

Financial
Markets
Law
Committee

BANKING ACT 2009 and the FMLC

Presentation to Quadrilateral
Meeting, Milan, 19 June 2009

Michael McKee, *DLA Piper UK LLP*

Kate Gibbons, *Clifford Chance LLP*

BANKING ACT 2009 - BACKGROUND

Collapse of Northern Rock

- Government recognised the need to simplify the process of nationalising banks
- Reduce the after effects of a bank failing

Banking (Special Provisions) Act 2008

- Gave HM Treasury powers to deal with banks in financial difficulty
- Powers only temporary

Banking Act 2009

- Permanent powers
- Powers shared between Bank of England, FSA and HM Treasury
- Came into force together with two implementing statutory instruments on 21 February 2009

FMLC AND THE BANKING ACT CONSULTATIONS

The proposals raise ...complex issues...likely to have widespread repercussions for financial services business...in the United Kingdom...and for legal certainty within the financial markets
FMLC's April 2008 response to Tripartite Consultation on Banking Reform

Selected issues:

- Special Resolution Regime - the US approach not right for UK
- Special Resolution Regime - the trigger mechanism needs to be clear
- Special Resolution Regime - partial transfers - need for certainty about assets and liabilities being transferred
- Insolvency Regime - do not change the whole UK insolvency regime

NETTING AND SET-OFF

- The stabilisation procedures may result in some but not all of a bank's financial contracts being transferred
- In these situations, it could result in netting arrangements or set-off rights being overridden
- The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 addresses this problem

Solution:

- Partial property transfers must transfer all of the protected rights and liabilities between a particular person and the bank under a particular set-off arrangement, netting arrangement or title transfer financial collateral arrangement - s.3(1)
- Partial property transfers must not include provision under the continuity powers which terminates or modifies the protected rights or liabilities between a particular person and a bank - s.3(2)

NETTING AND SET-OFF

Remaining problems:

- Some important categories of transactions covered within netting agreements are not covered:
 - spot and forward FX
 - physically-settled commodity derivatives
 - bullion forwards and options
 - longevity and mortality CFDs and other CFDs on asset classes not contemplated by the MiFID definition of “financial instrument”
- The inclusion of one unprotected transaction could lose the protection of the order for the whole agreement

LEGAL OPINIONS, BANKING AND STRUCTURED DEBT

Banking Opinion issues

- Qualification wherever a trust is involved by virtue of Section 34(7)
- Qualification wherever group undertakings may be involved
- Possibility of an event of default for exercise of a stabilisation power (with a Banking Act qualification corollary)
- Security granted over “Securities” qualification

Structured Debt Opinion Issues

As for Banking Opinions, **plus**

- Breadth of “Securities” definition and particularly for Covered Bonds
- Section 38 type impact on “triggers” occasioned by rating downgrades

Trustees and others

- Partial Property Transfers, Article 12 (4)

CONTACT DETAILS

Michael McKee

Partner

Financial Services Regulatory
Team

DLA Piper UK LLP

Tel: 020 7153 7468

michael.mckee@dlapiper.com

Kate Gibbons

Partner

Finance and Capital Markets
Team

Clifford Chance LLP

Tel: 020 7006 2544

kate.gibbons@cliffordchance.com

Financial
Markets
Law
Committee

BANKING ACT 2009 and the FMLC

Presentation to Quadrilateral
Meeting, Milan, 19 June 2009

Michael McKee, *DLA Piper UK LLP*

Kate Gibbons, *Clifford Chance LLP*