



Financial Markets Law Committee (“FMLC”)

Insurance Scoping Forum

Date: Tuesday 20 November 2018

Time: 2.00pm to 3.30pm

Location: Dentons UK and Middle East LLP, One Fleet Place, London, EC4M 7RA

In Attendance:

Matthew Wainwright (Chair)

Dentons UK and Middle East LLP

Peter Bloxham

Beth Dobson

Slaughter and May

Reid Feldman

Kramer Levin Naftalis & Frankel LLP

David Kendall

Cooley (UK) LLP

Alison Matthews

Herbert Smith Freehills LLP

Steven McEwan

Hogan Lovells International LLP

Clare Swirski

Debevoise & Plimpton LLP

Venessa Parekh

FMLC

Thomas Willett

FMLC

Guest Speaker:

Cheng Li Yow

Clifford Chance LLP

Registered Charity Number: 1164902.

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Regrets:

George Belcher	Skadden, Arps, Meagher & Flom LLP
Theresa Chew	Hymans Robertson LLP
Katherine Coates	Clifford Chance LLP
Pollyanna Deane	Simmons & Simmons LLP
Jennifer Donohue	Algorithm and Extremal Consulting Limited
Hilary Evenett	Clifford Chance LLP
Charlotte Heiss	Royal & Sun Alliance Insurance Group plc
Adam Levitt	Ashurst LLP
Mike Munro	CMS Cameron McKenna Nabarro Olswang LLP
Chris Newby	AIG Europe Limited
Chris Sage	Transatlantic Reinsurance Company
Jonathan Teacher	Swiss Re Management Ltd
Kees van der Klugt	Lloyd's Market Association

Minutes:

1. Introductions

1.1. Michael Wainwright opened the meeting and delivered a brief introduction.

2. Administration: Lifecycle of a Project and confirmation of the 2019 Forward Schedule (Venessa Parekh) ¹

2.1. Venessa Parekh described to the members how new issues of legal uncertainty on which the FMLC can undertake work are raised. She elaborated on the Committee's process of adopting new projects, how working groups operate, the publication drafting process and the profile of past FMLC publications.

2.2. Attendees did not raise any issues in relation to the draft Forward Schedule of meetings for 2019. These meetings dates were therefore confirmed.

3. Solvency II and Insurance (Amendments) (EU Exit) Regulations 2018 (Cheng Li Yow)

3.1. Cheng Li Yow introduced the draft Solvency II and Insurance (Amendments) (EU Exit) Regulations 2018 (the "draft Solvency II SI") and explained that it aims to ensure that the regime under Directive 2009/138/EC on the taking-up and pursuit of the business of

¹ Please see Appendix I below.

Insurance and Reinsurance (the “**Solvency II Directive**”) continues to operate effectively once the U.K. has withdrawn from the E.U. (“**Brexit**”) by introducing amendments to fix deficiencies to the legislation. The provisions fall under the following categories, generally:

- i. regulation of cross-border European Economic Area (“**E.E.A.**”) groups of (re)insurance companies;
- ii. equivalence;
- iii. risk weights for E.U. assets;
- iv. transfer of functions to U.K. authorities;
- v. information sharing and cooperation requirements between U.K. and E.E.A. regulators; and
- vi. binding technical standards.

3.2. The members discussed the regulation of cross-border E.E.A. groups of (re)insurance companies. They observed that E.U. Member States will be treated as Third Countries; as such, E.E.A. groups with U.K. insurance subsidiaries will be subject to group supervision by the Prudential Regulation Authority (“**PRA**”).

3.3. Moving on to equivalence, one participant queried if there would be a separate equivalence decision from each E.U. 27 country, or whether there would be one single equivalence decision that permits the provision of insurance in the E.U. as a whole. Members were unsure but concluded that this was likely dependent on the politics of the deal.

