

## Financial Markets Law Committee (“FMLC”)

### Insurance and Pensions Scoping Forum

Date: Tuesday 2 February 2021

Time: 2.00pm to 3.30pm

Virtual meeting



#### Attendees:

Pollyanna Deane (Moderator)	Fox Williams LLP
George Belcher	Skadden, Arps, Meagher & Flom LLP
Peter Bloxham	
Beth Dobson	Slaughter and May
Jennifer Donohue	Algorithm and Extremal Consulting Limited
Reid Feldman	Kramer Levin Naftalis & Frankel LLP
David Kendall	Cooley (UK) LLP
Adam Levitt	Ashurst LLP
Ben Lyon	Debevoise & Plimpton LLP
Martin Membery	Sidley Austin LLP
Clare Swirski	Debevoise & Plimpton LLP
Kees van der Klugt	Lloyd’s Market Association
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

#### Regrets:

Duncan Barber	Linklaters LLP
Charlotte Heiss	Royal & Sun Alliance Insurance Group plc
Alison Matthews	Herbert Smith Freehills LLP
Steven McEwan	Hogan Lovells LLP
Chris Newby	AIG Europe Limited
Sarah Parkin	Linklaters LLP
Chris Sage	TransRe
Michael Wainwright	Dentons UK and Middle East LLP

Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company"). Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

## Minutes

### 1. Introductions

1.1. Ms Deane opened the meeting.

### 2. FMLC Scoping Forums (Venessa Parekh)<sup>1</sup>

2.1. Ms Parekh explained that the FMLC's remit covers the entirety of the wholesale financial markets. In order to identify issues of legal uncertainty, the FMLC Secretariat runs ten Scoping Forums, each focused on a specific area of the financial services. Ms Parekh reminded members how Scoping Forums work in practice to further the aims of the FMLC, their role in Forum and the Forum's conduct of business rules.

### 3. FCA Business Interruption Test Case (Clare Swirski and Ben Lyon)

3.1. Ms Swirski provided an overview of the Supreme Court's decision in *The Financial Conduct Authority v Arch and Others* [2021] UKSC 1 (hereafter, the "FCA test case") which had been handed down in mid-January, following the conclusion of hearings in November. The Supreme Court had found for the FCA, dismissing the appeals by the insurers. She noted that the insurers had placed their faith in the "but for" test. The Supreme Court had acknowledged the applicability of the test in a majority of cases but found that it would be too wide to be applied in these circumstances. Taking a narrower approach to identifying the insured peril or trigger in disease clauses, the Supreme Court focused on individual occurrences, finding that they could as a matter of law satisfy the test of causation and concluding that there was cover under the disease clauses.

3.2. The Supreme Court had considered the geographical limitation in a typical disease clause. The insurers had argued that the clause only covered the business interruption consequences of any cases of a Notifiable Disease occurring within a specified radius of the insured premises. The FCA's position was that the clause covered the business interruption consequences of a Notifiable Disease wherever the disease occurs, provided there is at least one case of illness caused by the disease within the radius. The Supreme Court observed that there is cover for "any ... occurrence of a Notifiable Disease within" the radius—i.e., any occurrence outside the area would not be covered. Further, each case of illness is a separate occurrence and a "Notifiable Disease" in the

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<sup>1</sup> Please see Appendix I

sense used in the wording is not the outbreak nor the disease itself but rather the illness sustained by any person. While the Supreme Court found that the disease clause provides cover for business interruption caused by any cases of illness resulting from Covid-19 that occur within a radius, it does not exclude the interruption which may result from cases of the “Notifiable Disease” outside the radius, especially in the context of the rapid spread of the disease. Each case, whether or not within the radius, was a cause of government action and the public response to the pandemic.

