

Financial Markets Law Committee (“FMLC”)

Banking Scoping Forum

Date: Tuesday 17 September 2019

Time: 2.00pm to 3.30pm

Location: Linklaters LLP, One Silk St, London, EC2Y 8HQ



In Attendance:

Jeremy Stokeld (Chair)	Linklaters LLP
Chris Allen	Standard Chartered
James Bresslaw	Simmons & Simmons LLP
Jons Lehmann	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Dorothy Livingston	Herbert Smith Freehills LLP
Monic Sah	Clifford Chance LLP
Hwee Peng Ngoh	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Guest Speakers:

Katie Hoyle	Clifford Chance LLP
Sam Gater	PwC
Sadhana Mistry	PwC
Adam Stage	PwC

Regrets:

Leland Goss	International Capital Markets Association
Simon Hills	UK Finance
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Suhail Khawaja	Wilmington Trust
Stuart Willey	White & Case LLP

Registered Charity Number: 1164902.

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Minutes:

1. **Introductions**

1.1 Jeremy Stokeld opened the meeting and members introduced themselves.

2. **The FMLC's Public Education Function: Speeches (Hwee Peng Ngoh)**

2.1 Hwee Peng Ngoh delivered a short presentation¹ on the FMLC's Public Education Function and encouraged Forum members to get in touch with the Secretariat if they wish to have a member of the Secretariat visit their offices to speak with them about any legal uncertainties in a relevant area of financial markets.

3. **Operational Resilience – TheCityUK report and overlaps with resolution activity (Sam Gater, Sadhana Mistry and Adam Stage)²**

3.1 Adam Stage started the discussion by highlighting that operational resilience is becoming very interesting internationally as can be seen from the Basel Committee's plan to update their "Principles for the sound management of operational risk" and therefore is a topic relevant not just for UK regulators but also regulators globally. A definition of operational resilience by Charlotte Gerken at the Bank of England was given and it was emphasised that the key message is not whether failure will happen but that failure will happen and therefore there is a need to build capabilities to respond. Operational resilience is also not confined to the cyber or tech space. The key is for firms to have an over-arching view when looking at resilience and that firms should do so by looking at "business services" rather than silo operations.

3.2 The importance of operational resilience can be seen from the recent fine imposed on JPMorgan by the Central Bank of Ireland as it had failed, among other things, to obtain prior central bank approval to outsource its fund administration. Operational Continuity in Resolution ("OCIR") on the other hand is part of the wider operational resilience ambit and aims to ensure the continuity of critical services, such as deposit-taking activities, in the event of a resolution scenario. Sam Gater went on to explain the challenges with OCIR including the lack of clarity around what the regulators view as critical functions and firms trying to use solutions built for business continuity purposes which do not contain a clear view of critical services by business line. Other challenges also include the lack of reporting capabilities to easily provide the data that

¹ Please see Appendix I below

² Please see Appendix II below

PRA might need or where arrangements are more informal in cases where more than one critical service is provided by the same service provider hence resulting in the lack of data.

3.3 A discussion regarding outsourcing amongst members followed:

3.3.1 Recognising that there are overlaps, it often depends on the institution and the scenario in question as to whether the institution should implement outsourcing measures first or the broader operational resilience/OCIR measures of which outsourcing forms a part.

3.3.2 The amount of work involved in complying with the [European Bank Authority \("EBA"\) guidelines on outsourcing](#)—and they are fairly detailed and prescriptive—is often underestimated and this is frequently the result of an underestimation of the extent of the lack of data in the case of intra-group outsourcing. It then becomes challenging for firms to demonstrate to regulators how they are in compliance internally.

