

FINANCIAL MARKETS LAW COMMITTEE

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

Date: 28 May 2020

Time: 4.30pm to 6.00pm



Attendees:

Lord Thomas (Chairman)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried, Frank, Harris, Shriver & Jacobson LLP
Andrew Bagley	Goldman Sachs
Claude Brown	Reed Smith LLP
Paul Double	City of London Remembrancer's Office
Simon Firth	Linklaters LLP
Kate Gibbons	Clifford Chance LLP
Richard Gray	HSBC
Carolyn Jackson	Katten Muchin Rosenman U.K. LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Sir Robin Knowles	Royal Courts of Justice
Rachel Kent	Hogan Lovells (International) LLP
Peter King	HM Treasury
Ida Levine	Capital International Limited
Jon May	Marshall Wace LLP
Rob Price	Bank of England
Jan Putnis	Slaughter and May
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

Registered Charity Number: 1164902.

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MINUTES

1. **Introductions**

- 1.1. The Chairman opened the meeting. He commented that there had been many developments since the last meeting but legal complexities arising from the pandemic continued to occupy the financial markets. He mentioned the FMLC's work in this regard, including a seminar held to update members of the judiciary on pandemic-related contractual and market issues.

2. **Contractual issues**

- 2.1. The Chairman noted that force majeure, frustration and material adverse change clauses in contracts remained a relevant consideration. A Member commented that the contractual questions which were likely to reach the courts, in addition to these questions, would concern implied terms in contracts.
- 2.2. The discussion turned to the possibility of negative interest rates, and whether parties to existing contracts may argue that their contracts no longer reflect their original intention. A Member said that reports that the Bank of England may adopt negative rates seemed exaggerated. She reported that, on a call with stakeholders, the Governor had downplayed the likelihood of this. Another member observed that there were cases which considered questions arising in the context of negative interest rates. A Member stated that negative interest rates were a policy decision and it didn't seem as though the FMLC could draw attention to specific issues without wading into policy analysis. In addition, any contractual questions would be specific to the wording and circumstances of individual contracts.
- 2.3. The restrictions on the movement of people has brought into focus complexities relating to the need for "wet" signatures in contracts in cases where electronic execution is not possible. It had seemed, in March when lockdowns had just begun, an area in which complexities would arise. Members were of the opinion that market participants were generally managing to authenticate documents using electronic execution and adapting witnessing requirements in a satisfactory manner. In addition, the authorities had issued statements and guidance around the validity of and formalities necessary for electronic signatures to be accepted.

3. Institutional issues

- 3.1. The discussion then turned to the Corporate Insolvency and Governance Bill 2019-21 which had recently had its first reading in the House of Commons. The Bill will provide a suspension of existing insolvency provisions that otherwise might impose personal liability on directors for continuing to trade when their business is in financial distress. The Chairman noted that the Bill would move through the legislative process quickly as it contained emergency provisions to help businesses during the pandemic. A member noted that the Bill is a hybrid offering, comprising provisions with temporary effect, to provide relief during the pandemic, as well as provisions with permanent effect which arise from recommendations made by the Insolvency Service in 2018. He noted that there were issues around the scope of the legislation from an extraterritorial perspective. Another member drew attention to the proposed suspension of contracts and questions around its application to a range of contracts.
- 3.2. Another member drew attention to the broad powers included in the bill to exempt financial institutions. HM Treasury would be publishing specific regulations with regards to these exemptions. Members expressed a concern that these safeguards could be removed during the legislative process. The Chairman suggested that the FMLC write to the authorities setting out the legal uncertainties which may arise from the enactment of this Bill.
- 3.3. The Chairman asked whether there were aspects of the changes introduced by the Bill which would be relevant to the judiciary. A member said that it was likely that the pandemic led to insolvency-related litigation which would ultimately be governed by provisions of the Bill. He also noted changes to the UK schemes of arrangement in which courts would be involved. Another member observed that the new restructuring plan introduced by the Bill borrows heavily from the requirements of Chapter 11 of the U.S. Bankruptcy Code. This will change the Court's role in insolvency proceedings, necessitating more judicial involvement in the process.

4. Market issues

- 4.1. In May 2020, the Federal Constitutional Court of Germany found the E.U. quantitative easing programme to be *ultra vires*. The decision may give rise to legal uncertainties with regards to stimulus policies by other central banks. The Secretariat proposed that the Committee consider whether it would be useful to post an explainer on the FMLC

website on monetary financing (as to its legal aspect) for public education purposes. A member drew attention to a distinction between the quantitative easing offered in 2015 and that which was offered now to help businesses cope with the pandemic, which might not be viewed as critically. The Chief Executive clarified that this would be an explanatory note drawing no conclusions or offering no solutions but aimed purely at meeting the FMLC's educational remit. The Committee agreed to review a first draft of such a note.

4.2. Members turned then to a discussion about negative oil prices. The market for crude oil has been particularly affected by reduced demand, with prices falling below zero on certain exchange-traded contracts in April 2020 for the first time in history. The Secretariat had circulated a draft paper exploring the nature of the legal uncertainties arising in financial markets as a result of negative oil prices. Members had sent in valuable comments on the paper which the Secretariat was working on incorporating. As this is likely to change the paper substantially, the Secretariat will recirculate a draft for Members' review in due course.

4.3. A member observed that, like negative interest rates, any contractual questions which arose from negative oil prices would be quite contract-specific. The Chief Executive stated that any paper on negative oil prices would draw out the point that contracts are contextual and legal advice must be sought. Nevertheless, this is a live issue and a paper drawing attention to legal uncertainties would be useful. The member observed that it might be hard to draw conclusions in an FMLC paper without sight of individual contracts.

4.4. Members agreed to review a revised version of the paper.

5. **Other issues Members may wish to raise**

5.1. During the COVID-19 pandemic, HM Government and Member States of the European Union have provided financial aid to businesses to help them survive the damaging impact of the pandemic. The European Commission on March 19 adopted a Temporary Framework for State Aid (the "**Temporary Framework**"), which specifies the measures of financial support E.U. Member States can provide to companies in line with E.U. state aid rules, in order to ensure their liquidity and access to finance. The Commission amended the Temporary Framework on April 3. On May 8 the Commission adopted a further amendment identifying two additional temporary

state aid measures, including public support in the forms of recapitalization and subordinated loans.

- 5.2. A Member drew attention to the potential implications of the E.U.'s amended state aid regime under WTO rules. He observed that this may become relevant to the U.K. after its withdrawal from the E.U. He explained that of the two types of subsidies which the WTO considered, one type applied largely to goods. The second, namely "actionable subsidies", would leave the state offering such a subsidy open to action by other WTO members if they were adversely impacted. He stated that there was no current issue but this should be kept under review as it may become relevant.

6. Any other business

- 6.1. No other business was raised