

BEST PRACTICE STATEMENT:

Re: Authorisations underpinning Financial Markets Agreements (the “Authorisations”)

1. Purpose of this Best Practice Statement

The purpose of this Statement is to highlight the essential elements to be provided for by Authorisations, and to propose a Format or Formats within which such Authorisations might best be embodied.

2. Purpose of Authorisations

Authorisations, incorporated within a particular Format (such as a Power of Attorney, Certificate of a Corporate Officer, Resolution of Directors) issued on behalf of an Institution and properly certified, ought to provide clear evidence of an Institution’s decision as to:-

- the range of Financial Market Agreements it proposes to enter into; and
- the person or persons who will execute such Financial Market Agreements on its behalf with its counterparties,

and thus enable a counterparty to satisfy itself, without further time consuming enquiries, that the Financial Markets Agreement proposed to be entered into have been appropriately authorised and that the signatories are clearly identifiable and duly authorised.

3. Current State of Authorisations

3.1 *Identification of Transactions rather than Agreements*

In the majority of cases, Authorisations define the Financial Markets Transactions in which the Institution proposes to participate rather than specifying the relevant type of Financial Markets Agreements relevant to such transactions to be entered into by the Institution. Examples of the purported definitions of such Financial Markets Transactions include;

- General terms used to identify certain product types –
 - “fixed income transactions/business”
- The use of catch-all provisions –
 - “to enter into Derivatives or similar contracts”
- The enumeration of certain transactions followed by the phrase –
 - “ any other similar transactions”.
- Transactions described by reference to purpose-
 - “Transactions for the purpose of hedging”; or
 - “ In connection with the business” of the particular Institution

all of which leave a counterparty in an invidious position given their ambiguity.

3.2 *Format of the Authorisation*

Authorisations may be contained in several diverse Formats, some more relevant than others – Powers of Attorney, Directors’ Resolutions, Statement issued by a Chief Executive, Secretarial Certificate.

Such Formats are generally acceptable per se: the uncertainties in regard to this element of the Authorisation usually arise due to the inadequacies of certification as to the source from which the person signing off on the Authorisations derives authority to provide same and whether or not the Authorisation itself continues in force in all respects.

3.3 *Signatories nominated by the Authorisation*

The manner of nomination of signatories for the purpose of executing the Financial Markets Agreements are also often diverse and unsatisfactory i.e. signatories may be nominated by submission of:-

- signatory books
- a compliment slip with signatures endorsed thereon

- ambiguous signatories, e.g.
 - “The Treasurer and in the absence or disability of the Treasurer by the Assistant Treasurer”
 - A, B, C who are for the time being employed by the Institution.
 - signatories by reference to their title or function, e.g.
 - “ a Financial Markets Lawyer”,
 - “ a Divisional Secretary”
 - “ a Chief Operating Officer”
4. The general inadequacy of current Authorisations as exemplified above has the potential to increase legal risk for the parties involved, cause uncertainty and consequent delays, increase risks to the counterparties involved, and give rise to operational inefficiency and backlogs in processing Financial Markets Agreements documentation. This view is shared by many practitioners in the area and is echoed in the paper of February 2004 issued by the Foreign Exchange Committee.

The EFMLG also has concerns regarding the increasingly inadequate nature of Authorisations issued by many of the Financial Institutions (market participants) in relation to the ISDA Master Agreements, Global Master Agreements and other agreements ancillary thereto, including Guarantees. In consequence, a sub-group of the EFMLG (the “Sub-Group”) was formed with a view to proposing coherent Authorisation procedures which would enable Financial Markets Agreements to be signed off in an expeditious manner mutually protective of both parties to the Agreement.

5. The Sub-Group reviewed a sample of Authorisations. The Sub-Group, in order to promote the development of a more consistent approach to formulating Authorisations, issued a questionnaire to the members of the EFMLG (the “Questionnaire”) whose responses have been duly considered by the Sub-Group.
- 5.1 Whilst participants operating in the Financial Markets are not obliged to adopt these guidelines, the EFMLG would encourage participants to follow this Best

Practice Statement in order to create, as far as practicable, a standardisation of the Authorisations procedure.

- 5.2** The proposed Format of the Authorisation to be adopted, the means by which the Agreements to be entered into are described, the manner in which the signatories are to be defined and the certification that the Authorisation remains extant at any particular time, remain the responsibility of the parties concerned. The EFMLG assumes no responsibility for any use to which this Best Practice Statement may be put. Each participant following the recommendations contained in this Best Practice Statement should satisfy itself that these recommendations are appropriate to reflect the intention of the parties and are in compliance with such laws and regulations as may be applicable to such party.

COMMENTARY

- 6.** As already stated the Sub-Group has examined a number of Authorisations currently issued by Institutions and has identified issues which cause uncertainties and consequent delays in completion of Financial Markets Agreements: these issues affect:-

- the Choice of Format
- the Core Stipulation i.e.
 - description of Financial Markets Transactions
or
 - description of Financial Markets Agreements
- the Nomination of Signatories

have been cited in the preceding paragraphs. The Sub-Group has sought to address these issues and the resulting consensus arrived at is set out in this Commentary under the following headings:-

6.1 *Format of Authorisation*

Responses to the Questionnaire addressed to members of the EFMLG highlighted a multiplicity of Formats currently in use. However, despite this diversity one or two discernible common threads have emerged e.g. a certain preference for a

Power of Attorney followed, in descending order, by Directors Resolutions, Chief Executive/Chief Corporate Officer Statements.