3.3.3 The EBA guidelines apply to all outsourcing (whether or not third party or intra-group and whether or not material) whereas the Financial Conduct Authority ("FCA") is more focussed on material outsourcing. Other more detailed aspects of the EBA guidelines were also discussed, for example, that the outsourcing of functions cannot absolve institutions of responsibilities and that they remain responsible and accountable for complying with their regulatory functions, that regulatory approval may be required for the outsourcing of certain activities and the need for firms to understand outsource risk management and assess the ease of moving from an affected service provider to an alternative service provider. It was noted that if firms choose to outsource any of their functions, there are growing expectations on their governance and supervision.

3.3.4 That many firms, including big firms, have difficulties negotiating with outsourcing providers such as cloud providers. There is a tension between their ability to influence the providers and their need to comply with regulatory requirements.

3.3.5 It is not clear and there is currently no clarity from the EBA as to whether some regulated activities such as custody or brokerage services are to be considered outsourced services.

4. Latest updates on the transition from LIBOR to Risk-Free Rates (Katie Hoyle)

- 4.1 Katie Hoyle gave a brief update on the transition from LIBOR to Risk-Free Rates (“**RFRs**”):
- 4.1.1 *Rates:* RFRs are being developed to replace LIBOR and one of them is SONIA (for sterling). As SONIA is an overnight rate, term versions of SONIA may be needed for use in the loan and the bond market. Two possibilities have started to emerge, being a backward-looking term rate and a forward-looking term rate, with the latter being preferred given this is the way the loan market has been operating. EURIBOR will, on the other hand, continue to exist in the short and medium term although there will be a change in its methodology. It might therefore be necessary to consider if this change in methodology would affect contracts referencing EURIBOR. In this regard, it was noted that the International Swaps and Derivatives Association (“**ISDA**”) are not planning to make any changes to the ISDA documents as a result of this change. The methodology for calculating EONIA (Euro Overnight Index Average) will change on 2 October 2019 to €STR plus a spread.
- 4.1.2 *New products:* There have not been many SONIA deals in the loan market—a recent bilateral deal between NatWest and National Express has been publicised. Although there are a few banks/borrowers looking at syndicated deals using SONIA, these deals have not been concluded yet. Further, although the Alternative Reference Rates Committee (“**ARRC**”) has published some fallback wording for LIBOR using SOFR rates this has not gained much traction in the market as market participants are not willing to hardwire alternative rates in their documents at this stage particularly given that some of these rates such as “Term SOFR” do not yet exist.
- 4.1.3 *Legacy products:* Amendment of loan and bond products is currently the only way to deal with legacy loans and bonds. Such amendment is unlikely to be straightforward as some US bonds, for example, require 100% bondholders’ consent for amendment and, in the case of loans, some transactions may also require 100% lenders’ consent for amendment. It is anticipated that the Bank of England will be launching a consultation in Q4 2019 on legacy transactions and the cash market.
- 4.2 ISDA has been conducting consultations on adjustments required to RFRs to account for the differences with LIBOR for fallback purposes. Loan market participants will need to consider if this credit spread methodology by ISDA can also apply to the cash market (see the Loan Market Association (“**LMA**”) note on LMA Revised Replacement of Screen Rate Clause and considerations in respect of credit adjustment spread).

4.3 Members acknowledged that the current alternatives for a LIBOR replacement appear to raise a number of issues and that use of overnight rates could potentially be quite risky given the potential fluctuations in overnight rates. Backward-looking rates could also cause issues due to the fact that a borrower will not know at the beginning of an interest period how much interest will be payable at the end of that period. Members further discussed the issue of whether the borrower or lenders might have to bear the costs of the transition and acknowledged that the market position remains unclear. Attention was then brought to a “Dear CEO” letter dated 19 September 2018 which aims to seek assurance from firms that their senior managers and boards understand the risks associated with the transition of LIBOR to RFRs and that they are taking appropriate action for the firm to transit before the end 2021. In light of this letter, a query was raised as to whether the LMA will be publishing more robust fallbacks. It was then discussed that the function of the LMA is often more for the purpose of coalescing market practice and positions rather than to set market practice and positions. It might therefore be a “wait and see” from the LMA before it commits to hardwiring any recommended LIBOR replacement wording in the LMA documents. It is however anticipated that the LMA would publish documents referencing SONIA in the near future.

