and conditions of the contract and on the circumstances surrounding the breach. In some cases, a party may wish to rely on contractual provisions that excuse a breach of contract resulting from an operational disruption or other circumstances outside a party's control. In other cases, it may place reliance on contractual techniques which eliminate or mitigate the specific consequences of such a breach.

6.3 In many cases, the contract itself will specify "internal" rights or remedies available to address non-performance by a party. Non-performance frequently is described as an "event of default" and the occurrence and/or declaration of that event by the non-defaulting party triggers the availability of internal rights and remedies. These rights and remedies may include the right of the non-defaulting party to withhold its own performance, the right to terminate the contract or accelerate the time for performance of other obligations, or rights to liquidate or exercise other rights over collateral.

6.4 The primary class of risk, relevant in both wholesale and retail financial markets, which often is addressed by contractual provisions, is the risk of liability to pay indeterminate amounts of compensation in respect of losses suffered as a result of a breach of contract. There is a risk that a large number of indeterminate liabilities to pay compensation could adversely affect an individual financial services firm or a sector of the financial markets. Such claims might be asserted in respect of breach consequent upon a major operational disruption, even where the technical default has been cured by performance (albeit delayed). These risks can be addressed through the use of contractual measures that either prevent or excuse the breach or that exclude or limit the defaulting party's liability to compensate for the breach.

6.5 This risk is not universal, either in terms of its existence or, where it does exist, its extent. There is no general right to claim damages in respect of delayed payment of a money debt. Here, the principal remedy is a claim for contractual or statutory interest to compensate for the delay in payment. Although this is a liability that a defaulting party may be required to meet, the extent of the liability is predictable and consequently more manageable than an indeterminate liability. This is relevant to the many financial contracts the main object of which is to create debt claims.

7 System insiders and system outsiders

7.1 In considering risks and how to address them, both the specific legal arrangements made by parties and the context or parties' broader relationship must be examined. Where the relationship is between parties who are active participants in the market, and likely to face similar issues in the event of a significant disruption to financial markets — "system insiders" — the parties are likely to recognise their common interest in co-operation to achieve the general objective of resumption of the markets. System insiders can be expected to behave pragmatically in the event of a major operational disruption and to be accommodating. This reflects their shared susceptibility to regulatory and other external official pressures and to guidance provided by relevant industry associations ("soft powers") to resolve contractual difficulties in the broader public interest of confidence, market integrity and resumption of financial market operations.

7.2 In contrast, "system outsiders" do not have the same relationship context and probably are neither subject nor susceptible to the same regulatory (and other) pressures. As a result, it is not impossible that they may not be as willing to accommodate others and, instead, will seek to optimise their individual interest in the context of a particular transaction.

7.3 This potential mismatch in behaviour with respect to contracts can be addressed in the wake of a major operational disruption; however, the Working Group believes that it should properly be considered by system insiders as a contractual matter, when contracting with system outsiders.

7.4 System insiders and outsiders define a spectrum, rather than two discrete groups; the position of the parties to a contract on this spectrum can be expected to influence their stance with respect to risks that crystallise and may indicate their willingness to be accommodating in the broader public interest.

8 Wholesale market contractual issues

8.1 The wholesale financial markets operate generally on the basis of: (a) individual agreements formed through negotiation by the parties; and (b) standardised agreements developed by industry associations with substantial industry input. Much of the documentation used in the UK's wholesale markets is

sufficiently similar that a degree of standardisation can be identified.

8.2 In wholesale markets, breach of contract raises two classes of risk that are additional to the risk of liability to pay indeterminate amounts of compensation noted above. These two classes are: risk of exercise of acceleration, termination or other rights by the non-defaulting party, and risk of operation of cross-default rights.

8.3 A breach of contract that constitutes an event of default raises the risk of exercise of acceleration, termination or other rights by the non-defaulting party. If a major operational disruption created a significant number of contractual defaults and caused widespread exercise of these rights by non-defaulting parties against, in particular, financial institutions, this could, in the absence of suitable “defences” or risk management techniques in the contract, have a material adverse impact on the institutions. However, frequently adequate defences are built into the contracts.

8.4 Even where a contract does not include a force majeure clause or other clause excusing performance, this risk often will be addressed through the use of one or more techniques. These techniques typically include: the limitation of the right to declare a breach to constitute an event of default to those breaches that are material; and the use of “grace periods” (notice periods that provide an opportunity for the defaulting party to “cure” the default).

8.5 Where contracts contain cross-default or cross-acceleration clauses, the risk arises that a default under a contract may trigger a cascade of defaults under the other contracts. Many financial contracts contain provisions that enable a party to activate internal rights and remedies where events indicate that the other party is likely to be unable to perform. Typically, non-performance under a contract identified in the cross-default provision of another contract causes a default under the second contract, whether or not any non-performance under the second contract actually has occurred. A major operational disruption raises the possibility that cross-default and cross-acceleration provisions could be triggered and, depending on the scale of the cascade, this could cause significant difficulties. Some of the risk can be addressed through suitable defence provisions, including the use of

thresholds, the use of a narrow definition of the types of defaults capable of triggering cross-default provisions and the use of grace periods.

8.6 The Working Group believes that parties to contracts should consider carefully the limitation of the operation of cross-default and cross-acceleration provisions in the event of a major operational disruption so that such clauses do not create or exacerbate difficulties for institutions or the markets.

8.7 The Working Group has been assisted by the work of the FMLC which identified key types of contracts typically used in the UK’s wholesale financial markets and analysed the contractual provisions that address the inability of one or more parties to perform obligations under the contract. A number of techniques can currently be found in the markets, including contractual provisions tailored to deal with disruption and the markets to which they relate.

Key defensive measures and risk management techniques

8.8 Key defensive measures and risk management techniques identified in the contracts currently in use include those set out in paragraphs 8.9 to 8.21 below.

8.9 **Business day provisions** Many financial contracts are structured so that performance of contractual obligations is required only on a day that qualifies as a “business day”, or the equivalent concept. One objective of business day provisions is to adjust the timing of performance so that it falls on a day when it would be reasonable to expect performance to occur because the necessary means are available to the parties. The concept of business days is also used in determinations of relevant periods under many contracts.

8.10 In a major operational disruption, it is possible that the day will not count as a business day, which may lead to postponement of the time when performance is due. Whether or not this is the case will depend on how the business day provision is drafted. Typically, “business day” is defined by reference to whether banks, markets, exchanges and/or settlement systems are in fact open and whether payments or other deliveries are in fact made or capable of being made. In their operation these clauses have some of the same effects as force majeure clauses.

8.11 Rate/price determination provisions Rates or prices may be required to be determined under a financial contract, during the life of the contract, in order to establish the amount or nature of the parties' obligations. Normally, these determinations are stipulated to be made on a "business day", as defined in the contract. A disruption could result in the situation where a day was a "business day", because infrastructure, etc. is open and operating, but the particular rate cannot be determined because a relevant reference is not available. Many contracts provide an "objective" fall-back mechanism for establishing a rate or price when the primary mechanism is not available, usually substituting another rate. If, as could be the case in a major operational disruption, the "objective" fall-back is also unavailable, the contract might provide a "subjective" fall-back. For example, a contract might provide that the party in question will determine its own cost of funds or its own assessment of a relevant value. These provisions will be most valuable in a major operational disruption if they permit relevant determinations to be made after the specified time, even where they are required to be "as of" that time. Attached as Annex 4C is an analysis by the Sterling Money Markets Liaison Group of interest rate setting mechanisms.

8.12 Settlement or performance disruption provisions Some agreements contain specific provisions addressing disruption to the expected means of settlement or performance. These provisions might operate alongside business day provisions and allow for delay in performance where the expected means of performance are not available. In some cases, specified substitution might be permitted. These provisions also share similarities with force majeure clauses in that they provide a means for adjusting performance requirements.

8.13 Market convention override provisions Some financial contracts provide that certain contractual obligations will be performed in accordance with the rules of an exchange or clearing house or with market conventions. The effect of a disruption may be to delay performance where the exchange or market in question closes or does not open. These clauses provide a degree of flexibility in dealing with risks.

8.14 Exclusions or limitation of liability Where non-performance could expose a party to potentially significant damages claims, that party may seek to exclude or limit liabilities. These clauses also may

provide protection against the risk of damages claims based on non-performance due to operational disruption. Typical exclusion or limitation provisions protect a party from, or limit, its liability for loss, unless that party has been negligent or caused the loss by its wilful default. These forms of the clause may exclude liability for involuntary defaults caused by a disruption. Some versions of the clause specifically address liability for losses caused by circumstances outside a party's reasonable control. This version more explicitly links the excuse for non-performance to the existence of force majeure events. Consequential and indirect losses also may be relevant and may be dealt with through exclusion and limitation clauses.

8.15 Although variations of exclusion and limitation clauses are common in contracts for provision of services in the financial sector, they are less common in the context of "transactional" obligations. In contracts defining transactions, parties generally expect that obligations will be performed; excuses for non-performance which do not specify consequences generally are not acceptable.

8.16 Grace periods Grace periods — the provision of a period to enable a defaulting party to cure its default — are one of the most important contractual techniques for managing the consequences of non-performance. Grace periods provide a means of mitigating the impact of a default. By effectively delaying the ability of the non-defaulting party to enforce internal rights and remedies in the contract, grace periods provide "breathing space". Clauses of this type could prove useful in the event of a major operational disruption by providing a means to perform obligations on a delayed basis, thereby enabling parties to work around or through the impact of a disruption.

