

Financial Markets Law Committee (“FMLC”)

Brexit Advisory Group

Date: Thursday 13 December 2018

Time: 9.30am to 11.00am

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

In Attendance:

Joanna Perkins (Chair)	FMLC
Caroline Boon	Barclays
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Rebecca Chalk	BlackRock
Charles Clark	Linklaters LLP
Thomas Donegan	Shearman & Sterling LLP
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
Jonathan Gilmour	Travers Smith LLP
Saima Hanif	3 Verulam Buildings
Professor Trevor Hartley	London School of Economics and Political Science
Jim Ho	Cleary Gottlieb Steen & Hamilton LLP
Katy Hyams	The London Metal Exchange
Ian Jameson	Sumitomo Mitsui Banking Corporation Europe Limited
Rashpal Kaul	Rabobank International
Vanessa Knapp	
Anne MacPherson	Gibson Dunn & Crutcher LLP
John McGrath	Sidley Austin LLP
Sinead Meany	Bank of England
Marke Raines	Raines & Co
Professor Arad Reisberg	Brunel University London
Andrew Seager	Taylor Wessing
Priya Odedra	FMLC Secretariat
Venessa Parekh	FMLC Secretariat
Rachel Toon	FMLC Secretariat

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Minutes:

1. Introduction.

1.1. Joanna Perkins opened the meeting and delivered a brief introduction.

2. Ambulatory references in the European Union (Withdrawal) Act 2018 / Financial Services (Implementation of Legislation) Bill (Paul Double and Charles Clark)

2.1. Paul Double gave a brief overview of various amendments which were proposed to the meaningful vote motion to be held under section 13(1)(b) of the European Union (Withdrawal) Act 2018 (the “**E.U. Withdrawal Act**”). The meaningful vote would allow Parliament to approve or reject the draft agreement on the withdrawal of the U.K. from the E.U (the “**Withdrawal Agreement**”). Mr Double noted, however, that these amendments were not put to the vote as the Government had postponed the vote. The motion and amendments being re-tabled in Parliament before Monday 21 January 2019, which is specified in the E.U. Withdrawal Act as the deadline by which HM Government must deliver a statement on how it intends to proceed in the event no deal is agreed between the U.K. and E.U. Mr Double stated that if the Withdrawal Agreement is passed by Parliament in January 2019, but subsequently amended, there is little guidance in the Withdrawal Act as to how Parliament would be given a vote. Mr Double highlighted that the implementation process cannot be fulfilled without an approval from Parliament; however, after the meaningful vote was postponed, opposition members of the House of Commons sent a letter to the Prime Minister, outlining grievances with regards to the Withdrawal Agreement and vote deferral. Mr Double noted that it is therefore unlikely that the Withdrawal Agreement will be approved and implemented without amendments.

2.2. The speakers then discussed “ambulatory references” to EU legislation and the provisions relating to them in paragraphs 1 and 2 of Schedule 8 of the E.U. Withdrawal Act.

2.3. Charles Clark noted that some people had wondered if the Schedule was so broadly worded as to catch ambulatory references in contracts. The possible factual circumstances of any one contract are so infinite that a single rule of interpretation would be undesirable as it would risk changing the intention of the parties and give rise to unintended consequences. The interpretation of such references was best left to the established jurisprudence on contractual interpretation. Mr Clark drew attention to the *Memorandum on Private Contracts and Schedule 8*

of the European Union (Withdrawal) Act¹ (the “**Memorandum**”), published recently by the City of London Law Society (the “**CLLS**”) which concludes that the provisions of paragraphs 1 and 2 of that Schedule do not apply to contracts. He noted that the memorandum has been prepared by a number of law firms, with a view to outlining practical considerations and providing certainty not only for financial market participants but for the wider legal professions and businesses generally. Note: Mr Double has since received a letter from DExEU confirming that the Government does not now intend to legislate further on the interpretation of ambulatory references subject to the memorandum.

2.4. Mr Clark also introduced the Financial Services (Implementation of Legislation) Bill (the “**Implementation Bill**”), which was put forward at the House of Lords for a second reading on Tuesday 4 December 2019. In case of a no deal Brexit, the Implementation Bill provides HM Treasury with broad powers to implement and make changes to “in flight” pieces of E.U. financial services legislation. The Bill lists the legislation which is within its scope. These are pieces of E.U. financial services legislation that: (1) have been adopted by the E.U., but do not yet apply so cannot be captured by the Withdrawal Act; or (2) are currently in negotiation and may be adopted within two years after exit day. .

