



Electronic Trading Platforms and Enforceability

Joint Meeting of the EFMLG/FLB/FMLC/FMLG

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Platform Structures

- **Proprietary (bilateral) platforms**

- Typically operated by a dealer
- One source of liquidity
- All trades between a client and the dealer
- Use of confirmations and trade blotters
- Bilateral agreements between dealer and each client

- **Multilateral platforms**

- Typically operated by a third party that is not itself a dealer
- Multiple sources of liquidity
- Interdealer trading
- Client to dealer trading
- Use of confirmations
- Rules binding on participants



Platform Trades Enforceability Issues

- Platform confirmations are often sent only in electronic form
- Confirmations may not be acknowledged by the recipient
- Multilateral platform confirmations may not be sent by either party to the trade



Other Confirmation Enforceability Issues

- Effect of matching practices
- Telephone confirmations
- Typewritten names on hard copy confirmations
- Trade settlement as evidence of transactions
- Spot trades may not use confirmations



Advice Requested

- The FMLG has asked Allen & Overy to advise it and the FXC regarding these issues
- Issues examined under New York and English law
- Advice requested with respect to FX transactions but principles may have broader applicability
- Advice assumes that basic elements to form a contract are present:
 - Offer and acceptance
 - Consideration
 - Certainty as to material terms
- Following slides contain a summary of this advice



New York Law Analysis – Summary of Advice

- Initial analysis centers on statute of frauds, which requires certain contracts incapable of being performed within one year to be:
 - “in writing” and
 - “subscribed by the party to be charged therewith, or by his lawful agent”
- An electronic means of exchanging written text will generally be sufficient to satisfy the “in writing” requirement. Applicable statutes:
 - NY Electronic Signatures and Records Act (ESRA)
 - Electronic Signatures in Global and National Commerce Act (E-SIGN)



New York Law Analysis – Summary of Advice

- The “in writing” requirement will be satisfied if the confirmation constitutes an “electronic record” under ESRA or E-SIGN
- ESRA provides that electronic records can be admitted into evidence and are considered equivalent to traditional written documents
 - Record must be capable of accurate reproduction
- E-SIGN provides that a signature, contract or record may not be denied legal effect solely because it is in electronic form
 - An electronic record is a “contract or other record created, generated, sent, communicated, received or stored by electronic means”.



New York Law Analysis – Summary of Advice

- The statute of frauds requires that the writing be subscribed by the party to be charged
- Courts have looked to whether a symbol or act manifests intent to authenticate the writing
- A&O advises that “so long as the electronic confirmations contain some manifestation of assent, New York courts will likely view the confirmations as signed writings as such term is used in the Statute of Frauds”
- Affixing electronic signature or delivery of confirmation could together with other communications and circumstances manifest an intention to be bound



New York Law Analysis – Summary of Advice

- Section 5-701(b)(1) of the NY General Obligations Law exempts “qualified financial contracts” from the writing requirements of the statute of frauds if:

- There is “sufficient evidence to indicate that a contract has been made”, or
- In a prior or subsequent written contract, the parties have agreed to be bound from the time they reach agreement on the contract terms by telephone, electronic messages or otherwise

- “Sufficient evidence” includes:

- Evidence of electronic communication admissible in NY
- A confirmation in writing “sufficient against the sender” is sent to the counterparty and the sender does not receive written objection within three business days



New York Law Analysis – Summary of Advice

•Applicability to electronic platforms

- An electronic confirmation can satisfy the NY statute of frauds requirements and evidence a valid and enforceable contract, as more fully discussed in the advice
- Restricted trading access to platforms can provide evidence of a trader being authorized to act on behalf of its employer
- Use of an online trading blotter will satisfy the GOL exemption from the statute of frauds if the parties have agreed to be bound by that method of confirmation
- Assent to a “click wrapped” agreement will be enforceable where the terms are reasonably conspicuous to the average user and the assent is unambiguous



FDIA Section 13(e)

- Section 13(e) of the Federal Deposit Insurance Act contains requirements for a contract with an insured depository institution to be valid against the FDIC as receiver
- FDIC Statement of Policy on Qualified Financial Contracts provides that a QFC will be deemed to meet the requirements of 13(e) if it complies with the following:
 - The QFC is evidenced by a writing sent by the depository institution to the counterparty or by the counterparty to the depository institution “reasonably contemporaneously” with the transaction
 - Implications for confirms from third party platforms
 - The depository institution was authorized by corporate action to enter QFC
 - Can be deemed to have taken corporate action



FDIA Section 13(e)

- A writing evidencing the QFC is maintained by the depository institution in its books and records or produced by the counterparty
 - Depository institution should be able to maintain these records in electronic form so long as they can be printed

English Law Analysis – Summary of Advice



- A master agreement and confirmation are not the types of contracts that under English law are required to be made in writing where neither party is a consumer or retail client
- Article 9(1) of the European Directive on Electronic Commerce 2000 provides that EU member states ensure that their legal systems allow contracts to be concluded by electronic means
 - Implemented in the UK in the form of the E-Commerce Regulations
- “No objection” provisions in a confirmation may not be effective unless agreed in an underlying contract
- Confirmations sent by a third party platform can be enforceable – depends on facts and circumstances

English Law Analysis – Summary of Advice



•English law of evidence

- Any form of record of the terms of an agreement is capable of being evidence of its terms
- Electronic records of transactions formed by electronic means are admissible
- No special rule of evidence which applies to electronic records
- Often submit a visible record such as a print out of the electronic communication
- Factors in determining the weight that evidence is given include:
 - Reliability of the manner in which the evidence was generated, stored or communicated
 - Manner in which the originator was identified

English Law Analysis – Summary of Advice



- Telephone call will constitute a valid oral contract (assuming all other conditions to formation of a valid contract have been met)
 - Court of Appeal held that a party must notify the other party that conversations will be recorded to preserve right to introduce the tape recording in evidence
- A typewritten name on a hard copy confirmation should be sufficient as a manifestation of intent to be bound