5. Legal uncertainties on whether novation gives rise to a new contract in the context of a transfer of a participation in a syndicated loan (Jeremy Stokeld)

5.1 Jeremy Stokeld led a discussion regarding the legal uncertainties on whether a novation gives rise to a new contract in the context of a transfer of a participation in a syndicated loan. This might appear in the first instance to some as being settled law—that a novation would inevitably give rise to a new contract—but looking into it further, the law appears to be far from being clear and settled. An example was given of a Spanish obligor who had granted security and one of the banks then transferred its loan participation by way of novation. A creditor argued that the novation resulted in a new contract and accordingly the Spanish law security was ineffective and that the obligor should have granted new security.

5.2 Members engaged in a discussion of the following:

5.2.1 The LMA template documents provide for two methods for transferring loan participations: one method is by way of novation where the transferor is released of all its existing rights and obligations and the transferee would then acquire those rights

and obligations, and another method is by way of an assignment of rights and assumption of obligations by the assignee.

- 5.2.2 Contract law in the textbooks set out straightforward examples of a contract between party A and party B with party B novating to party C and a new contract arises between party A and party C. *Chitty on Contracts, 33rd Ed* for example explains that *novation* takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. *There is a new contract* and it is therefore essential that the consent of all parties shall be obtained. (emphasis added)
- 5.2.3 This analysis however begins to fall apart when it is applied to a multiparty contract and the question then arises as to whether a new contract is created *vis-à-vis* all parties to the contract. Unlike earlier versions, the latest edition of *Chitty on Contracts, 33rd Ed*, Chitty now appears to acknowledge that there could be “novation of *part of* a contract while leaving the rest of the contract to survive, although this may require some variation of the original surviving terms”. It added that whether that is what is being achieved in any particular situation will largely turn on the intention of the parties. In principle, it further follows that there can be a novation of the whole or part of a multiparty contract with the original contract being left in place entirely as regards some parties while there is a whole or partial novation as regards other parties.
- 5.2.4 There is little judicial authority directly on this point apart from a case involving an application for a summary judgment, *Langston Group Corp v Cardiff City Football Club Ltd, 2008 WL 833542 (2008)* which is helpful to some extent. The application by the claimant—who claimed that a contract that was varied to transfer some but not all obligations to another third party was in effect a novation which had the result of terminating the whole contract—for summary judgment was dismissed on a couple of grounds, one of which was that the respondent had a real prospect of establishing at trial that the variation was not a termination. The judge was in fact willing to go further and conclude that based on certain assumed facts, the contract was not terminated by the variation. The judge was of the view that the substitution of one obligor for another in relation to a particular contractual obligation could take place only by novation, but it did not necessarily follow that where a particular obligation was novated by substitution of one obligor for another, the conclusion had to be that a large and complex contract containing other obligations which were not so novated had to be treated as having itself been terminated by novation and replaced by a

wholly new contract. The judge added further that the question whether the addition of a new party to an agreement, and its substitution as obligor for an existing party in respect of some, but not all of that party's obligations under the contract gives rise to a determination of the old contract and its replacement with a new one is not susceptible of a single doctrinaire answer, applicable for all purposes. It will always be relevant to know for what purpose the question needs to be answered.

5.2.5 The case highlights some important issues:

5.2.5.1 That the substitution of one obligor for another in relation to a particular contractual obligation could take place only by novation. This raises the question of whether the LMA alternative to a novation—an assignment of rights and assumption of obligations—could simply be a description of a novation.

5.2.5.2 That there could be a part novation with other parts of the contract which are not novated continuing to exist without being terminated and replaced by a new contract on the same terms. This raises the question of whether a novation by one party to a multiparty contract would result in the termination of that contract, and the replacement of that contract with a new one, between all parties.

