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**Aide-mémoire of the
15th meeting of the European Financial Markets Lawyers Group,
held on Wednesday, 18 February 2004**

1. Approval of the agenda and of the aide-mémoire of the last meeting

The aide-mémoire of the 13th meeting and the draft agenda were approved by the group. It was noted that the minutes of the trilateral meeting in London were still outstanding. The members were saddened to learn of the passing away of Dr. Ulrich Bosch.

10(b) Standard Market Documentation used in the European Financial Markets

The group was briefed by Michael Wood about a meeting which took place in July 2004 at the ECB between those market associations which sponsor or are affiliated with standard market documentation used in European financial markets in the areas of derivatives, foreign exchange, repurchase and securities lending transactions. The minutes of the July meeting will be circulated within the EFMLG once available.

The group expressed their overall support for the initiative to further investigate the legal and operational differences between existing standard master agreements and to explore ways and means to further reduce basis risk that results from the co-existence of different agreements. In particular, they were interested in the suggestion to address some of the identified topics through the establishment of a European steering committee for documentation issues. The attention was drawn on the specific needs of corporates and the absence of any standardisation for middle market customers.

Follow-up:

The group agreed to closely follow the further activities of the initiative and to provide practical input to the extent deemed helpful. In particular, the EFMLG website could be used as a forum for further

discussion. Furthermore, it was suggested to establish a contact with the Euro-Associations of Corporate Treasurers. EFMLG members are asked to express their interest to **join an EFMLG sub-group** on documentation issues by **15 November 2004**.

2. Financial Law Committee of Paris Europlace

Carole d'Armaillé, Director, Paris Europlace and Hubert de Vauplane, member of the Financial Law Committee of Paris Europlace gave an overview of the activities of Paris Europlace and of the Financial Law Committee thereof. The EFMLG took note of the current activities of the Financial Law Committee, including a study on standard market documentation, the development of a European contract law and the reform of the law applicable to dematerialised securities.

Follow-up:

Given the high degree of matters of common interest, the group agreed to establish a regular exchange of information on the activities of the Financial Law Committee of Paris Europlace and the EFMLG, with Hubert de Vauplane acting as liaison point.

3. Securitisation law reform

The recent Luxembourg law on securitisation of 22 March 2004 and the French law on financial security of 1 August 2003 were presented by Marie-Paule Gillen and by Stéphane Kerjean, respectively. The group discussed those recent developments with a particular focus on European integration concerning securitisation transactions. Furthermore, Hubert de Vauplane and Pedro Ferreira Malaquias presented specific adverse consequences emanating from the application of banking monopoly rules and banking secrecy as well as data protection rules on securitisation transactions. The members highlighted their concerns regarding cross-border securitisation, the authorisation and mutual recognition of securitisation vehicles with different legal status and the insolvency remoteness of transferred assets. It was also pointed out that existing restrictions on banking secrecy in connection with the transfer of receivables, notwithstanding the attempts to find market-led solutions, might ultimately require legislative solutions.

Follow-up:

The EFMLG emphasised the need for a further harmonisation on a European level and the development of clear and convenient rules regarding cross-border securitisation. To further investigate the obstacles which would have to be addressed, a sub-group is to be established. This sub-group could enter into contact with the European Securitisation Forum and other relevant groupings to draw on the work that has already been conducted by those entities. Following the identification of the most pressing obstacles, the sub-group could prepare an EFMLG letter to the Commission. The members are asked to nominate **participants for the sub-group by 15 November 2004**.

4. Signing authorities and the enforceability of master agreements

Helen Moran informed the EFMLG on the outcome of the first meeting of the sub-group on signing authorities which was held in Dublin on 17 September. It was explained that at a first stage, the sub-group focused only on master agreements as such and not individual confirmations. The sub-group identified that the vast degree of differences in national requirements regarding powers of attorney could only be resolved by legislative action. It would however already be of great benefit as a first step to provide to the markets a comprehensive overview of the national requirements in the EU. Furthermore, given the high number of defective or unclear powers of attorney issued by market participants, it is suggested that the EFMLG would develop a set of terms of reference or best practices for the drafting of such powers of attorney.

Follow-up:

The EFMLG members are requested to provide short information on the following **questions** by **15 November 2004**:

- What is the current practice regarding authorisations in relation to master agreements?
- What would be, in your view, the ideal practice regarding authorisations?

On the basis of the answers received, the sub-group will attempt to elaborate a first draft best practice statement.

5. Clearing and settlement issues

5(a) The Commission's second communication on clearing and settlement and follow-up activities

Klaus Löber reported on the state of affairs as regards the Commission's activities in the field of clearing. The group noted that the EFMLG report on book-entry securities was received with interest by the Commission and forms part of their background documentation for the proposed EU legal certainty project.

