Financial Markets Law Committee ("FMLC")

Insurance Scoping Forum

Date: Thursday 7 September 2017
Time: 10.00am to 11.30am
Location: Bank of England, Threadneedle Street, London, EC2R 8AH

In Attendance:
Chris Newby (Chair) AIG Europe Limited
Beth Dobson Slaughter and May
Richard Farnhill Allen & Overy LLP
Reid Feldman (dial in) Kramer Levin Naftalis & Frankel LLP
David Kendall Cooley (UK) LLP
Adam Levitt Ashurst LLP
Alison Matthews Herbert Smith Freehills LLP
George Scott Pacific Life Re Limited
James Scoville Debevoise & Plimpton LLP
James Smethurst Freshfields Bruckhaus Deringer LLP
Michael Wainwright Dentons UKMEA LLP
Graham White Marine Aviation & General (London) Ltd
Kees van der Klugt Lloyd's Market Association

Venessa Parekh FMLC
Thomas Willett FMLC

Regrets:
Theresa Chew Hymans Robertson LLP
George Belcher Skadden, Arps, Meagher & Flom LLP
Nigel Brook Clyde & Co LLP
Jennifer Donohue Ince & Co
Matthew Griffith RPC
Charlotte Heiss Royal & Sun Alliance Insurance Group plc
Benjamin Lyon Debevoise & Plimpton LLP
Steven McEwan Hogan Lovells International LLP
Sean McGovern XL Catlin
Chris Sage Transatlantic Reinsurance Company
Minutes:

1. Introduction.

1.1. Chris Newby opened the meeting and delivered a brief introduction.

2. Administration

a. short presentation on key FMLC statistics (Venessa Parekh);¹

2.1. Venessa Parekh presented to the Forum members a selection of FMLC statistics about the range of legal uncertainties analysed by the FMLC since 2003, recent publications and events, the international connections the FMLC have forged, and a glance at funding and expenditure. Information on how to get involved in the FMLC’s work was included on the last slide.

b. present the draft 2018 Forward Schedule;²

2.2. The draft 2018 Forward Schedule was presented to Forum members. These dates will be recirculated for comment and confirmed at the next Forum meeting on 7 December 2017.³

c. suggestions for the 2018 Forward Agenda.⁴

2.3. Some participants suggested that discussions on Brexit in relation to the insurance industry should be put on the agenda for the next Forum meeting in December and, depending on developments in U.K.-E.U. negotiations, for the 2018 meetings. Another

¹ Please see Appendix I below.

² Ibid., slide 10.

³ In the meanwhile, if you have any suggestions or queries regarding the draft 2018 Forward Schedule, please contact Thomas Willett at forums@fmlc.org.

⁴ If you have any suggestions for the 2018 Forward Agenda, please contact Thomas Willett at forums@fmlc.org.
The topic raised by participants was the legal uncertainties arising from insurance business transfer schemes under Part VII of the Financial Services and Markets Act 2000.³

2.4. Forum members also mentioned insurance-related issues in connection with smart contracts.

2.5. Forum members resolved to send any agenda topics for the December meeting, including those concerning Brexit, to the Secretariat by end of October.⁶


3.1. Further to the discussion on the IDD at the Q2 Forum meeting in June,⁷ the Forum members considered the second round consultation from the Financial Conduct Authority (“FCA”).

3.2. Participants agreed that legal uncertainties were not raised by this Consultation—or indeed the IDD. The issues were rather more practical.

3.3. One participant, however, suggested that Article 16 of the IDD, on the restriction on the use of intermediaries, could present complexities in the context of Brexit, especially for E.U. insurers dealing with U.K. intermediaries for whom outsourcing back into the U.K. could raise issues.

4. Update on the General Data Protection Regulation (“GDPR”) (Kees van der Klugt).

4.1. In a follow-up to the discussion held at the previous meeting of the Insurance Scoping Forum, on the GDPR,⁸ Kees van der Klugt updated the Forum members on the potential legal uncertainty which may be faced by insurers in relation to the consent guidance under the GDPR.

4.2. Mr van der Klugt provided a short overview of the new guidance published in draft by the Information Commissioner’s Office (“ICO”) in March 2017 for processing special categories of personal data (sensitive personal data) by insurers. Under this guidance, the only practical ground for processing data in the arranging and underwriting of insurance,


⁶ Please send any agenda topic suggestions for the Q4 meeting in December to Thomas Willett at forums@fmlc.org.