8.17 There is a link between the length of grace periods and the necessity for a force majeure clause. Where grace periods are long and there are few, if any, other adverse consequences flowing from a breach, then there is less incentive to provide in detail for the consequence of a force majeure event. If, on the other hand, grace periods are short, then it may become important to consider the inclusion of a force majeure clause to ensure the contracting parties have sufficient protection against breaches arising from circumstances outside their control.

8.18 Force majeure provisions The most common contractual technique dealing with the inability of a

party to perform is the force majeure provision. There are different variations of force majeure clauses; however, several common elements can be identified. In most cases, a force majeure clause is triggered by an event or circumstance outside a party's reasonable control which makes it impossible, or at least impracticable, for one party to perform its obligations. A list of the possible categories of events will generally be included; typically the list is open-ended but covers both general circumstances and those specific to the parties in question.

8.19 When a circumstance arises which triggers the force majeure clause, the obligations of the party concerned may then be suspended during a period while it endeavours to avoid the force majeure event. Alternatively, or additionally, either party may be given the right to terminate the contract, normally after the expiration of a cure or waiting period. There also may be an allocation of liability for compensation for delays in performance.

8.20 Force majeure clauses are not a panacea, although in certain types of contracts they may provide a useful mechanism for addressing the impact of a major operational disruption. Not every contract in the sample contains a force majeure clause but, in the opinion of the Working Group, the absence of such a clause is not a cause for concern per se. Force majeure clauses may be undesirable in certain contracts either because the concept itself is not easily or sensibly applied, as with pure payment obligations, or because there is a public policy interest in not permitting parties the option of non-performance in the event of major operational disruptions, as with essential service contracts. Examples of the latter include contracts for the provision of disaster recovery or business continuity services and contracts for telecommunications, data and other electronic communication services. The Working Group has analysed key service contracts of this nature, the conclusions from which are attached as Annex 4D.

8.21 **Changes in circumstance provisions** Some contracts contain provisions addressing different aspects of operational disruption. These clauses enable a party to excuse itself from performance because the circumstances prevailing at the time when performance is due differ from those prevailing when the contract was entered into or because the circumstances make performance undesirable to the party due to perform. Such clauses typically are found in loan and underwriting agreements.

Observations and conclusions

8.22 Contractual treatment of risks varies among the agreements, reflecting differences in the relevant markets and differences in the parties' priorities, including with respect to assumption of risk.

8.23 Having reviewed key typical contracts used in the wholesale financial markets, the Working Group believes that the contractual risk management mechanisms currently available provide the ability for contracting parties to address and manage risks appropriately. Room for improvement remains, however, and the Working Group encourages contracting parties, industry associations, and others to deliberately consider these issues in the drafting and/or negotiation process, including the impact of a major operational disruption and whether, in such an event, the contract provides an appropriate solution. The full list of matters that the Working Group believes should be considered is set out in Annex 4A.

8.24 The Working Group believes that, even in an event of major operational disruption, the preference should be to encourage those who can perform their contract to do so. No basis for intervention that provides an excuse for non-performance has been identified by the Working Group. Contracting parties, however, should consider the impact of a major operational disruption on the bargain between them and take steps to ensure the contract addresses such risks appropriately.

9 Retail market contractual issues

9.1 A major operational disruption will affect both wholesale and retail financial markets. Risks in retail financial markets differ from risks in wholesale markets; in particular, risks are not concentrated to the same extent in the retail as in the wholesale markets. The principal concern, however, remains the consequences of a breach of contract. In the wholesale financial markets, these risks are assessed and allocated in contracts through negotiations among parties which largely have similar negotiating power. In contrast, in retail financial markets, contracts generally are made between a retail financial services firm, on the one hand, and a retail consumer, on the other. Parties to typical retail financial services contracts, including current and deposit account arrangements, credit card agreements, mortgages and insurance and pension products, generally have asymmetric negotiating power.

9.2 The Working Group examined a sample of retail financial services contracts. Annex 4E sets out an analysis of the relevant terms and conditions in this sample. The Working Group believes the sample is representative of the contracts typically used in the UK's retail financial services markets.

9.3 Many of the contracts reviewed contained explicit force majeure clauses and disclaimers of liability. Other clauses that may be relevant in the event of major operational disruption include terms permitting the financial institution to: (a) vary the terms of the contract, although in some instance prior notice requirements may limit the usefulness of this provision; (b) suspend the service; and (c) terminate the service or product.

9.4 The Working Group believes that retail financial services firms can, and do, include in their retail contracts provisions designed to protect and assist them in the event they are unable to perform their obligations, including non-performance caused by a major operational disruption. They can, and should be able to, use contractual provisions to protect themselves against the risks of liability for non-performance arising from major operational disruption.

9.5 The consumer may be able to rely on provisions, such as business day definitions, to alleviate performance obligations in the event of a major operational disruption, but these probably will provide limited protection. Although the Working Group has a strong preference for observing the principles of *caveat subscriptor* and *caveat emptor* in wholesale financial markets, it believes that the requirements of consumer protection may need to modify these principles in certain circumstances in the context of retail financial services contracts. Potential concerns would include the desirability of ensuring that consumers were not penalised by the accrual of interest at a default penalty rate or that collateral can become enforceable or that insurance cover should be invalidated as a consequence of non-performance of a contractual term resulting from a major operational disruption.

9.6 Retail consumers in financial markets are already protected through a variety of measures, including the FSA's Principles for Businesses and Conduct of Business Rules, statutes, such as the Unfair Contract Terms Act 1977 and the Consumer Credit Act 1974, industry codes of conduct, and ombudsmen. It may be considered that these measures suffice to

address adequately the risk of financial services institutions penalising retail customers for failure to perform following a major operational disruption. Should additional powers be necessary to ensure that, for example, ombudsmen are able to perform this function effectively, then, as with any new or amended power contemplated to address a major operational disruption, the powers would need to be carefully constructed and responsibly construed.

9.7 The Working Group believes it would be undesirable for the use of measures (including any power by an ombudsman) to have the effect of, or provide the opportunity for, substantial rewriting of contracts. Equally, any such measure, and the use thereof, should not undermine the contract, thereby leading parties to believe that they are not bound by the contract. It is essential, in retail financial markets as much as in wholesale financial markets, that parties know that they can rely on contracts they have made.

10 Bank-to-bank arrangements

10.1 Bank-to-bank arrangements in the financial markets typically reflect a primary activity carried out by one of the banks. These arrangements include inter-bank deposits and correspondent banking arrangements.

10.2 The arrangements may take a wide variety of forms and, accordingly, generalisations are difficult. Some arrangements, such as inter-bank deposits, may not be in the form of written contracts. However, where written contracts do exist, they will reflect a broad disparity in the specific contents of the contract. Some contracts will contain provisions similar to those discussed in Section 8; others may not.

10.3 The Working Group does not, however, believe that bank-to-bank arrangements generally give rise to significant problems in practice. The parties which may be affected by a major operational disruption are system insiders and can be expected to co-operate to find practical solutions in the event of a major operational disruption.

11 Conclusions

11.1 The Working Group acknowledges the considerable work performed by the FMLC and thanks the FMLC, particularly the FMLC's Contracts sub-group, for its analysis of the contracts in use in the wholesale financial markets.

11.2 In analysing this work, and in carrying out similar analyses in respect of the retail financial markets and bank-to-bank arrangements, the Working Group considers that there are sufficient risk management techniques in existence in contracts in the financial markets to enable the impact of major operational disruption in the UK financial services sector to be minimised. Room for improvement remains, however, and the Working Group encourages contracting parties, industry associations, and others to deliberately consider these issues during the drafting and/or negotiation process, including the impact of a major operational disruption and whether, in such an event, the contract provides an appropriate solution.

11.3 Furthermore, it is the view of the Working Group that in the event of a major operational disruption, the overriding objective should be to maintain or restore confidence and get the financial markets back to “business as usual”. This view grounds the conclusion that what is needed is the least possible interference with the markets and, at most, a temporary “breathing space” to facilitate the effecting of necessary

repairs to infrastructure, the gathering and analysis of intelligence about the state of the markets, and the appropriate dissemination of information to facilitate the resumption of business on a co-ordinated basis.

11.4 Accordingly, the Working Group does not believe that legislative or regulatory measures are necessary *ex ante*. However, it may be that modernisation of Section 1 of the Banking and Financial Dealings Act 1971 would provide an additional tool to facilitate, by non-coercive means (through “signalling”), the creation of a suitable “breathing space” for the markets in some circumstances.

11.5 Finally, the Working Group notes that the US Securities Industry Association published an assessment of the impact on the US securities industry of the 11 September 2001 attacks. This update, “Six Months On: The Impact of September 11th on the Securities Industry”, has been published on the web site of the US Securities Industry Association¹. The Working Group considers that this update is consistent with the Working Group’s views contained in this report.

1 <http://www.sia.com/research/pdf/RsrchRprtVol3-2.pdf>

ANNEX 4A

Financial Markets Law Committee: Checklist for Contracts¹

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 application 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?

¹ This text is reproduced from the report of the Emergency Powers Legislation Working Group of the Financial Markets Law Committee: 'Issue 56 — Emergency Powers Legislation. Analysis of how the law and market practice would respond to an event of major operational disruption'. The report is available from the FMLC website: www.fmlc.org

ANNEX 4B

Summary of analysis of consequences for other UK statutes of a declaration of a “bank holiday” under the Banking and Financial Dealings Act 1971

1 The Working Group examined whether the declaration of a “bank holiday” under the Banking and Financial Dealings Act 1971 might have unintended consequences because it would affect the operation of other UK statutory provisions. Of course, it would be open to the Government to address these consequences, including through a disapportionation provision in the enacting legislation (eg perhaps by distinguishing, for some purposes, or generally, “extraordinary bank holidays” from “normal bank holidays”, perhaps by reference to the amount of notice given in relation to the declaration). Even this distinction, however, may prove troublesome, bearing in mind that there may be special bank holidays on short notice for other reasons. This suggests that, even if new legislation were to facilitate the use of this tool, it would only be appropriate to use this power in some circumstances.

