



Financial Markets Law Committee (“FMLC”)

Insurance Scoping Forum

Date: Tuesday 22 May 2018

Time: 2.30pm to 3.30pm

Location: AIG, 58 Fenchurch St, London EC3M 4BE

In Attendance:

Chris Newby (Chair)	AIG
Peter Bloxham	
Theresa Chew	Hymans Robertson LLP
Beth Dobson	Slaughter and May
Reid Feldman	Kramer Levin Naftalis & Frankel LLP
Matthew Griffith	RPC
Adam Levitt	Ashurst LLP
Alison Matthews	Herbert Smith Freehills LLP
Steven McEwan	Hogan Lovells International LLP
James Middleton	AIG
Victoria Sander	Linklaters LLP
James Smethurst	Freshfields Bruckhaus Deringer LLP
Kees van der Klugt	Lloyd's Market Association
Michael Wainwright	Dentons UK and Middle East LLP
Venessa Parekh	FMLC
Thomas Willett	FMLC

Regrets:

Nick Bonsall	Slaughter and May
Nigel Brook	Clyde & Co LLP
Pollyanna Deane	Simmons & Simmons LLP
Jennifer Donohue	Algorithm and Extremal Consulting Limited
Hilary Evenett	Clifford Chance LLP
Richard Farnhill	Allen & Overy LLP
Charlotte Heiss	Royal & Sun Alliance Insurance Group plc
David Kendall	Cooley (UK) LLP
Benjamin Lyon	Debevoise & Plimpton LLP

Registered Charity Number: 1164902.

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Chris Sage
Jonathan Teacher
Graham White

Transatlantic Reinsurance Company
Swiss Re Management Ltd
Marine Aviation & General (London) Ltd

Minutes:

1. Introduction

- 1.1. Chris Newby opened the meeting and delivered a brief introduction, explaining that the shorter meeting time presented a good opportunity for Forum members to have a general discussion concerning legal uncertainties that are of importance to them and their clients.

2. Administration: the FMLC—a charity (Venessa Parekh)¹

- 2.1. Venessa Parekh described to members the FMLC’s transition from an independent body established by the Bank of England to its current status as a registered charity under the Charity Commission. She elaborated on the ways in which the FMLC’s charitable remit has an impact on its work and conduct, including very closely-guarded requirements to be transparent and impartial.²

3. Plenary discussion on recent developments and legal uncertainties in the insurance sector (led by Chris Newby)

- 3.1. Mr Newby began by mentioning that AIG, like many other U.K. law firms, has been in talks with the Prudential Regulation Authority (“PRA”) regarding the continued ability of U.K. insurers to provide business and service clients in the European Economic Area (“E.E.A.”) when U.K. passporting rights are withdrawn following Britain’s secession from the E.U. (“Brexit”).
- 3.2. Mr Newby relayed that, in line with HM Government’s plan under the European Union (Withdrawal) Bill (the “Withdrawal Bill”), the PRA, too, plans to maintain the current E.U. legal framework, transposing existing law in U.K. law while only implementing superficial changes. Risks located in the E.U. are currently insured in the U.K. on a freedom of services basis but it isn’t yet clear how this will work.

¹ Please see Appendix I below.

² For further information as to how you can support the work of the FMLC, please contact Thomas Willett at forums@fmlc.org.

- 3.3. To mitigate legal and operational uncertainties expected upon Brexit, one solution which insurers are exploring would involve the establishment in the U.K. of a branch of a company authorised in Luxembourg. The Luxembourg company would delegate authority into the U.K. branch. Without this option, it was explained that risk would have to be referred back into European insurers or offices and staff would have to be relocated out of London. The PRA's stance on this would be important as if it treated policyholders as policyholder of the U.K. branch, despite them being E.U. policyholders of an E.U. insurer, it could risk creating a perception of an attempt by the insurer to avail itself of passporting rights which are no longer available in the U.K.
- 3.4. Forum members discussed the challenges to this solution, including uncertainties in the post-Brexit application of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (the "**CRR**"), the probability that E.U. firms would be subject to the limited rules for Third Countries available in Solvency II should they wish to access the UK market (until such a point that U.K. authorities amended received legislation), and case law in the U.K. owing to which distinguishing between the "freedom of establishment" and "freedom of services" remained tricky.
- 3.5. Members expressed the need from HM Government or HM Treasury to provide a solution in order to ensure that insurers on both sides of the border are not prevented from providing services post-Brexit.
- 3.6. Next, a Forum member mentioned that the Financial Conduct Authority ("**FCA**") had privately written to insurers concerning the requirements they need to meet in order to carry out a Part VII transfer of insurance business. Forum members acknowledged ongoing concerns in relation to the process.
- 3.7. Another member brought up the topic of "Brexit clauses" which were being designed across the City to enable contracts to continue to be performed post-Brexit. Clauses such as this allowed a party to a contract to substitute another party in its place. This inspired a discussion about the lack of a definition of a "contract of insurance" for different instruments. A member explained that the courts have never fully defined the common law meaning of "insurance" and "insurance business" and only guidance in the form of descriptions have been given to "contracts of insurance". For instance, the member explained that there is still uncertainty as to whether credit derivatives apply in a life insurance context and if guarantees given by banks could constitute a contract of insurance. Although the guidance is useful, the member stressed that ambiguity still exists.

3.8. While the participants agreed that no definition exists for a “contract of insurance”, they arrived at the conclusion that such an exercise would be too large in scope and too challenging. Rather than attempting to explore the nature of insurance as a whole, a Forum member suggested that a more focused line of enquiry could be to determine whether advances in technology have altered the nature of insurance and have created legal uncertainties.

