

THE FINANCIAL MARKETS LAW COMMITTEE

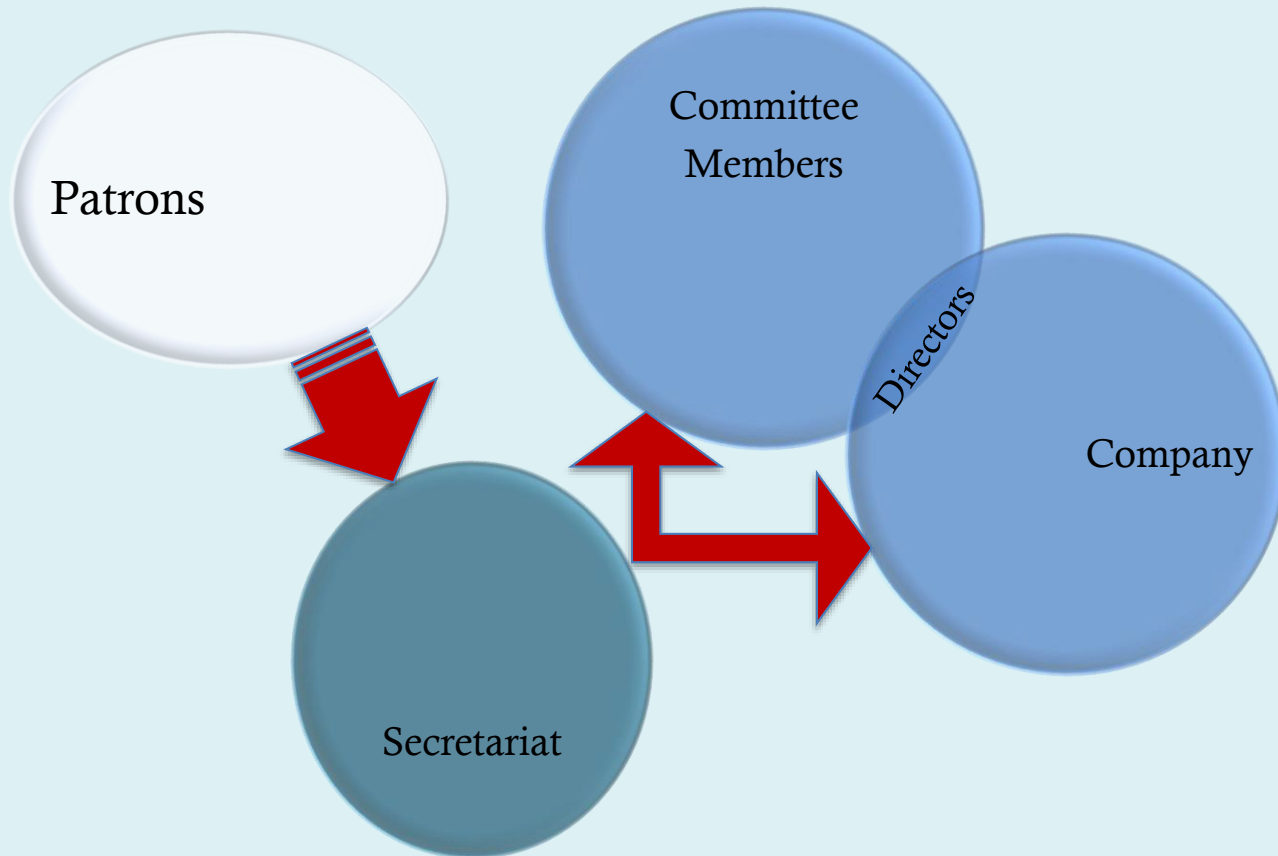


THE FINANCIAL MARKETS LAW COMMITTEE—REMIT

One of the core requirements of the financial markets is a sound legal infrastructure. However, some element of legal uncertainty is inevitable in financial markets that are international, competitive and innovative. Although the UK framework of law for financial markets is highly developed and robust, new ideas or practices, or proposals for new law or new regulations can sometimes raise legal uncertainties.

The FMLC is a registered charity established for the purposes, among others, of education and the advancement of the understanding of financial markets law. The Committee, contributes to the fulfilment of these purposes by identifying issues of legal uncertainty which might give rise to material risks, and considering how such issues should be addressed.

THE FINANCIAL MARKETS LAW COMMITTEE STRUCTURE



FMLC RESEARCH PROJECTS IN 2016

In 2016, the FMLC has, among other things, engaged regulators and market participants regarding coordination in the reform of international financial regulation and addressed issues of uncertainty in relation to

- The law relating to securities clearing in the U.K.: Part VII Companies Act 1989
- Legal obstacles to the mutual recognition (US-EU) of central counterparties
- Bank capital (Total Loss Absorbing Capital)
- Reform of financial benchmarks
- Bank resolution
- Virtual currencies
- Choice of jurisdiction clauses in financial contracts

Further work is expected on: sovereign debt restructuring, data protection and insurance.

