

The Financial Markets Law Committee (“FMLC”): Brexit Focus



Dr Joanna Perkins, Chief Executive

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FMLC 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 U.K. 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.
- FMLC publications can be found at www.fmlc.org

What this means...

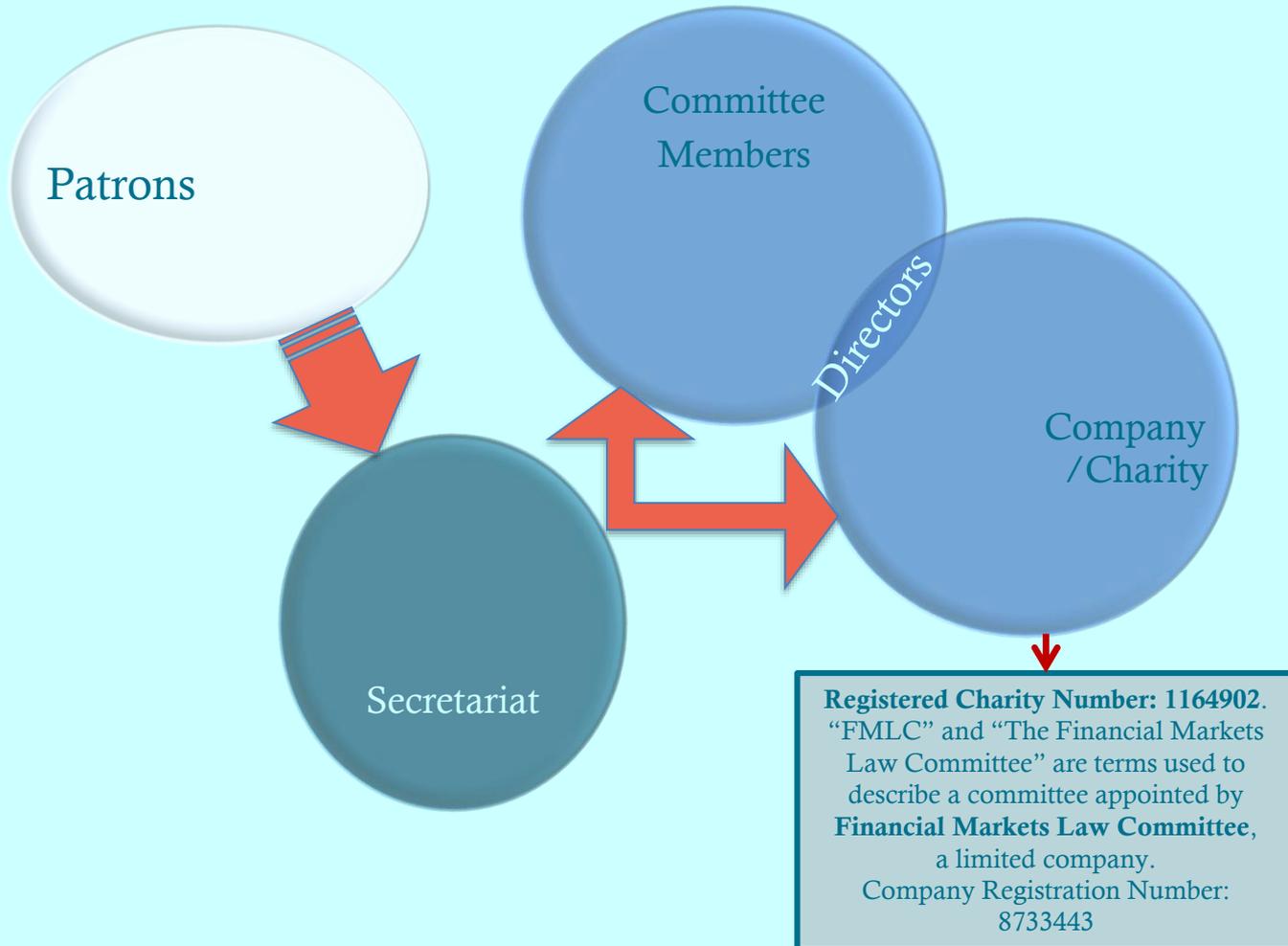
"But in my view, legal uncertainty is just another name for legal risk: the risk of increased litigation over legal rights that are poorly defined, the risk of market disruption because legislation has unintended consequences, or the risk that market standard contracts turn out to be unenforceable. These are broadly the sorts of issues the FMLC has been established to tackle."

