

Upcoming FMLC Publications

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Upcoming FMLC Publications:

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The following letters will be available on the FMLC [website](#) early next week.

Letter on the Assignment of Claims

The FMLC will send a letter in response to the European Commission's proposed [regulation](#) (the "**Regulation**") on the "third-party effects" of the assignment of claims. The Regulation applies the law of the assignor's habitual residence to the proprietary and third-party effects of an assignment, with various carve outs. The FMLC has written previously on this issue, including in response to a European Union consultation on the Regulation last year. The FMLC's [published view](#) has been that the law of the underlying claim, not the law of the assignor's habitual residence, should govern the proprietary effects. This is consistent with Rome I, preserves the contractual freedom of the parties and avoids difficult characterisation issues.

On 9 July 2018, HM Government [announced](#) that it would not be opting in to the proposed regulation. The FMLC will nonetheless send the letter to the European Commission to communicate its view that the Regulation creates more legal uncertainties than it resolves.

Letter on the Proposal to Amend Moratorium Powers

Following publication of the FMLC [paper](#) on 13 April 2018, which outlines legal uncertainties arising from the European Commission's proposal to amend moratoria powers in the Bank Resolution and Recovery Directive, stakeholders have been in touch with the Secretariat to draw attention to the latest proposal being considered by the European Parliament. The proposal suggests a two-day pre-resolution moratorium, followed by a ten-day break before the in-resolution moratorium begins. The Committee has approved a letter to be sent to the Rapporteur for the BRRD in the European Parliament, highlighting the practical uncertainties of this proposal.

Letters on "Legacy" E.U. Secondary Legislation

By recommendation of stakeholders, the FMLC has written to the Ministry of Justice and to the European Commission, highlighting issues of legal uncertainty about the treatment of Level 2 E.U. legislation when the relevant Level 1 act has been repealed or recast. In some cases, the Level 2 legislation is repealed too; in other cases, the legal basis of the Level 2 legislation is shifted to a newer Parent Act and the Level 2 legislation remains in force. In a few cases, upon the repeal of a Parent Act, the Level 2 regulation is labelled "implicitly" repealed.

There is little clarity, however, on how one of these paths is chosen. These issues are complicated further by the U.K.'s impending withdrawal from the E.U. and HM Government's strategy by means of the European Union (Withdrawal) Act 2018 to incorporate into U.K. law all E.U. legislation which "is operative" or "has effect in domestic law" immediately before Exit Day.

FMLC Paper on the Establishment of an Insurer in an E.U. Member State

In November 2016, a Working Group was convened by the FMLC to consider the distinction between a re(insurer) providing services in an E.U. Member State and becoming established in that E.U. Member State. The Working Group produced a [paper](#) considering this and related issues of legal uncertainty, which was not reviewed by the Committee and was published instead by the British Insurance Law Association (the “**BILA paper**”) on 10 January 2018.

In the context of the U.K.’s impending withdrawal from the E.U. (“Brexit”), the FMLC has now published its own paper developing the themes explored in the BILA paper. As U.K. insurers with clients in the E.U. begin to plan for the possibility that no deal is struck, it has become clear that the uncertainties in respect of the establishment of an insurer in an E.U. Member State will persist. In this paper, the FMLC evaluates the legal complexity involved in distinguishing between the freedom of establishment and the freedom to provide services, with reference to the European Commission’s Interpretive Communication, published in 2000, and the Solvency II Directive. The Committee highlights the impact of uncertainties on (re)insurers planning for Brexit and recommends that further clarity on this topic will assist both U.K. and other E.U. undertakings to ensure continued compliance with the regulatory framework post-Brexit.

[\(Read / download the paper here\)](#)

FMLC Letter on Legal Uncertainties relating to Insurance Business

The FMLC has sent a letter to HM Government’s Department for Exiting the European Union, outlining the issues of legal uncertainty arising from insurance business in light of Brexit. The letter draws attention to the uncertainties in identifying whether and when an insurer is providing services in another Member State, which is the subject of in-depth consideration in the above paper (the “**Establishment Paper**”). The letter also states that this question is vital to U.K. (re)insurers which are applying under Part VII of FSMA 2000 to transfer certain contracts to entities established in E.U. Member States.

