

Financial Markets Law Committee (“FMLC”)

Banking Scoping Forum

Date: Tuesday 20 March 2018

Time: 2.00pm to 3.20pm

Location: Clifford Chance LLP, 4 Coleman St, London EC2R 5JJ



In Attendance:

Monica Sah (Chair)	Clifford Chance LLP
Alex Biles	Ashurst LLP
James Bresslaw	Simmons & Simmons LLP
Clare Dawson	Loan Market Association
Thomas Donegan	Shearman & Sterling (London) LLP
Paul Gough	The Bank of New York Mellon
Simon Hills	UK Finance
Ian Jameson	Sumitomo Mitsui Banking Corporation Europe Limited
Jons Lehmann	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Dorothy Livingston	Herbert Smith Freehills LLP
Bob Penn	Cleary Gottlieb Steen & Hamilton LLP
Julia Smithers Excell	JP Morgan
Jeremy Stokeld	Linklaters LLP
Venessa Parekh	FMLC
Thomas Willett	FMLC

Guest Speakers:

Will Winterton	Clifford Chance LLP
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Registered Charity Number: 1164902.

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Regrets:

Laura Feldman	Eversheds Sutherland
Leland Goss	ICMA (“International Capital Market Association”)
Amy Kennedy	Gibson, Dunn & Crutcher LLP
Oliver Moullin	AFME (“Association for Financial Markets in Europe”)
Jan Putnis	Slaughter and May
Mitja Siraj	FIA
Stuart Willey	White & Case LLP

Minutes:

1. Introduction.

1.1. Monica Sah opened the meeting and delivered a brief introduction.

2. Administration: a short presentation on the FMLC Radar Function—Revisited (Venessa Parekh)¹

2.1. Venessa Parekh outlined the remit of the FMLC and its radar function, defined as the manner in which the FMLC identifies appropriate issues to analyse. The function can be broken down into three initiatives: (i) scoping forums; (ii) the relationship management programme; and (iii) radar meetings. She explained that the radar programme guarantees that the FMLC addresses those issues that are of most concern to stakeholders in the financial markets, ensuring that the FMLC’s work is current and has impact.²

3. Areas of uncertainty regarding cash/securities collateral (Will Winterton)

3.1. Will Winterton lead a discussion on areas of legal uncertainty regarding cash/securities collateral. Mr Winterton began by mentioning the FMLC paper on “Analysis of uncertainty regarding the meaning of “possession or... control” and “excess financial collateral” under Financial Collateral Arrangements (No. 2) Regulations 2003” (the

¹ Please see Appendix I below.

² If you would like to learn more about the FMLC radar programme, or become involved in one of the three initiatives, please contact Debbie Steen at secretarial@fmlc.org.

“FCARs”).³ Mr Winterton explained that the context in which the issues of uncertainty arose has changed, the uncertainties persist.

- 3.2. In the U.K., Mr Winterton explained, financial collateral generally remains in the account of the collateral provider and is subject to a contract between the collateral provider, the collateral taker and the custodian. As the collateral taker is not in the possession of the financial collateral, the meaning of “possession or control” under the FCARs was said to be of central importance. This has been examined in U.K. and European Court of Justice (“ECJ”) case law, however practical uncertainties persist and these would benefit from clarification.
- 3.3. One participant mentioned that the City of London Law Society (“CLLS”) has also been seeking clarification on these issues.
- 3.4. Another participant highlighted that the laws regarding collateral might change over the transition period of the U.K.’s withdrawal from the European Union (“Brexit”). The European Commission had recently introduced two related legislative proposals. One individual asked if, owing to Brexit, the appetite to tackle these legal uncertainties might increase again. Attending members agreed that any attempt to clarify the meaning of “possession or... control” and the meaning of “excess financial collateral” would improve the U.K.’s position after Brexit.
- 3.5. A discussion then ensued on the cross-jurisdictional differences in rules governing the control of fixed and floating charges. One Forum member highlighted that Belgium mitigates these issues through their rules of possession. In this context, the issue of control does not emerge as the collateral-taker still has control of the account.
- 3.6. Another individual presented the opinion that the possession or control of collateral will not move from the collateral-taker to the collateral-provider’s account. In response to this, another Forum member observed that the opinion outside of civil law countries is that collateral should stay in the collateral-provider’s account.
- 3.7. Ultimately, the participants agreed that while issues of legal uncertainties regarding cash/securities collateral still remain, any analysis of this point would only have impact when the U.K.’s post-Brexit rules are clearer.

³ FMLC, “Analysis of uncertainty regarding the meaning of “possession or... control” and “excess financial collateral” under the Financial Collateral Arrangements (No. 2) Regulations 2003”, (2012), available at: <http://web.archive.org/web/20170109041652/http://www.fmlc.org/uploads/2/6/5/8/26584807/0112121.pdf>.