2 A search on Butterworths Legislation Direct against the term “bank holiday” yielded 451 results. A selected number of these statutes was examined and relevant provisions have been extracted or highlighted as additional notes. The Working Group did not consider statutory instruments. As can be seen from these results, the declaration of a bank holiday under the 1971 Act has a number of statutory effects. Our purpose was to illustrate the types of references that might exist.

3 In a number of cases, these effects would exist even if the bank holiday were a local bank holiday, ie even if the declaration were restricted to the London area. In some statutes, the reference to a bank holiday includes a reference to a day that is a bank holiday in any part of the UK. In other cases, the provision is silent.

4 For the most part these provisions have little to do with contractual obligations. The most important exception identified is the Bills of Exchange Act 1882 where bank holidays are relevant for determining timings for payment, protest, etc of bills and cheques extracted or highlighted. To this extent, this would achieve the desired result.

5 In many other cases, the principal effect would seem to be the extension of periods of time for responding to or dealing with official notices etc or timings relating to court proceedings. One cannot rule out the possibility that this might cause a party inconvenience or lead to unexpected outcomes, for example where the parties were relying on something being done or not being done by a particular date.

6 The declaration of a bank holiday would have other effects. For example, it might require the extension of certain half-price or free travel schemes (but perhaps not if the bank holiday were restricted to London).

Arbitration Act 1996 (1996 c 23)

- “(1) The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement. (2) If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions. (5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.
- In relation to England and Wales or Northern Ireland, a “public holiday” means Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday.”

Bail Amendment Act 1993 (1993 c 26)

- Prosecution right of appeal.

Bank of England Act 1998 (1998 c 11)

- Schedule 2 Cash Ratio Deposits.
- “working days” are used to calculate the benchmark rate of interest and these exclude any bank holiday in any part of the UK.

Bankers’ Books Evidence Act 1879 (1879 c 11)

- Computation of time Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act. [Relevant

to section 7 which requires three clear days notice of any notice for inspection of bankers, books.]

Betting and Gaming Duties Act 1981 (1981 c 63)

- Schedule 3 Bingo Duty.
- Part II Supplementary Provisions.

Bills of Exchange Act 1882 (1882 c 61)

- Computation of time: “Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. ‘Non-business days’ for the purposes of this Act mean (a) [Saturday] Sunday, Good Friday, Christmas Day; (b) A bank holiday under [the Banking and Financial Dealings Act 1971]; (c) A day appointed by Royal proclamation as a public fast or thanksgiving day; [(d) a day declared by an order under section 2 of the Banking and Financial Dealings Act 1971 to be a non-business day]. Any other day is a business day.” The definition of business day is relevant eg for:
 - Section 14 (Computation of time of payment) “Where a bill is not payable on demand the day on which it falls due is determined as follows: (1) The bill is due and payable in all cases on the last day of the time of payment as fixed by the bill or, if that is a non-business day, on the succeeding business day.”
 - Section 41 (Rules as to presentment for acceptance, and excuses for non-presentment) “(1) A bill is duly presented for acceptance which is presented in accordance with the following rules: (a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue; (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only; (c) Where the drawee is dead presentment may be made to his personal representative; (d) Where the drawee is bankrupt, presentment may be made to him or to his trustee; (e) Where authorised by agreement or usage, a presentment through [a postal operator] is sufficient.”
 - Section 45 (rules as to presentment for payment): “(3) Presentment must be made by the holder or

by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as herein-after defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.”

- Section 51 (noting and protest of a bill) “(6) A bill must be protested at the place where it is dishonoured: Provided that (a) When a bill is presented through [a postal operator], and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day.”
- Section 74B (Presentment of cheque for payment: alternative means of presentment by banker) “(1) A banker may present a cheque for payment to the banker on whom it is drawn by notifying him of its essential features by electronic means or otherwise, instead of by presenting the cheque itself. (2) If a cheque is presented for payment under this section, presentment need not be made at the proper place or at a reasonable hour on a business day. (3) If, before the close of business on the next business day following presentment of a cheque under this section, the banker on whom the cheque is drawn requests the banker by whom the cheque was presented to present the cheque itself (a) the presentment under this section shall be disregarded, and (b) this section shall not apply in relation to the subsequent presentment of the cheque.”

Care Standards Act 2000 (2000 c 14)

- Schedule 4 Minor and Consequential Amendments.

Channel Tunnel Rail Link Act 1996 (1996 c 61)

- Schedule 10 Disapplication and Modification of Miscellaneous Controls.
- In paragraph 10 (dealing with emergency permits under the restriction on lorry movements rules in London for emergency journeys) “working day” means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971.

Children Act 1989 (1989 c 41)

- 45 Duration of emergency protection orders and other supplemental provisions “(1) An emergency protection order shall have effect for such period, not exceeding eight days, as may be specified in the order. (2) Where (a) the court making an emergency protection order would, but for this subsection, specify a period of eight days as the period for which the order is to have effect; but (b) the last of those eight days is a public holiday (that is to say, Christmas Day, Good Friday, a bank holiday or a Sunday), the court may specify a period which ends at noon on the first later day which is not such a holiday.”
- 105 Interpretation In the Act, “bank holiday” means a day which is a bank holiday under the Banking and Financial Dealings Act 1971.

Companies Act 1985 (1985 c 6)

- 42 Events affecting a company’s status “(1) A company is not entitled to rely against other persons on the happening of any of the following events (a) the making of a winding-up order in respect of the company, or the appointment of a liquidator in a voluntary winding up of the company, or (b) any alteration of the company’s memorandum or articles, or (c) any change among the company’s directors, or (d) (as regards service of any document on the company) any change in the situation of the company’s registered office, if the event had not been officially notified at the material time and is not shown by the company to have been known at that time to the person concerned, or if the material time fell on or before the 15th day after the date of official notification (or, where the 15th day was a non-business day, on or before the next day that was not) and it is shown that the person concerned was unavoidably prevented from knowing of the event at that time.” “(2) In subsection (1) (a) “official notification” and “officially notified” have the meanings given by section 711(2) (registrar of companies to give public notice of the issue or receipt by him of certain documents), and (b) “non-business day” means a Saturday or Sunday, Christmas Day, Good Friday and any other day which is a bank holiday in the part of Great Britain where the company is registered.”
- 220 Definitions for Part VI “(2) Where the period allowed by any provision of this Part for fulfilling

an obligation is expressed as a number of days, any day that is a Saturday or Sunday or a bank holiday in any part of Great Britain is to be disregarded in reckoning that period.”

- 328 Extension of s 324 to spouses and children “(5) An obligation imposed by subsection (3) on a director must be fulfilled by him before the end of five days beginning with the day following that on which the occurrence of the event giving rise to it comes to his knowledge; but in reckoning that period of days there is disregarded any Saturday or Sunday, and any day which is a bank holiday in any part of Great Britain.”
- 329 Duty to notify stock exchange of matters notified under preceding sections “(2) An obligation imposed by subsection (1) must be fulfilled before the end of the day next following that on which it arises; but there is disregarded for this purpose a day which is a Saturday or a Sunday or a bank holiday in any part of Great Britain.”
- 744 Expressions used generally in this Act “bank holiday” means a holiday under the Banking and Financial Dealings Act 1971.
- [744A Index of defined expressions.]
- Schedule 13 Provisions Supplementing and Interpreting Sections 324–28.
- Part II Periods Within Which Obligations Imposed By Section 324 Must Be Fulfilled.
- Part IV Provisions with Respect to Register of Directors’ Interests to be Kept Under Section 325.

Companies Act 1989 (1989 c 40)

- 167 Application to determine whether default proceedings to be taken “(3) On receipt of the application the [Authority] shall notify the exchange or clearing house, and unless within three business days after the day on which the notice is received the exchange or clearing house (a) takes action under its default rules, or (b) notifies the [Authority] that it proposes to do so forthwith, then, subject as follows, the provisions of sections 158 to 165 above do not apply in relation to market contracts to which the member or designated non-member in question is a party or to anything done by the exchange or clearing house

for the purposes of, or in connection with, the settlement of any such contract. For this purpose a “business day” means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971.”

Consumer Credit Act 1974 (1974 c 39)

- 189 Definitions.

Consumer Protection Act 1987 (1987 c 43)

- 31 Power of customs officer to detain goods.

Countryside and Rights of Way Act 2000 (2000 c 37)

- 22 Exclusion or restriction at discretion of owner and others.

Criminal Justice Act 1961 (1961 c 39)

- 23 Prison Rules.

Criminal Justice Act 1967 (1967 c 80)

- 11 Notice of alibi.

Customs and Excise Management Act 1979 (1979 c 2)

- 1 Interpretation.

Electricity Act 1989 (1989 c 29)

- 64 Interpretation etc of Part I.

Employment Relations Act 1999 (1999 c 26)

- 13 Interpretation “(6) For the purposes of section 10(5)(b) in its application to a part of Great Britain a working day is a day other than (a) a Saturday or a Sunday, (b) Christmas Day or Good Friday, or (c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in that part of Great Britain.” [Section 10(5) deals with an alternative time for a disciplinary or grievance hearing which must be within five working days of the originally proposed date.]
- Schedule 1 Collective Bargaining: Recognition: Para 172 “(2) For the purposes of this Schedule in its application to a part of Great Britain a working day is a day other than (a) a Saturday or a Sunday, (b) Christmas day or Good Friday, or (c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in that part of Great Britain.” eg Para 10(6) defines the first period for calculating timing of certain actions

taken in relation to recognition as a period of ten working days.

