

# The Financial Markets Law Committee: Brexit Focus



European Federation of Energy Traders  
("EFET") Legal Committee Meeting

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## Slide 1—The Financial Markets Law Committee: Brexit Focus

Hello and thank you to EFET for inviting me. I am delighted to be here as a guest speaker and grateful for your interest in the work of the FMLC on Brexit. Please feel free to interrupt me and ask questions as we go along.

## Slide 2—FMLC Remit

The FMLC, of which I am CEO, was established by the Bank of England in 2002 to identify issues of legal uncertainty affecting the global wholesale financial markets. It subsequently incorporated as a company and was formally recognised as a charity in 2015. As a charity, the aim of the FMLC is to advance the public interest in legal education and to work towards the better administration of the law.

## Slide 3—What this means ...

The original remit was, as I have said, to address issues of legal uncertainty but it is not always clear to our stakeholders what "legal uncertainty" means. To my mind, the FMLC should be pinpointing legal risk. And by legal risk I mean 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.

If there is also a broader concept of legal certainty at issue here then it is probably a question of predictability. From that perspective, Brexit arguably represents the biggest challenge of coordination around issues of legal certainty ever faced by the FMLC.

## Slide 4—FMLC Mission

According to its 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.

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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.

To do all this, the FMLC invites the input of experts at three levels: the Committee itself, which is ultimately responsible for all out output and which comprises about 30 individuals, a series of eight sectoral discussion groups (including one, now, on Brexit) and a multiplicity of *ad hoc* working groups focused on specific issues of legal uncertainty.

### **Slide 5—FMLC Structure**

This exercise in expert coordination is managed largely by the FMLC Secretariat whose role is illustrated on this slide. The work of the Secretariat is funded exclusively through donations.

### **Slide 6—FMLC Research Projects (*A sample from 2016*)**

To wrap up this brief introduction to the work of the FMLC, I thought I would set out a list of some of the key topics addressed in 2016. These include:

- 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) and
- Brexit.

The FMLC Secretariat was already at full stretch before the referendum and staff members have had to adapt swiftly to engage with Brexit.

### **Slide 7—23 June 2016**

...which brings me neatly back to the subject of today's talk: on 23 June last year, a 52% majority of U.K. voters in an in/out referendum voted to leave the E.U.

### **Slide 8—The Aftermath**

The market reaction was dramatic and instantaneous. It appeared to have received a severe shock. In particular there were sharp falls in bank stocks and currencies. The abrupt market reaction may have reflected the fact that the public had been led to believe that a "leave" vote would result in automatic notice, by the U.K. to the E.U., of the U.K.'s intent to withdraw. In the event, however, the resignation of the PM David Cameron made that course of action impossible.

Many of the market 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

### **Slide 9—The FMLC’s Referendum Response**

The FMLC’s response was a little more measured than the market reaction. It set out a plan for tackling the issues of legal uncertainty likely to arise. One of the steps in that plan was to establish the discussion forum on Brexit I mentioned earlier and that group also serves as a steering subcommittee for the FMLC’s work in this area.

### **Slide 10—Work on jurisdiction issues**

The first paper published under the auspices of this specialist advisory group focused on issue of jurisdiction and choice of law in financial contracts. It also examined the enforcement of judgments in cross-border cases. I will say a little bit, if I may, about the analysis and conclusions set out in the paper which are much to the drafting group credited in the paper and the chairmanship of Professor Trevor Hartley.

On choice of law, the paper observes that Regulation (EC) No 593/2008 on the law applicable to contractual obligations (“Rome I”) brings certainty in the choice of law governing financial contracts. There is likely to be no problem for the recognition of English choice of law clauses arising from Brexit because the E.U. Regulation recognises a choice of law in favour of the law of a Third Country. There may be, however, problems for the reliable recognition of foreign choice of law clauses by U.K. courts, if the U.K. loses the uniform E.U. conflicts rules which take direct effect. The smoothest solution to this problem, the paper says, would be the unilateral adoption by the U.K. of Rome I Rules (and Rome II rules, too). Fortunately, the U.K. government has proposed a reception statute which will do this.

On choice of jurisdiction and enforcement, the picture is much more complex. Regulation (E.U.) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the “Recast Brussels Regulation”) permits mutual enforcement without costly parallel proceedings.

When the U.K. withdraws from the E.U., difficulties for recognition of English jurisdiction and judgments in E.U. will arise if the U.K. becomes a Third Country. This would be regrettable and these difficulties may extend even to the situation in which there is a jurisdiction clause favouring U.K. courts, if the defendant is domiciled in the E.U. The unilateral adoption of the Recast Brussels Regulation by the U.K. is not a solution here as only the judgments of courts in Member States are automatically recognised under the Regulation.

On the other hand, the adoption by the U.K. of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded at Lugano on 16 September 1988 (the “Lugano Convention”)—which is similar in its terms to the Recast Brussels Regulation—maybe partial solution because it imposes mutual obligations of recognition on all signatories. The U.K. is a signatory to the Lugano Convention in its capacity as an E.U. Member State. It would, however, be required to sign as an independent party following Brexit, should it wish to retain the benefits of the Convention.

A similar picture emerges in respect of the Convention of 30 June 2005 on Choice of Court Agreements concluded at the Hague (the “Hague Convention”). If the U.K. were to accede to the Hague Convention, it could benefit from provisions requiring other signatory states to recognise contractual agreements favouring the courts of the U.K. Currently the U.K. is a signatory to this instrument as an E.U. Member State. The better view is that, after it withdraws from the E.U., its status as a signatory will automatically lapse.

A third option is for the U.K. to enter into bespoke bilateral treaty arrangements with the E.U. which would amount, in practice, to continuity with respect to the benefits of the Recast Brussels Regulation.

This is considered preferable to joining the Lugano Convention, which still contains some of the defects rectified in the Recast Brussels Regulation.

When the U.K. withdraws from the E.U., difficulties for the reliable recognition of foreign judgments—i.e., of E.U. Member States' courts—by the U.K. courts may also arise. Although English courts do have powers to recognise and enforce judgments at common law these are less certain in their application than the rules which currently have direct effect under the Recast Brussels Regulation. Here, however, the unilateral adoption of the Recast Brussels Regulation by the U.K. could achieve continuity, certainty and predictability.

#### **Slide 11—Other FMLC Brexit working groups**

This then has been the FMLC's first publication. There is, however, much more in the pipeline. In particular, four new working groups have been established and are hard at work. Two of these concern the banking and investment sectors in particular. Two others are of wider application to the corporate sector. The first of these deals with corporate insolvency and raises issues concerning the mutual recognition of insolvency proceeding and judgments by the U.K. and E.U. The second concerns the legal effect of the World Trade Organisation's General Agreement on Trade in Services.

#### **Slide 12—Work ahead?**

There is undoubtedly more to come and I would welcome input as to where the FMLC should focus its attention next. On this slide I raise just a few 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.

If you have additional suggestions to raise, I would be glad to hear them now or to receive them by email next week.

#### **Slide 13—Conclusion / The End**

Thank you for allowing me to participate in your meeting today. I am happy to take any questions you may have.