



International Swaps and Derivatives Association, Inc.  
One New Change  
London EC4M 9QQ  
United Kingdom  
Telephone: 44 (20) 7330 3550  
Facsimile: 44 (20) 7330 3555  
email: [isdaeurope@isda.org](mailto:isdaeurope@isda.org)  
website: [www.isda.org](http://www.isda.org)

5 August 2005

Lord Browne-Wilkinson  
Chairman - Financial Markets Law Committee  
c/o Bank of England  
Threadneedle Street  
London EC2R 8AH

Dear Lord Browne-Wilkinson,

**FMLC Issue 8: Amicus Briefs**

We are grateful for your kind invitation to comment on the outline proposal relating to amicus briefs on practice in the wholesale financial markets.

ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today has more than 650 member institutions from 47 countries. These members include most of the world's major financial institutions that deal in privately negotiated derivatives, as well as many corporations, governmental entities and other end-users that use over-the-counter derivatives to manage efficiently the financial market risks inherent in our business activities. A current list of ISDA's members, as well as other information about ISDA and its activities, is available on our website at [www.isda.org](http://www.isda.org).

As you know, we have been actively involved over many years in consultations with the FMLC. The scope of the FMLC project on amicus briefs raises many issues of importance to the financial markets. We will, of course, be delighted to continue our longstanding dialogue with the FMLC on this issue in the future.

ISDA is very appreciative of FMLC's efforts in highlighting legal issues relevant to the financial markets and its activities in creating a direct line of communication from the markets to the judiciary. From the perspective of the markets in privately negotiated derivatives, a market of

over USD 200 trillion, the global standard document used in over 90% of all cross-border transactions in these products is the ISDA Master Agreement. In terms of governing law for this contract this document provides the choice between English and New York law. Therefore, proposals in regards of English law civil procedure are of high significance to ISDA.

Over the years, ISDA has gained quite some experience with amicus briefs in North American fora. ISDA has prepared amicus briefs for American and Canadian courts frequently. We are under the impression, that, in many cases, amicus briefs are considered a helpful tool of benefit to the courts.

Benefits provided by amicus briefs range from providing courts with highly relevant additional information about market practice to explaining the broader implications of a case. Amicus briefs may also raise issues potentially overlooked by the parties and support judicial decisions through the involvement of commercially sensitive entities.

Given the overall significance of the financial markets to the United Kingdom and its legal system, it is absolutely appropriate to consider the introduction of amicus briefs into the law of civil procedure, as there certainly will be benefits to English courts in particular.

Having studied the outline proposal kindly provided to us, please allow us to make some preliminary remarks that could serve as a basis for further discussion.

The outline paper addresses the role of trade bodies as a source of referral and funding. The exact role trade associations are supposed to play according to the FMLC rules proposed in the paper need to be clarified. The FMLC would apply strict quality controls to any intervention. Any such intervention would be conducted under the FMLC's name and auspices. Also, it is envisaged that the FMLC make statements to certain market practices, where appropriate, as well as act as a clearing facility for any proposed amicus intervention. The envisaged clearing function by the FMLC would likely be helpful in addressing the reputational risk that comes with any intervention in litigation.

As for funding, the FMLC and ISDA as a trade association are non-profit organizations. Hence any allocation of resources by these bodies ensues a need for a high degree of influence in the conduct of any court proceedings supported by this trade body.

Issues for further discussion could include disclosure requirements for filers of amicus briefs. Also rules regarding the timing and content of filings on trial and appellate level plus disclosure requirements from amicus filers.

As outlined above, English law is essential to ISDA's global documentation. As noted above, ISDA has long experience with amicus briefs in the North American context. On the basis of this experience, we believe that we have a good deal of collective expertise to offer in assisting you in this effort.

We hope that the foregoing is helpful in your consideration of the amicus issue. We would be pleased to discuss this matter with you in more detail. Please do not hesitate to contact the

undersigned at ISDA's North American office (360 Madison Avenue, 16<sup>th</sup> Floor, New York, NY 10017, USA, telephone +1 212 901 6000; [ksumme@isda.org](mailto:ksumme@isda.org)) or Peter Werner at ISDA's European office in London, [pwerner@isda.org](mailto:pwerner@isda.org)).

Yours faithfully,

Kimberly A Summe  
General Counsel