

Financial Markets Law Committee (“FMLC”)

Infrastructure Scoping Forum

Date: Tuesday 23 June 2020

Time: 2.00pm to 3.30pm

Virtual meeting



Attendees:

Arun Srivastava (Moderator)	Paul Hastings LLP
Antony Beaves	Bank of England
Thomas Donegan	Shearman & Sterling LLP
Emma Dwyer	Allen & Overy LLP
Jonathan Gilmour	Travers Smith LLP
Nate Lalone	Katten Muchin Rosenman UK LLP
Matthias Lehmann	University of Bonn
Iona Levine	Minerva Chambers
Natalie Lewis	Travers Smith LLP
Barney Reynolds	Shearman & Sterling LLP
Julia Smithers Excell	White & Case LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Paul Watkins	
Venessa Parekh	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Guest Speaker:

Claude Brown	Reed Smith LLP
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Regrets:

Mark Drury	Linklaters LLP
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Minutes

1. Introductions

1.1. Mr Srivastava opened the meeting.

2. **ARRC proposal for New York State legislation on LIBOR transition** (Claude Brown)

2.1. Mr Brown began his remarks by noting that HM Treasury had announced, in a written statement by Rishi Sunak, the Chancellor of the Exchequer, that it intends to bring forward legislation to introduce amendments to the Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the “**Benchmarks Regulation**” or “**BMR**”) as amended by the Benchmarks (Amendment) (EU Exit) Regulations 2018 to ensure that the Financial Conduct Authority (“**FCA**”) has sufficient powers to manage an orderly transition from LIBOR under the forthcoming Financial Services Bill.¹

2.2. As a background to this proposal, the Bank of England’s Working Group on Risk Free Rates had established the Tough Legacy Taskforce to consider challenges which firms might face in respect of transitioning certain legacy contracts from LIBOR to the successor rate. The Tough Legacy Taskforce published a paper in May 2020, entitled “Paper on the Identification of Tough Legacy Issues” (the “**Tough Legacy Taskforce Paper**”).² The proposals put forward in the Tough Legacy Taskforce Paper to mitigate such challenges included: an active transition, stabilisation by means of a “synthetic methodology” to assist transition post-2021, and recommendations for HM Government to consider a legislative solution. The Tough Legacy Taskforce Paper noted the legislative proposal put forward by the Alternative Reference Rates Committee (“**ARRC**”) in March 2020 with regards to New York State law-governed contracts which reference LIBOR (the “**ARRC Proposal**”).³ If both the U.K. and New

¹ The Chancellor of the Exchequer, Statement UIN HCWS307 (23 June 2020), available at: <https://questions-statements.parliament.uk/written-statements/detail/2020-06-23/HCWS307>

² The Working Group on Sterling Risk-Free Reference Rates, *Paper on the identification of Tough Legacy issues* (May 2020) available at: <https://www.bankofengland.co.uk/-/media/boe/files/markets/benchmarks/paper-on-the-identification-of-tough-legacy-issues.pdf?la=en&hash=0E8CA18F27F75352B0A0573DCBBC93D903077B6E>

³ Alternative Reference Rates Committee, *Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition* (6 March 2020), available at: <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Proposed-Legislative-Solution.pdf>

York State take a similar approach to LIBOR transition, it would promote international consistency.

- 2.3. Mr Brown stated the ARRC Proposal aims to minimise legal uncertainty and adverse economic uncertainty associated with LIBOR transition. The proposal for New York state legislation is not limited to “tough legacy” LIBOR contracts. Three reasons are given to justify the ARRC Proposal: the role of New York State law in financial contracts, the potential burden on New York State courts and, as many contracts reference LIBOR, the impact of the uncertainty on the economy of New York state. The ARRC Proposal notes a 1998 New York State law precedent which was used in the introduction of the Euro—General Obligation Law, Article 5, Title 16. Mr Brown provided an overview of some of the issues identified from LIBOR transition including the continuity of contracts, no fallback, and practical issues with fallbacks.
- 2.4. Mr Brown went on to give an overview of the ARRC Proposal, which does not draw distinction between different types LIBOR-referencing contracts, allows parties to opt out by mutual agreement, and does not apply to contracts with non-LIBOR fallbacks. The ARRC Proposal contains a number of mandatory provisions which apply in three situations. Firstly, where the contract contains no fallback provision, the proposed legislation will apply and require the use of its recommended replacement benchmark. Secondly, the draft legislation’s recommended replacement benchmark is mandatory where the contract contains a fallback provision to a LIBOR-based rate. Thirdly, where contracts contain fallback language that requires polling for LIBOR or other interbank funding rates, the proposed legislation nullifies those provisions.
- 2.5. The ARRC Proposal contains provisions to ensure continuity of contract, such as a prohibition on parties refusing to perform the contract, voiding or declaring a breach of contract either on the basis of the discontinuance of LIBOR or the use of the (proposed) legislation’s recommended benchmark replacement and stipulating the (proposed) legislation’s recommend Benchmark Replacement is a commercially reasonable replacement. The ARRC Proposal allows parties to avail themselves of a safe harbour from litigation if they make changes to their documents to accommodate the benchmark replacement rate endorsed by the legislation within a prescribed period.
- 2.6. Mr Brown observed that market commentary of the ARRC Proposal includes concerns that it may be unconstitutional. There also appears to be no appetite for a U.S, Federal Law to mirror the ARRC Proposal for a New York State law. The ARRC Proposal

does not seem to contemplate different sources of rates and seems to be predicated on the ISDA methodology for triggering when LIBOR is terminated.

3. Plenary discussion on issues arising out of LIBOR transition (Arun Srivastava)

- 3.1. Mr Srivastava opened the floor to members. A member queried the practical difficulties in a difference of approach between the U.K. and U.S. Mr Brown noted the Chancellor's statement made it clear the U.K. will not follow the same route as that adopted by the ARRC. He explained there are two main differences: firstly, the U.K. will not face the constitutional issues the U.S. approach may face; and secondly, the idea of rearranging contracts by legislation was not received positively in the U.K. How the authorities and the market will contend with transitioning "tough legacy" contracts away from LIBOR remains unclear. Members discussed the litigation risk under the ARRC Proposal and U.K. approach.

4. Any other business

- 4.1. No further business was raised.