2.5. Mr Clark explained that, for example, the Implementation Bill gives HM Treasury the power to incorporate into U.K. law parts of the E.U. Prospectus Regulation which won’t be operative on exit day. The Implementation Bill gives HM Treasury very broad powers but limited to the legislation listed in the Bill. Mr Clark suggested that a relevant avenue for the FMLC might be going through the Implementation Bill to see if there is other legislation within the responsibility of HM Treasury which is not listed rather than to focus on what is already there. He reiterated that the Implementation Bill would be a useful fix, removing uncertainty from post-Brexit legislation. Dr Perkins noted that the FMLC will be following the progress of the Implementation Bill.

3. Update on FMLC’s work on Brexit (Joanna Perkins)

3.1. Dr Perkins provided a brief overview of the FMLC’s work so far on statutory instruments (“**SI’s**”), including the following publications:

- i. A paper outlining the legal uncertainties arising from the changes proposed by two draft SIs key to investment funds and their managers—the *Draft Alternative Investment Fund*

¹ CLLS, *Letter to HM Treasury: Memorandum on Private Contracts and Schedule 8 of the European Union (Withdrawal) Act 2018*, (23 November 2018), available at: <http://www.citysolicitors.org.uk/attachments/article/106/CLLS%20endorsed%20memorandum%20on%20private%20contracts%20and%20Schedule..pdf>

Managers (Amendment) (EU Exit) Regulations 2018 and the *Draft Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2018*.

- ii. A paper examining the legal complexities relating to changes proposed by the *Draft Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018* (“BRR SI”) and a cover letter drawing attention to another issue of legal uncertainty, which does not arise directly from the draft BRR SI.
- 3.2. Dr Perkins noted that the FMLC is in the final stages of drafting papers relating to legal uncertainties arising from: the *Draft Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018* and the *Draft Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2018* as a follow up to the BRR SI.
- 3.3. Dr Perkins also mentioned that a FMLC paper regarding the impact of Brexit on the trading of emissions allowances has been drafted and circulated to the Committee for approval. Furthermore, at the most recent Committee meeting, as a follow up to the FMLC paper on the robustness of financial contracts after Brexit, a project on “reverse enquiry” was approved. Dr Perkins highlighted that the two papers on this topic will endeavour to reassure financial market participants and lessen uncertainty. She added that all the FMLC’s projects are looking for contributors, and urged members to participate should they have expertise in a particular area.

4. Any other business

- 4.1. When opened to discussion, one participant asked whether British contractors that have E.U. or U.K. ambulatory references in their documents will be required to amend their contracts. Mr Clark explained that contractors will not be required to amend their contracts but may wish to consider clarifying as between themselves for specific circumstances, in order to be clear as to the effect of the ambulatory reference involved. He explained that, being a matter of construction, the issue of ambulatory references in the E.U. Withdrawal Act, does not provide a particular solution or problem.
- 4.2. A participant asked whether members of the bar might share the same views as the CLLS’ Memorandum in relation to ambulatory references. Separately, the participant also speculated whether more could be done to publicise the issue at hand. Mr Clark noted that the Memorandum had been discussed at the Brexit Law Committee, where the points made had not given rise to significant controversy. He also highlighted that as the Memorandum was published on the CLLS website in the last day or so, it is anticipated to promote greater discussion in the next few weeks within the financial services and other sectors.

4.3. Concerning the Implementation Bill, one member speculated the extent of which the statute will apply to private contracts: when the U.K. leaves the E.U. on 29 March 2019 (“Exit Day”, might this give rise to considerable legal uncertainty? Dr Perkins noted that the Implementation Bill is indeed a short-term comfort, which presents long-term uncertainty.

5. Meetings after March 2019 (Appendix I)

- 5.1. Dr Perkins asked members for their views on the whether the meeting dates listed in the draft 2019 Forward Schedule that fall after Exit Day should be considered or removed, taking into account the remit of the Brexit Advisory Group. One member noted that legal uncertainty in the financial markets is likely to continue after the Exit Day; therefore, it might be beneficial to keep the dates for now and remove them at a later date if required.
- 5.2. Another member suggested moving the proposed date for the next meeting (Thursday 21 February 2019) forward, with a view to aligning the meeting with Monday 21 January 2019, so as to discuss HM Government’s anticipated statement and its implications on the U.K. financial markets.
- 5.3. Dr Perkins proposed rescheduling the first meeting for Friday 25 January 2019, subject to room availability and asked members to enter the remaining Forward Schedule dates tentatively to their diaries. This date was subsequently revised to Monday 28 January 2019.