3.9. Lastly, a member suggested the impending results of the PRA’s consultation on credit risk mitigation could serve as a topic for the next meeting of the Insurance Scoping Forum.

4. Any other business.

4.1. Forum members noted that the next meeting of the Insurance Scoping Forum will be held on Tuesday 4 September between 2.00pm and 3.30pm.

Financial Markets Law Committee: a charity (And what that really means)

Venessa Parekh, Research Manager

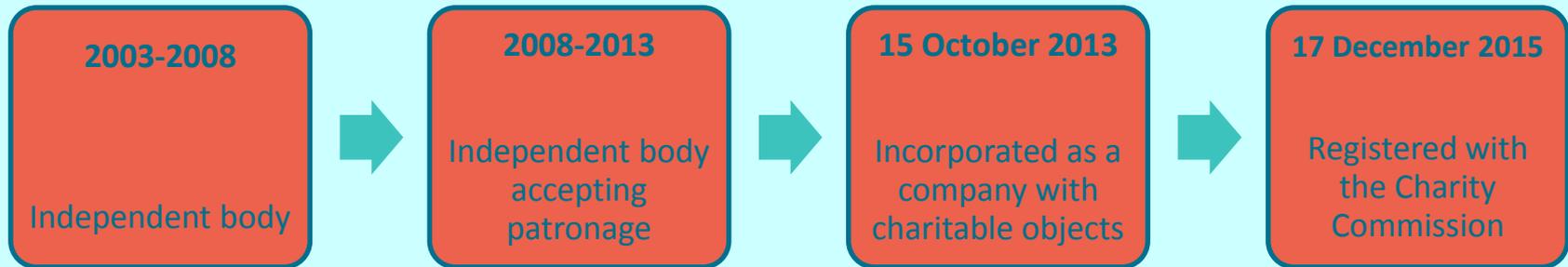


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The road to incorporation

- In **2003** the Bank of England established the FMLC as an independent organisation solely responsible for its own recommendations.
- In **2008**, the FMLC took a step towards greater independence by accepting funding from patrons.
- In **October 2013** the FMLC achieved structural self-sufficiency by **incorporating under charitable articles of association**.
- In **December 2015** the Charity Commission accepted the FMLC's application to **register as a charity**.



The FMLC's charitable remit



According to the charitable 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).

Reduced legal uncertainty and risk is in the public good; the *radar* and *research* functions are somewhat self-explanatory in this regard. The *public education* function is a key aspect of the FMLC's status as a charity, and is addressed in the following ways:

- All FMLC papers, presentations/speeches and correspondence are freely available via the FMLC website.
- The FMLC seeks to raise the profile of its research with those who are best positioned to implement solutions.□This is achieved primarily through correspondence: the FMLC maintains active correspondence with regulatory and legislative groups around the world, particularly HM Treasury and the European Commission.
- Most FMLC events (with the exception of Patrons' events) are free to attend by members of the public.
- The FMLC also acts as a bridge to the judiciary, a task it carries out primarily by organising seminars to brief senior members of the judiciary on aspects of wholesale financial markets practice.

Transparency...



The FMLC follows the Charity Commission's guidance with the aim of maximising transparency. To this end, the FMLC:

- is registered with—and submits financial data to—the European Transparency Register;
- publishes full lists of both Patrons and Members on its website;
- is regularly audited by an independent accountancy firm;
- provides funding/expenditure breakdowns on request;
- publishes the minutes of Committee meetings to its website;
- publishes the agendas/minutes of every Scoping Forum meeting on its website;
- maintains policies governing conflict of interest, risk management and volunteer management; and
- remains independent from the Bank of England, government or legislative bodies and the financial sector itself..

...and impartiality



Since its creation the FMLC has been an independent body solely responsible for its own views and research. The Bank of England does not guide or submit input to the FMLC's reports. Anyone—including members of the general public—can raise issues of legal uncertainty for the Committee to investigate.

The FMLC does not comment on or seek to influence matters of policy. Issues relating to policy rather than solely to legal uncertainty are rejected.

The FMLC is dedicated to impartial consensus; for this reason the absolute maximum number of members from a single organisation is two individuals for a Scoping Forum, and one for a Working Group.

Scoping Forums have no *vires* to initiate projects or pass resolutions affecting the FMLC. Substantive issues of legal uncertainty are proposed by the Secretariat to the FMLC as a topic which may require further action.

Papers drafted by Working Groups are submitted to the entire Committee for review to ensure accuracy, objectivity and impartiality.

The FMLC is supported entirely by patronage. Patronage relates to funding only, there are no further contribution expectations or requirements and no special treatment for Patrons apart from seasonal social events.

Future endeavours/ can you help?

The FMLC's educational remit is theoretically endless: there are always more financial markets participants, regulatory/government bodies and members of the public to keep informed of our work.

To that end, the FMLC is currently researching or pursuing the following:

- A full revamp of the website, focusing on accessibility and greater sharing of materials.
- Boosting attendance of FMLC events by members of the general public.

The FMLC is also considering new ways to disseminate its research, and in future may investigate:

- Recording/broadcasting solutions for events to allow greater access.
- Summarising and disseminating the FMLC's work in easily digestible media formats such as short videos or podcasts.

The FMLC is grateful for suggestions on how to amplify its message, better to serve its charitable function and the general public. Can you help?