Joanna Perkins, FMLC Chief Executive

FMLC Mission

- According to the remit, the FMLC has a tripartite mission:
 - to identify relevant issues (the **radar** function);
 - to consider such issues (the **research** function); and
 - to address such issues (the **public education** function).
- The **radar function** relies on the FMLC's scoping forums and other horizon-scanning, advisory bodies. It also relies on a relationship management programme which the FMLC Secretariat maintains with Patrons and Stakeholders.
- The **research function** is addressed by the FMLC Secretariat and by highly-focused working groups who work to draft papers and correspondence on behalf of the FMLC.
- The **public education function** is furthered when the FMLC publishes these letters and papers. It is also addressed by the regular programme of events organised by the FMLC Secretariat, including: roundtables, seminars and conferences. These feature high-profile guest speakers.

FMLC Structure



FMLC Research Projects

(A sample from 2016)



In 2016, the FMLC engaged with regulators and market participants regarding coordination in the reform of international financial regulation and addressed issues of uncertainty in relation to the following subjects, among others:

- The law relating to securities clearing in the U.K.: Part VII Companies Act 1989
- Legal obstacles to the mutual recognition (U.S.-E.U.) of central counterparties
- Bank capital (Total Loss Absorbing Capital)
- Reform of financial benchmarks
- Bank resolution
- Virtual currencies
- Choice of jurisdiction clauses in financial contracts
- Data protection
- Insurance (as credit risk mitigation)
- **BREXIT.**

23 June 2016



Poll Card E.U. Referendum @ Abi Begum / Flickr

The Aftermath

On Thursday 23 June 2016, the United Kingdom voted in favour of withdrawal from the European Union (“Brexit”). Subsequently:

- Five of the largest U.S. and U.K. CCPs demanded \$27bn in additional collateral across derivatives products on 24 June, according to the CFTC.
- Large currency swings and equity price declines occurred, particularly in U.K. and E.U. bank stocks.
- The £ declined sharply to a 31-year low. It recovered slightly but remained lower against the \$ and EUR than before the referendum.
- The U.K. stock markets recovered quickly. Over the next six months, the large-cap FTSE 100 index gained 13 per cent, the mid-cap FTSE 250 gained about 4 per cent.
- In the E.U. stock prices dropped by around 10 percent and gradually returned to pre-referendum levels for non-bank stocks over the summer.
- In the U.K., several open-ended property funds suspended redemptions.
- The Bank of England required U.K. banks to increase their capital and liquidity buffers.
- In August, the Bank of England cut the Bank Rate to 0.25% and introduced a package of measures designed to provide additional monetary stimulus.
- In the rest of the E.U., Monte dei Paschi di Siena and Deutsche Bank suffered the brunt of the impact of Brexit on share prices.

Many, if not all, of these effects were temporary, if dramatic. In contrast, changes to the legal framework in the United Kingdom (and in the E.U.) are likely to prove permanent. If these are not carefully structured, residual legal uncertainty may persist for decades

The FMLC's Referendum Response

- On Friday 24 June 2016, the FMLC announced that it would undertake work to identify and analyse the legal uncertainties associated with Brexit and to make impartial recommendations for resolving them.
- In particular, the FMLC Secretariat announced that it would hold one or more Colloquia on the legal aspects of Brexit; establish a High Level Advisory Group to give direction to the Committee's future work programme and convene a standing forum of experts to contribute to research and publications.
- The aim was, and is, to identify, analyse and address legal uncertainties relating to the U.K. withdrawal including, without limitation, those relating to
 - negotiations under Article 50, the withdrawal agreement and the terms of the future relationship between the E.U. and U.K.
 - the terms on which the U.K. will access the E.U. Single Market
 - the status of legacy and future E.U. legislation and legislative amendments in U.K. law; and
 - issues relating to the continuity of contracts and financial instruments.