5.2.5.3 That the question of whether a substitution as obligor for an existing party in respect of some, but not all of that party's obligations under a contract gives rise to a termination of that contract and a replacement of a new one is not a question with only one answer that applies for all purposes. It would seem that the intention of the parties and the need to achieve an outcome which does not result in "commercial absurdity" or which "flouts business common-sense" would be relevant factors to take into account.

5.2.6 A possible distinction was drawn between a bilateral loan and a multiparty syndicated loan. There are possible strong arguments that a novation of a bilateral loan is more likely to result in a new contract between the parties but a novation by one party to a multiparty syndicated loan may not result in a new contract between all the parties to the loan. If a novation of a bilateral loan gives rise to a new contract might the same argument be made for a syndicated loan if only one bank were to sign the loan and syndication took place subsequently. A member observed that the LMA warning note in the LMA form of Transfer Certificate warns only about the ineffectiveness of the transfer of security from the existing lender to the transferee lender but not that the

whole security granted to all lenders is, as a result of a novation by one lender, ineffective.

5.3 There could therefore be a spectrum of possibilities as to whether a novation gives rise to a new contract and that could depend, for example, on whether the contract is bilateral or multiparty and/or whether it is a full transfer or part transfer.

5.4 A distinction was also drawn between the LMA methods of transfer and the ISDA methods of transfer. ISDA mainly provides for one way of transfer of rights and obligations, namely by way of novation and any security issues would always need to be considered and dealt with. There was some discussion around the origins of the assignment and assumption mechanism in the LMA documents and although there were no clear answers, members acknowledged that the assignment and assumption mechanism was created with the aim of addressing potential security issues that might arise in certain E.U. jurisdictions because of the effects of novation.

5.5 In any case, it would seem that the practical effect of whether a novation gives rise to a new contract or whether an assignment and assumption is in effect a novation are unlikely to be significant in the case of unsecured loans and therefore is likely to only matter where the loan is secured and the security is at risk.

5.6 It was concluded that these issues remain an unclear and complex area of English law and that it could, in the future, be debated and determined in the courts.

6. Any other business

6.1 No other business was raised.

The FMLC's Public Education Function: Speeches

Hwee Peng Ngoh

Legal Analyst



Registered Charity Number: 1164902.

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The FMLC's charitable remit



According to the charitable 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).

Reduced legal uncertainty and risk is in the public good; the *radar* and *research* functions are somewhat self-explanatory in this regard. The *public education* function is a key aspect of the FMLC's status as a charity, and is addressed in the following ways:

- All FMLC papers, presentations/speeches and correspondence are freely available via the FMLC website.
- The FMLC seeks to raise the profile of its research with those who are best positioned to implement solutions. This is achieved primarily through correspondence: the FMLC maintains active correspondence with regulatory and legislative groups around the world, particularly HM Treasury and the European Commission.
- Most FMLC events (with the exception of Patrons' events) are free to attend by members of the public.
- The FMLC also acts as a bridge to the judiciary, a task it carries out primarily by organising seminars to brief senior members of the judiciary on aspects of wholesale financial markets practice.

The Public Education Function



- Along with publications and events, the FMLC Secretariat furthers the Committee's education function by giving speeches about legal developments and issues of legal uncertainty in the financial markets.
- These speaking engagements may be at high-profile events or at a smaller gathering of an interested audience at a stakeholder firm.
- Members of the Secretariat have presented to audiences, within law firms for example, which are interested in learning about current issues facing the financial markets.
- The FMLC used to be CPD-qualified and such talks presented excellent training opportunities.
- Example of topics on which the Secretariat has presented are set out in slides below.

