



Financial Markets Law Committee (“FMLC”)

Finance and Technology Scoping Forum

Date: Tuesday 5 February 2019

Time: 9.00am to 10.30am

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

In Attendance:

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|-------------------------|--------------------------------------|
| John Taylor (Chair) | Queen Mary University of London |
| Antony Beaves | Bank of England |
| Kirsty Bell | Bank of England |
| Cat Dankos | Herbert Smith Freehills LLP |
| Pinar Emirdag | State Street Corporation |
| Jonathan Gilmour | Travers Smith LLP |
| Andrew Godwin (dial in) | Melbourne Law School |
| Richard Hay | Linklaters LLP |
| Lorraine Johnston | Ashurst LLP |
| Emmanuel Le Marois | Global Financial Markets Association |
| Angus McLean | Simmons & Simmons LLP |
| John Salmon | Hogan Lovells International LLP |
| Kathleen Tyson | Granularity Ltd |
| | |
| Virgilio Diniz | FMLC |
| Venessa Parekh | FMLC |

Guest Speakers:

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| David Sutter | TradeIX |
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Regrets:

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| Nikita Aggarwal | |
| Peter Chapman | Clifford Chance LLP |
| Raymond Cox QC | COMBAR |
| Mark Kalderon | Freshfields Bruckhaus Deringer LLP |
| Suhail Khawaja | Wilmington Trust |
| Ben Kingsley | Slaughter and May |
| Lewis Lee | CLS Services Ltd. |

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| Sarah Lewis | Cleary Gottlieb Steen & Hamilton LLP |
| Philippa List | Societe Generale |
| Fiona Maclean | Latham & Watkins |
| Vlad Maly | Morrison & Foerster LLP |
| Helen McGrath | Stripe |
| Deborah Sabalot | Deborah A. Sabalot Regulatory Consulting |
| Adam Sanitt | Norton Rose Fulbright LLP |
| Ian Stevens | CMS Cameron McKenna Nabarro Olswang LLP |

Minutes:

1. Introductions

- 1.1. The Chair opened the meeting and asked attendees to introduce themselves.

2. Administration: Elsewhere at the FMLC (Venessa Parekh)

- 2.1. Ms Parekh provided attendees with an update on the recent work undertaken by the FMLC's other Scoping Forums.

3. Blockchain in Trade Finance and Considerations for Secured Transaction Law (Dave Sutter)

- 3.1. Mr Sutter introduced himself and his company. He noted the importance of efficient and transparent secured transaction law to market stability, especially in developing economies. The provision of trade finance and supply chain finance is subject to difficulties in developing countries where the legal framework is underdeveloped and collateral is most commonly available in the form of moveable collateral (inventory, crops, etc.).
- 3.2. Mr Sutter drew attention to efforts amongst big investment banks, central banks and tech firms which were aimed at using Distributed Ledger Technology (“**DLT**”) in trade finance. A DLT-powered network, Mr Sutter explained, would enable trade data to be transformed into unique digital assets and transactions using them would be recorded securely, preventing many of the common concerns about invoices used for double financing, privacy and security. The resulting secure market is likely to stimulate market liquidity too. Mr Sutter then discussed two case studies—in China and Mexico—where a DLT network has had great impact, helping to streamline and secure warehouse receipt transactions. Another

example of the use of DLT would be in perfecting interest in supply chain finance through the creation of a single database.

- 3.3. In the discussion that followed, attendees discussed historical examples of similar attempts at cross-border collaboration, such as efforts by the United Nations Commission on International Trade Law (“**UNCITRAL**”) to agree a Convention on the Assignment of Receivables in International Trade. Participants touched upon the role of banks versus the potential role of tech companies like PayPal and Alibaba in making such a project come to fruition, as well as the generally slow progress with is to be expected in collaborative efforts. Another participants highlighted similar difficulties related to the cross-border conflict of laws which arose in relation to a project concerned with central securities depositories and blockchain.
- 3.4. The Chair asked attendees whether they would like to propose further analysis on this to the FMLC. Attendees agreed that the topic as a whole, albeit important, was too large. Efforts should be made to identify those questions which the FMLC could address.

4. **FCA Consultation Paper CP19/3: [Guidance on Cryptoassets](#) (John Salmon)**

- 4.1. Mr Salmon recounted earlier publications on the topic of FinTech from HM Government and the Financial Conduct Authority (the “**FCA**”), including a discussion paper on DLT in April 2017, a report from HM Treasury in Autumn 2018 and the most recent Report by the Cryptoassets Taskforce in October 2018. One of the commitments in the October Report was that the FCA should provide clarity to firms about where current cryptoasset activities are regulated, and exploring whether unregulated activities should be captured by regulation in the future. This Consultation focuses on where cryptoassets interact with the U.K.’s regulatory perimeter and, in particular, whether they could be considered “Specified Investments” under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the “**RAO**”), financial instruments’ such as “Transferable Securities” under Directive 2014/65/EU on markets in financial instruments (“**MiFID II**”), or captured under the Payment Services Regulations 2017 or the E-Money Regulations 2018.
- 4.2. Mr Salmon highlighted that, in addition to these questions, the Consultation document considers the eventual transposition in the U.K. of Directive (EU) 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the “**Fifth Anti-Money Laundering Directive**” or “**AMLD5**”). One relevant question was whether non-custodial wallets—typically understood to be a technological product provided by technology companies—would fall within the remit of

AMLD5. Forum members agreed that AMLD5, in general, and this question, in particular, should be discussed at future meetings.

