



## Financial Markets Law Committee (“FMLC”)

### Sovereign Debt Scoping Forum

Date: Tuesday 11 September

Time: 8.30am to 10.00am

Location: Bank of England, Threadneedle Street, London, EC2R 8AH

#### **In Attendance:**

Rodrigo Olivares-Caminal (Chair)	Queen Mary University of London
Carter Brod	Morgan, Lewis & Bockius UK LLP
Leland Goss	International Capital Market Association
Duncan Kellaway	Freshfields Bruckhaus Deringer LLP
John McGrath	Sidley Austin LLP
David Sabel	Cleary Gottlieb Steen & Hamilton LLP
Andrew Shutter	Cleary Gottlieb Steen & Hamilton LLP
Harriet Territt	Jones Day
Deborah Zandstra	Clifford Chance LLP
Venessa Parekh	FMLC
Thomas Willett	FMLC

#### **Regrets:**

Lachlan Burn	Linklaters LLP
Ian Clark	White & Case LLP
Francis Fitzherbert-Brockholes	ICE
Jim Ho	Cleary Gottlieb Steen & Hamilton LLP
Rosa Lastra	Queen Mary University of London
Yannis Manuelides	Allen & Overy LLP
Andrew Yianni	Clifford chance LLP

**Registered Charity Number: 1164902.**

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## Minutes:

### 1. Introductions

- 1.1. Rodrigo Olivares-Caminal opened the meeting.

### 2. Administration: Scoping Exercise—Statutory Instruments under the Withdrawal Act (Venessa Parekh)<sup>1</sup>

- 2.1. Venessa Parekh described to members the way in which the FMLC is conducting work on the draft statutory instruments (“SIs”) under the European Union (Withdrawal) Act 2018 in relation to the financial services. In addition to the FMLC resolving to meet on an *ad hoc* basis should the volume of draft SIs and gravity of the legal complexities require the Committee’s full attention, the Secretariat will also write to an existing Working Group or Scoping Forum on the topic of the SI to ask for their assistance and expertise in identifying any drafting inconsistencies or logical discrepancies.<sup>2</sup>

### 3. Remarks on recent developments in Cuba (Rodrigo Olivares-Caminal)

- 3.1. Professor Olivares-Caminal began by detailing Cuba’s sovereign debt history. In 1986, Cuba declared a moratorium on repaying commercial banks and western governments which had lent it money. In 1993, a new Central Bank was established. This bank did not carry the old debts and was able to access new financing until 2010. In 2011, the Cuban government changed policy and sought to reprofile some of the debt and secure new loans. Sporadic bilateral financing has been obtained, mainly from Venezuela, but currently is very limited.
- 3.2. In 2015, an ad-hoc creditor committee was formed, comprising creditors who in total owned approximately 50% of Cuba’s private sector debt. Several attempts were made to engage the government on repayment but these failed. At the end of 2015, a deal with a group of bilateral creditors was made, under which Cuba agreed to pay \$2.6 billion in arrears in return for debt relief over 18 years. Cuba has not, however, dealt with its defaulted commercial creditors in the London Club which holds obligations representing \$5 billion worth of debt (including principal and PDI), despite the committee reaching out in January 2018 with a restructuring proposal in a manner similar to that agreed with the bilateral creditors.

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<sup>1</sup> Please see Appendix I below.

<sup>2</sup> Should you identify an issue of legal uncertainty in a statutory instrument before receiving correspondence from the Secretariat, please contact Venessa Parekh at: [research@fmlc.org](mailto:research@fmlc.org).

3.3. Professor Olivares-Caminal observed that Cuba's unwillingness to engage was almost certainly representative of its inability to access any new sources of financing. Members also briefly discussed the symbiotic relationship between Cuba and Venezuela.

**4. Remarks on recent developments, including Argentina and Venezuela (Rodrigo Olivares-Caminal)**

4.1. Professor Olivares-Caminal described the current situation in Venezuela as a huge humanitarian disaster. He provided an overview of the situation in Venezuela where both the sovereign state as well as a state-owned enterprise (PDVSA) had issued bonds and payments on which they had defaulted. Discussions on remedying the situation of PDVSA's debt had been held focusing on the possibility of using U.S. Chapter 11 and U.K. schemes of arrangement.

4.2. The members then discussed the ruling from a U.S. judge giving a Canadian mining company, Crystallex, permission to seize shares of the Venezuelan holding company that owns Citgo, a U.S. oil refiner. The judge ruled that Crystallex had the right to attach the shares to compensate for \$1.4 billion it is owned by the Venezuelan state.

4.3. One Forum member mentioned that some of the Venezuelan bonds have links to the U.K. in that there is contractual submission to the jurisdiction of the English courts. Focusing on recent sanctions, the participant queried how law firms are negotiating the U.S. sanctions and offering services to clients without falling foul of the restrictions. Members noted the difficulty in gaining clearance to operate with the sanctions in place. Any restructuring of Venezuela's debt has become very difficult as U.S. creditors are prevented from entering restructuring discussions.

