FINANCIAL MARKETS LAW COMMITTEE

Videoconference

Date: 10 December 2020

Time: 4.30pm to 6.00pm

MINUTES

Attendees:

Lord Thomas (Chair)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried, Frank, Harris, Shriver & Jacobson LLP
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
Carolyn Jackson	Katten Muchin Rosenman LLP
Rachel Kent	Hogan Lovells International LLP
Peter King	HM Treasury
Ida Levine	Impact Investing Institute
Chris Newby	AIG
Rob Price	Bank of England
Jan Putnis	Slaughter and May
Barney Reynolds	Shearman & Sterling LLP
Sanjev Warna-kula-suriya	Latham & Watkins
Joanna Perkins	FMLC Chief Executive
Venessa Parekh	FMLC Research Manager
Chhavi Sinha	FMLC Acting Manager
Katja Trela-Larsen	FMLC Forums Coordinator

CHAIRMAN'S COMMENTS

The Chairman stated that the interim and virtual meeting of the Quadrilateral conference, convened on 21 October, was a success. The Chief Executive let Members know that the FMLG has begun to plan for next year's Quadrilateral conference which too would be held virtually.

The Chairman drew Members' attention to an email from the Law Commission asking to hear about any areas of the law which the FMLC has identified as in need of reform and which might be suitable for the Law Commission. He suggested that the Secretariat contact the Law Commission to organise a meeting in January which Members should also attend. Members agreed.

ACTIVE PROJECTS

Monetary financing

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. The note is intended to be an explanatory note drawing no conclusions or offering no solutions but aimed purely at meeting the FMLC's educational remit.

Members discussed whether the judgment of the German Constitutional Court would have an impact on decisions made by the Bank of England. The Chief Executive explained that the Secretariat had attempted to explain the obligations imposed on central banks by the Treaty on the Functioning of the European Union in an accessible manner. The Secretariat had tried not to say anything about the Bank of England except to observe that central banks in the future would have to think about the justification they might offer when launching a stimulus policy. A Member noted that the paper's narrative seemed too wide. The Chairman suggested that the Secretariat amend the paper to draw attention to the differences in the functions fulfilled by central banks. Another Member suggested that the text be simplified further so that the paper would fulfil the FMLC's educational function.

Wet signatures and notarisation

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. At the May meeting, the Secretariat had reported an issue raised by stakeholders around the authentication of global notes. On discussion with Euroclear, it has become clear that the ICSD will accept electronic signatures as long as the governing law of the security considers them valid. A majority of these securities are governed by English law; the remainder is governed by the laws of Germany, the Netherlands, Ireland and Luxembourg.

The Secretariat had drafted a paper in pursuit of the FMLC's public education function highlighting the positions taken by these legal systems with regards to electronic signatures. A Member questioned whether it was within the remit of the FMLC to comment on non-U.K. jurisdictions. The Chief Executive confirmed that the FMLC's Articles of Incorporation did not limit it to considering U.K. law only. She stated that the Secretariat had asked experts in each jurisdiction to advise on the laws in their respective Member States. The topic at hand—the authentication of global notes by electronic signatures—was a multijurisdictional issue and required a multijurisdictional perspective. Members approved the publication of the paper subject to some minor edits for flow.

LIBOR Transition

The FMLC's paper on LIBOR transition was published on 23 October 2020. Following the publication, a number of developments have taken place which the Secretariat considered may form the basis of a possible addendum to the paper or prompt further work. Members agreed that it would be useful for the FMLC to publish an addendum on issues of uncertainty arising in the context of transition. A member drew attention to the possibility of a statutory immunity provision being added to the financial services bill. He noted that, should such an amendment be proposed, it would be useful for the FMLC to review and comment on it.

The Secretariat also reported that it had received an email from Otto Heinz at the ECB, who chairs the EFMLG, proposing a joint letter from the FMLC, FMLG, FLB & EFMLG to the relevant authorities (IOSCO, the FSB and local authorities in the U.S., U.K., E.U. and Japan) asking for an increased coordination to avoid unintended consequences linked to legislative initiatives. The Secretariat has expressed willingness to contribute to such a letter. Members agreed that this would be useful.