In this letter, the FMLC asks HM Government to raise the need for further guidance on this issue with the European Commission. The issue of similar guidance for the benefit of firms hoping to access the U.K. market after Brexit is also recommended.

[\(Read / download the letter here\)](#)

New Working Group on Legislative Conflict relating to Sanctions

On 8 May 2018, President Donald Trump announced that the U.S. was withdrawing from the Iran nuclear deal and reinstating secondary sanctions against non-U.S. persons that do business with Iran. In response, on 18 May 2018, the European Commission announced that it would be taking steps to reactivate the Blocking Regulation (the “**Regulation**”), which prohibits E.U. entities from complying with specified foreign laws listed in the Annex to the Regulation. This process attempts to block the extra-territorial effect of foreign sanctions, as breach of the Regulation results in penalties against the relevant E.U. entities.

Assuming that the U.S. and the E.U. proceed with secondary sanctions and the Regulation, respectively, legal complexity is a certainty. The FMLC has resolved to convene a Working Group to consider the potential issues which may arise in so far as those fall within the Committee’s remit.

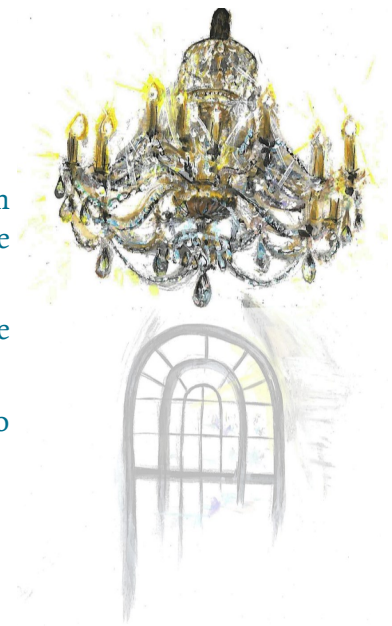
If you would like to inquire about your firm's participation in this Working Group or for more information, please email Aarushi Sahore at legalintern@fmlc.org.

Patrons’ Dinner—2018

The FMLC will host a Patrons’ Dinner on Thursday 4 October 2018, from 7.15pm onwards at the Bank of England. A drinks reception will precede the dinner.

The dinner is an annual opportunity to thank Patrons for their valuable contributions to the work of the Committee.

If you have not yet sent in your acceptance, please email to events@fmlc.org.



Original artwork by Priya Odedra

New FMLC Website

As you might have noticed, the FMLC website has undergone a revamp, which was officially revealed on Friday 29 June 2018. The website serves as part of the FMLC’s public education function—a key aspect of the FMLC’s charitable remit—to ensure transparency and inclusivity in relation to its research and publications.

Any suggestions?

Should you have any comments or suggestions on the FMLC’s new look, or on how to further ease of access on the website, please contact publications@fmlc.org.

Brexit-related Statutory Instruments (“SIs”)

HM Government has begun publishing draft SIs in pursuit of the objectives of the European Union (Withdrawal) Act (the “**Withdrawal Act**”). So far, three of particular relevance to the financial markets are available to review:

- the draft [Financial Regulators’ Powers \(Technical Standards etc.\) \(Amendment etc.\) \(EU Exit\) Regulations 2018](#);
- the draft [The Central Counterparties \(Amendment, etc., and Transitional Provision\) \(EU Exit\) Regulations 2018](#); and
- the draft [EEA Passport Rights \(Amendment, etc., and Transitional Provisions\) \(EU Exit\) Regulations 2018](#).

The FMLC has resolved to identify legal uncertainties in arising from these and the other anticipated statutory instruments.

Should you or a colleague be working on particular issues/SIs and would like to suggest issues of legal uncertainty on which the FMLC might usefully contribute, or would like to be involved in any related projects, please let us know.

The FMLC Secretariat would be delighted to hear from Patrons that might have any suggestions on the topic of SIs. Please contact Venessa Parekh by email: research@fmlc.org.

Registered Charity Number: 1164902.