3.4. One member mentioned that the draft Solvency II SI provides that references to the PRA Rulebook or the rules made by the PRA to implement Solvency II are to be read as references to those rules as they have effect on exit day. The member noted that there is no commentary on this in the explanatory note to the SI, suggesting the intention is to ensure that future changes to the onshored legislation are subject to Parliamentary scrutiny. The member stressed that it is unclear, however, how this will work in practice: if the PRA makes changes to its Rulebook, presumably a new SI would be needed to amend the “snapshot” of exit day. In the absence of this, if the PRA Rulebook changes, there would be two sets of rules governing one activity, and firms would have to comply with two different sets of obligations. Ms Parekh confirmed that the Secretariat had raised the uncertainties deriving from the “snapshots” of E.U. law or E.U.-derived law in respect of other SIs. She requested attendees to send more information about this point via email.

3.5. An attendee drew attention to potential legal uncertainties concerning the definitions imported the U.K. legislation by the onshoring SI when such definitions refer to other pieces of E.U. legislation. They explained that uncertainty could arise, for example, by the provision in the statutory instrument which states that, except to the extent otherwise provided, expressions used in the Commission Delegated Legislation supplementing Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (the “**Solvency II Delegated Regulation**”) which are used in the Solvency II Directive will have the meaning given in the Directive as at exit day. “Insurance undertaking” is not separately defined in the SI but is defined in the Directive as a direct life or non-life insurance undertaking which has received authorisation in accordance with Article 14 of the Solvency II Directive. The member explained that post-Brexit; Article 14 and the Solvency II SI will no longer apply in the U.K. It is therefore uncertain whether existing U.K. insurers would fall within that definition, and whether new insurers authorised post-Brexit would not. [Subsequently, HM Treasury published the draft Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 which, in regulation 86(7), provides an updated definition of “insurance undertaking”]

3.6. Forum members agreed to send further information concerning the Solvency II SI to the Secretariat to contribute to a paper.

4. **Draft U.K. Withdrawal Agreement and its implications for insurers, intermediaries and policyholders during the transition period and beyond (Michael Wainwright)**

4.1. Michael Wainwright led a discussion concerning the draft U.K. Withdrawal Agreement and its implications for insurers. Forum members discussed the provision of insurance business during a transition period.

4.2. Discussions took place on the continuity of insurance contracts. Members also noted that and Part VII transfers were less than satisfactory as a means of providing continuity. One participant raised a query regarding what happens post-transition period to E.U. insurers providing services in the U.K. but who do not have a permanent place of business there. Members agreed to return to this topic once more detailed provisions were written.

5. **Guarantees used under Solvency II (Steven McEwan)**

5.1. Steven McEwan presented to the members a potential issue of legal uncertainty concerning the treatment of credit insurance and guarantees under Solvency II.

5.2. Mr McEwan explained that under Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (the “**Capital Requirements**”

Regulation” or the “**CRR**”) the risk-weights of loans through guarantees and credit insurance are normally reduced for banks; the insurance regulatory regime, however, does not permit the same practice under Solvency II. Mr McEwan observed that, increasingly, insurers and banks invest in similar kinds of assets. Under the Capital Requirements Regulation, however, credit protection deriving from guarantees are subject to a lower risk rate and capital charge.

5.3. He explained that that although this could be seen as an issue of policy, it could be possible that the position has resulted from the issue not being considered when the Solvency II Directive was drafted, with the result that there is regulatory inconsistency. Mr Ewan drew a comparison to the words of Article 215 of the Solvency II Directive, noting how they are almost identical to the words of Article 213 and 215 of the CRR. This, he explained, would suggest an intention for a similar policy to apply, but owing to the location of Article 215—in the counterparty default risk section, rather than the market risk section—and the existence of Article 5 which deals generally with ratings, this is overridden. As such, Mr Ewan explained that an insurance company could not reduce the capital charge applicable to a bond or loan by taking out a guarantee or credit insurance from a guarantor or insurer which has a better rating than the obligator of the bond or loan.