Enterprise Act 2002 (2002 c 40)

- 32 Supplementary provision for purposes of sections 25 and 31.
- 54 Decision of Secretary of State in public interest cases.
- 56 Competition cases where intervention on public interest grounds ceases.
- 98 Section 97: supplementary.
- 151 Further interaction of intervention notices with general procedure.

Finance Act 1997 (1997 c 16)

- 108 Payment of dividends on government stock.

Finance Act 1999 (1999 c 16)

- 135 Lending by Revenue Accounts to National Loans Fund.

Food Safety Act 1990 (1990 c 16)

- 53 General interpretation “(5) Where, apart from this subsection, any period of less than seven days which is specified in this Act would include any day which is (a) a Saturday, a Sunday, Christmas Day or Good Friday; or (b) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of Great Britain concerned, that day shall be excluded from that period.”

Freedom of Information Act 2000 (2000 c 36)

- 10 Time for compliance with request.

Government of Wales Act 1998 (1998 c 38)

- 67 Disapplication of procedural requirements.

Greater London Authority Act 1999 (1999 c 29)

- 45 The Mayor’s periodic report to the Assembly.
- 242 Requirements as to scope “(1) Arrangements under section 240(1) above for travel concessions for London residents meet the requirements of this section as to scope if they provide [(a)] for the grant of travel concessions to all eligible London residents on journeys falling within subsection (2) below; and (b) for the travel concessions granted to them to include the concession specified in subsection (8) below.”

“[(8) The travel concession which must be included is a half-price concession for each journey on the London bus network which begins (a) at any time on a Saturday or Sunday or on any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971; or (b) in the period from midnight to 4.30 am, or the period from 9.30 am to midnight, on any other day.]”

- Schedule 16 The Free Travel Scheme “(1) In any financial year during which the free travel scheme has effect, the concession required by the scheme in the case of all eligible London residents in any other category . . . is the concession described in sub-paragraph (2) below. (2) The concession mentioned in sub-paragraph (1) above is the waiver, on production of a travel concession permit issued to any such resident under paragraph 4(2) below, of any fare otherwise payable by the person to whom it was issued for any journey falling within section 242(2) of this Act and beginning (a) at any time on a Saturday or Sunday or on any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971; or (b) in an eligible period on any other day. (3) Subject to sub-paragraph (4) below, for the purposes of paragraph (b) of sub-paragraph (2) above the eligible periods are (a) the period from midnight to 4.30 am; and (b) the period from 9 am to midnight. (4) The periods which are eligible periods for the purposes of sub-paragraph (2)(b) above may be altered from time to time by Transport for London by notice published in such manner as it thinks fit, specifying the new period or periods and the effective date of the alteration.”

Greater London Council (General Powers) Act 1984 (1984 Chapter XXVII)

- 3 Restriction on opening Deptford Creek Bridge “(1) Notwithstanding the provisions of the Act 43 Geo. 3 Chapter CXXXI or any other enactment or rule of law, the Council shall be required to open Deptford Creek Bridge for the purpose of providing passage for the navigation of any vessel only between the following times and in the following circumstances: (a) on flood tides falling between the hours of 07.00 and 21.00 on any day from Monday to Friday (inclusive) except on a public holiday or a bank holiday; (b) subject to the following paragraph, on flood tides falling between the hours of 21.00 on any day from Monday to

Thursday inclusive (not being a public holiday or a bank holiday) and 07.00 on the following day, falling between the hours of 21.00 and 24.00 on any Friday (not being a public holiday or a bank holiday) or falling on any Saturday (not being a public holiday or a bank holiday), if not less than 24 hours’ notice that passage for the navigation of the vessel is required is given to the Council’s Thames Tunnels Superintendent or other officer of the Council for the time being having charge of the said bridge; (c) notwithstanding the last foregoing paragraph, on flood tides falling on any Sunday or on any public holiday or bank holiday and between the hours of 00.00 and 07.00 on the day following any Sunday or any public holiday or bank holiday, if not less than forty-eight hours’ notice that such passage is required is given to the said Thames Tunnels Superintendent or other officer of the Council. (2) In this section “public holiday” means Christmas Day and Good Friday and any day of public rejoicing or mourning; and “bank holiday” means any of the days specified in Schedule 1 to the Banking and Financial Dealings Act 1971, any day appointed under section 1(2) of that Act to be a bank holiday instead of a day specified in the said Schedule 1 and any day appointed under section 1(3) of that Act to be a bank holiday in any place including Greater London.”

Health and Safety at Work etc Act 1974 (1974 c 37)

- 25A Power of customs officer to detain articles and substances.

Highways Act 1980 (1980 c 66)

- 323 Reckoning of periods “(1) For the purposes of this Act (a) in reckoning any period which is therein expressed to be a period from or before a given date, that date is to be excluded; and (b) in reckoning any period therein mentioned of 8 days or less which apart from this provision would include a Sunday, Christmas Day, Good Friday or a bank holiday, that day is to be excluded. (2) In this section “bank holiday” means a day which is a bank holiday under the Banking and Financial Dealings Act 1971.”

Housing Grants, Construction and Regeneration Act 1996 (1996 c 53)

- 116 Reckoning periods of time.

Insolvency Act 1986 (1986 c 45)

- 251 Expressions used generally: “business day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday in any part of Great Britain.

Intelligence Services Act 1994 (1994 c 13)

- 11 Interpretation and consequential amendments: In this Act (f) “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (1990 c 40)

- Schedule 8 Amendment of Enactments: Part I Amendments to the Licensing (Scotland) Act 1976.

Licensing Act 1964 (1964 c 26)

- 76 Permitted hours where special hours certificate in force: “[3A] Subject to the following provisions of this section, the permitted hours on Sundays in any premises or part of premises to which this section applies shall extend until thirty minutes past midnight in the morning following, except that (a) the permitted hours shall end at midnight on any Sunday on which music and dancing is not or, in the case of casino premises, gaming facilities are not provided after midnight; (b) where music and dancing end or, in the case of casino premises, gaming ends between midnight on any Sunday and thirty minutes past midnight, the permitted hours on that Sunday shall end when the music and dancing end or, as the case may be, when the gaming ends; and (c) in any premises or part for which a certificate is in force subject to a limitation imposed in relation to Sundays in pursuance of section 78A or 81A of this Act, the permitted hours shall not extend beyond the time specified in the certificate. (3B) In relation to any Sunday which falls immediately before a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971, other than Easter Sunday, subsection (3A) shall have effect (a) in the case of premises which are situated as mentioned in subsection (3), with the substitution for the references to thirty minutes past midnight in the morning following of references to three o’clock in the morning following; and (b) in the case of any other premises, with the substitution for the references

to thirty minutes past midnight in the morning following of references to two o’clock in the morning following.]”

Licensing Act 2003 (2003 c 17)

- 193 Other definitions: “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c 80) in England and Wales.

Local Government Act 1972 (1972 c 70)

- 243 Computation of time and timing of elections, etc.
- 270 General provisions as to interpretation.

Local Government Act 1999 (1999 c 27)

- 9 Response to audit.

Local Government and Housing Act 1989 (1989 c 42)

- 5 Designation and reports of monitoring officer.

Local Government Finance Act 1988 (1988 c 41)

- 115 Authority’s duties as regards reports.
- [115B Duties of executive as regards reports].

Local Government Finance Act 1992 (1992 c 14)

- 26 Powers of entry.
- 89 Powers of entry.

London County Council (General Powers) Act 1957 (1957 Chapter XXXV)

- 81 Removal of bottles from streets.

National Debt (Stockholders Relief) Act 1892 (1892 c 39)

- 2 Effect of, and time for, striking balance “(4) The time at which the balance for a dividend on any stock is struck shall not fall before (a) the beginning of the tenth business day before the day on which the dividend is payable; or (b) such later time (if any) as may be determined, in accordance with an order made by the Treasury, to be the earliest time at which that balance may be struck. (5) In this section “business day” means any day other than (a) a Saturday or Sunday; (b) Good Friday or Christmas Day; (c) a day which, in any part of the United Kingdom, is a bank holiday under the Banking and Financial Dealings Act

1971; (d) a day specified in an order under section 2(1) of that Act (days on which financial dealings are suspended) and declared by that order to be a non-business day for the purposes of this section; or (e) a day appointed by Royal proclamation as a public fast or thanksgiving day.”

Nationality, Immigration and Asylum Act 2002 (2002 c 41)

- 136 Notice “(2) A period of time specified in a notice [ie a notice to require information] under subsection (1)(c)-(a) must begin with the date of receipt of the notice, and (b) must not be less than ten working days.” “(5) In this section “working day” means a day which is not (a) Saturday, (b) Sunday, (c) Christmas Day, (d) Good Friday, or (e) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c 80) in any part of the United Kingdom.”

New Roads and Street Works Act 1991 (1991 c 22)

- 98 Reckoning of periods.
- 157 Reckoning of periods.

Northern Ireland Act 1998 (1998 c 47)

- 31 Dates of elections and dissolutions.

Planning (Listed Buildings and Conservation Areas) Act 1990 (1990 c 9)

- 91 Interpretation.

Political Parties, Elections and Referendums Act 2000 (2000 c 41)

- 77 Restriction on making claims in respect of campaign expenditure.

Postal Services Act 2000 (2000 c 26)

- 125 Interpretation.