- 4.3. When opened to discussion, attendees briefly discussed the different approach taken by the European Securities Markets Association (“**ESMA**”) in its recently published report on the same topic. In that context, attendees discussed the possible treatment of utility tokens in the future, Mr Diniz offered an update on the FMLC’s Working Group on Initial Coin Offerings, which was analysing many of the themes in the Consultation document and urged attendees to get in touch with the Secretariat should they wish to contribute. This led an attendee to observe that an essential piece of analysis which is missing from the FCA’s Consultation is a clear taxonomy of cryptoassets and how an asset’s underlying characteristics might change during the lifecycle of a transaction.

5. Any other business

- 5.1. No other business was raised.

Elsewhere at the FMLC ...



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Addressing legal uncertainty



Since 2003, the FMLC has analysed and made recommendations to resolve legal uncertainties in 222 disparate topics.



Remit and Scope



“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

The FMLC’s remit covers the entirety of the wholesale financial markets. In order to identify issues of legal uncertainty, the FMLC Secretariat runs nine “horizon scanning” Forums, each focused on a specific area of the financial services.

We thought you might be interested in the recent priorities of the other Forums.

Asset Management



- Established to provide a space for discussion of current and future issues of legal uncertainty that are of concern to the asset management industry.
- In recent months, the Forum has considered:
 - Scope of the definition of “user” under the Benchmarks Regulation;
 - Scope of the definition of “institutional investor” under the Securitisation Regulation; and
 - The FCA consultation paper on illiquid assets and open-ended funds.

Banking



- Originally established to review the European banking reform package which proposed fundamental changes to E.U. legislation on bank resolution and bank capital.
- In recent months, the Forum has considered:
 - The European legislative proposal for a Directive on credit services, credit purchasers and the recovery of collateral;
 - The preparations by the loan market ahead of the discontinuation of LIBOR; and
 - Draft secondary legislation incorporating relevant E.U. law into U.K. statute books.

Brexit

- Established to provide a space for discussion of current and future complexities affecting the financial markets as a result of the U.K.'s secession from the E.U. This group is also tasked with providing advice and guidance to the FMLC on the scope and nature of work which C relating to the referendum and consequential withdrawal.
- This Forum has considered:
 - The options for the U.K.'s future relationship with the E.U.;
 - The European Union (Withdrawal) Bill (now enacted); and
 - HM Treasury's preparations for withdrawal by way of the publication of secondary legislation "onshoring" E.U. law

FinTech



- Established to encourage discussion of current and future issues of legal uncertainty arising in the context of technological innovations in financial markets.
- Recently, this Forum has discussed:
 - The evolution of U.S. regulatory position on cryptocurrencies;
 - ISDA’s recent report on smart contracts;
 - New regulations in Gibraltar on the use of DLT and tokens; and
 - The FCA’s consultation on cryptoassets and the U.K.’s regulatory perimeter.

Infrastructure



- Established to provide a space for discussion amongst market infrastructure bodies and a channel of communication between the market infrastructure sector and the public authorities.
- Recently, this Forum has discussed:
 - ESMA Q&As on the Benchmarks Regulation;
 - ESMA Public Statement on managing the risks of a no-deal Brexit in the area of central clearing;
 - The Draft Payments and electronic money(Amendment) (EU Exit) Regulations; and
 - The Draft Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.

Insurance



- Established to identify current and future issues of legal uncertainty that are of concern to the insurance industry.
- Recently widened to bring into scope the pensions industry.
- This Forum's priorities over the past year include:
 - The development of cyber insurance;
 - The impact of Brexit on existing insurance contracts; and
 - The PRA's consultation on credit risk mitigation

Securities Markets



- The FMLC resolved in January 2019 to establish a new Forum for horizon scanning purposes in respect of the primary markets
- The Forum will consider topics including the aspects of MiFID II and MAR which impact on primary markets, the Prospectus Regulation and PRIIPS, non-MiFID primary markets conduct, infrastructure financing and securitisation issues.

Quarterly Discussion Forum

- The Quarterly Discussion Forum call is a bilateral teleconference between the FMLC and the Financial Markets Lawyers Group (the “FMLG”, associated with the New York Federal Reserve).
- In recent months, topics discussed on these calls have included Brexit, the phasing out of LIBOR and the development of alternative reference rates, and the Benchmarks Regulation.
- This is a “closed” Forum in the sense that it does not have a standing membership and is usually attended by Members of the FMLC. The Secretariat would be grateful, however, to hear from persons who might volunteer to attend as a guest speaker.

Sovereign Debt



- Established to provide a space for ongoing discussion regarding legal uncertainty issues affecting sovereign debt under English, European, international and, possibly, foreign law.
- Last year, this Forum:
 - Welcomed guest speakers, Lee Buchheit and Mitu Gulati, to discuss the Venezuelan debt crisis;
 - Considered the “odious debt” defence; and
 - Discussed a proposal to make “secret” loans unenforceable.

Conclusion



- If you wish to enquire about your firm's participation in any of the Scoping Forums, please do get in touch.
- The Secretariat is always pleased to receive recommendations for topics for discussion or guest speakers.

Financial Markets Law Committee

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