Insurance Scoping Forum

Date: Thursday 9 March 2017
Time: 10:00 – 11:30am
Location: AIG, 58 Fenchurch Street, London, EC3M 4AB

In Attendance:

Chris Newby (Chair)      AIG
George Belcher        Skadden, Arps, Slate, Meagher & Flom LLP
Beth Dobson            Slaughter and May LLP
Jennifer Donohue       Ince & Co LLP
Alastair Evans         Lloyd’s
Hilary Evenett         Clifford Chance LLP
Reid Feldman (by telephone)  Kramer Levin Naftalis & Frankel LLP
Matthew Griffith       RPC LLP
David Kendall          Cooley LLP
Adam Levitt            Ashurst LLP
Benjamin Lyon          Debevoise & Plimpton LLP
Alison Matthews        Herbert Smith Freehills LLP
Steven McEwan          Hogan Lovells LLP
Sean McGovern          XL Catlin
Mike Munro             CMS Cameron McKenna LLP
James Smethurst        Freshfields Bruckhaus Deringer LLP
Clare Swirski          Clifford Chance LLP
Kees van der Klugt     Lloyd’s Market Association
Michael Wainwright     Dentons LLP

Venessa Parekh         FMLC Acting Project Secretary
Rachel Toon           FMLC Senior Administrator
Regrets:

Adrian Hacking  Scor SE
James Ray  Twelve Capital
Simeon Rudin  Freshfields Bruckhaus Deringer LLP
Chris Sage  Transatlantic Reinsurance
Victoria Sander  Linklaters LLP
George Scott  Pacific Life Re
Martin Thomas  Altima Partners LLP

Minutes:

1.  Introductions

2.  Forum administration

2.1. FMLC Communications Officer, Venessa Parekh, outlined the remit of the FMLC, the practical meaning of “legal uncertainty” within this remit, the mission which derives from the remit, the role of scoping fora within this mission, the six purposes which are fulfilled by the eight scoping fora which the FMLC has established so far and the questions which it would be helpful for members to address in 2017.

2.2. The procedure of publishing Forum documentation on the FMLC website within the public domain was outlined.

3.  Presentation and discussion about climate-related insurance

3.1. Sean McGovern presented an overview of climate-related insurance products and identified them as an area for growth in the insurance industry—particularly in emerging markets where there is a very significant insurance gap, meaning that disasters create very significant economic damage in addition to human tragedy. Low insurance penetration, poor disaster resilience and a lack of data all hinder the traditional ways of assessing and pricing risks. The industry also often lacks support from the prevailing financial and regulatory infrastructure.

3.2. Mr McGovern observed that there are benefits to be gained from private-public collaboration, whereby governments would focus on helping to build hazard and disaster-related data, build and incentivise better resilience into their infrastructure and ensure the regulatory regime creates the best conditions for insurers to take risk. In turn, the insurance industry would share its research and work towards constructing innovative risk transfer solutions.

1 Please see Appendix I below
3.3. The Insurance Development Forum, jointly formed by the United Nations, the World Bank and the insurance industry, is working to support this public-private partnership across the world to build resilience. Mr McGovern tentatively raised this work as a topic for possible discussion at a later meeting.

3.4. Forum members indicated their preference to return to this topic once there had been more development of specific disaster management-related insurance products.

4. A discussion on the EBA’s response to the FMLC insurance as CRM letter

4.1. Mike Munro provided the background to the FMLC’s letter to the European Banking Authority ("EBA") regarding the potential eligibility of credit insurance as unfunded credit risk protection under the Capital Requirements Regulation (E.U.) 575/2013 ("CRR").

4.2. The EBA's reply, whilst helpfully noting a number of existing responses in the Single Rulebook Q&A which contain guidance bearing on certain aspects raised in the FMLC's letter, suggested that any additional clarification on specific points should be sought specifically through the public Q&A process.²

4.3. The group discussed whether, in the light of the existing guidance and the EBA's reply, the FMLC should take up that suggestion in relation to any specific points. In this context there was, amongst other things, particular discussion of the interpretation of the phrase “timely manner” in relation to which there remained a certain level of discomfort despite the EBA’s recent clarification in Q&A 2306.³

4.4. The Group's view, however, was that the EBA’s responses to date give reasonable comfort that, if properly structured, insurance contracts may, in principle, be viewed as "guarantees" for the purposes of the CRR (the test being one of substance rather than strict legal form).