Proceeds of Crime Act 2002 (2002 c 29)

- 335 Appropriate consent “(2) A person must be treated as having the appropriate consent if (a) he makes an authorised disclosure to a constable or a customs officer, and (b) the condition in subsection (3) or the condition in subsection (4) is satisfied. (3) The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that consent to the doing of the act is refused. (4) The condition is that (a) before the end of the notice period he receives notice from a constable or customs officer

that consent to the doing of the act is refused, and (b) the moratorium period has expired. (5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure. (6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused. (7) A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c 80) in the part of the United Kingdom in which the person is when he makes the disclosure.”

- 336 Nominated officer: consent “(7) The notice period is the period of seven working days starting with the first working day after the nominated officer makes the disclosure . . . (9) A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c 80) in the part of the United Kingdom in which the nominated officer is when he gives the appropriate consent.”

Public Health Act 1961 (1961 c 64)

- 53 Closing of parks and pleasure-grounds “(4) The proviso to the said subsection (which prohibits the closing of a park or pleasure-ground on a Sunday or public holiday) shall cease to apply to a public holiday, but on any bank holiday, or on Christmas Day or Good Friday, or on a day appointed for public thanksgiving or mourning, a local authority shall not have power under the subsection to close any park or pleasure-ground, or any part thereof, if the area so closed, together with any other area so closed, exceeds one-quarter of the total area of all the parks or pleasure-grounds provided by the local authority.”

Referendums (Scotland and Wales) Act 1997 (1997 c 61)

- Schedule 3 Conduct of the Referendums.

Regulation of Investigatory Powers Act 2000 (2000 c 23)

- 81 General interpretation: “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Representation of the People Act 1983 (1983 c 2)

- 40 Timing as to local elections in England and Wales.
- 43 Day of ordinary local elections in Scotland, and other timing provisions.
- 119 Computation of time for purposes of Part II.
- Schedule 1 Parliamentary Elections Rules: Part I Provisions as to Time.

Representation of the People Act 1985 (1985 c 50)

- 19 Timing of elections.

Scotland Act 1998 (1998 c 46)

- 4 Calculating time for meeting of the Parliament.

Town and Country Planning Act 1990 (1990 c 8)

- 336 Interpretation “(4A) Where (a) an electronic communication is used for the purpose of serving or giving a notice or other document on or to any person for the purposes of this Act, and (b) the communication is received by that person outside that person’s business hours, it shall be taken to have been received on the next working day, and in this subsection, “working day” means a day which is not a Saturday, Sunday, Bank Holiday or other public holiday.”

Trade Union and Labour Relations (Consolidation) Act 1992 (1992 c 52)

- 237 Dismissal of those taking part in unofficial industrial action “(4) The question whether industrial action is to be so taken in any case shall be determined by reference to the facts as at the time of dismissal. Provided that, where an act is repudiated as mentioned in section 21, industrial action shall not thereby be treated as unofficial before the end of the next working day after the day on which the repudiation takes place. (5) In this section ... a “working day” means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971.”
- Schedule A1 Collective Bargaining: Recognition: Part IX General “(2) For the purposes of this Schedule in its application to a part of Great Britain a working day is a day other than (a) a

Saturday or a Sunday, (b) Christmas Day or Good Friday, or (c) a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in that part of Great Britain.”

Transport Act 2000 (2000 c 38)

- 146 Mandatory concessions: supplementary: “relevant time” means (a) any time on a Saturday or Sunday or on any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971, or (b) a time during the period from 9.30 am to 11 pm on any other day.
- 151 Concessions in Greater London “(8) The travel concession which must be included is a half-price concession for each journey on the London bus network which begins (a) at any time on a Saturday or Sunday or on any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971; or (b) in the period from midnight to 4.30 am, or the period from 9.30 am to midnight, on any other day.”

Water Industry Act 1991 (1991 c 56)

- 144 Liability of occupiers etc for charges “(6) In subsection (5) above “the appropriate time” in relation to a case in which a notice has been served for the purposes of section 62 above, means whichever is the later of (a) the expiry of the notice; and (b) the end of the period of two working days beginning with the service of the notice. (7) In this section any reference to two working days is a reference to a period of forty-eight hours calculated after disregarding any time falling on (a) a Saturday or Sunday; or (b) Christmas Day, Good Friday or any day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971.”

Freedom of Information (Scotland) Act 2002 (2002 asp 13)

- 73 Interpretation.

Mental Health (Care and Treatment) (Scotland) Act 2003 (2003 asp 13)

- 47 Extension of detention pending application for compulsory treatment order.

Water Industry (Scotland) Act 2002 (2002 asp 3)

- 35 Liability of occupiers etc for charges.

ANNEX 4C

Money Market Liaison Group analysis of rate setting mechanism, October 2002

Contingency Planning Rates Sub-Group – background and recommendations

Terms of reference

The sub-group had the following terms of reference:

“To propose to MMLG non-binding guidelines for the interest rates that might be applied to unexpected long and short balances in the event of major market disruption or infrastructure failure.

The proposals might be in the form of various options with pros and cons in different circumstances.

The sub-group might helpfully review practice in other markets and note relevant past events in the sterling market.

Background: relevant section of the NIPS code.”

(Paragraph 106 gives the Bank of England discretion to determine and publish the rate(s) to be applied in such circumstances.)

Background

1 Previous disruptions in UK markets included the 1987 hurricane and a CGO interruption in early 1990. On both those occasions a rate which was in practice equal to the official policy rate had been recommended for application to consequential overdrafts and credit balances. A more recent occasion in April 2002 had been an interruption to settlement of DBVs in CREST, preventing settlement of some repo, but not unsecured, transactions. It was questionable whether this had been an event of sufficient scale to be covered by the sub-group’s terms of reference but on that occasion the Bank of England had applied the day’s high and low to any settlement bank overdrafts and credit balances respectively.

2 On 11 September 2001, New York markets followed long-established New York Clearing House guidelines to apply the effective Fed funds rate (plus an administration fee) for any displaced balances. In its

operations the Fed switched from lending sufficient funds for banks to meet reserve balance targets to lending as much as counterparties wanted: for one week after the disaster open market operations were in overnight repo. The Fed encouraged counterparties to make all their payments and give customers liquidity.

3 In the euro area the Federation Bancaire has agreed that EONIA +/- 25 basis points should be applied to compensation claims in respect of ordinary business. No such ground rules for compensation exist in sterling markets, but in any case the purpose of the sub-group was not to discuss undue enrichment in a day-to-day context.

4 In the Pan-EU TARGET system for euro payments a compensation scheme based on the ECB’s main refinancing rate has been in operation for use when payments remain unprocessed at the end of a business day because of a malfunction (for whatever reason) of a TARGET component. The scheme is based on the principle of no undue enrichment and is cost-neutral for NCBs. There are, however, current discussions as to whether the compensation rate should be based on a market rate such as EONIA.

Discussion

5 The consensus among sub-group members was that the approaches adopted in other international markets, although of interest, were probably of more relevance in their respective domestic contexts given different money market structures and operational techniques.

6 The sub-group considered a range of scenarios — an event causing physical or electronic disruption to a significant number of key market participants or infrastructure providers, a CREST problem, a CHAPS problem or a SWIFT problem. It concluded there need be no difference between the approach applied in these various possible situations — long and short positions would result because of an inability to complete the day’s business in one or more of the settlement and payment systems. The key point was that this should have

market-wide consequences rather than affecting the business of one or two market participants only.

7 The view of the sub-group was that a single rate should be applied to both long and short positions arising from a large-scale disruption. Long and short positions arising from a disruption would not be deliberate, so any penalties would be arbitrary. It was also not obvious how a fair spread could be determined. The sub-group also saw no justification for the application of administration fees, it being unclear what the concept meant in this context. And in any event administration costs tended to net out between parties.

8 The minutes of the sub-group's meeting describe the various arguments for and against applying a rate based on what may have already taken place in the market prior to any disruption. In the event of a large-scale shock, it may prove to be impossible to establish any middle market rate that would be generally acceptable. The use of a SONIA-type average rate, reflecting business successfully conducted before the event, was considered but ruled out on the grounds that it was open to challenge and would probably take too long to determine, or perhaps not be possible to determine at all. The use of the previous day's SONIA was also considered as was a long-run average of it, but these too were thought inappropriate. A rate based on quotes collected from a BBA-type panel of banks was another idea but this also was thought to be likely to take too long and again be open to challenge. The prevailing Bank of England official repo rate was on the other hand neutral and, of course, known to all in the market. Use of the Bank's official repo rate would give rapid certainty and transparency.

Recommendations

- Following an event causing market-wide disruption to settlement of sterling money market

transactions, unintended long balances should be remunerated and unintended overdrafts charged at the current Bank of England official repo rate.

- The rate to be applied to balances should be the official repo rate most recently announced by the Bank of England's Monetary Policy Committee at the close of business on the day of a disruption, following any changes announced on that day.
- Transactions agreed before any disruption occurred, including on that day, should stand at the rates at which they were struck.
- Maturing transactions, if extended because of the inability to return funds, should run on at the Bank's repo rate, not the rate applicable to the original transaction.
- Notwithstanding the sub-group's recommendations and as reflected in the NIPS code, the Bank of England would continue to have discretion to determine and publish a rate following a market-wide event of this kind. It was important to retain this flexibility given the impossibility of forecasting the circumstances at the time.
- Members of the APACS End Of Day Transfer Scheme have agreed to use the rate of interest published by the Bank for loans between members on the day of a disruption.
- The Wholesale Markets Brokers' Association has agreed to use the rate of interest published by the Bank as the fixing of the Sterling Overnight Index Average (SONIA) on the day of a disruption.

