

Financial Markets Law Committee (“FMLC”)

Note for Record of Committee Meeting

Date: 15 March 2018

Time: 4:30PM-6:00PM

Location: Lloyd’s of London, One Lime Street, London, EC3M 7HA

Copies to: FMLC Members, Joanna Perkins

In attendance

Lord Thomas (Chairman)	Sean Martin
David Greenwald (Deputy Chairman)	Jon May
Andrew Bagley	Sinead Meany
Raymond Cox QC	Chris Newby
Bradley J Gans	Jan Putnis
Kate Gibbons	Barnabas Reynolds
Carolyn H. Jackson	Peter Spires
Mark Kalderon	Pansy Wong
Rachel Kent	Joanna Perkins (Chief Executive Officer)
Peter King	Juliana Franco (Legal Analyst)
Sir Robin Knowles CBE	Venessa Parekh (Research Manager)

Chairman’s Comments

Lord Thomas thanked Lloyd’s of London for hosting the Committee meeting. He began by observing that it continued to be very difficult to predict how the Brexit process and negotiations would develop. There remained political, and hence legal, uncertainty in not only what the next steps would be but also the timing of any changes. For the time-being, he noted, there seemed to be utility in distinguishing between three categories of law: existing, adopted (or retained) and, eventually, new law. Legal uncertainties would inevitably arise in the practical application of each of these categories and these issues would have political resonance.

In this context, Lord Thomas said that the FMLC could either: (1) choose to set aside any issues which had political significance; or (2) it could undertake work on such issues but, in order to

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continue to fulfil its remit as an unbiased, apolitical commentator, it would only lay out various options, by way of recommendations to resolve uncertainty, but not address the merits of any. He expressed a preference for the latter option but opened the floor to discussion.

Members agreed that it was key that the FMLC identify solutions or mitigants if it were to analyse legal uncertainties related to Brexit. One observed that most legal complexities had political connotations, even if these were not immediately obvious; the FMLC would simply have to find a way to conduct its work in a neutral manner. Another observed that, as the statutory instruments were published, there would be a (short) consultation period during which HM Government would invite engagement.

Members agreed ultimately to address issues related to Brexit as long as the FMLC felt able to set out alternative solutions or mitigants fairly.

Issue 221: Proposal to Amend Moratorium Powers in the BRRD

The Secretariat had composed a draft letter to the European Commission, drawing attention to legal uncertainties arising from the proposal to amend the Bank Recovery and Resolution Directive to, *inter alia*, enhance the moratorium powers available to resolution authorities in respect of a failing institution. The Chief Executive stated that the Secretariat had received a comment about the impact of the new powers on back-to-back contracts for central counterparties, which the Secretariat would incorporate. It was likely then that the letter would turn into a short paper.

Members reviewed and approved the letter. Sinead Meany asked that, in view of the Bank of England's role in the resolution process, a disclaimer be inserted exempting her participation in the discussion.

Issue 219: Brexit—Judicial Interpretation (Chair—Ed Murray)

Following recommendation from the FMLC's Advisory Group on Brexit, the Committee had resolved to establish a Working Group to identify potential legal uncertainties arising from the interpretation by U.K. courts of autonomous E.U. legal concepts which appear in received E.U. legislation as it is incorporated into U.K. law.

The Working Group had, upon discussion, reached a consensus view that they could more usefully examine tensions which might arise in the definition of "retained law" in the European

Union (Withdrawal) Bill. Members of the Working Group had composed a note setting out such issues for Committee Members' consideration.

Finally, in view of the Chairman's recommendation at a previous Committee meeting that this work be concluded rapidly, the Secretariat has drafted a letter to the Ministry of Justice drawing upon the initial brief which the Committee had approved.

Members approved the publication of the letter and the establishment of a Working Group on retained law. They advised the Secretariat to confirm that Mr Murray would be happy to continue to chair this work.

Issue 215: Brexit—Robustness of Financial Contracts (Chair—Professor Hugh Beale)

This Working Group was established to examine whether a disorderly cliff-edge withdrawal from the E.U or a withdrawal based on a free trade agreement which does not cover the provision of financial services would have any legal ramifications for existing financial contracts. The Group has met two times and Professor Beale is in the process of revising a draft paper based on the Working Group's discussions, which will then be reviewed by the Secretariat.

One Member queried whether this paper should include analysis of human rights elements, such as acquired rights. He offered to introduce the Working Group to an academic who could contribute such analysis. Lord Thomas observed, however, that this paper might be subject to the legislative timetable as it referenced the Withdrawal Bill. Members also agreed that this was one of the most discussed questions in the market and the publication of this paper would assuage many concerns.

Members agreed that the FMLC's analysis should be vigilant to all options so as to make a fair recommendation. This would also eventually include an analysis of private law. In this context, they resolved that Professor Beale's paper should continue toward publication, and be finalised by the end of April, but further work be commenced on related issues in public international and private law, which could subsequently be presented as part 2 of a series of publications on financial contracts post-Brexit.

Any Other Business

A Member briefly mentioned that issues of legal uncertainty had been observed in relation to Article 31 of the Anti-Money Laundering Directive and agreed to send more information to the Secretariat.

Lord Thomas thanked Simon Dodds, who will be retiring from the Committee, for his contributions to the FMLC's work.