⁷ Minutes from the Q2 Forum meeting in June 2017 are available at: http://www.fmlc.org/uploads/2/6/5/8/26584807/.fmlc_up_11689218_v_1_minutes_8_june_2017_insurance_scoping_forum.pdf

⁸ Ibid.
and paying claims, is the consent of customers. This presents practical and legal problems and the Lloyd’s Market Association (with other associations) had been in contact with the ICO and the Department of Culture, Media and Sport (“DCMS”) to request a derogation under the GDPR to provide a new practical ground for the processing of such data by insurers.

4.3. The ICO’s guidance also states that the customer must be able to withdraw consent. Such withdrawal would potentially frustrate a contract of insurance, where continuing consent is necessary for administration and claims settlement. The ICO has outlined in its guidance that “conditional consent” is not appropriate (i.e. agreeing to underwrite a contract of insurance on the basis that consent will run with the contract).

4.4. Mr van der Klugt highlighted the legal uncertainties arising from this situation, for example in relation to group policies, where a beneficiary could withdraw consent; or in relation to mandatory insurance, e.g. motor and employer’s liability. Members formed a consensus that the issues were largely practical. A legal risk may arise if consent were to be withdrawn but this seems unlikely.

4.5. Forum members raised questions about how this issue was being dealt with by other Member States.

5. **Insurance: innovative forms of coverage (Graham White).**

5.1. Graham White identified cyber and security-related challenges as one of the biggest preoccupations of the insurance industry. Mr White highlighted that getting the wording of cyber policies correct was critical to the development of the industry and to the mitigation of risks.

5.2. Mr White referred briefly to kidnap and ransom insurance and how the factors used to determine such policies were being considered in relation to insuring cyber risks.

5.3. Mr White concluded by observing that the challenges arising from innovation will raise new and as yet unknown legal uncertainties. Establishing a legal framework will be crucial to negotiating legal risk.

5.4. In the discussion following Mr White’s remarks, Forum members expressed an interest in discussing, at a future meeting, micro-insurance as utilised after natural disasters.

6. **Any other business.**

6.1. No other business was raised.
Did you know ..?
A quick glance at some FMLC numbers

Venessa Parekh,  Acting Project Manager
Since 2003, the FMLC has analysed and made recommendations to resolve legal uncertainties in 212 disparate topics.
FMLC research is conducted through:

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<th>Scoping Forums</th>
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- Banking
- Brexit
- Buy-side
- Infrastructure
- Insurance
- Fintech
- Sovereign Debt

... were established since the beginning of 2016:
- 7 Working Groups are still active;
- 5 deal with matters related to Brexit; and
- 9 have published and are anticipating further work.
FMLC Publications

- 22 publications were produced in 2016
- 69 pages in our longest paper
- 5 publications were on the topic of benchmarks reform
2016-Present FMLC Events

10 formal events were held

45 guest speakers across all events

4 events examined legal uncertainties arising from Brexit

176 guests attended the 2016 Spring Colloquium on the anticipated U.K. referendum. This was the FMLC’s most successful event in the past 3 years
International connections

- 18 speeches were given by the FMLC CEO in 5 different countries
- 4 calls are held every year with the Financial Markets Lawyers Group ("FMLG") (New York)
- 3 sister organisations (associated with the Federal Reserve, the ECB and the Bank of Japan) participate in an annual conference with the FMLC
- 7 jurisdictions (E.U., Hong Kong, Japan, Switzerland, Singapore, U.K. and U.S.) hold a biannual information-exchange video conference
People and the FMLC

- 39 patron organisations
- 35 average members per Scoping Forum
- 26 Committee Members
- 15 average members per Working Group
- 11 staff at the FMLC Secretariat (plus one volunteer!)
Looking under the hood …

89% of the FMLC’s charitable income is spent on Secretariat salaries

Expenditure on Salaries
£312,700

Donations
£347,500
You can get involved in the FMLC’s work by becoming a:

- **patron**—for a sample Patrons’ Newsletter, a copy of the FMLC donation pack and any other enquiries, please contact: Barbara Martin (patrons@fmlc.org);
- **stakeholder**—for a sample Stakeholders’ Newsletter and any other enquiries, please contact: Rachel Toon (executivesupport@fmlc.org); or
- **recipient to our general mailing list**—should you wish to receive regular notifications about new FMLC publications, please contact: Amy Shaw (secretarial@fmlc.org).
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<th>Date</th>
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<td>Tuesday 20 February</td>
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<td>Tuesday 22 May</td>
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<td>Tuesday 4 September</td>
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<td>Tuesday 20 November</td>
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Conclusion / The End

Financial Markets Law Committee
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