FMLG | FINANCIAL MARKETS LAWYERS GROUP

Meeting Minutes
By Teleconference
Thursday, May 7, 2020
8:30 a.m. – 9:30 a.m.

Members present: Syed Riaz Ali, Sarah Ashkenazi, James Brown, Maria Douvas-Orme, Chinedu Ezetah, Terence Filewych, Jill Hurwitz, Glade Jacobsen, Robert Klein, Matthew Lillvis, Nancy Rigby, Jeffrey Saxon, Lisa Shemie, David Trapani, James Wallin, Frank Weigand, and Bryan Woodard

Federal Reserve Bank of New York ("New York Fed") participants: Lisa Joniaux, Kathleen Ramirez, Michael Nelson, Thomas Noone, Sanja Peros, and Shawei Wang

Financial Markets Law Committee ("FMLC"): Sir William Blair (Queen Mary University of London), Claude Brown (Reed Smith LLP), Simon Firth (Linklaters LLP), Kate Gibbons (Clifford Chance LLP), Richard Gray (HSBC), Carolyn Jackson (Katten Muchin Rosenman LLP), Ida Levine (Impact Investing Institute), Jon May (Marshall Wace LLP), Venessa Parekh (FMLC Secretariat), Joanna Perkins (FMLC Chief Executive), Barney Reynolds (Shearman & Sterling LLP), Chhavi Sinah (FMLC Secretariat), and Lord Thomas of Cwmgiedd (FMLC Chairman)

European Financial Markets Lawyers Group ("EFMLG"): Volker Enseleit (European Central Bank), Otto Heinz (European Central Bank), Inigo Arruga (European Central Bank)

Financial Law Board ("FLB"): Makoto Chiba (FLB Secretariat), Seiya Hikuma (FLB Secretariat), Kunihiko Morishita (Anderson Mori & Tomostune LLP, FLB Co-Chair), Kenta Sekiguchi (FLB Secretariat), Akihiro Wani (Morrison & Foerster LLP)

Other participants: Amelia Kaufman (Deutsche Bank), Jeffrey Lillien (Wells Fargo), Annette Maluenda (Barclays)

The FMLG invited members of its three sister organizations—the FMLC, EFMLG, and FLB—to join its May 7, 2020 meeting to discuss cross-border legal issues arising as a result of the coronavirus pandemic.

Force majeure

Maria Douvas, Volker Enseleit, and Simon Firth led a discussion with other teleconference participants about force majeure clauses and the legal doctrine of impossibility or frustration in the United States, the United Kingdom, and Europe. The discussion covered variations in standard industry contracts—for example, the 2002 and 1992 templates published by the International Swaps and Derivatives Association ("ISDA")—and the need to consult specific terms in trade confirmations. Participants also discussed court precedents and the various factors that may be relevant in litigation depending on the jurisdiction, including commercial practice.

There were several questions raised during the discussion. For example, do force majeure clauses contemplate pandemic quarantines? If a force majeure clause lists some circumstances, does it exclude others? How will courts approach contracts with multiple performance obligations—some of which are impossible under pandemic quarantines, but others of which remain possible? What will courts require a party to show if particular performance was impossible even though the market, on the whole, can perform well? To what extent may courts declare performance impossible if it is physically impossible but exceedingly burdensome, impracticable, or commercially unreasonable? In the context of payments, which rely on book entries, is performance ever impossible?

Finally, for some market participants, discussions about force majeure clauses have changed over the two or three months of the coronavirus pandemic. At the start of the pandemic, market participants may have worried about performance while employees are telecommuting. Experience has changed the focus for some participants to illegality concerns as a result of executive orders or legal forbearance requirements.

E-signatures

James Wallin, Kate Gibbons, and Claude Brown led a discussion about the validity of electronic signatures in the United States, the United Kingdom, Europe, and Asia. In the United States and the United Kingdom, participants reported that e-signatures are acceptable for a majority of contracts, but not for all contracts. The parity of e-signatures and wet signatures depend on the same legal factors—for example, a legitimate intent to sign. Some examples of particular circumstances in which e-signatures may not be acceptable include deeds and other real estate contracts. From an English law perspective, execution of deeds by electronic signature is perfectly legal, valid, and binding, as is a combination of execution methods for one document.

Participants discussed, among other issues, differences among the various formats of e-signatures, which may be specified or limited in particular contracts and may have different evidential weight. Some contracts may limit e-signatures based on historical preferences in some jurisdictions for wet signatures. One question that has emerged is whether all parties must agree to sign in the same signature format. The answer may vary depending on the governing law. There was also discussion around witnessing and notarization, which may require separate electronic confirmation.

Participants also discussed challenges in witnessing during pandemic quarantines. Governing law or contract terms may limit witnesses by excluding family members or minors, which could make witnessing at home difficult. There was some question of whether the concept of signing "in the presence of" another person had to by a physical presence as opposed to a virtual presence. And, if a physical presence was required, would it be acceptable if a neighbor watched from a doorway, or if a witness observed a signature through a window? Finally, some participants discussed "medallion programs," in which groups of parties agree on signature mechanisms with an insurance guarantee.

Notice

Jill Hurwitz and Glade Jacobson introduced a discussion of delivering notice during the coronavirus pandemic. Participants considered a hypothetical scenario in which an ISDA closeout notice needs to be delivered following a clear default—a bankruptcy, for example. Under the 2002 ISDA Master Agreement, email is not a permitted channel for sending a closeout notice. Ordinarily, parties would use a courier and send a courtesy copy via email. But with offices closed because of pandemic quarantines, a courier may not be able to deliver to the address listed in the contract. Fax and Telex numbers may no longer work. Other methods of delivery—for example, via a local law firm—may not be practicable if counterparties need to receive and deliver notice quickly.

Participants observed that some jurisdictions may favor actual notice over any formality required in a contract. Actual notice may be sufficient to give notice even if the channel of delivery is expressly excluded in a contract or if the prescribed channels are possible but inconvenient. Other jurisdictions may not be as permissive—especially if a party could argue that certain channels were selected or precluded by the parties for good reason. Participants also discussed the possibility of updating the 2002 ISDA Master Agreement to include electronic delivery, and variations in local laws and contracts that require notice to be sent, but are silent about its receipt. Finally, participants exchanged anecdotes about the range of market practices for confirmation of notice during the coronavirus pandemic, including requests for "selfies" with documents.

N.B. Following the meeting, Glade Jacobsen supplied citations for cases addressing the validity of actual notice under New York law: Suarez v. Ingalls*, 723 N.Y.S.2d. 380 (N.Y. App. Div. 2001),* Rockland Exposition v. Alliance*, 706 F. Supp 2d. 350, 360 (S.D.N.Y. 2009), and* Good Samaritan Home, Inc. v. Lancaster Pollard & Co.*, 2012 US Dist. LEXIS 37386 at 9 (S.D. Ind. March 20, 2012).*

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