5.4. Forum members agreed to propose to the Committee that a letter might be written to the pertinent authority drawing attention to this discrepancy.

6. Brexit and the expanded role of the IAIS in co-ordinating international insurance standards (Michael Wainwright)

6.1. Mr Wainwright led a brief discussion on the International Association of Insurance Supervisors (“**IAIS**”) and its expanded role in the light of Brexit, in co-ordinating international insurance standards.

6.2. Members acknowledged the large amount of work conducted to establish the Insurance Core Principles which provide a globally accepted framework for the supervision of the insurance sector. They agreed to monitor this after Brexit.

7. Any other business

7.1. No other business was raised.

Lifecycle of a Project

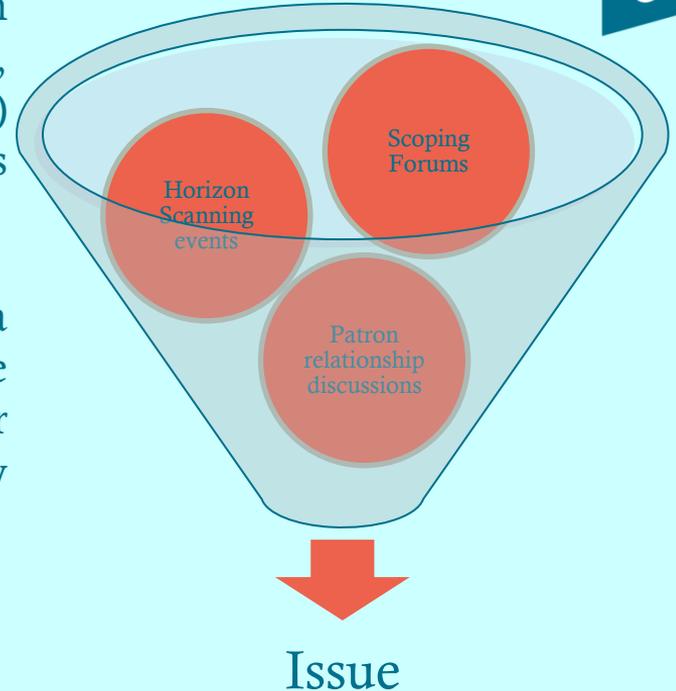


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How an issue of legal uncertainty is raised

- 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 relationship calls with members of the Secretariat.
- Once an issue is raised, the Secretariat usually asks for a briefing note to be prepared by the person(s) making the recommendation. This is then put before the Committee for their consideration. (The FMLC Secretariat will normally offer formatting and other assistance in preparing the brief.)



The brief

FINANCIAL MARKETS LAW COMMITTEE (“FMLC”)



Briefing Note: Issues of Legal Uncertainty on Brexit and Judicial Interpretation

1. Introduction

1.1. Following the referendum in June 2016, in which the U.K. voted to withdraw from the European Union, the FMLC established a High Level Advisory Group (“HLAG”) of experts to give direction to the Committee’s work relating to Brexit. At a meeting of the HLAG in December 2017, members of HLAG recommended that the FMLC establish a Working Group to identify potential legal uncertainties arising from the interpretation by U.K. courts of autonomous E.U. legal concepts which appear in received E.U. legislation as it is incorporated into U.K. law

1.2. An overview of HM Government’s proposal to incorporate E.U. law into the U.K. and the various legal complexities relating to the interpretation of autonomous E.U. terms are set out below.

2. The European Union (Withdrawal) Bill—and domestic preparations for Brexit so far

1.1. In the run up to the referendum, those who campaigned for withdrawal from the E.U. argued for an end to the principle of the supremacy of E.U. law and judgments of the European Court of Justice (“ECJ”). The European Union (Withdrawal) Bill (the “Withdrawal Bill”), introduced into the House of Commons on 13 July, aims to fulfil this purpose by: (i) repealing the European Communities Act 1972 on the day the U.K. leaves the E.U.; and (ii) incorporating E.U. law as it stands into domestic law. The Withdrawal Bill also provides guidelines for a new relationship between domestic law and U.K. law.