Brexit, FinTech and FinTech Regulation After Brexit

Transitional Period: "Fourth" Country

- Another uncertainty arising in the context of a transition period will be a result of the U.K.'s status during the period as a Member State.
- While the U.K. will continue to be considered a Member State for the purposes of intra-E.U. business, such as for the purposes of not legally continue to be party to the E.U.'s states.
- For example, U.K. CCPs may not automatically be substituted compliance concessions awarded by the CFTC.
- It will be necessary to start from scratch with the authorities to negotiate bilateral memoranda of understanding with each Third Country jurisdiction in order to ensure effective access to date.

FinTech Today

- At the end of 2018, Bloomberg reported that over 2000 types of cryptocurrencies were used.
- According to a KPMG survey, over 2000 types of cryptocurrencies were used.
- In March 2019, the European Central Bank announced a trial of cross-border central bank digital currencies.
- On 28 June 2019, Facebook announced a trial of "stable global cryptocurrencies".
- Blockchain venture capital funding reached a record of \$1.5 billion in 2018.

Post-Brexit U.K. Fintech Regulation

- **HMT Consultation on Transposition of 5th Money Laundering Directive**
 - Expands regulatory perimeter to include virtual currencies and custodian wallet providers
- **FCA Cryptoassets Taskforce Report**
 - Sets out measures that the U.K. authorities intend to take regarding cryptoassets, including regulating financial instruments that reference cryptoassets and consulting on extending the regulatory perimeter for ICOs
- **FCA's Feedback Statement (FS17/4) on its Discussion Paper (DP17/3) on DLT**
 - Suggests current rules are flexible enough to accommodate use of DLT and that the FCA will continue to monitor DLT-related market developments
- **FCA granting e-money licences**
 - The FCA granted its first e-money licence to Coinbase in March 2018
- **FCA Guidance (FG16/5) for firms outsourcing to the "cloud"**
 - Lists areas of guidance that firms should consider when outsourcing to the cloud and other third-party IT services, including legal and regulatory concerns and effective access to date.

IBOR Transition (at the P.R.I.M.E Finance Conference 2019)

SONIA (ON)

The definition of SONIA has two elements:

- (i) Statement of underlying interest
- (ii) Statement of methodology

SONIA is a measure of the rate at which interbank wholesale funds in circumstances where credit is provided at arm's length.

On each London business day, SONIA is measured as the weighted average of interest rates paid on eligible transactions, of interest rates paid on eligible transactions.

Eligible transactions are:

- reported to the Bank's Sterling Money Market daily data
- the effective version of the 'Reporting Instructions for Forward Transactions'
- unsecured and of one business day maturity;
- executed between 00:00 hours and 18:00 hours UK time and
- greater than or equal to £25 million in value.

Euro Rates

EURIBOR is the rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the EMU zone, and is calculated at 11:00 a.m. (CET) for spot value (T+2).

EOBIA is a rate which represents the rates at which banks of sound financial standing in the European Union and European Free Trade Area (EFTA) lend funds in the overnight interbank money markets in Euro.

ESTER is a rate which reflects the wholesale euro unsecured overnight borrowing costs of euro area banks. The rate is published for each TARGET2 business day based on transactions conducted and settled on the previous day (reporting date T) with a maturity date of T+1 and which are deemed to be executed at arm's length.