Follow-up:

The group agreed that the EFMLG should offer its support to the future work of the legal experts group dealing with the Commission's legal certainty project.

5(b): The FMLC project of Property interests in investment securities

Martin Thomas presented the FMLC project on property interests in investment securities and asked for the EFMLG's views on it.

Follow-up:

The EFMLG sub-group on dematerialisation will analyse the documents and will decide whether to convey comments back to the FMLC.

6. Legal risk and the Commission's draft proposal for a revision of the Consolidated Banking Directive and the Capital Adequacy Directive implementing Basel II

The members had a brief exchange of views as regards possible areas of legal concern in the Commission's proposal and how their institutions practically intend to implement the requirements on legal risk. It was noted in particular that legal risk may arise in different connections, such as being part of credit risk management, operational risk or otherwise. Many institutions have already elaborated tailor-made definitions of legal risk. Members also stated that for instance national regulations might prescribe divergent concepts of legal risk unless there is a harmonised definition on a European level.

Follow-up:

The EFMLG agreed that the members would send to the Chairman by **15 November 2004**, to the extent possible and on a fully confidential basis, a copy of their internal definition of legal risk. Such definitions would be re-packaged and re-circulated to the members of the group on a strictly anonymous basis.

7. ACI STEP initiative on Short-term Securities

Stéphane Kerjean briefed the group on the consequences of the decision of the ECB Governing Council of 22 July 2004 as regards the ACI STEP initiative on short-term securities markets and on the recent activities of the ACI STEP Task Force.

8. Recent ECJ developments

8(a) Eurofoods IFSC Limited referred to the European Court of Justice

Helan Moran reported on the reference made by the Irish Supreme Court to the European Court of Justice (ECJ) on 27 July 2004 concerning the application of the EU Regulation on Insolvency Proceedings (1346/2000) in relation to Eurofoods IFSC Limited, an Irish subsidiary of the Parmalat Group. The Court has referred several questions to the ECJ concerning, among other things, how to define a debtor's centre of main interests (COMI) in view of the competing claims for jurisdiction by the Irish and Italian courts. The members expressed concern that the corporate personality of the Irish subsidiary might not be respected because, if the Parma courts are found to have jurisdiction, it could have severe corporate law consequences in respect of the need for banks to conduct due diligence in all jurisdictions within a corporate group that might potentially qualify as the debtor's centre of main interests.

8(b) CaixaBank France judgment of 5 October 2004 - prohibition of paying interest on "sight" accounts

The group was informed on the recent ECJ judgment concerning the prohibition of paying interest on "sight" accounts laid down by the French legislation. The ECJ has ruled that such prohibition constitutes, for credit institutions from other Member States, a serious obstacle to the pursuit of their activities via a subsidiary in France, affecting their access to the market and consequently their right of establishment under Article 43 of the Treaty.

9. Netting and collateral issues

9(a): Update re EFMLG report on netting and set-off

The group took note of the finalisation of the EFMLG report on the netting issues in Community legislation. The Report will be posted on the EFMLG website and communicated to the Community authorities.

9(b): Netting arrangement in the new Member States

The group was informed by Ewa Kozłowska on recent developments regarding the enforceability of netting arrangements in the new Member States. An updated EFMLG report will be circulated to the members for their comments and approval in the coming weeks.

9(c): Status of implementation of the Collateral Directive

As regards the status of the implementation of the Collateral Directive, the group took note that implementation is still lacking in ten Member States and that the legislation passed shows significant differences as regards the personal scope of application.

10(a): Update on the work of the New York Financial Markets Law Group

David Bloom reported on some recent activities of the FMLC regarding a judgment (Enron Australia/TXU) involving the ISDA master agreement. He mentioned that the FX and Currency Options Definitions published by ISDA, EMTA and the Foreign Exchange Committee are to be expanded to provide terms for more exotic instruments, which should be published in 2005. Furthermore, the FEOMA, IFEMA and ICOM Master Agreements are about to be updated.

10(d): Enlargement of the EFMLG

The group reflected on the best way that the EFMLG could respond to the EU enlargement. It was generally felt that a representation of the new jurisdictions would add value to the EFMLG. Yet, it was noted that there seems to be a lack of independent banks in the new Member states with a significant trading activity in the financial markets. The group resolved to try to identify over time both potentially

eligible institutions as well as qualified in-house lawyers from the new Member States, which could become members of the EFMLG.

10(e): Date and place of the next meeting

The next meeting will be held in Frankfurt on 9 February 2005.