



Financial Markets Law Committee (“FMLC”)

Sovereign Debt Scoping Forum

Date: Tuesday 3 December 2019

Time: 8.30am to 10.00am

Location: Norton Rose Fulbright LLP, 3 More London Riverside, London, SE1 2AQ

In Attendance:

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| Michael Godden (Chair) | Norton Rose Fulbright LLP |
| Antony Beaves | Bank of England |
| Carter Brod | Morgan, Lewis & Bockius UK LLP |
| Ian Clark | White & Case LLP |
| Michael Doran | Baker & McKenzie LLP |
| Francis Fitzherbert-Brockholes | White & Case LLP |
| Leland Goss | International Capital Market Association |
| Jim Ho | Cleary Gottlieb Steen & Hamilton LLP |
| John McGrath | Sidley Austin LLP |
| Richard O’Callaghan | Linklaters LLP |
| Rodrigo Olivares-Caminal | Queen Mary University of London |
| Venessa Parekh | FMLC Secretariat |
| Katja Trela-Larsen | FMLC Secretariat |

Regrets:

| | |
|-------------------|---------------------------------|
| Rosa Lastra | Queen Mary University of London |
| Yannis Manuelides | Allen & Overy LLP |

Registered Charity Number: 1164902.

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Minutes:

1. Introductions

1.1. Mr Godden opened the meeting and invited attendees to introduce themselves.

2. Administration (Venessa Parekh)

2.1. The FMLC's Engagement with the Public Sector

2.1.1. Ms Parekh delivered a short presentation providing an overview of the FMLC's engagement with public authorities.¹ She explained that FMLC is a charity which does not engage in lobbying; it does, however, interact closely with legislative and regulatory bodies in the U.K. and E.U. She provided examples of recent projects on which the FMLC had liaised with public authorities.

2.2. 2020 Forward Schedule

2.2.1. Ms Parekh turned to the proposed 2020 Forward Schedule and asked attendees to send any comments on the dates to the Secretariat at their earliest convenience.

3. *Ukraine v The Law Debenture Trust Corporation plc*—the Court of Appeal Ruling (Michael Godden)

3.1. Mr Godden began his remarks on the case of *Ukraine v The Law Debenture Trust Corporation plc* [2018] EWCA Civ 2026 by stating that he acts on behalf of The Law Debenture Trust Corporation plc. An appeal to Court of Appeal's judgment was scheduled to be heard at the Supreme Court in the following week, with a judgment in the new year. Mr Godden stated that, in view of the upcoming hearing, he would only speak to facts which are in the public domain and give an overview of the Court of Appeal judgment.

3.2. Mr Godden explained that the Ukraine had issued a Eurobond note in 2013 for \$3 billion US dollars as the first part of a \$15 billion financing deal arranged between Ukraine and the Russian Federation. The debt was governed by English law and Russia was the sole subscriber. In 2014, Ukraine defaulted on its obligations under the debt and the Law Debenture Trust (acting on the direction of Russia) brought proceedings against Ukraine in the U.K.

¹ Please see Appendix I below

3.3. Mr Godden commented that the Court of Appeal proceedings centred on four main issues which, as put forward by Ukraine, were:

- a) Duress: Ukraine was on the verge of signing an Association Agreement with the European Union but it did not ultimately do so. Ukraine contended that Russia applied economic and political pressure to force its administration into accepting Russian financial support instead. The transaction documents should therefore be found voidable;
- b) Capacity: procedures under Ukrainian law had not been followed when issuing the Eurobond which had breached the borrowing limits in Ukraine's Budget Code;
- c) Authority: even if the State was found to have legal capacity, Ukraine's The Minister of Finance lacked capacity to contract and therefore the bond was void; and
- d) Breach of implied terms: Russia, by invading the Crimea, was in breach of implied terms as it had deliberately interfered with Ukraine's capacity to repay or breached its obligations to Ukraine under public international law.

3.4. Mr Godden noted that, at first instance, Mr Justice Blair had delivered summary judgment in which he had rejected all of Ukraine's arguments. The Court of Appeal ruled that, despite the divergence from its own domestic law, Ukraine did have the capacity to contract. The Court observed that neither party had been able to cite any case law in which the capacity of a state to borrow, or to enter into other forms of contract, had been raised or discussed. The Court of Appeal held once a State is recognised by HM Government, it derives legal personality under English law from which capacity flows. Any restrictions in a State's own constitutional laws are questions of authority rather than capacity.