For the purposes of this Commentary the Sub-Group has chosen the Power of Attorney Format which, if not necessarily appropriate and/or in compliance with any particular legal system, will at least focus members' attention on those elements essential to an Authorisation if it is to be functional/workable. Accordingly, where an alternative Format is chosen it should contain, as far as practicable, the elements of the attached sample Power of Attorney which provide for a reasonable degree of certainty essential for a smooth functioning of the legal documentation process. Briefly the sample Power of Attorney provides for:-

- the range of Financial Markets Agreements to be entered into and the proposed signatories thereto;
- the protection of bona fide third parties acting in good faith without notice of its termination.

In addition to the essential elements of an Authorisation there are two further issues which require careful attention i.e.

(a) ***Evidence of the continued existence of the Authorisation***

This is particularly important where the date of the Authorisation is considerably prior to the date of its submission to a counterparty. Whatever the Format adopted, a provision may be included dealing with this issue, such as an assurance of the counterparty in the form set out at paragraph 3 of the sample Power of Attorney, or by inclusion of a particular date to the effect that any agreements executed on or after that date are properly made or given on behalf of the Institution (see Paragraph 5), or by way of an additional separate certificate of an appropriate corporate person of the relevant counterparty issued contemporaneously with the executed Financial Markets Agreement.

(b) ***Source of the authority vested in the person giving the Authorisation***

The parties will require to be satisfied that the person signing off on the Authorisation is duly authorised – where, for example, the Format is that of a Statement, Secretarial Certificate or a Power of Attorney given by an Officer(s) of the Institution as distinct from such a Format given under the Seal of an Institution as in Common Law countries.

In both of the foregoing cases at (a) and (b) above, the level of certification to be called for will vary according to the Format in which the Authorisation is embodied and such other circumstances as may be deemed relevant: suffice to say that it rests with the particular counterparty and its legal adviser, in any given case, to reasonably determine the level of certification it considers necessary in all the circumstances: any requests in this regard must, however, be treated with respect by the other party and dealt with as expeditiously as possible. This is particularly so where the party from whom further certification is requested, has reasonably sought to protect its position by including provisions in its Authorisation such as or comparable with the following:-

- The powers granted hereby to _____ shall be deemed automatically revoked upon that person or persons, ceasing to be employed.

6.2 *The core stipulation of the Authorisation i.e. Financial Markets Agreement*

Clearly this element of the Authorisation is the most important. It is the core of this Authorisation – the activity to be authorised is the entry into Agreements which will govern the various Financial Markets Transactions carried on by the Parties. If there is a blurring between Agreements and Transactions this causes untoward difficulties and delays which are all the more frustrating given that they are avoidable. Practical problems arising in this area have been cited at paragraph 3.1 hereof. In the circumstances the Sub-Group having considered this issue very carefully and has concluded that it is the type of Financial Markets Agreements which should be authorised rather than the carrying on of a shopping list of financial transactions/products. It seems to the Sub-Group that authority for the many varied transactions which an Institution proposes to enter into is a matter for its internal controls and not an appropriate conundrum to be visited upon lawyers seeking to formalise Financial Markets Agreements in a manner, mutually protective of the interests of both parties to the particular Agreement. It will be noted that the Schedule to the sample Power of Attorney Format adopts the various types of Financial Markets Agreements as the activity with which the Authorisation is concerned.

6.3 *Nomination of the Signatories pursuant to the Authorisation*

Examples have been cited at paragraph 3.3 hereof illustrating the unnecessarily complicated provisions in this element of the Authorisation for whatever the reason: frequently further enquiry is called for.

The Sub-Group recommends that the provision regarding signatories should seek to avoid convoluted formulae: essentially the signatory or signatories should be identified by name rather than by reference to the position he/she holds unless perhaps such a position is a statutory position recognised by law such as that of Corporate Secretary. A signatory's authority should not be made conditional upon his/her continued employment.

In those countries where commercial registers contain the names of persons authorised to sign on behalf of an Institution – it might be useful if such person or persons were nominated as signatories or at least one of the alternative signatories. In such cases a translation of the relevant extract should be made available in English to the requesting counterparty.

Reference to signature books per se is not satisfactory: frequently such books are out of date. Furthermore, authorities contained in signature books may be limited: indeed such authorities frequently have no reference whatsoever to Financial Markets Agreements or Transactions.

As to the provision that an authority may be revoked if the nominated signatory is no longer employed by the Institution (see paragraph 3.3 hereof) is not satisfactory from a counterparty's point of view – this necessitates further enquiry and is, in fact, imposing responsibility for the maintenance of internal controls upon an outside party.

If, however, a counterparty insists upon this 'protective provision', then, the question will arise as to who may give the required confirmation. In such case the Sub-Group suggests that the Authorisation provides for the person who will give such confirmation, e.g. the legal adviser dealing with the transaction, might be appropriately nominated in the Authorisation.