



FINANCIAL MARKETS LAW COMMITTEE

Videoconference

Date: 28 January 2021

Time: 4.30pm to 6.00pm

Attendees:

Lord Thomas (Chair)	FMLC Chairman
David Greenwald (Deputy Chairman)	Fried, Frank, Harris, Shriver & Jacobson LLP
Andrew Bagley	Goldman Sachs
Sir William Blair	Queen Mary University of London
Claude Brown	Reed Smith LLP
Michael Duncan	Allen & Overy LLP
Paul Double	City of London Corporation
Simon Firth	Linklaters LLP
Kate Gibbons	Clifford Chance LLP
Carolyn Jackson	Katten Muchin Rosenman LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Peter King	HM Treasury
Sir Robin Knowles	Royal Courts of Justice
Ida Levine	Impact Investing Institute
Karen Levinge	Financial Conduct Authority
Jon May	Marshall Wace LLP
Oliver Moullin	Association for Financial Markets in Europe
Rob Price	Bank of England
Jan Putnis	Slaughter and May
John Tribolati	JP Morgan Chase?
Sanjev Warna-kula-suriya	Latham & Watkins LLP
Joanna Perkins	FMLC Chief Executive
Venessa Parekh	FMLC Research Manager
Chhavi Sinha	FMLC Acting Manager
Katja Trela-Larsen	FMLC Forums Coordinator

Registered Charity Number: 1164902.

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MINUTES

CHAIRMAN'S COMMENTS

The Chairman welcomed John Tribolati of J. P. Morgan Chase to the Committee. He also let Members know that Richard Gray of HSBC had stepped down from the FMLC.

The Chairman said that the event on the impact of the Hong Kong Autonomy Act on banks, held on 26 January 2021, had been a great success. The Secretariat was now organising a virtual event colloquium on the status of retained law after Brexit.

He turned to the 2021 Quadrilateral Conference, which will be hosted by the Financial Markets Lawyers Group (“FMLG”). Given the current circumstances arising from the pandemic, the event has been split over three videoconferences to be held in March, June and September. The first videoconference will take place on Thursday 4 March 2021 from 1.00m to 3.00pm U.K. time. The Chief Executive urged Members to volunteer to speak on one of the panels.

Finally, the Chairman noted that a meeting between FMLC Members and the Law Commission has been fixed for 23 February. The meeting is to highlight any areas of the law which the FMLC has identified as in need of reform and which might be suitable for the Law Commission. The Chairman asked Members to give some thought to topics for the agenda and to send in any thoughts to the Secretariat.

ACTIVE PROJECTS

Negative oil prices

The market for crude oil was particularly affected by reduced demand during the pandemic, with prices falling below zero on certain exchange-traded contracts in April 2020 for the first time in history. The Secretariat had drafted a paper exploring the nature of the legal uncertainties arising in financial markets as a result of negative oil prices. At a meeting last year, Members had asked for the paper to be amended, which the Secretariat had done. A draft paper was circulated to Members for their approval. The Chief Executive noted that further comments had been received by the Secretariat which would be incorporated and another iteration of the paper would be sent to Members in coming weeks for final approval.

A Member noted that negative oil prices had had an effect on retail investors in emerging markets, making the paper one of international relevance. Another Member urged others on the Committee to review the final paper so that it was representative of the Committee as a whole.

The Chief Executive asked Members for an introduction to any contacts they might have at Platts in order to facilitate further research into the construction of oil price benchmarks.

Artificial intelligence and use of machine learning in financial services

On 27 November 2020, the Centre for data ethics and innovation (the “CDEI”) published a report of its [review into bias in algorithmic decision-making](#) (the “CDEI Report”) and made cross-cutting recommendations that aim to help build the right systems so that algorithms improve, decision-making.

In relation to financial services, the CDEI suggests that the explainability of models is key for financial services organisations and regulators to identify and mitigate against discriminatory outcomes and for gaining public trust in the use of algorithms. In this regard, the Financial Conduct Authority (the “FCA”) and Bank of England (the “BoE”) have established the Artificial Intelligence Public-Private Forum (“AIPPF”) which aims to support safe adoption of machine learning and artificial intelligence (“AI”) relating to financial services and of which CDEI will become an observer.

The Secretariat has drafted a letter to the Co-Chairs of AIPPF, Dave Ramsden, Deputy Governor, BoE and Sheldon Mills, FCA, congratulating them on the establishment of AIPPF. The draft letter draws attention to the risks posed by AI in the potential for algorithmic bias, herd behaviours and disruption of the level playing field.

Members agreed that this was an important area on which the FMLC should comment. Uncertainties were likely to arise not only in relation to bias and herd behaviour, as mentioned in the letter, but also from the new duties which would be created as AI was adopted more widely.

Members approved the sending and publication of the letter.

U.K. Bank Ring-Fencing Legislation

Members had resolved to establish a Working Group to examine legal uncertainties in the context of the U.K.'s ring-fencing regime, raised by Jan Putnis. Owing to the pressure on the Secretariat's capacity for work, it was agreed that Mr Putnis would coordinate the initial scoping exercise. Mr Putnis had contacted experts from banks who may be interested to join but expressed the opinion that it would be useful to have more representation from law firms. The Secretariat reported that it would write to Patrons and stakeholders to invite further expressions of interest in joining the Working Group.

Mr King reported that HM Treasury was carrying out a statutory review of the ring-fencing regime, making this a timely project.