3.5. On the matter of authority, Ukraine had argued that its Minister of Finance lacked the authority to contractually bind the country. The Court of Appeal found that the Minister did have ostensible authority. Its reasoning differed from that of the High Court: it stated that ostensible authority arises where there has been some direct representation as to the authority of the person acting. The Court of Appeal concluded that it was impossible to find that the Law Debenture Trust knew, or should have known, prior to the Eurobond issuance, that Ukraine's external borrowing limit would be exceeded.

- 3.6. As to duress, the Court of Appeal ruled that Russia’s alleged actions, both around the time of the transaction and when it invaded the Crimea, were considered to be “Acts of States”. These were *prima facie* non-justiciable. Mr Godden commented that non-justiciability had been disappplied on grounds of public policy in the event of a violation of public international law in *Belhaj and others v Straw and others* [2017] UKSC 3. It had been unclear whether that argument would be accepted again by the Court of Appeal—or indeed the Supreme Court. Finally, the Court of Appeal also held that Mr Justice Blair had correctly concluded terms could not be implied into the Eurobonds and accordingly had rejected Ukraine's arguments.
- 3.7. A discussion followed. Attendees considered whether, were the Supreme Court to disagree with the Court of Appeal’s finding on justiciability and found that Russia’s actions impeded Ukraine’s ability to pay, a stay might be granted, either permanently or pending judgment by another international Court. Attendees discussed which international forum might be best placed to consider this issue. They observed that there had been cases in respect of Chinese and Sri Lankan sovereign debt which had been heard by the International Court of Justice. Attendees also discussed complications which might have arisen if the notes had been traded on the secondary market and whether third-party holders could be “punished” for buying problematic bonds. Parallels were drawn between such an hypothetical and the “secret” debt issued by Mozambique and Venezuelan “hunger bonds”.
- 3.8. In Venezuela, it is possible that litigation might arise in the coming year. Attendees discussed the complex political situation in Venezuela where two “governments” currently existed and had been recognised internationally. A question which may become relevant in a sovereign debt dispute is how ongoing and new litigation would contend with the two administrations.
- 3.9. Turning to Mozambique, an attendee stated that there were new and arguably valid authorities stating that the parties holding the bonds, originally issued in 2013-14 and novated in 2016, had played no part in the political situation of 2013-14. An attendee asked what the impact would be on the new obligation created in 2016 if the original debt was found to be void. Attendees discussed the timeline of the Mozambique debt crisis and the question of whether the novation might be considered an “exchange”. If English law-governed debt is found to be “void” or “voidable” under English law, an attendee asked whether any further action would be necessary in the issuer’s jurisdiction to prevent enforcement by the creditors.

3.10. Mr Godden noted the Supreme Court judgment was expected next year. Attendees expressed interest in discussing the judgment in due course.

4. **Plenary discussion on recent and anticipated developments—potential areas of focus for future meetings (Michael Godden)**

4.1. A Forum member suggested that the Forum might wish to discuss at a future meeting updates made to Euro-area collective action clauses (“**CACs**”). The E.U. Economic and Financial Committee proposed CAC model introduces single-limb aggregation. These CACs would be implemented over 2020 and go into effect in 2022. Another member commented that it would be interesting to observe the “uniform applicability” rule in practice within CACs in the context of Argentinian debt. An attendee noted the importance of consistency in respect of CACs over time rather than across jurisdictions.

4.2. A member highlighted uncertainties arising in the context of the transition away from LIBOR in respect of legacy floating rate notes. He observed that although SONIA had been adopted for new financing, it might be necessary to gather bondholders’ consent to amend terms in legacy contracts. Although this was an issue of relevance to the financial markets as a whole, there could be sovereign debt implications. A member noted, however, that there are few floating rate notes from Sovereigns.

4.3. Members raised the Barbados debt restructuring and Mozambique as possible topics of discussion at future meetings. Barbados was issuing climate-resilient public debt for which changes needed to be made to the International Capital Market Association (“**ICMA**”) template with regards to issues such as credit engagement clauses. The member drew parallels with debt issued by Grenada. The Forum agreed to return to this subject at the next meeting.