RADAR AND SCOPING

Developments in FinTech

The European Commission's Digital Finance Package was published at the end of October. It comprises three pieces of legislation, aimed at, redpectively: (1) creating a comprehensive framework on digital operational resilience in the financial sector; (2) imposing regulatory requirements for crypto-asset issuers and service providers on transparency, disclosure and governance; and (3) creating a pilot regime for market infrastructures based on distributed ledger technology. Stakeholders have highlighted uncertainties in relation to certain definitions proposed in the draft legislation. The Secretariat asked Members for any further points or details in relation to the definitional uncertainties for inclusion in a possible response. Members agreed that the FMLC should draw attention to any legal uncertainties arising in the context of the proposed legislation.

The discussion moved on to a wider point about the FMLC's engagement with E.U. law after Brexit. A Member noted that, especially in the context of FinTech, it was important that the FMLC highlight any uncertainties in E.U. law because the U.K. was likely to also establish its own regulations in due course and it would be unfortunate if there were minor discrepancies between the two regimes, creating an additional burden on firms, were questions of legal uncertainty not addressed. The Chief Executive reported that the Secretariat had raised the question of continued interaction with E.U. law with the Brexit Advisory Group, which had recommended that the FMLC should continue to comment on legislative proposals in the E.U.. Another member noted that the FMLC's strength was identifying technical issues and furthering the cause of clarity in law. As long as it continued to do that, in contrast to lobbying to further the role of the U.K. in the financial markets, its comments are likely to be received well. Members agreed.

Regulatory divergence in relation to sustainable finance

At the last meeting of the ESG Scoping Forum, attendees discussed the likely divergence which was likely to arise between sustainable finance standards adopted in the E.U.—through legislation which includes Regulation (E.U.) 2019/2088 sustainability-related disclosures in the financial services sector (the "**Sustainable Finance Disclosure Regulation**" or the "**SFDR**"), Directive 2014/95/E.U. as regards disclosure of non-financial and diversity information by certain large undertakings and groups (the "**Non-Financial Reporting Directive**" or the

"**NFRD**"); and Regulation (E.U.) 2020/852 on the establishment of a framework to facilitate sustainable investment (the "**Taxonomy Regulation**")—and the U.K. after Brexit. Forum members noted that, although these pieces of legislation had formed part of the proposed Financial Services (Implementation of Legislation) Bill, since it fell, HM Government has not clarified whether it intends to follow the E.U.'s approach under these measures.

Ms Levine drew Members' attention to the lack of clarity in relation to the U.K.'s strategy with regards to the implementation of E.U. legislation on ESG. She noted that market participants would struggle to conduct business in both jurisdictions if the U.K. only incorporated parts of the Level 1 E.U. legislation. A Member noted that the Chancellor had announced that the U.K.'s measures would be published imminently. He recommended waiting until the proposals in the U.K. are published. He and other members agreed that the FMLC should comment on ESG-related complexities. The Chairman agreed with this proposal.

HM Treasury's Call for Evidence: Solvency II

HM Treasury has issued a Call for Evidence on the framework for the prudential regulation of the insurance sector which is governed by Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance ("**Solvency II**"). This Call for Evidence is the first stage of the review of the application of Solvency II in the U.K. after Brexit. Members of the Insurance Scoping Forum recommended that the FMLC submit a response drawing attention to some of the enduring uncertainties which arise in respect of the Solvency II regime in the expectation that these may be mitigated as the regime is amended for a post-Brexit U.K.

Members resolved that a response should be submitted.

The Future of Financial Services Regulation in the U.K.

The Secretariat had drawn Members' attention to two open consultations on the future of financial services regulation in the U.K.: the Future Regulatory Framework Review, aimed at determining the overall approach to regulation of financial services after Brexit, and the Treasury Committee Inquiry on the future of financial services, which aims to examine and consider how financial services legislation should be determined and scrutinised by Parliament. The FMLC has raised concerns in the past in relation to the possible lack of democratic overview of decisions taken by the regulators to track or diverge from E.U. technical standards—decisions

which, in the E.U., would have been subject to the rigours of the consultative European legislative process pre-exit day.

