



FINANCIAL MARKETS LAW COMMITTEE

Teleconference to discuss legal uncertainties arising from major operational disruption owing to COVID-19

Date: 26 March 2020

Time: 4.30pm to 6.00pm

Attendees:

Lord Thomas (Chair)	FMLC Chairman
William Blair	Queen Mary University of London
Claude Brown	Reed Smith LLP
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
David Greenwald	Fried, Frank, Harris, Shriver & Jacobson LLP
Carolyn H Jackson	Katten Muchin Rosenman UK LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Peter King	HM Treasury
Ida Levine	Capital International Limited
Karen Levinge	Financial Conduct Authority
Jon May	Marshall Wace LLP
Rob Price	Bank of England
Barnabas Reynolds	Shearman & Sterling LLP
Sanjev Warna-kula-suriya	Latham & Watkins LLP
Pansy Wong	J.P. Morgan
Joanna Perkins	FMLC Chief Executive
Venessa Parekh	FMLC Research Manager
Chhavi Sinha	FMLC Acting Manager
Katja Trela-Larsen	FMLC Forums Coordinator

Registered Charity Number: 1164902.

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MINUTES

1. **Introductions**

- 1.1. The Chairman opened the meeting and Members introduced themselves. The Chairman began by highlighting that this meeting was being convened via teleconference to discuss specific legal uncertainties arising from the major operational disruption owing to COVID-19. The Chairman proposed that the FMLC might wish, at the end of the call, to resolve (1) to set up a standing group of experts who may review any legislative or regulatory action necessitated by the circumstances of COVID-19 and (2) to publish a paper on these issues. He suggested that the discussion proceed, first, on the basis of the agenda and briefing note provided by the Secretariat.

2. **Issues of legal uncertainty**

- 2.1. A Member noted that contractual issues were a common consequence of the disruption all around the world, including in the U.S. He stated that material adverse change, in particular, was very fact specific. Another Member observed that, while the general situation around COVID-19 has given rise to substantial difficulty in the financial markets, these issues are not necessarily legal uncertainties. They might simply be commercial questions.
- 2.2. The Chairman asked whether, in this context, if test cases arose, it should be recommended that the commercial courts should make special arrangements. A Member agreed that this would be useful, in addition to drawing attention to the Financial List Test Case procedures. Members discussed the timing of such a recommendation but generally agreed that drawing attention to the specific procedures available would be a useful thing for the FMLC to do.
- 2.3. Turning to the contractual issues listed in the agenda again, a Member noted that, in addition to these questions, he had received queries regarding other aspects of contracts which were being impacted by the operational disruption. One of these was relief in the form of payment moratoria offered by various governments. He stated that this affects payments which may be made in financing transactions, impacts many types of existing contracts and may result in insolvency action in the future. The European Banking Authority, the European Securities and Markets Authority and the Prudential Regulation Authority have all issued statements regarding such measures. It remains to be seen whether people or companies relying on such payment moratoria will be

considered to be in default in any legal action. Members discussed the merits of a legislative or regulatory intervention on this issue at this stage.

- 2.4. Another related question concerns the duties of directors and officers in respect of potential “wrongful trading” consequences of continuing to trade in light of concerns about their ability to meet payment obligations to their creditors. A Member noted that Germany has proposed legislation which would protect directors in this context. The Chairman agreed that this point should be included in any publication the FMLC produces on this topic.
- 2.5. Members then discussed complexities arising from requirements related to certain documents which may only be authenticated by a “wet” signature. By way of example, the U.K. Land Registry does not accept virtual signatures and similar requirements arise in respect of securities. A Member noted that there was a conflict of laws aspect to this issue as the requirements for the electronic execution of documents differs across jurisdictions. Another Member agreed that there was very little guidance around when wet signatures were required. She observed that similar difficulties arose in the context of notices being served in person owing to the restriction of the movement of people. On a related point, a Member drew attention to the requirements in respect of certain declarations which must be signed in the presence of a notary. In this context too, social distancing rules meant that efforts to notarise documents were often frustrated. A Member asked whether the FMLC could draw attention to the Committee’s previous work on the execution of documents which might offer guidance.
- 2.6. Finally, a Member observed that frustration and material adverse change clauses were key questions at the moment for short-term contracts. Different issues of legal uncertainty would arise in respect of long-term contracts which the FMLC would need to monitor.
- 2.7. Turning to institutional issues, a Member stated that there remains the possibility of widespread market closures. For example, the Philippines stock exchange had been closed earlier in the month. Were the New York Stock Exchange closed, several issues of uncertainty would arise for which there were no precedents. He noted that the last time the New York Stock Exchange had been closed for an extended period of time was during World War I, although it had been closed for two days during hurricane Sandy in 2012. Such a closure would result in several complexities, including in respect of ISDA contracts and with regards to margin payments.

2.8. The discussion then turned to concerns relating to negative interest rates. A Member noted that where the interest rate was close to zero, in some circumstances the effect of the application of transaction charges was that the overall flow of funds was reversed. He reported that many parties were attempting to amend contract terms to prevent this.

2.9. A Member drew attention to the implementation across the E.U. of temporary short sell bans. He said that authorities had issued statements on this subject daily and that the bans could be widened in the future, resulting in implications with respect to various indices. Another Member highlighted the disparity between bank lenders, which would have access to funding from the central bank, and non-bank lenders who do not, resulting in further financing complexities.

3. Proposed plan of action

3.1. The Chairman asked whether it would be beneficial to publish a document highlighting these issues of uncertainty. The document might be useful to authorities, which are reacting to major disruption, in setting priorities. Members agreed that this would be useful. The Chairman asked the Secretariat to prepare and publish such a memo by Monday (30 March).

3.2. The Chairman also asked whether a smaller expert group might be established to review any forthcoming legislative or regulatory action and act as a point of contact for the Secretariat. He asked Members who wished to join to email the Research Manager.

3.3. The Chairman agreed to explore judicial channels to determine if there was anything the FMLC could do at this stage which would help the judiciary.

3.4. The Chairman suggested that Members might convene again for a similar teleconference should there be any serious developments before the next FMLC meeting. Members agreed.

4. Any other business

4.1. No other business was raised.