2.1. Clause 5 of the Withdrawal Bill states that the principle of the supremacy of E.U. law will not apply to any enactment or law passed or made on or after Exit Day (i.e., the term defined in the Withdrawal Bill as the day the U.K. leaves the E.U., except so far as relevant to the interpretation, disapplication or nullifying any enactment or law passed or made before exit day.¹ Clause 6, quoted below, provides guidance on the relationship between courts in the U.K. and the ECJ.

Interpretation of retained EU law

(1) A court or tribunal—

(a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and

(b) cannot refer any matter to the European Court on or after exit day.

(2) A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but *may do so if it considers it appropriate to do so* (emphasis added).

3. Relevant Issues of Legal Uncertainty

3.1. As a consequence, where the meaning of an autonomous E.U. term or concept is defined before Exit Day, the U.K. will follow that interpretation. Where the meaning of terms, which may appear in the

incorporated *acquis* of E.U. law, is not fixed by Exit Day—or their interpretation is discussed and adjudicated upon by the ECJ post-Brexit—there remains ambiguity as to how U.K. courts should proceed. Following the publication of the Withdrawal Bill, the former President of the Supreme Court, Lord Neuberger, remarked in the media that judges would require guidance from HM Government on how U.K. courts should interpret European concepts and judgments post-Brexit.

3.2. Referring to this, members of the HLAG also highlighted the importance of interpretational equivalence between the U.K. and E.U. in preventing legal uncertainty in the context of negotiations for a future trade agreement, or in the event the U.K. applies for “equivalence” under the E.U.’s Third Country regimes, where regulatory coordination might be deemed important.

3.3. The questions before HM Government and U.K. judges (and for this Working Group to study and attempt to address) begin with a consideration of whether, and in what circumstances, U.K. courts might follow the ECJ’s judgments in so far as they settle, after Brexit, the meaning of terms in E.U. legislation previously received into U.K. law.

3.4. In the event that the U.K. courts choose not to abide by the ECJ’s interpretation, questions of legal complexity arise in relation to other aides to interpretation on which judges in the U.K. might rely. One such aide might be found, it has been suggested, in the Model Conventions and laws proposed and signed under the auspices of the United Nations. The Model Conventions are not, however, signed by a majority of E.U. Member States, which elicits further questions as to their authority and comprehensiveness.²

3.5. A final area of legal uncertainty which requires consideration is the basis for judicial interpretation in the event it is agreed that international conventions and existing aides do not provide sufficient guidance. In such a scenario, Lord Neuberger’s call on Parliament for direction becomes more relevant. The Working Group might wish to reflect upon the overarching principles which might facilitate Parliament’s determination of its guidance to judges on the interpretation of E.U. law and ECJ judgments post-Brexit.

