

Financial Markets Law Committee (“FMLC”)

Brexit Advisory Group

Meeting Date: Monday 22 June 2020

Meeting Time: 10.00am to 11.00am

Virtual meeting



Attendees:

Joanna Perkins (Moderator)	FMLC
Gregg Beechey	Fried, Frank, Harris, Shriver & Jacobson (London) LLP
Caroline Boon	Barclays Bank
Nick Brittain	Sidley Austin LLP
Charles Clark	Linklaters LLP
Paul Double	City of London Corporation
Paul Edmonson	CMS Cameron McKenna Nabarro Olswang LLP
Kate Gibbons	Clifford Chance LLP
Jonathan Gilmour	Travers Smith LLP
Jan Haizmann	European Federation of Energy Traders
Saima Hanif	3 Verulam Buildings
Trevor Hartley	London School of Economics and Political Science
Jim Ho	Cleary Gottlieb Steen & Hamilton LLP
Katy Hyams	The London Metal Exchange
Bruce Johnston	Morgan Lewis & Bockius UK LLP
Rashpal Kaul	Rabobank International
Vanessa Knapp	
Dorothy Livingston	Herbert Smith Freehills LLP
Anne MacPherson	Gibson Dunn & Crutcher LLP
Greg McEneny	Lloyds Banking Group plc
Michelle Moran	K&L Gates LLP
Hamish Patrick	Shepherd and Wedderburn LLP
Rob Price	Bank of England
Jan Putnis	Slaughter and May
Marke Raines	Raines & Co
Arad Reisberg	Brunel University London

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Nathalie Robertson Nugent	Natwest Markets Legal
Andrew Seager	Taylor Wessing LLP
Kate Sumpter	Allen & Overy LLP
Sanjev Warna Kula Suriya	Latham & Watkins LLP
Peter Werner	International Swaps and Derivatives Association
Venessa Parekh	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Minutes

1. Introduction

1.1. Dr Perkins opened the meeting.

2. Parliamentary Update (Paul Double)

2.1. Mr Double reported that Parliament had partially returned to Westminster with ‘hybrid’ proceedings. The House of Commons is back in person with social distancing mechanisms in operation, but a good proportion of parliamentary staff had yet to return. The House of Lords was still sitting largely virtually. Mr Double went on to give a summary of Bills currently making their way through the Parliament.

2.2. The Private International Law (Implementation of Agreements) Bill [HL] 2019-21 (the “**Private International Law Bill**”) has been through the House of Lords for a second reading, committee stage and, last week, the report stage.¹ The Private International Law Bill’s first clause would enable domestic effect to be given to the 1996, 2005 and 2007 Hague Conventions of which the U.K. is currently a signatory owing to its status as an E.U. Member State.² At the end of the transition period, the wide body of E.U. legislation, as well as any international agreements applying to the U.K. *qua* E.U. Member State, will cease to be applicable to the U.K. The U.K. would therefore need to rejoin the Conventions in its own right.

¹ HM Government, Private International Law (Implementation of Agreements) Bill [HL] 2019-21, available at <https://services.parliament.uk/Bills/2019-21/privateinternationallawimplementationofagreements.html>

² Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the “**1996 Hague Convention**”); the Convention of 30 June 2005 on Choice of Court Agreements (the “**2005 Hague Convention**”) and Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the “**2007 Hague Convention**”).

- 2.3. The Private International Law Bill’s second clause is a broad permissive clause providing HM Government with a delegated power to implement other private international law agreements in domestic law in the future via secondary legislation—a species of so-called “Henry VIII” type clause. Concern has been raised that the executive power given by the second clause is very broad, and the possibility of Judicial Review of the delegated legislation could introduce legal uncertainty. An amendment whose effect was to completely remove the clause had been tabled in the House of Lords. An Advisory Group member suggested the second clause might have not been removed by amendment had it been limited to a power to allow HM Government to join the 2007 Lugano Convention.³ Mr Double stated that without this second clause or an alternate clause in the Private International Law Bill there would be no power for the U.K to join a convention without additional Parliamentary approval. The third reading of the Private International Law Bill in the House of Lords was pending after which it would be introduced to the House of Commons where he anticipated the clause would be reinserted. A member commented that the Lord Chancellor’s Advisory Committee on Private International Law had been re-engaged by the Ministry of Justice..
- 2.4. Mr Double moved on to discuss the Corporate Insolvency and Governance Bill 2019-21 (the “**Insolvency Bill**”).⁴ He observed the Insolvency Bill was moving extremely rapidly through Parliament. The Insolvency Bill contained some provisions related to the effects of the COVID-19 pandemic and other more permanent provisions. Mr Double noted the FMLC had written to HM Government in respect of the Insolvency Bill.⁵ He commented that there is a lack of political will to hold up progress of the Insolvency Bill owing to its pandemic-related provisions.
- 2.5. Mr Double noted the Trade Bill 2019-21 (the “Trade Bill”) is currently in the House of Commons at the Committee stage.⁶ He commented that the Trade Bill had previously not made progress in Theresa May’s government. A big issue in debate on the Trade Bill was transparency. The Trade Bill was particularly pertinent in relation to the implementation of international trade agreements. Mr Double commented that, in contrast to its lack of progress

³ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29>

⁴ HM Government, Corporate Insolvency and Governance Bill 2019-21, available at: <https://services.parliament.uk/Bills/2019-21/corporateinsolvencyandgovernance/documents.html>

⁵ FMLC, *Letter: Corporate Insolvency and Governance Bill* (12 June 2020), available at: http://fmlc.org/wp-content/uploads/2020/06/11707453_1.pdf

⁶ HM Government, Trade Bill 2019-21, available at: <https://services.parliament.uk/bills/2019-21/trade.html>

in the previous Administration, the Trade Bill was now unlikely to face substantial parliamentary obstruction.

3. **COVID-19: The Case for Extending the Brexit Transition Period—The Scottish Government Paper (Hamish Patrick)**

3.1. Dr Patrick referred to a paper published by the Scottish Government entitled COVID-19: The Case for Extending the Brexit Transition Period (the "**Scottish Government Paper**").⁷ The Scottish Government Paper makes the case for an extension to the Brexit transition period in light of the projected detrimental economic effects of Brexit combined with those arising from COVID-19 and the related lockdown. The Scottish Government Paper models four possible outcomes for Brexit: ending the transition period this year (on 31 December 2020), extending the transition period to end in 2022, a simple E.U./U.K. trade agreement, or a “no-deal” scenario with World Trade Organization (“**WTO**”) rules for U.K./E.U. trade. The Scottish Government Paper also contains modelling for potential economic recovery outcomes following the COVID-19 pandemic, based on either a “V-shaped” economic recovery or in the event of a second wave of infection a “W-shaped” economic recovery. These variables for potential economic outcomes from the pandemic and the existing Brexit modelling are overlaid. Dr Patrick stated that he could not comment on the modeling or its suitability.

3.2. The Scottish Government Paper gives a broad headline that the modelling predicts a hit to the Scottish economy of up to £3bn and suggests extending the transition period by two years to soften this impact. The Scottish Government Paper then attempts to model the economic impact of COVID-19 combined with Brexit in a sector by sector breakdown, such as tourism and manufacturing. The case provided for the extension of the transition period is to give time to recover from the economic effects arising from COVID-19, their prediction that Brexit makes the economic impact of COVID-19 worse, with a COVID dimension on Brexit preparations and the possibility of getting a more advantageous trade agreement with the E.U and the disruption from the pandemic reducing scrutiny of any trade deal. Dr Patrick commented that the Scottish Government’s view of a “better deal” may not be the same as that of HM Government.

⁷ The Scottish Government, *COVID-19: The Case for Extending the Brexit Transition Period* (June 2020) available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2020/06/covid-19-case-extending-brexit-transition-period/documents/covid-19-case-extending-brexit-transition-period/covid-19-case-extending-brexit-transition-period/govscot%3Adocument/covid-19-case-extending-brexit-transition-period.pdf>

3.3. The Scottish Government Paper can be viewed through the prism of the Scottish independence movement as well as the Scottish majority “remain” vote in the Brexit referendum and political dynamics within the U.K. Minister for the Cabinet Office, Michael Gove had announced, however, there would be no extension of the transition period shortly before a scheduled meeting with the devolved Governments on Brexit, and following publication of the Scottish Government Paper, following which the devolved Governments decided not to attend the meeting. Dr Patrick suggested nothing is likely to happen on this matter between now and the June deadline, under the Withdrawal Agreement, for applying for an extension of the transition period.

4. Next steps (Joanna Perkins)

Dr Perkins thanked the speakers and briefly recounted political developments since the last meeting of the Advisory Group. She noted HM Government had suspended review the “onshoring” Statutory Instruments owing to Covid-19. She drew members’ attention to the Covid-19 developments and LIBOR transition pages on the FMLC’s website, and asked members to feedback if there was any areas they would recommend to FMLC attention.

5. Any other business

5.1. No further business was raised at the meeting.