Legal aspects of virtual currencies

Registered Charity Number: 1164902

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Virtual Currencies

Background

- **What are virtual currencies?**
- The commonest virtual currencies are “cryptocurrencies”, which:
 - are created through a process called “mining”
 - are incorporated in a network supported by “distributed ledger technology” (DLT), also “blockchain”
 - rely on cryptographic techniques to record transactions
- Virtual currencies share certain key characteristics with commodities, securities and instruments of payment:
 - The CFTC has concluded that Bitcoin is a commodity*
 - A US court has ruled that Bitcoin-denominated units or shares are securities*
- A clear definition of the legal aspect of money may assist regulators in predicting the outcomes of proposed regulatory approaches

**(Order of the CFTC (Docket No. 15-29) in the Matter of Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan)*

***SEC v Shavers (No-4-13-CV-416) Eastern District of Texas, September 18, 2014*

Private law rights

Property

Non-property

Real

Personal

e.g. quotas,
permissions
licences

e.g. land

Chattels
real

Chattels personal

e.g.
leasehold
interests

Tangible property/choses
in possession

Intangible property/choses **in action**

Documentary intangibles

Non-
negotiable
chattels

Negotiable
chattels

Negotiable
instruments

Negotiable
securities

Non-
negotiable
choses in
action

e.g. cars,
chairs,
ordinary
“things”

e.g. money
(coins)

e.g.
promissory
notes

e.g. bearer
bonds and
notes

e.g. non-
bearer
shares and
debts

**The
Classification
of Private Law
Rights in
English Law**

Virtual Currencies

Property and Personal Right

- What is the legal character of virtual currencies?
- Are they *property* or *personal rights* under the English common law?

Before a right or an interest can be admitted into the category of **property**, or of a right affecting property, it must be definable, identifiable by third parties, **capable in its nature of assumption** by third parties and have some degree of permanence or stability (*Lord Wilberforce in National Provincial Bank v Ainsworth [1965] 1 AC 1175 at 1247-8*)

- It seems likely that units of virtual currency which have both economic value and transferability among participants (i.e. are robust and well-engineered) will be categorised as a type of property

Virtual Currencies

“In possession” or “In action”?

- Are virtual coins held “in possession” or “in action”?
 - Can we “possess” virtual currencies?
 - If not, against whom can holders enforce their rights?
- English law distinguishes two kinds of personal property:
 - “**choses in possession**” (tangible—property of this kind can be possessed); and
 - “**choses in action**” (intangible—property or claims of this kind must be enforced through the courts)
- Virtual currencies seem to share some of the characteristics of each category.
- Could there be third category: “virtual choses in possession”?

Virtual Currencies

Possession, delivery and ownership

- Users treat *possession* as tantamount to *ownership*, what does this tell us about virtual coins?
- Some “choses in possession” are said to be “**negotiable**” in English law.
- Negotiable things are valuable tools in commerce because **delivery is sufficient to transfer ownership**. (That means that a good faith acquirer has no need to make enquiries as to the title of the transferor.)
- The commonest examples of “negotiable chattels” are coins and bank notes, i.e. money...
- Might virtual coins be “money”, too?

Virtual Currencies

Money, money, money

- What *is* money?
- At law, money is something that will “*pass in currency*”, i.e. commonly and continuously be accepted as payment in exchange for articles of commerce
- It is unclear which, if any, virtual currencies have achieved the status of money “passing in currency” in this way
- The European Court of Justice has classified virtual currencies as means of payment

Virtual Currencies

E-money

- Does English law recognise “electronic” money?
- Electronic bank account balances and online credit balances are commonly treated as money.
- If e-money is indeed money then some objections to accepting some virtual currencies as money may fall away.

Virtual Currencies

Foreign Exchange?

- Does it matter that virtual currencies have a small user community?
- Coins can “pass in currency” even when they are not commonly accepted as a means of exchange.
- Under English law, foreign money is still regarded, in its legal aspect, as “money”.*
- If foreign currencies are money, then so may be virtual currencies.

**Court of Appeal in Camdex International Ltd v Bank of Zambia* [1997] CLC 714

Virtual Currencies

Conclusion

- Virtual currencies have a strong claim to be recognised as “money” under English law.

FMLC OUTREACH ACTIVITIES IN 2016

- **FMLC Spring Seminar, March 2016:** in conjunction with the Bingham Centre for the Rule of Law, the FMLC co-hosted a seminar on the E.U. Referendum, and how the U.K.'s departure from the European Union, one of the world's most powerful trading blocs, would affect financial markets.
- **Outreach Seminars at Law Firms, March and May 2016:** FMLC CEO and staff gave talks on topics relating to its work to law firms to raise awareness.
- **Euribor Legal Workshop meetings in Brussels, May 2016:** The FMLC commented on the European Money Markets Institute's position paper on the evolution of Euribor, highlighting areas of legal uncertainty in relation to a benchmark transition. In response, EMMI invited the FMLC to attend a series of legal workshop meetings in Brussels.
- **Judicial Seminar, July 2016:** In its role as a "bridge to the judiciary", the FMLC provides a link between commercial judges and relevant expertise in financial markets law by holding an annual seminar. This year's seminar was on the subject of bank capital and bail-in and considered the question of ending "Too Big to Fail".
- **Visit to IOSCO, July 2016,** FMLC CEO Joanna Perkins met with Paul Andrews, Secretary General of IOSCO, to discuss cross-border regulation.
- **Relationship Management Programme, monthly:** As part of its radar programme, FMLC staff contact participants in the wholesale financial markets from the private and public sectors on a monthly basis to identify any significant legal uncertainties of which they may be aware.

Quadrilateral

- The FMLC greatly values its links with the Quadrilateral Group (EFMLG, FMLG and FLB).
- The group discusses global issues of concern to the financial markets and meets at least annually. The FMLC hosted the Quadrilateral Conference in 2016 at the Bank of England in London.
- On the agenda, were topics as wide-ranging as the legal challenges presented by new virtual payment systems, the legal considerations of negative interest rates, a primer on clearing and margins, an in-depth look at the many legal measures related to ending “Too Big to Fail” and, of course, Brexit
- The highlights of the conference include a speech by Commissioner Piwowar of the U.S. Securities and Exchange Commission and visits to the Tate Modern and Kew Gardens. A drinks reception and dinner were also held at the Guildhall Art Gallery.