ANNEX 4D: Force majeure clauses: analysis of key services contracts

Service	Provision	Impact of force majeure	Possible controls	Market impact
3rd party recovery site vendors Eg SunGard, Schlumberger Sema, ICM	<p>1 Contingency seating: <ul style="list-style-type: none"> ◆ Hot (guaranteed) — ◆ Dedicated desks ◆ Cold (syndicated) — shared desks normally on a ratio of 1:16 or 1:25 whereby the seat is allocated to up to 25 users on the basis of geographic exclusion zones. </p> <p>2 IT Suite — both provision of equipment to support invocation and provision of dedicated space to support dedicated IT facilities.</p> <p>3 Network management of the DR site.</p> <p>4 Telephony including voice logging/recording and replay facilities.</p>	<ul style="list-style-type: none"> ● Unavailability of contingency seating when it is most needed. ● Forced transfer of contingency seating to another location within the vendor portfolio. ● Potential loss of dedicated IT facilities at the site. 	<ul style="list-style-type: none"> ● Exclusion zones embedded in the contract which are designed to prevent a single incident resulting in multiple invocations of the same contingency seats. ● Testing of ability to utilise an alternative location within the vendor portfolio. ● (Given previously unthinkable multiple failure scenarios, affecting both the City and Canary Wharf, existing risk management practices are inadequate.) 	<ul style="list-style-type: none"> ● Loss of a single or multiple trading entities. ● Inability to satisfy market obligations. ● Lack of liquidity in markets with relatively few players.
Data centre providers Eg Telehouse, Global Switch	<p>Hosting for production and disaster recovery technology potentially for multiple market participants.</p>	<ul style="list-style-type: none"> ● Loss of critical system back-up or production resilience. 	<p>None—but should be located physically distant from the primary production site.</p>	<ul style="list-style-type: none"> ● Loss of a single or multiple market participants.
Market data providers Eg Reuters, Bloomberg	<p>Market prices from various exchanges around the globe. Trading systems. News services.</p>	<ul style="list-style-type: none"> ● Loss of market share. Inability to identify risk exposure. 	<p>Potential to utilise alternative vendors if planned in advance.</p>	<ul style="list-style-type: none"> ● Loss of entire markets (extreme).
Telecomms providers Eg BT	<p>Voice services.</p>	<ul style="list-style-type: none"> ● Limitations on the voice capability. 	<p>Alternative vendors for all voice services eg Cable and Wireless or Colt.</p>	<ul style="list-style-type: none"> ● Restriction on the volume of calls made and received by market participants.
Fibre providers Eg Fibrenet, BT	<p>Network connectivity between firms, markets and suppliers.</p>	<ul style="list-style-type: none"> ● Loss of connectivity between key systems. 	<p>Multiple fibre providers.</p>	<ul style="list-style-type: none"> ● Market closure to disadvantaging geographic locations.
Power suppliers Eg London Electricity	<p>Power facilities.</p>	<ul style="list-style-type: none"> ● Blackouts — regional problems. 	<ul style="list-style-type: none"> ● Multiple connectivity to different sub-stations but still the same supplier. ● UPS batteries. ● In house back-up power generation capability. 	<ul style="list-style-type: none"> ● Market closure to disadvantaging geographic locations.
ISP — Internet Service Providers Eg Telia	<p>Internet access.</p>	<ul style="list-style-type: none"> ● Loss of web delivered services, research capability impacted. 	<p>Different providers in US and EMEA.</p>	<ul style="list-style-type: none"> ● Web supported trading applications unavailable.

ANNEX 4E

Analysis of selected retail financial services contracts

1 Capital One — Credit card

1.1 **Clause 6: Using the card and credit card cheques** “We will not be responsible if a supplier refuses to accept the card or credit card cheques as payment for any goods or services, or if a bank, building society or cash machine will not allow you to make a cash withdrawal.”

1.2 **Clause 18: Variations** “After giving you any notice we must provide, we may change the terms of this agreement at any time.”

1.3 **Clause 21: Ending your agreement** “As well as our rights under Clause 15 [Default], we can close your account by giving you at least seven days’ written notice...”

1.4 **Clause 22: General** “We will not be liable if we are unable to meet our responsibilities under this agreement because of a problem with a computer system or cash machine, industrial dispute or any circumstances beyond our control.”

2 Royal Bank of Scotland — RBS Advanta Credit Card

2.1 **Clause 7: Ending the agreement** “We may end the agreement at any time by giving you reasonable notice in writing.”

2.2 **Clause 8: Changes to the agreement** “(a) We may change the terms of this agreement at any time to reflect changes in market conditions, good banking practice and relevant laws; (b) We will give you reasonable notice, in writing, about any change.”

2.3 **Clause 4(b): Liability** “We will not be liable if any establishment or machine refuses to let you pay or withdraw cash with your card or a cheque.”

2.4 **Clause 10: General** “We do not accept liability if we cannot provide any part of our service for a reason beyond our control (for example, industrial action, failure of power supplies or equipment).”

3 MBNA — Silver credit card

3.1 **Clause 15: Alterations** “We may make alterations under condition 8.8 [varying interest rates]. We may also from time to time: (a) introduce any charge; (b) alter or introduce any characteristic of a service supplied under this Agreement, if we have a valid reason; and (c) alter or introduce any other term of this Agreement by such notice in writing to you as is required by law.”

3.2 **Clause 16.1: Ending this Agreement** “We may end this Agreement at any time: (a) by giving reasonable notice in writing to you; or (b) without notice if we have a valid reason. In this case, we will inform you immediately that we have ended this Agreement and of our reason.”

3.3 **Clause 19.4: General** “We will not be liable to carry out any of our responsibilities under this agreement if this is prevented directly, or indirectly by: (a) any fault in any machine, data processing system or transmission link;...(c) anything outside the reasonable control of ourselves, our agents or subcontractors.”

4 Northern Rock — Credit card

4.1 **Clause 23.2: Variation** “...We may vary this Agreement and any of the Financial Details: (a) if interest rates have altered or are likely to alter or in order to reflect or respond to changes in the cost of providing this service or facility to you; (b) to reflect changes in market conditions, good banking practice, relevant laws, regulations, codes of practice, court decisions or other requirements affecting us; (c) to meet or improve the terms, facilities or services offered under this Agreement; or (d) for any other commercial reason which we reasonably consider appropriate.”

4.2 **Clause 26.2: Force majeure** “We will not incur any liability to you for any equipment or communication failure, strikes or other events beyond our reasonable control which prevent us from carrying out our obligations under this Agreement.”

5 Alliance and Leicester — Visa/MasterCard Credit Card

5.1 **Clause 9: Termination of account** “(a) We may (subject to the Consumer Credit Act 1974) at any time and without giving a reason take all or any of the following steps: (i) cancel, withdraw or suspend the issue of or right to use any card, either entirely or in respect of special facilities or any credit card cheque; (ii) decline to issue, renew or replace any card or credit card cheque; (iii) close the account; and (iv) terminate the agreement; in each case by notice in writing to you and such notice shall (subject to the Consumer Credit Act 1974) become effective immediately or at the end of such period as is specified in the notice.”

5.2 **Clause 10** “Any action taken by us...under Condition 9 will not prejudice or affect our rights and remedies under this agreement which shall continue in full force and effect.”

5.3 **Clause 21** “We may terminate, withdraw, suspend or impose a limit on any transaction to be effected by any terminal or machine and/or any information facilities provided through any such terminal or machine wholly or in part, without notice. We shall not be liable if any card is not honoured by any bank, retailer, terminal or machine (for whatever reason) or if any credit card cheque or promotional credit card cheque is not accepted by any payee in whose favour it is drawn. We shall not be liable for any loss or inaccuracy of data arising directly or indirectly from any mechanical failure or industrial dispute in whatever form, or circumstances beyond our control in respect of the use of a card.”

5.4 **Clause 32: Events beyond our control** “We shall not be liable for failure to perform any of our obligations as a result of computer systems, ATM or other equipment failure, industrial dispute or any circumstances beyond our control.”

6 Marbles — Credit card

6.1 **Clause 10: Ending this Agreement** “We may terminate this Agreement: (i) by giving at least 7 days’ written notice to you; (ii) subject to service on you of any notice required by law, in any of the circumstances set out in Condition 7(b).” [This does not include circumstances beyond Marbles’ control.]

6.2 **Clause 11: General** “We shall not be liable for...failure to perform any of our obligations under this Agreement, resulting from causes beyond our reasonable

control including but not limited to mechanical failure (including without limitation the failure of automated teller machines), fires, strikes of our own or other employees, insurrections, riots, embargoes, requirements or regulations of any civil or military authorities.”

7 American Express — Credit card

7.1 **Clause 12: Ending this Agreement** “(2) We can end this Agreement at any time by giving immediate notice to you. Alternatively or in addition, we can stop you from using the card. If we end this Agreement you must pay all money you owe on the account not yet debited to your account.”

7.2 **Clause 17: Liability and refunds** “(1) We are not liable if a Service Establishment refuses to accept the card.” “(5) Amex is not liable for any: (i) non acceptance of the card or the way the card is accepted or not accepted; (ii) failure to carry out any of AMEX’s obligations under this agreement if this is because of a system failure, a date or other data processing failure, industrial dispute or other event outside Amex’s reasonable control; or (iii) indirect, special or consequential damages arising under this Agreement.”

8 Lloyds TSB — Credit card

8.1 **Clause 9: Termination and Suspension** “We may end the Agreement by writing to you giving 30 days’ notice, subject to the service of any default or other notice required by law. In exceptional circumstances of unacceptable business risk or for other good reasons, we may immediately suspend or withdraw your credit limit under this Agreement. If the Agreement ends you must immediately pay off your balance with any interest payable to the date on which you do so and return all cards.”