4.5. In the circumstances, the group was not clear that further specific approaches to the EBA were necessarily required at this stage. It agreed that the issue should be kept under review and revisited by the Forum in due course, taking account, if appropriate, of further developments or guidance.

5. Update on FMLC project concerning the establishment of an E.U. insurer in another member state

5.1. David Kendall laid out the progress made by the Working Group on its report on the establishment of an E.U. insurer in another member state.

² Please see Appendix II below

³ The text of Q&A 2306 is available here: http://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2015_2306
6. **Update on FMLC work regarding Brexit**

6.1. Chris Newby reiterated FMLC protocol which specifies that a working group can only consider a single issue of legal uncertainty.

6.2. The Forum members discussed the legal risks arising from Brexit in relation to reinsurance. It was decided that a briefing note outlining these risks and their context would be sent to the FMLC Secretariat by **Thursday 23 March** so that it could be put before the Committee during their next meeting.

7. **Any other business**

7.1. No other business was raised.
Financial Markets Law Committee
Insurance Scoping Forum

Thursday 9 March 2017
10:00am to 11:30am
THE FMLC RADAR FUNCTION: an introduction

Venessa Parekh, Acting Project Secretary
Financial Markets Law Committee
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 Founding Documents, September 2002
"But in my view, legal uncertainty is just another name for legal risk: the risk of increased litigation over legal rights that are poorly defined, the risk of market disruption because legislation has unintended consequences, or the risk that market standard contracts turn out to be unenforceable. These are broadly the sorts of issues the FMLC has been established to tackle."

Joanna Perkins, FMLC Chief Executive
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.
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, and members formulate and propose to the FMLC issues considered by them to cause substantive legal uncertainty to their industry.”

FMLC Brochure, January 2017
How Scoping Forums work...

- A scoping forum, then, should serve six key purposes:
  1. to establish a pool of expertise available to the FMLC;
  2. to enable full discussion among interested parties with a view to facilitating collective legal risk assessment;
  3. to guide the FMLC and establish priorities for the expenditure of resources;
  4. to make recommendations to the FMLC as to specific issues to be addressed;
  5. to make non-binding suggestions as to the manner of the FMLC’s engagement with the issues; and
  6. to nominate experts to working groups.
- At this time of significant political change, the FMLC Secretariat would be grateful for assistance with items 2-4, in particular.
Questions, questions…

• Assuming the FMLC has limited resources to devote to Insurance issues, in 2017, which are those that it should prioritise?

• Does the Forum agree that the flow of information between members and the FMLC Secretariat should ideally be a 2-way process? How can the Secretariat best assist the Forum in its discussions?

• Does the Forum agree that the Secretariat should table updates for the Forum on issues which the FMLC considers relevant to the industry, although not a commercial priority (e.g. developments in other jurisdictions)?

• *For a fuller list of questions for consideration, please apply to the Secretariat, which will make one available by email or at the next meeting.*
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 Forum is a means by which the FMLC can fulfil its radar function.

• The Forum serves six key purposes.

• At this time, the FMLC Secretariat would be grateful for help with assessing legal risks, identifying priorities and selecting issues for further work.

• The Secretariat has highlighted questions for possible consideration.*
Dear Ms Perkins,

Many thanks for your letter dated 16 December to EBA Chairperson Andrea Enria and myself regarding unfunded credit protection under the CRR.

As a general rule, it is not possible for EBA staff to provide advice or address question on a bilateral basis, in order to avoid un-level playing field concerns. For this reason, we suggest that you to formally submit a question in the Q&A Tool on the eligibility of (credit) insurance to be treated as a guarantee for the purposes of CRM, possibly but not necessarily as follow up to Q&A 768, which you highlighted within your letter. Guidance on submitting Q&As can be found here.

In any case, it might be helpful to you to point out that the topic you mention has been partly covered in Q&A 803, related to Articles 213 and 215 CRR, and more recently also by Q&A 2306, which further specified the term "timely manner". We do hope this will help answering your question.

Thank you for your understanding and apologise for the somewhat belated response.

Kind regards

Lars

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Dear Mr Enria,

Please find attached a soft copy letter from Joanna Perkins (Chief Executive of the Financial Markets Law Committee) in relation to unfunded credit protection under Regulation (EU) No 575/2013 of June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (the “CRR”). A hard copy of the letter has also been posted to your offices today.

Yours sincerely,

Jennifer Enwezor
Project Secretary
Financial Markets Law Committee
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