The High Level Advisory Group on Brexit

- The High Level Advisory Group on Brexit has since been established. This provides a forum for discussion of current and future issues of legal uncertainty affecting the wholesale financial markets that relate to U.K. secession from the E.U. The issues identified include constitutional questions, transitional questions, trade issues and issues relating to proposals for new U.K. legislation. Several working groups have been established to address specific issues.

Work on jurisdictional issues

The FMLC's first Brexit-related paper—entitled *Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—the Application of English Law, the Jurisdiction of English Courts and the Enforcement of English Judgment*—was published on 02 December 2016.

The paper addresses issues of legal uncertainty likely to arise in the context of cross-border commercial litigation in consequence of Brexit. It examines the situation with regard to choice of law clauses in financial markets contracts and concludes that contractual continuity would be enhanced by the preservation of the current rules following Brexit.

The paper also attempts to address the question of jurisdiction, especially regarding the jurisdiction of English courts under an English choice-of-court agreement, the application of English law and the enforcement of English judgments, which may pose greater problems of legal uncertainty arising from Brexit. By way of solution, the paper analyses the consequences of replacing existing E.U. instruments in the U.K. by a new conflict of laws agreement with the E.U. or a new accession to existing international conflict of laws instruments.

Other FMLC Brexit Working Groups

- **Brexit – BRRD & CIWUD:** considers issues of legal uncertainty in the context of the Banking Recovery and Resolution Directive (“BRRD”) and the Directive on the reorganisation and winding up of credit institutions (“CIWUD”) potentially arising from Brexit. This group had its inaugural meeting in November, and identified defects in the BRRD which could cause practical uncertainty in the resolution of a cross-border financial institutions. The group, in cooperation with the Secretariat, is preparing a letter highlighting such issues, and the likely recipients of the letter are the Ministry of Justice and the Insolvency Service.
- **Brexit – E.U. Insolvency Law:** considers issues relating to the applicable law, jurisdiction and recognition that hinge on the face of the E.C. Regulation on Insolvency Proceedings (including as recast) (“EUIR”) arising in the context of Brexit. The group met for the first time in November, and is currently producing a framework paper setting out the scope of the work that it will undertake. This paper will guide the group’s preparation of a discussion paper.
- **Brexit –Third Country Regimes:** was formed with a view to producing a paper on equivalence and similar third country regimes in European financial services regulation. In keeping with the FMLC's remit as an educational charity, the paper will explain the global concept of equivalence and the shared characteristics of third country regimes, identify and analyse related issues of legal uncertainty and make recommendations to resolve such complexity.
- **Brexit – Scope of WTO Rules:** will consider legal uncertainties in relation to the scope of the World Trade Organisation (“WTO”) rules across wholesale financial markets. This includes, but is not limited to, analysis of: (i) the impact of the WTO rules both as a support and a constraint on cross-border business post-Brexit; (ii) the viability of transitional arrangements; and (iii) the scope and effects of the “most-favoured nation” provision of the General Agreement on Trade in Services (GATS).

Work ahead?

- What Brexit-related issues might the FMLC turn to next?
- Here are some suggestions:
 - The need for transitional arrangements on access for U.K. firms to the Single Market and for E.U. firms to the U.K. markets; the shape and nature of those arrangements.
 - The E.U. Commission’s proposal for an “enhanced” equivalence regime (now that the U.K. will be a Third Country).
 - HM Government’s plans for a “Great Repeal Bill” which will repeal the European Communities Act 1972 (thereby ending the direct effect of E.U. law), convert the *acquis* into U.K. law (an action known as “reception” or “standstill”) and grant extensive powers to ministers to amend legacy legislation.

Conclusion / The End



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