4. U.K. territorial perimeter—financial services activities, deposit-taking, insurance and consumer credit (Monica Sah):

- 4.1. Ms Sah identified the need to assess inbound financial services and the U.K.’s treatment of them in comparison to other jurisdictions, especially in the context of Brexit.
- 4.2. A key question, Ms Sah noted, was how the U.K. would assess its territorial perimeter. Ms Sah explained that for businesses considering whether they need to be separately authorised or registered for the purposes of providing custody and payment services in the U.K., different tests exist depending on the type of activities—e.g. whether the service provider is located in the U.K., where the assets are safeguarded, where the accounts are located, etc. The test applied in determining the application of the regulatory perimeter becomes less clear in relation to other activities such as dealing in investments as principal or agent. Attendees then discussed the overseas person’s exemption which applies different tests per activity, highlighting the lack of clarity on the relevant conditions which will apply.
- 4.3. The discussion shifted to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (“**MiFID II**”) which provides for a Third Country regime at the E.U. level. Forum members noted that the Third Country regime is unlikely to apply until an equivalence determination was made. Attendees observed that the European Commission’s notices to stakeholders, published in response to Brexit, contradict previous and established knowledge. Next, Ms Sah presented the question of whether the correspondent banking structure presents a problem in terms of licences issues when considering Brexit.
- 4.4. With regards to accepting deposits, Forum members discussed complexities around licencing structures and whether the perimeter drawn by individual E.U. Member States—such as, France—in relation to the U.S. would be extended to the U.K. Ultimately, the Forum members agreed that these issues were more political in nature, rather than legally uncertainty.
- 4.5. Turning to the matter of outbound business, Forum members acknowledged that this was not regulated by many countries as each considered outbound business outside their jurisdiction. The U.K. does consider some factors under Part XXIX, Section 418 of the RAO (*Carrying on regulated activities in the United Kingdom*). A member emphasised that the territorial scope of regulated activities is scattered throughout the RAO. Forum members agreed that codification of the rules in one place would bring clarity.

5. Any other business.

- 5.1. Clare Dawson delivered short remarks on legal complexities relevant to the loan market in the current environment. She identified the following key developments: the consultation by the Prudential Regulation Authority (“PRA”) on credit risk mitigation,⁴ the transition from LIBOR, and HM Government’s proposal for the [Business Contract Terms \(Assignment of Receivables\) Regulations 2017](#) (which have now been put on hold). With regards to the PRA consultation on credit risk mitigation, members agreed that the proposed requirement for the guarantor to be obliged, contractually, to pay out in a timely manner, i.e., within days instead of weeks or months, was of particular concern and may not be achievable.

⁴ PRA Consultation Paper CP6/18, Credit risk mitigation: Eligibility of guarantees as unfunded credit protection, (2018), available at: <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2018/cp618.pdf?la=en&hash=FDC3C115AE5B423A37BAA104C02D476F8EF12057>.

The FMLC Radar Function: *revisited*



Venessa Parekh, Research Manager

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FMLC Remit

“The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.”

FMLC Foundational Documents, September 2002



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.

Breaking down the radar function

The FMLC's radar function is (broadly) broken down into three initiatives:

1. **Scoping forums**
2. **Relationship management programme; and**
3. **Radar meetings**



Scoping Forums

“Scoping forums serve as an avenue for the FMLC to engage with focus groups on legal issues affecting specific segments of the financial markets.

The forums serve as spaces for discussion of broader issues of legal uncertainty. Members formulate and propose to the FMLC issues considered by them to cause substantive legal uncertainty to their industry.”

FMLC Brochure, January 2017



Scoping forums in practice

- A scoping forum establishes a **pool of expertise** available to the FMLC. That pool can guide the FMLC by **recommending specific issue to the FMLC for analysis**.
- Scoping forum members can make non-binding suggestions as to the manner of the FMLC's engagement and nominate experts for working groups.
- Meetings include presentations from industry experts, individuals with first-hand experience of legal uncertainty and those at the cutting edge of their respective fields.
- Scoping forums discuss all manner of topics, issues and solutions within their sector.
- Not every issue discussed will go on to become an issue adopted by the FMLC. Scoping forums are horizon-scanning bodies and places to share and compare knowledge. They are about **learning and discovery** as much as they are about **identifying specific issues for further consideration**.
- Information about the FMLC's scoping forums—as well as the agenda and minutes of all 2017 meetings—can be found on our website at: <http://www.fmlc.org/scoping-forums.html>

Relationship management

- Another key aspect of the radar function, the FMLC's **relationship management programme**, ensures regular communication and information exchange between the FMLC Secretariat and Patrons, Members or other stakeholders.
- Relationship management calls provide a valuable opportunity for participants to highlight issues—both present and future—for the FMLC to investigate, providing the FMLC with up-to-date and market-relevant information. They also allow the FMLC Secretariat to update Patrons and stakeholders on the Committee's recent work.
- FMLC Patrons have calls monthly. We organise calls with a predetermined list of stakeholders according to their appetite for engagement.
- Monthly relationship management calls normally last around 15 minutes. If you're a Patron who'd like to participate in your firms' monthly call (as an alternate perhaps), or if you'd like to receive a stakeholder call, let us know!



Radar meetings

- FMLC Chief Executive Joanna Perkins regularly meets with financial markets participants to discuss issues of legal complexity.
- These meetings are an excellent opportunity for the exchange of information. Participants can:
 - raise issues of concern or interest in relation to legal complexity, and
 - learn about the FMLC’s recent work and insights, get updates on forthcoming publications or—in the case of new contacts—learn more generally about the work and remit of the FMLC.
- Please speak to a member of the Secretariat if you are interested in arranging a meeting with your firm or organisation.

Information exchange

- The Radar programme guarantees that the FMLC addresses those issues that are of most concern to stakeholders in the financial markets, across the public and private sector.
- It also helps to ensure that the FMLC only addresses in depth issues that are material and may have an appreciable impact on the international wholesale financial markets.
- Together, these three Radar initiatives ensure our work is current and has impact.



Summary and Conclusion



To sum up...

- The FMLC is tasked with identifying, considering and addressing **legal uncertainty**...
- ...which is sometimes better thought of as “legal risk”.
- The **radar function** is the manner in which the FMLC identifies appropriate issues to analyse.
- The radar function is fulfilled through **scoping forums, relationship management calls, and radar meetings**.
- At this time, the FMLC Secretariat would be grateful for help with **assessing legal risks, identifying priorities and selecting issues for further work**.