4. Working Group—Brief

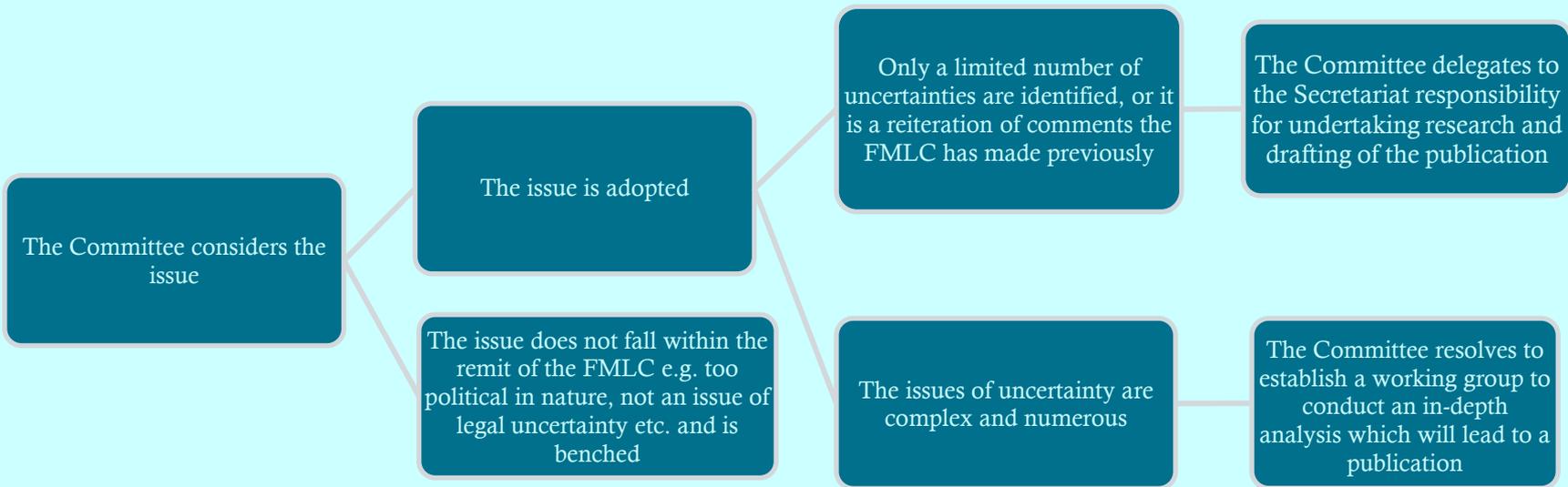
4.1. The Working Group is invited to examine in general the legal issues surrounding the judicial interpretation of autonomous legal terms post-Brexit and to document the results of their inquiry into a paper. As a guide, the paper should address the subject according to the following outline: (i) summary and introduction; (ii) legislative background; (iii) legal issue analysis; (iv) market impact or potential impact of the issue(s); (v) proposed solutions and mitigants; and (vi) conclusion.

4.2. More detail about drafting a paper for the FMLC can be found in the FMLC Contributors’ Guidelines.

¹ See clauses 5(1) and (2) of the Withdrawal Bill.

² The FMLC has previously considered, for instance, the efficacy of the UNCITRAL Model Law on Cross-Border Insolvency (1997) in the recognition of cross-border insolvency proceedings post-Brexit. This Working Group’s research would expand upon such work.

The issue is presented to the Committee



Working Group membership, conduct of business



- Members of the relevant Scoping Fora as well as academics, experts and other FMLC stakeholders are invited to join working groups.
- Working groups are convened under Terms of Reference, including conduct of business guidelines. These include the following:
 1. participation is limited to one member per organisation;
 2. alternates are not permitted to attend meetings; and
 3. working group meetings are to be attended in person, where possible. Dial-in details are only provided to members who are permanently based abroad.

Working Group meetings

- Working groups typically meet between two and five times to identify relevant issues of legal uncertainty, make decisions as to any work product (i.e., a paper or a letter), and review draft contributions. Working group members volunteer to draft sections of the paper.
- The Secretariat will support the Chair and the working group during meetings and manage Group-related communications. The Secretariat will help draft and circulate meeting agenda and related documents and take minutes.
- On completion of a publication, the Working Group is likely to shut down.



Review process and publication

- For publications drafted by the Secretariat, draft copies will be circulated to the individual(s) who raised the issue for comment and then to the Committee for their review before being finalised. In these cases, the Scoping Forum, as the Committee's pool of experts on the general area of financial services law, will be asked if they have any feedback.
- For working groups, members who committed to writing sections of a paper will send their drafts to the Secretariat, who will align it to FMLC house-style as defined in the contributors' guidelines and collate the sections into one document. Working group members will have the opportunity to comment on the draft publication before it is sent to the Committee.
- Once approved by the Committee, the publications will be uploaded to the [FMLC website](#) and circulated to relevant stakeholders and authorities.