8.2 **Clause 10: Variations to rates, charges and conditions etc** “As long as we make the same or correspondingly similar changes to the interest rates, credit charges and fees of other cardholders, we may change the interest rate (other than any fixed rate) and the credit charges and fees used in the pricing module that applies to your package if, for example, market rates change or our cost base changes or for other reasons to do with our business.” “If we vary rates, charges or fees or make other changes to these conditions, we will always give you at least the length and type of notice required by law and the codes to which we subscribe.”

8.3 **Clause 14: General** “We are not liable if banks, retailers, other suppliers, terminals or other machines do

not accept cards.” “We are not liable for failures caused by industrial action, machine, data-processing or transmission failures or other events outside our reasonable control.”

9 Barclays — “ShareDeal” online brokering

9.1 **General** “3. We may change this agreement at any time.” “6. We will not be responsible for any claim in connection with our duties unless it has been caused by our negligence, wilful default or fraud.”

9.2 **Limitation of liability** “1....We cannot guarantee the accuracy, completeness, timeliness or correct sequencing of the data. We are not responsible for any decision made or action taken by you in reliance upon the data. Barclays Stockbrokers shall not be held responsible for any errors, failures or distortions in the transmission of information or instructions, either from you to us or from us to you and we will not be responsible for the failure of security of such transactions.”

9.3 **Circumstances we cannot control** “We will not be responsible if we fail, interrupt or delay in performing our duties under this agreement because of a breakdown failure or malfunction of any telecommunications or computer systems (internally or externally), equipment or software, or any other event which is not reasonably within our control. This includes prevailing stock market conditions, the breakdown or failure of any clearing system used in connection with the service provided to you, the insolvency or default of any participant in such a clearing system, or the failure by any settlement bank to make, receive or debit any payment. This also includes failures, interruptions or delays due to industrial disputes, postal delays, unauthorised access, theft earthquakes and interference (whether or not caused by severe or abnormal weather conditions).”

10 Charles Schwab — Online brokering

10.1 **Introductory provisions** “Under certain trading conditions it may be difficult or impossible to liquidate a position...”

10.2 **Clause 4: Carrying out your instructions**

“4.8 We will use our reasonable efforts to act on your Instructions in the order in which we receive them.” “4.9 We may, if we think it justified, refuse to carry out an instruction...” “4.10 We will not be responsible for loss to you as long as we have acted

reasonably.” “4.11...We will do what we reasonably can to implement your instructions as soon as we receive them.” “4.12 You can usually use the service at the published service times. Routine maintenance, demand on the systems, and other circumstances beyond our control may mean that is not always possible.”

10.3 **Clause 11: Liability for loss** “We are only liable for losses you incur as a result of our negligence or deliberate default. We will only be liable for indirect losses which are reasonably foreseeable, which both sides had contemplated at the time this Agreement is made or where you advise us of the possibility that you may incur a loss.”

10.4 **Clause 12: Ending your use of the service** “12.2 We may end or suspend your use of the service. We will usually give you 30 days notice. We may give you less or no notice if we consider it necessary, for example because of security concerns or...other breaches of arrangements with us.” “12.8...If we exercise our right to end or suspend your use of the service we will not be liable to you for losses which may be suffered by you due to a decrease in the value of your investments between the date you purchased and the date we sold them.”

10.5 **Clause 13: Our right to change this agreement** “13.2...We can change this Agreement to make it fairer to you or more easily understandable or to correct a mistake, or to cover a development in the Service. We can also change this Agreement for any of the following reasons: 13.2.1 to reflect a change in market conditions or practice; 13.2.2 to reflect a change in the law or regulation...or the way in which they are applied; 13.2.3 to reflect a change in technology;...13.2.5 for any other valid reason.” “13.3 We will normally give you ten days notice of any change. It may have to be shorter to protect security or in other circumstances beyond our control.”

10.6 **Clause 20: Suspended stocks** “If your portfolio contains investment(s) for which trading has been suspended, we reserve the right to charge for our costs of administering these investments on your portfolio.”

10.7 **Clause 31: Transfers, withdrawals and termination of your PEP/ISA** “31.11 We may terminate your PEP/ISA at any time. We will give you written notice of our intention to terminate your PEP/ISA...we will give you the opportunity to transfer your PEP/ISA to

another PEP/ISA manager before the date of termination.”

11 **Nat West** — Online brokering.

11.1 **Clause 4: Dealing** “(xxi) From time to time, there may be a delay in the execution of your instructions. Wherever possible, you will be given the reason for, and the maximum extent of, the delay.”

11.2 **Clause 7: Provision of information** “(ii) Neither we nor any of our agents or licensors make any representation as to the completeness, accuracy or timeliness of such [news, prices, and other information which we may provide to you] information...”

11.3 **Clause 14: Indemnity** “We will not be liable for any loss suffered by you, unless it arises from our negligence, wilful default or fraud.”

11.4 **Clause 23: Termination** “Either party is entitled to terminate the Agreement, without penalty with immediate effect, by giving the other party written notice to this effect.”

12 **Barclays** — Current account, customer agreement

12.1 **Clause 9: Our Liability to you** “9.2 We will not be liable to you if...we cannot carry out our responsibilities under these conditions as a result of anything that we cannot reasonably control. This includes any machine failing to work and industrial disputes.” “9.3 We will not be liable in any circumstances for any losses which are not direct or which we could not reasonably have foreseen.”

12.2 **Clause 13: Changing the terms of this Agreement** “13.1 We may change the terms of this agreement (including our charges) at any time by telling you about the changes. Changes will normally be caused by market conditions, changes in the cost of providing a service to you, changes in legal or other requirements affecting us, or any other good reason.” “13.2 We will tell you about any changes by: advertising in the press; putting messages on your statements; or sending you a separate written notice. Most changes will happen at least 30 days after we tell you about them...except changes in the interest rate which may apply immediately.”

12.3 **Clause 14: Closing your account** “14.3 We can end our banking relationship with you by

telling you in writing. We will give you at least 30 days’ notice.”

13 **Barclays** — Barclays Bank card conditions

13.1 **Clause 4: Limiting your right to use the card** “4.1 If we have a good reason, we may: refuse to approve a transaction; cancel or suspend your right to use the card...” “4.2 We will not be liable: if we do not approve a transaction; if you cannot use the card for a transaction or transfer; or for any loss or damage you suffer as a result of the way you are told this.”

13.2 **Clause 7: Limits of liability** “7.3 If we are unable to debit your account...as a result of anything that we cannot reasonably control, you will still be liable to pay us for all transactions.” “7.4 We will not be liable to you if we cannot carry out our responsibilities under this agreement as a result of anything that we cannot reasonably control. This includes: any machine failing to work; and industrial disputes.”

13.3 **Clause 10: Ending this Agreement** “This agreement will end if you or we have given written notice to the other and you have returned all cards and made all payments due...”

13.4 **Clause 11: General** “11.1 We do not promise that services and benefits which we provide outside the terms of this agreement will always be available.”

14 **Egg** — Savings account

14.1 **Clause 5: Taking money out of your accounts** “5.7 In order for us to run our business lawfully and with prudent liquidity levels, in exceptional circumstances, we may need to suspend your right to take money out of an account for a period of up to 60 days. We will try to give you notice as soon as possible if this happens although we may not be able to tell you beforehand.”

14.2 **Clause 9: Our liability to you** “9.1 If we do not carry out your instructions or do so late or incorrectly we will be liable for any resulting loss, injury or damage up to the lower of the amount of such loss, injury or damage and the amount of any interest you did not receive or had to pay as a result of our failure, delay or error. We will not be liable for any indirect losses or losses we could not have reasonably expected to occur.” “9.2 We will not be liable to you if we do not act on your instructions for any reason set out in this agreement or if we cannot carry out our responsibilities to you because of something that we cannot reasonably control

(this would include any machine failing to work and industrial disputes).”

14.3 Clause 11: Account closure “11.1 Unless there are exceptional circumstances we can close your account at any time by giving you at least 30 days’ notice in writing or, if relevant, at the end of any fixed interest period.”

14.4 Clause 13: Changes to terms and conditions “13.1 We can change the terms and conditions of our contract...to cover a development in, or the introduction of new products and services or to reflect a change in the law or any code of practice (or the way in which they are applied). We may also vary our charges and the rates of interest payable...for any of the following reasons:

- to reflect a change in market conditions or banking practice or the overall cost of providing our services to our customers;
- to reflect a change in the law or any code of practice (or the way in which they are applied) or to reflect a change in technology;
- to cover a development or change in our services or in the facilities that we provide;
- to ensure the good management or competitiveness of our business; and
- for any other valid reason.”

14.5 “13.2 Apart from changes in the interest rate (which we may make immediately), we will give you at least 30 days prior notice of any change or addition to the terms and conditions applicable to your account which is to your disadvantage. We will let you know of the change by letter, e-mail, statement notice, or separate written notice...We may make interest rate changes or any other changes to this Agreement which are not to your disadvantage immediately and will tell you about them within thirty days after the change...”

15 Scarborough Building Society — All Scarborough accounts

15.1 Clause 6: Charges “The Society may make charges on your account and these may be debited from your account. These may include charges for the Society’s costs in looking after your account and charges for any services or facilities it makes available to you. The Society may change the amounts of charges, may

make new or different charges and change the way in which you have to pay charges for any of the following reasons:

- If the Society changes the service of facilities on your account...
- Where the Society has to change because of technology, market conditions or general commercial practice.
- Where in the interest of administration the Society makes a change to the way it looks after the generality of accounts.
- Where inflation or the costs of providing the services or facilities that are available on your account make this necessary.

15.2 “6.2 Where the Society introduces new charges or increases existing charges, you will be informed about the change not less than 30 days before it takes effect, either by letter or other personal notice or by general notice...A change which abolishes a charge or reduces the amount of an existing charge, may be introduced with immediate effect and without notice.”