5. **Any other business**

5.1. No further business was raised.

Did you know that although the FMLC is a charity and not a lobbying organisation...it has engaged significantly with public authorities?

Venessa Parekh, Research Manager



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The FMLC's charitable remit

According to its 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).

FMLC's engagement with public authorities

- The FMLC is NOT a lobbying organisation, but it has engaged significantly and effectively with public authorities;
- The engagement with public authorities is a natural adjunct to its radar, research and public education functions of identifying, considering and addressing issues of legal uncertainties;
- A few examples of topics on which the FMLC has corresponded with public authorities and has achieved effective outcomes and impact are set out in slides below.

U.K. withdrawal from the E.U. based on a free trade agreement not covering financial services – evidence to the House of Lords E.U. Financial Affairs Sub-Committee

- As an extension of work conducted by an FMLC Working Group examining whether a withdrawal from the E.U. based on a free trade agreement not covering the provision of financial services would have any legal ramifications for existing financial contracts, Professor Hugh Beale (University of Warwick) and Simon Firth (Linklaters LLP) gave evidence on the topic of post-Brexit contractual continuity to the House of Lords E.U. Financial Affairs sub-committee.



Colloquium on crypto-assets with the Chief of Staff of the U.S. Securities and Exchange Commission

- On 21st June 2019, the FMLC was delighted to welcome Michael Gill, Chief of Staff and Chief Operating Officer of the U.S. Commodity Futures Trading Commission (the “CFTC”), as keynote speaker at a colloquium on regulating crypto-assets. In the U.S., regulation of crypto-assets has evolved into a multifaceted, multi-regulatory approach and oversight is split between several federal and state authorities. The CFTC has responsibility over crypto-assets used in derivatives contract, or if there is fraud or manipulation involving crypto-assets traded in interstate commerce. Mr. Gill provided an overview of the development of crypto-assets and of the approaches taken by U.S. regulators in evaluating them. He outlined the CFTC’s priorities in considering whether and how crypto-assets should be regulated.



Review of Brexit “onshoring” legislation

- In recent months, the FMLC has focused on reviewing statutory instruments published in draft by HM Treasury under the European Union (Withdrawal) Act 2018. These instruments incorporate and amend (i.e., “**onshore**”) the E.U.’s legal and regulatory framework for financial services.
- The FMLC Secretariat was invited by HM Treasury to review draft versions of this legislation and, to facilitate a quick response to such secondary legislation, the Secretariat has organised meetings amongst leading organisations in the City, comprising representatives from the Brexit Law Committee, (the legal wing of the IRSG), the CLLS Financial and Regulatory Law Committees and the Law Society, to discuss coordinated responses.
- The FMLC has also published papers on the statutory instruments onshoring regulations relating to bank recovery and resolution, investment funds and their managers, markets in financial instruments, corporate insolvency, securitisation and the Benchmark regulation.

ESMA update on its Q&A on MAR in response to a letter from the FMLC

- On 5 September 2017, the FMLC received a response from the Financial Conduct Authority (“**FCA**”) on its paper that explores uncertainties as to the financial instruments that fall within the scope of the Market Abuse Regulation (“**MAR**”). The letter states that the FMLC’s analysis and recommendations stemming from this paper were circulated to the FCA policy team, who works with the European Securities and Markets Authority (“**ESMA**”) in its development of its MAR guidance materials. The letter flags that ESMA has updated its Q&A on MAR on 1 September 2017 to include a new Q&A 9 on market soundings, which seeks to provide guidance on some of the issues highlighted in the FMLC paper.

Summary and Conclusion

- The FMLC seeks to accomplish its radar, research and public education remits while also engaging with public authorities;
- Although the FMLC is NOT a lobbying organisation, it has charitable remits which are aligned with engagement with public authorities; engagement which serves to accomplish the charity's objectives of radar, research and public education.

Proposed 2020 Forward Schedule



- Tuesday 17 March 2.00pm to 3.30pm (U.K.)
- Tuesday 16 June 8.30am to 10.00am (U.K.)
- Tuesday 15 September 2.00pm to 3.30pm (U.K.)
- Tuesday 1 December 8.30am to 10.00am (U.K.)