The screenshot shows the FMLC Publications website. At the top, there is a header with the text "FMLC Publications" and a background image of a person writing. Below the header, there is a search bar with the text "Search by keyword or topic" and a button "Type and press enter". To the right of the search bar, there is a section titled "Search the FMLC archive using common tags" with a list of tags including years (2003-2017), "BENCHMARK REPORT", "BREXIT", "DIRECTORATE GENERAL INTERNAL MARKET AND SERVICES", "EMERGENCY POWERS", "EUROPEAN COMMISSION", "EUROPEAN SECURITIES AND MARKETS AUTHORITY", "FINTECH", "HM TREASURY", "ISSUE 56", "LETTER", "MAJOR OPERATIONAL DISRUPTION", "MINISTRY OF JUSTICE", "MR FAILL", "PRESENTATION", "REPORT", and "U.K. WITHDRAWAL FROM THE E.U.". Below the search bar, there is a section titled "Recent Publications" with three entries:

- **Letter to the Department for Exiting the European Union: Legal Uncertainties relating to Insurance Business: 12 July 2018**
The FMLC has sent a letter detailing the issues of legal uncertainty which arise in relation to insurance business in the context of Brexit. The letter draws attention to the uncertainties in identifying whether and when an insurer is providing
Brexit, Department for Exiting the European Union, establishment of an E.U. insurer in another member, Financial Conduct Authority, Insurance, Insurance Interpretive Communication 2000, Ministry of Justice, Part VII Transfers, U.K. Withdrawal from the E.U., 12 July 2018
- **Report: Establishment of an E.U. Insurer in Another Member State: 12 July 2018**
As the U.K. and E.U. continue to negotiate their relationship in the context of the U.K.'s impending withdrawal from the E.U. ("Brexit") and as U.K. insurers with clients in the E.U. begin to plan for the possibility that no deal
Brexit, Insurance, Insurance Interpretive Communication 2000, U.K. Withdrawal from the E.U., 12 July 2018
- **Report: Analysis of the Proposal to Amend Moratorium Powers: 13 April 2018**
On 23 November 2016, the European Commission published a package of reforms proposing fundamental changes to E.U. legislation on bank resolution and bank capital. One proposed

Examples of recent projects suggested by Scoping Fora



Asset Management

- [Letter](#) to Financial Conduct Authority: Asset Management Review: February 2017

Banking

- [Report](#): Analysis of the Proposal to Amend Moratorium Powers: April 2018

Brexit Advisory Group

- [Letter](#) to Ministry of Justice: Clause 6 of the Withdrawal Bill: March 2018

Finance and Technology

- [Report](#): Distributed Ledger Technology and Governing Law: March 2018

Infrastructure

- [Report](#): EMIR: the European Commission's Legislative Proposal to Amend Procedures for recognition of Third Country Central Counterparties: July 2018

Insurance

- [Report](#): Establishment of an E.U. Insurer in Another Member State: July 2018

Sovereign Debt

- [Report](#): *Pari Passu* Clauses in Sovereign Debt Obligations: April 2015

Achievements and impact

Professor Hugh Beale (University of Warwick) and Simon Firth (Linklaters LLP) gave evidence to the House of Lords E.U. Financial Affairs Sub-Committee on the topic of post-Brexit contractual continuity as an extension of work conducted by the FMLC Working Group on Brexit—Robustness of Financial Contracts.

In response to the FMLC paper exploring uncertainties as to the financial instruments that fall within the scope of MAR, the FMLC received a letter from the FCA stating that the paper was circulated to the FCA policy team who worked with ESMA to develop the MAR guidance materials. Subsequent ESMA Q&A's on MAR were updated to include questions on market soundings.

In response to the FMLC paper on issues of uncertainty arising from the European Commission's proposed directive and regulation on data protection, the FMLC was asked by the Commission to conduct further work. Subsequently, draft texts of the regulation were closely aligned with changes proposed by the FMLC.