Brexit and finance: the legal framework

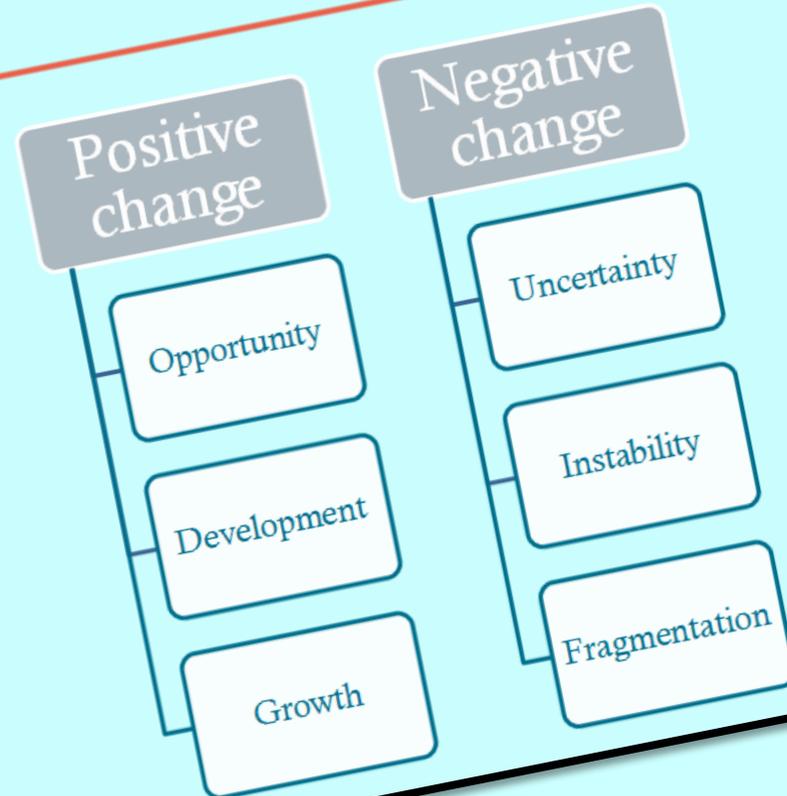
Covering note on the Financial Regulators' Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018

5 Following this model will mean that EU 'Level 1' legislation (which was developed by the European Commission and negotiated through the Council and European Parliament) and 'Level 2' legislation (apart from BTS and certain other technical elements of Level 2), will become the responsibility of the UK Parliament. This body of EU legislation includes provisions which set the policy direction for financial services, so it is appropriate that responsibility for deciding how deficiencies are fixed in this legislation should rest with Parliament. HM Treasury will propose amendments to this legislation, using the powers under the EUWB, ensuring that Parliament is able to scrutinise all of the changes. It is expected that the majority of the statutory instruments needed to correct deficiencies in this legislation will be laid under the affirmative procedure.

6 For certain EU 'Level 2' technical rules, known as Binding Technical Standards (BTS), HM Treasury proposes to transfer ongoing responsibility from the European Supervisory Authorities to the UK financial regulators – the Bank of England, the PRA, the FCA and the Payment Systems Regulator (PSR). BTS, running to several thousand pages, do not set overall policy direction but fill out the technical detail of how the requirements set at Level 1 are to be met. Having played an important role in the EU to develop these standards, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators have the necessary expertise and resource to maintain them after the UK's exit from the EU. This allocation of responsibility would be consistent with the general rule-making responsibilities already delegated to the FCA and PRA by Parliament under FSMA.

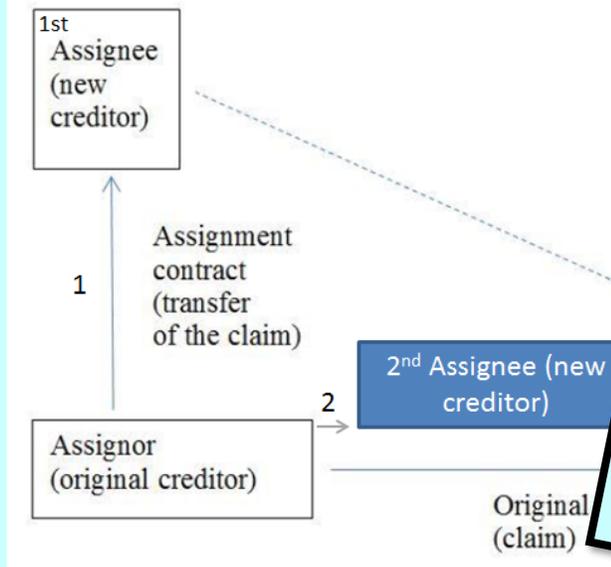
7 As HM Treasury proposes to transfer ongoing responsibility for BTS to the UK regulators, it also makes sense that the regulators perform the task of making corrections to deficiencies in existing BTS so that these rules operate effectively in the UK at exit. HM Treasury therefore proposes to delegate to UK financial regulators the power to correct deficiencies in BTS arising from EU withdrawal.