Members agreed that the FMLC should raise issues of uncertainty arising in the context of decisions made in relation to the financial services framework in the U.K.. The Chairman noted that it was likely that there would be a large volume of work in this area. Another Member noted that making sense of onshored E.U. law would be a large project spanning at least 3 to 5 years. A Member suggested that the FMLC get involved after there is clarity on the U.K.'s proposed approach. The chairman agreed that the Secretariat should monitor this question on an ongoing basis.

FOR INFORMATION ONLY

Scoping project on Intermediated Securities

The Secretariat received an email and phone call from a stakeholder regarding the cancellation of bearer certificates and the matter of intermediated securities. He recommended that intermediated securities should be more of a priority for the FMLC. He drew attention to the recent case of *Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP (in special administration) and many others* [2020] EWHC 1624 (Comm); a factual and legal enquiry into the nature of the beneficial ownership of shares held in an intermediated holding system is a feature of the case and he believes that the time is ripe for further work to clarify property interests in intermediated securities.

The Chairman observed that the FMLC would not comment on an issue arising in the context of an ongoing case. He suggested that the Chief Executive ask the stakeholder to contact the Secretariat once judgement on the case had been passed.

The Private International Law (Implementation of Agreements) Bill

A stakeholder had written to the Chief Executive drawing attention to an amendment to the Private International Law (Implementation of Agreements) Bill**,** tabled by the House of Lords. The amendment would allow HM Government to adopt the new UNCITRAL Model Law on the Recognition of Insolvency Related Judgments (the "**New Model Law**") by secondary legislation (with or without amendments). One of the consequences of adopting the New Model Law is that it would, most likely (and if adopted without amendment) overrule the

English common law rule set out in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399) (the so-called "**rule in Gibbs**"). The effect of this rule is that the proper law of a debt governs how it may be extinguished and so, unless a foreign law is recognised and given effect under English law (as is currently the case for European insolvency proceedings under the European Insolvency Regulation, until 31 December 2020), a foreign compromise proceeding would not be able to discharge or vary an English law contract.

Members agreed that a decision to incorporate the UNCITRAL Model Law must be scrutinised properly. The rule in Gibbs had provided legal certainty for several decades. Any decision to remove it must be scrutinised carefully.

Other

The following matters were also discussed. No resolution was passed.

- U.K. Bank Ring-Fencing Legislation: At the last meeting, Members discussed uncertainties arising in the context of the U.K.'s ring-fencing regime, raised by Jan Putnis. Members agreed that a Working Group might be set up to examine legal uncertainties in this context. Owing to the pressure on the Secretariat's capacity for work which would arise from other projects initiated at the meeting, it was agreed that Mr Putnis would coordinate the initial scoping exercise. Mr Putnis said that he hoped the project would be progressed soon.
- Section 3 of the RAO—Definition of contract of insurance (Chair: Peter Bloxham): This Working Group was established to consider uncertainties around the definition of the phrase "a contract of insurance" in the Regulated Activities Order, which contains an extension "or similar contracts of guarantee" which is broad and difficult to interpret. The Working Group has had three meetings and has sent in drafting for a paper. The Secretariat is working on reviewing the drafting and compiling a draft paper. The Chairman said that he hoped the Secretariat could circulate a draft and publicise the fact that the FMLC was working on it in the newsletter.
- Negative oil prices: The Secretariat had drafted a paper exploring the nature of the legal uncertainties arising in financial markets as a result of negative oil prices, but the paper was in the process of being updated.
- Share trading obligation under MiFID II after Brexit: The Securities Markets Scoping Forum had recently discussed complexities which may arise in relation to dual-listed shares under the share trading obligation ("STO") in MiFID II after Brexit. The

concerns focused on the likelihood that firms would have to contend with two different sets of share trading obligations. In the short-term, authorities have provided relief, the result of which is likely to be loss of liquidity but not legal uncertainty. In the longer term, the Forum would like to monitor the issue.

ANY OTHER BUSINESS

A Member drew attention to an interim report published by the International Regulatory Strategy Group on the access to the U.K. by international firms. She highlighted the possibility that a call for evidence would be published shortly on issues such as equivalents decisions and the Overseas Persons Exemption.

Another Member noted that Brexit would result in a greater volume of legislation and regulation for the FMLC to scrutinise.