15.3 Clause 7: Interest rates “7.1 The Society will tell you about changes to the rates of interest which it must pay on the balance of your branch account by putting a notice in two or more national daily newspapers and in its branches, or by writing to you.” “7.2 The Society may vary the interest rate [where]:

- There has been, or the Society reasonably expects there to be, a general trend to alter interest rates on savings accounts.
- The Society for commercial reasons needs to amend savings interest rates.
- The Society wishes to adjust its interest rates payable by borrowers.

15.4 Clause 10: Changes to terms and conditions “10.1 The Society may change these terms and conditions...for any of the following reasons:

- To reflect changes in the law...
- When the Society has to change because of technology, market conditions or general commercial practice.

- Where in the interests of administration, the Society makes a change to the way it looks after accounts generally.

15.5 “10.2 The Society will tell you about changes to these terms and conditions...by giving you reasonable notice of the changes.” “10.7 Without notice, the Society may change, suspend or withdraw any of the services or facilities that it makes available on your account or the conditions that apply to them (even if they do not form part of the Society’s agreement with you).”

15.6 **Clause 11: General information** “11.1 The Society is not liable to you for any loss which you may suffer as a result of it being unable to provide any services as a result of strikes, postal delays, failure of power supplies, equipment or other causes beyond the Society’s reasonable control.”

16 **Egg — Personal loans**

16.1 **Clause 10** We may, at our discretion, choose to reduce the rate of interest applicable to the loan for such period as we may determine...”

16.2 **Clause 15** “We will not be liable to you for any failure to perform our obligations under the agreement due directly or indirectly to the failure of any machine, data processing system or transmission link, any industrial action or anything outside our control or the control of our agents or sub-contractors.”

16.3 **Clause 27** “27.1 We can change the agreement to make it fairer to you...or to cover a development in, or the introduction of, new products and services or to reflect a change in the law...We may also vary our charges on your account for any of the following reasons:

- to reflect a change in market conditions or banking practice or the overall cost of providing our services to our customers;
- to reflect a change in the law...;
- to reflect a change in technology, to cover a development or change in our services or in the facilities that we provide;
- to ensure the good management or competitiveness of our business;
- and for any other valid reasons.

16.4 “27.2 We will give you at least 30 days prior notice of any change or addition to the agreement which is to your disadvantage and we will let you know of the change by sending you an e-mail, letter or separate written notice...” “27.3 We may make other changes to the agreement which are not to your disadvantage immediately and will tell you about them within thirty days after the change. These changes will be so notified by sending you an e-mail, letter or separate written notice. “27.4 If we have made a major change or a lot of minor changes in one year, we will give you a copy of the new terms and conditions or a summary of the changes.”

17 **Egg — Money manager**

17.1 **Clause 4: Limits of liability** “4.5 We will not be liable if we are prevented from doing anything because of something we cannot reasonably control, including the unavailability of any Third Party Site or your PC failing to function properly.”

17.2 **Clause 6: General** “6.2 We may change this Agreement to make it fairer to you or...to cover a development in, or the introduction of, new products and services and new ways in which you can use the Service or to reflect a change in the law...We will give you at least one month’s prior notice for any change or addition to this Agreement. We will tell you about any change by sending you an e-mail, separate written notice or by advertising on our web site.” “6.3 If we have good reason for doing so, we may, without notice cancel or suspend your right to use the Service at any time. We may in any event, cease to provide the Service on reasonable notice, not being less than one month’s notice.”

18 **Insurance Company — Pooled Pension Fund Policy**

18.1 **Clause 5: Nature of units, PF Sections etc** “5.3 The Company may, at its discretion: increase the range of PF Sections at any time; at any time close a PF Section so that no further consideration can be allocated to it; subject to giving four months’ written notice to policyholders who hold units of the relevant PF Section, amalgamate, merge or sub-divide PF Sections in whole or part and ...re-allocate assets of a PF Section to a different PF Section...and surrender units allocated to the policy and allocate units...to the same value at bid price; subject to giving four months’ written notice of any significant changes to policyholders who hold units of the relevant PF Section, change the objectives of a PF

Section; or subject to giving four months' written notice to affected policyholders, discontinue any PF Section."

18.2 "5.5 The company will have no liability to the policyholder in connection with the policy except where:

- 5.5.1 any loss is caused by the negligence, wilful default or fraud of the company or any other group company; or
- 5.5.2 the company is required by law or regulation to accept such liability.

18.3 In any event the company will have no liability in relation to a pricing error or the cumulative effect of a number of pricing errors which it is not required to correct pursuant to Condition 13 [Pricing Error]."

18.4 **Clause 7: Surrender of units** "7.2 The company may impose requirements (which will be notified as necessary to the policyholder) regarding the required period and form of notice (which may be different for surrenders of different values, either absolutely or as a proportion of a policyholder's holding of units), the method of payment/transfer of surrender proceeds, a minimum surrender amount or a minimum residual policy value from time to time."

18.5 "7.8 If the company in its reasonable opinion considers that market conditions or other external factors (for example, exchange control or other laws which prevent the proceeds of realising underlying investments being returned to it in the UK) require this it may:

- 7.8.1 in the case only of a PF Section the investments allocated to which comprise primarily real estate (or assets which derive their value from real estate), delay accepting any surrender notice given under Sub-Condition 7.1 for a period expiring no later than the first dealing day to fall after nine calendar months have passed from the dealing day on which that notice would otherwise have expired; and/or
- 7.8.2 in any case, delay the surrender of units or the payment of amounts due on the surrender of units for up to one year after the dealing day on which the units would otherwise have been surrendered (including any dealing day postponed by the operation of Sub-Condition 7.8.1). The company need not surrender all affected units at

the same time and may surrender such units in such numbers and at such intervals over that period of one year as the company considers appropriate.

18.6 If the company decides to take either or both of these steps, it will notify the policyholder as soon as practicable."

18.7 **Clause 10: Switching** "10.2 If the company receives a request pursuant to Sub-Condition 10.1 [that all or part of the policyholder's unit holding already allocated to one or more PF Sections may be switched within the policy from one PF Section to another], it is not bound to effect such switch if it believes that to do so would adversely affect the reasonable expectations of other policyholders (for example, because of adverse market conditions) and, if it does effect such switch, it may make an administration charge for so doing."

18.8 **Clause 12: Variation of the policy** "12.1 The company reserves the right to require the issue of a new policy and to amend the terms and provisions of the policy as it shall think fit without prior notice and with immediate effect if...(ii) external circumstances (which may include, without limitation, changes in law or practice that affect the taxation, regulation or operation of the company, the policy or the scheme) cause the company to conclude (in its reasonable opinion) that this would be appropriate."

18.9 "12.2 The company reserves the right to vary the terms and provisions of the policy from time to time on giving to the policyholder four months' notice in writing of its intention so to do."

19 **Insurance company** — Extra income bond

19.1 **Clause 2: Our commitment** "In operating the bond, we will take the advice of the actuary who will take due account of the interests of our policyholders as well as those of X. The actuary's advice will be determined in accordance with the principles of equity and with regard to established insurance practice. It will be consistent with the original aims and intentions of the bond."

19.2 **Clause 3: Fund administration** "3.1 The benefits provided by the bond depend on the investment performance of the funds to which the policies are linked and are calculated by reference to the value of units which are allocated to the policies. The bond may

only be linked to the funds that we make available for the purpose from time to time...”

19.3 **Clause 9: Exceptional circumstances** “9.1 If we consider, on the advice of the actuary, that there are exceptional circumstances which affect the assets of any Fund and that it would be in the interests of the majority of our policyholders to defer the realisation of those assets, we may postpone the implementation of any request or instruction that entails the cancellation of units in that fund.

19.4 We will give you written notice of any such postponement...for a period of not more than one month or, where the assets consist of land or property, six months. The calculation and payment of the Death Benefit will not however be affected by the provisions of this condition.”

19.5 “9.2 The policies have been issued by us on the basis of our understanding of current law as it relates to us, our assets, our investment activities and the applicable taxation requirements.

19.6 If there is a change in the law or circumstances arise which would make it commercially impossible, or impractical, or inequitable for us to implement the terms and conditions set out in this policy document, we may change them on the advice of our actuary.”

20 **Insurance company** — Extra income bond — income option

20.1 **Clause 9: Exceptional circumstances** “The range of exceptional circumstances cannot be forecast but include the following: (i) market disruption events [defined as “any suspension of or material limitation of trading on the Stock Exchange which in the opinion of X makes it impossible to accurately calculate the value of the Index on any particular day.”]; (ii) changes in legislation...; (iii) changes in the index and non-publication of the index. In such circumstances X reserves the right to make alterations to the provisions of this bond, including the determination of the value to be attributed to the bond on any relevant date and the use of any alternative index rates as it considers at its absolute discretion appropriate.”

20.2 **Clause 10: Errors in the index** “X is not responsible for any error or misstatement in the calculation or publication of the index. X will calculate the capital value on the basis of the Index as published...”

20.3 **Clause 13: Termination** “This contract terminates upon payment of the Death Benefit or earlier payment of the Cash Surrender Value.”

21 **Term life/critical illness policies/income protection policies**

21.1 No provision for force majeure. Policies may exclude death caused by war, riot etc.

ANNEX 4F

Members of the Contracts Working Group

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Sarah Breedon, Bank of England
David Clegg, Lloyds TSB
Michael Corran, Lloyds TSB
Richard Everett, Financial Services Authority
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Edward Green, Cleary Gottlieb Steen & Hamilton
Simon Hills, British Bankers' Association
Cheryl McCuaig, Credit Suisse First Boston
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