Two faces of a Brexit future:



Conflicts of laws on securities and claims: collateralisation

Collateralisation and the assignment of claims



Collateralisation and the assignment of claims

- The Commission proposal insures that retail deposits, which are made against banks by natural person depositors, are governed by the law of the underlying claim.
- This is the correct rule: high protection for the consumer by a natural person, who is determined by his habitual residence.
- Situations in which individuals are not acting in a professional relationship, the assigning of a security interest to a company on the bank account from one spouse to another, matters are excluded from the proposal. In such cases, it may lead to competing entitlements and generate a legally certain result.

Collateralisation and the assignment of claims

- Further, with regard to bank accounts in general, it is often argued that banks should be able to take a charge over their own indebtedness *vis à vis* their clients under the law of the assigned claim and irrespective of any rule to the contrary in the law of the latter's habitual residence.
- The question arose for consideration in the U.K. courts in two cases: *In re Charge Card Services Ltd* [1987] Ch 150, where it was held to be "conceptually impossible" that banks should take a charge in these circumstances, and *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, where the House of Lords settled the question and upheld the charge. In between these case decisions, legislation was enacted in several jurisdictions with common law influence (including the Cayman Islands, Bermuda, Singapore and Hong Kong) providing for the validity and enforceability of charges of this kind, which were common at the time and continue to be prevalent as a means of taking security today.

Summary and Conclusion

- The Secretariat is happy to visit your organisation and introduce legal uncertainties in a relevant area of the financial markets.
- This helps us get reach a wider audience of stakeholders, learn about the questions occupying their time and fulfil our public education.
- If you are interested, get in touch with Debbie Hayes at: secretarial@fmlc.org or with Venessa Parekh at: research@fmlc.org

Operational Resilience: TheCityUK report and overlaps with resolution activity

Adam Stage – Senior Manager, PwC
Sadhana Mistry – Manager, PwC
Sam Gater – Manager, PwC



Defining Operational Resilience



the ability to adapt operations to continue functioning, when – not if – circumstances change

Charlotte Gerken: BoE 2017

The embedding of capabilities, processes, behaviours and systems, which allow a firm to continue to carry out its mission in the face of disruption, regardless of its source

PwC & TheCityUK 2019

We already do this, right?

- Firms have many of the component parts
- Connecting the functions and the data is the challenge
- Resilience isn't just a technology issue