RADAR AND SCOPING

ESMA Consultation Paper on MiFID II/MiFIR review report on Algorithmic Trading

The European Securities and Markets Authority (the "ESMA") has launched a [Consultation](#) seeking input from market participants on the impact of requirements under Directive 2014/65/EU on markets in financial instruments ("MiFID II") and Regulation (EU) No 600/20142 on Markets in financial instruments ("MiFIR") regarding algorithmic trading, including high-frequency algorithmic trading. The Consultation covers, in relation to algorithmic trading the authorisation regime; provisions for algorithmic and high-frequency traders; and provisions applicable to trading venues allowing or enabling these market participants.

The Secretariat reported that the FinTech Scoping Forum had discussed the Consultation and recommended that the FMLC monitor developments in relation to this topic for comment in the future. Members agreed with this suggestion.

New Chinese Rules to Address Extra-Territorial Applications of Foreign Laws

A stakeholder had brought to the Chief Executive's attention the publication by China's Ministry of Commerce on 9 January 2021 of Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Laws and Other Measures (the "Rules"). The Rules have been read by many as a countermeasure put into effect by China. The stakeholder drew attention to the

possibility that the Rules could, in future, raise issues similar to those which arose from the E.U. Blocking Regulation, even though, at the moment, the Rules seem to be primarily compensatory.

Members agreed that the Secretariat should monitor developments in this area.

Good faith in English law

Following an event organised by the London Shipping Law Centre and Linklaters on the relevance of good faith in disputes triggered by the Covid-19 crisis (at which Simon Firth was a panellist and which was attended by the Chief Executive), Members had considered the possibility of expressing a nuanced view on this issue, under the FMLC's educational remit. The Chairman had suggested that, in the first instance, the Secretariat conduct a scoping exercise by contacting the panellists for their views on how the FMLC might add value to this issue.

The Secretariat had contacted panellists, who have all indicated interest in contributing to the FMLC's project and have kindly sent in some thoughts and resources. The Secretariat had prepared a briefing note on the basis of these resources to help define the questions a project might address.

A Member stated that the question for the Committee is whether it might wish to publish a paper to help inform the discussion around the wider adoption of the doctrine of good faith. Another Member drew attention to a recent judgment of the Canadian Supreme Court on which the panellists of the event mentioned above had expressed disagreement. He noted that this was just an example of the range of opinions on the topic, which could make building consensus a tricky task. The Chairman suggested approaching an academic to provide insight into the treatment of good faith across jurisdictions as well as to help the Secretariat with research. A Member noted that New York law has an implied covenant of good faith, which might provide a helpful comparison.

The Chairman asked the two Members who had been involved in the Secretariat's discussion with the expert panellists to advise the Committee by the next meeting on whether the FMLC should adopt this issue and how it should proceed.

Regulatory divergence in relation to sustainable finance

At the last FMLC meeting, Members discussed, on the recommendation of the ESG Scoping Forum, the lack of clarity in relation to the U.K.'s strategy with regards to the implementation of E.U. legislation on ESG. A Member recommended waiting to comment until the Chancellor had announced the U.K.'s post-Brexit measures.

The Secretariat noted that HM Government's proposal has not yet been published. The Member advised the Secretariat to continue to monitor developments as the proposal should be announced imminently.

FinTech Scoping Forum

The FinTech Scoping Forum had convened on 26 January to discuss, *inter alia*, HM Treasury's [Call for Evidence](#) on a "U.K. Regulatory Approach to Cryptoassets and Stablecoins". The Forum had raised concerns about the interaction of the proposed regulatory approach set out in the Call for Evidence with the U.K.'s regulatory perimeter.

The Chairman asked Mr King whether more work was planned in the area of FinTech over the next year and asked Members how the Secretariat might organise itself to respond quickly. Mr King offered to share HM Treasury's priorities at the next meeting.

Other

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

- [LIBOR Transition](#): The Secretariat reported that, since the last meeting, in pursuit of the Committee's resolution to engage with LIBOR transition two further pieces of correspondence have been published on the topic: (1) a [letter](#) on the Financial Services Bill 2019-21, drawing attention to the possible interaction of the powers, granted by that Bill to the FCA to help manage an orderly transition away from LIBOR, with similar measures in other jurisdictions; and (2) a [response](#) to the FCA's Consultation on the exercise of the aforementioned powers. The Secretariat will continue to work on an Addendum to its Oct 2020 Report as well as a letter, in conjunction with the European Financial Markets Lawyers Group ("EFMLG"), urging regulators to consider increased

coordination to avoid unintended consequences linked to legislative initiatives in relation to LIBOR transition.

- HM Treasury’s Call for Evidence: Solvency II: The Secretariat is working with Members of the Insurance Scoping Forum to respond to HM Treasury’s 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**”).
- Section 3 of the RAO—Definition of contract of insurance: The Secretariat is working on reviewing the drafting and compiling a draft paper on the definition of the phrase “a contract of insurance” set out in the Schedule 1 to the Regulated Activities Order.

ANY OTHER BUSINESS

A Member asked whether the FMLC might monitor the wider consequences of Brexit on the legislative framework governing financial services after the loss of E.U. market access and the removal of mutual reciprocity. The latter, in particular, would have repercussions for concepts such as right *in rem* and set off. The Chairman suggested the Brexit Advisory Group might consider this; the Chief Executive agreed and added that, were more select experience necessary, the Secretariat could call upon the expertise of the Working Group which had written the 2017 paper on equivalence (Issue 208). The Member agreed to discuss this further with the Chief Executive.

Another Member drew attention to the impact of the National Security and Investment Bill on loan arrangements. The Chairman noted that, if the FMLC was going to comment, it would have to be quickly because the Bill was already making its way through Parliament. The Member suggested that, even if the FMLC was unable to affect the working of the legislation, it would be useful to publish a letter suggesting how the provisions might be interpreted.