4.4. Lee Buchheit and Mitu Gulati's paper on *Sovereign Debt Restructuring and U.S. Executive Power* was then discussed.<sup>3</sup> The members resolved to hold a discussion on this paper at the Q4 Sovereign Debt Scoping Forum meeting.

4.5. Professor Olivares-Caminal then gave a brief update on the recent developments in Argentina. The members noted that inflation had reached 3.9% in August from July, with prices rising 34.4% compared to a year ago. The current domestic situation in Argentina

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<sup>3</sup> Buchheit, Lee C. and Gulati, G. Mitu, *Sovereign Debt Restructuring and U.S. Executive Power* (Reestructuración De Deuda Soberana Y El Poder Ejecutivo Norteamericano) (September 4, 2018). *Capital Markets Law Journal* (forthcoming). Available at SSRN: <https://ssrn.com/abstract=3243663>.

was also touched upon, with members highlighting that investors have begun to worry about its potential impact.

**5. Plenary discussion on recent developments and legal uncertainties concerning Sovereign Debt**

5.1. One participant mentioned that the court of appeal will be issuing their final verdict on the Russia/Ukraine sovereign bond dispute in the coming days. It was agreed that the members should revisit this topic at the next Forum meeting.

5.2. A member noted that the European Stability Mechanism (“**ESM**”) is considering aligning the E.U. collective action clauses (“**CACs**”) with the single limb CACs, the current international standard. Another member observed that it would interesting to discuss insurance linked securities for sovereigns as well as recent developments in Puerto Rico.

**6. Any other business**

6.1. Forum members noted that the next meeting of the Sovereign Debt Scoping Forum will be held on Tuesday 4 December between 8.30am and 10.00am.

# Scoping Exercise—Statutory Instruments under the Withdrawal Act

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Venessa Parekh, Research Manager

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# Recent Developments ...

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- The European Union (Withdrawal) Act 2018 (“**Withdrawal Act**”) will repeal the European Communities Act 1972 as of Exit Day, copy into the domestic framework all directly applicable E.U. law which is in operation on Exit Day, and give HM Government the ability to modify and adapt this “retained” law as necessary to resolve any deficiencies. This last stated aim of the Withdrawal Act will be fulfilled by means of statutory instruments (“**SI**s”) published by relevant ministries.
- HM Treasury has announced it will approximately produce 70 pieces of secondary legislation under the European Union (Withdrawal) Act 2018 in relation to the financial services. As the end of the Article 50 notice period rapidly approaches, the timeline for any comment or consultation on these drafts is likely to be compressed.

# The FMLC's Response

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- In its meeting on 31 May 2018, the FMLC resolved to meet on an *ad hoc* basis—in addition to its scheduled bimonthly meetings—should the volume of the draft statutory instruments and gravity of the legal complexities require the Committee's full attention.
- The Secretariat organised meetings on 29 June 2018 and 3 August 2018 amongst leading organisations in the City to discuss a coordinated response to HM Treasury's announcement.
- As the statutory instruments are published, the FMLC hopes to be able to rely on and amplify its Radar function to identify legal uncertainties arising from the them.

# FMLC radar function

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- Currently, the FMLC identifies relevant issues of uncertainty through the radar function.
- New issues of legal uncertainty on which the FMLC can undertake work are raised in Scoping Forum meetings, bilateral radar meetings with Joanna Perkins (FMLC CEO) and during monthly Patron and Stakeholder relationship calls with members of the Secretariat.
- For the purposes of analysing the raft of secondary “reception” instruments, however, the Secretariat proposes to expand its Radar function by reaching out to pre-existing working groups and scoping forums on an *ad hoc* basis to request their assistance in assessing legal risks, identifying priorities and selecting issues in relation to the draft SIs.





# Next Steps ...

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- Once an SI is published, the Secretariat will write to an existing Working Group on the topic of the SI or, where such a group does not exist or where the SI covers a significant piece of financial markets legislation, to the relevant Scoping Forum to ask for their help and expertise in identifying any drafting inconsistencies or logical discrepancies.
- Scoping Forum members are requested to indicate any areas of uncertainty on which they think the FMLC might usefully contribute.
- Owing to the shorter timescale for review, the Secretariat would be grateful to receive quick bullet points if that is easier.
- Needless to say, if you don't hear from us but spot a legal uncertainty in an SI, please do get in touch anyway!

# Points to note

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Any work the FMLC undertakes on the SIs will continue to follow the principles and processes set out in its constitution. These include:

- The FMLC does not comment on or seek to influence matters of policy. Issues relating to policy rather than solely to legal uncertainty will not be examined.
- The FMLC is dedicated to impartial consensus
- 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.
- Any response on the SIs will be submitted to the entire Committee for review to ensure accuracy, objectivity and impartiality.

# Draft 2019 forward schedule

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Tuesday 5 March 8.30am to 10.00am

Tuesday 4 June 8.30am to 10.00am

Tuesday 3 September 8.30am to 10.00am

Tuesday 3 December 8.30am to 10.00am