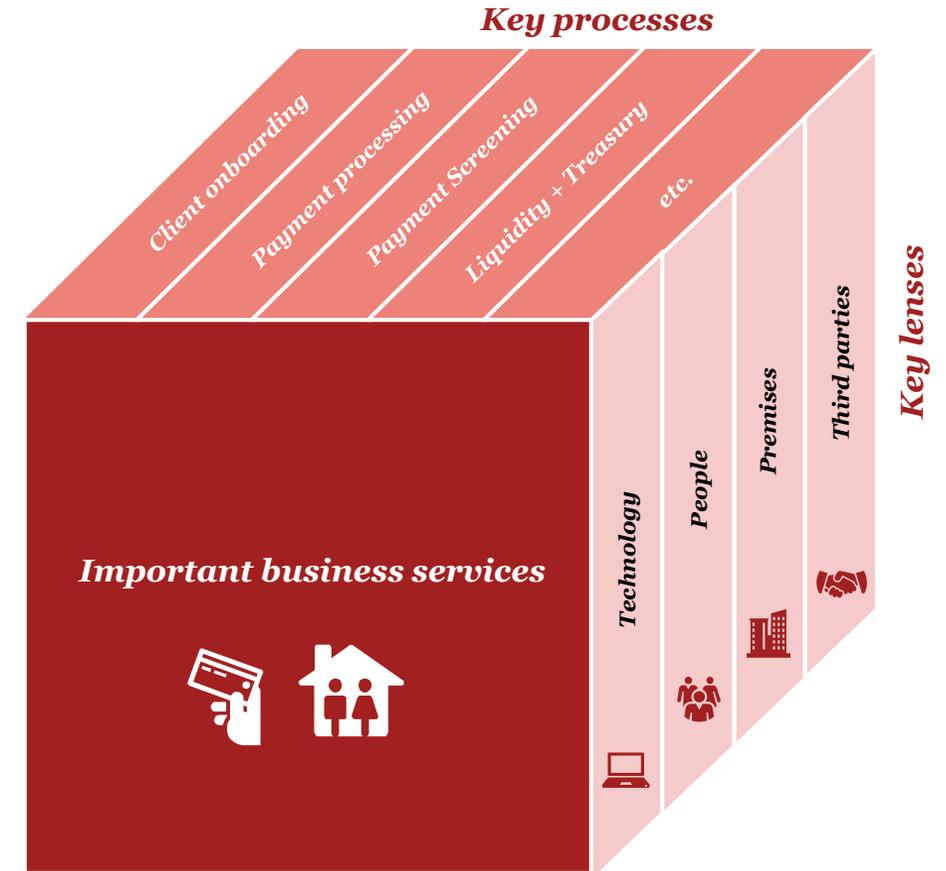
Outsourcing arrangements

Current regulatory focus

- EBA guidelines on outsourcing
- EBA guidelines on outsourcing to cloud
- FCA Business plan features outsourcing
- Data breaches are under the spotlight

What's next?

- PRA Supervisory Statement on cloud (autumn 2019)
- UK consultation paper on operational resilience (end of 2019)

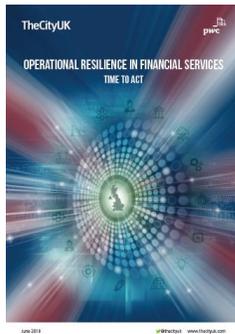


Where OCIR fits into operational resilience

	Operational Resilience	Operational Continuity in Resolution
Aims:	To make a firm's most important business services more resilient to disruption	To ensure that services which support a critical economic function continue in recovery and resolution
Focuses on:	Business Services	Critical Economic Functions (CEFs)
Relevant for:	Business as usual & recovery and resolution	Recovery and resolution only
Areas of consistency:	<ul style="list-style-type: none"> • Business services relating to CEFs • Role of third parties • Interconnectedness and complexity of firms • Data and reporting • Requires clear ownership within a firm 	

Our publications

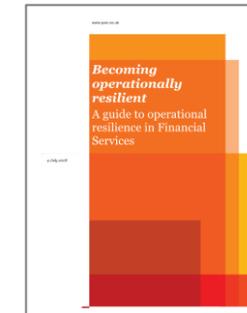
Our flagship report with TCUK
'Operational resilience in financial
service: time to act'



Our submitted evidence to TSC on their 'Inquiry
into IT failures at Retail Banks'. We gave oral
evidence on 9th July 2019



Our 2018 guide to 'Becoming
operationally resilient'



A sample of our regular publications covering the topic of operational resilience:

- [Becoming operationally resilient - the imperatives \(Part 1 - the regulatory imperative\)](#)
- [Becoming operationally resilient - the imperatives \(Part 2 - the commercial imperative\)](#)
- [BBI feature article on operational resilience - international consistency \(pages 3-5\)](#)
- [Why technology currency is a vital component of an operational resilience programme](#)
- [Ensuring resilience - from Cloud to climate change](#)
- [Parliament keeps the spotlight on operational resilience](#)
- [The end of legacy systems is nigh](#)

Time to act

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