- 3.3. In relation to causation, the Supreme Court highlighted the inadequacies of the “but for” test. Ms Swirski observed that the Supreme Court had overturned the decision in *Orient-Express Hotels Ltd v Assicurazioni General SpA* [2010] EWHC 1186 (Comm), noting that where there are two proximate causes of loss and only one is covered by the policy, the insurer will be found liable, unless the other cause is specifically excluded, in which case the exclusion will usually prevail. In relation to disease clauses, therefore, it would be sufficient to prove that the interruption was a result of government action taken in response to cases of disease where there was at least one case of Covid-19 in the relevant geographical area. In relation to prevention of access clauses, the Court considered the composite nature of the insured peril in these clauses, finding that the elements of the insured peril are inextricably connected and their effects on the business all arise from a single cause: the pandemic.
- 3.4. Turning to the discussion in the judgment on nature of the public authority intervention required to trigger the clause, Ms Swirski noted that the Supreme Court had focused on the wording used by Hiscox, noting that the same analysis applied to the other relevant wordings. The Supreme Court had held that, while ordinarily “restrictions imposed” by a public authority would be understood as mandatory measures backed by statutory legislation, it was not necessary for a restriction to be backed by the law before it would fall within the description. The Supreme Court had then offered guidance on how such a phrase may be interpreted. In addition, in relation to prevention of access clauses, Ms Swirski noted that the Supreme Court agreed with the High Court’s determination that this would be triggered in the event of an inability to use. However, the Supreme Court did not accept the High Court’s determination that there is no such “inability” where there is the capacity for partial use but not the full intended use.
- 3.5. Ms Swirski noted that an important issue in the case was the proper operation of the trends clauses, which form part of the quantification machinery in the policy and which are intended to determine and quantify loss covered by the policy. The Supreme Court concluded that the trends clauses should be interpreted, in determining the quantum of

the loss, such that the business' standard turnover or gross profit should be covered, subject to any adjustments for circumstances which are unconnected with the insured peril, and with reference to counterfactuals. In the case of the disease clause, this would mean covering the profit "but for" the occurrence of the pandemic.

- 3.6. Mr Lyon stated that the result does not bind policyholders or the Financial Ombudsman Service, although it is supposed to be persuasive to both. It is also likely to be persuasive in other common law jurisdictions considering non-damage business interruption cases. He noted the existence of other ongoing litigation and the fact that the policy language under consideration in this case was not comprehensive, making it likely that there will be continuing disputes over other wordings.
- 3.7. Forum members discussed the impact of the overturning of *Orient Express* and the need for insurable interest to be taken into account. A member asked if other cases be relitigated in light of this, noting that she had already amended her advice but with the caveat that the FCA test case is distinguishable. Ms Swirski noted that issues around concurrent causation will bring the "but for" test into question and may lead to increased litigation.
- 3.8. Forum members also discussed the possible repercussions of the Supreme Court's finding that guidance by public authorities can be construed to have the force of law. They touched upon the impact of this judgment on reinsurers and cedants.

#### **4. Any other business**

- 4.1. A member asked if the Forum would consider in the future questions around post-Brexit access to the E.U. market. An attendee stated that it would be interesting to see the result of the negotiations on equivalence between the U.K. and E.U.; another attendee noted that while big insurance companies have taken steps to prepare for Brexit, it is the small companies which will face a fallout, albeit belatedly.
- 4.2. In addition to Brexit, Forum members recommended discussing the results, if published, of the consultations in both the U.K. and E.U. on the review of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance ("**Solvency II**"). Another member said that it might be worth discussing the interaction between Lloyds of London and the European Insurance and Occupational Pensions Authority.

# FMLC Scoping Forums

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**Venessa Parekh**  
**Research Manager**

**Registered Charity Number: 1164902.**

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# Scoping Forums

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*“Scoping forums serve as an avenue for the FMLC to engage with focus groups on legal issues affecting specific segments of the financial markets.*

*The forums serve as spaces for discussion of broader issues of legal uncertainty and as a pool of expertise available to the FMLC. Forum members formulate and propose to the FMLC issues considered by them to cause substantive legal uncertainty to their industry.”*

FMLC Brochure, January 2021

The FMLC’s remit covers the entirety of the wholesale financial markets. In order to identify issues of legal uncertainty, the FMLC Secretariat runs ten Scoping Forums, each focused on a specific area of the financial services.

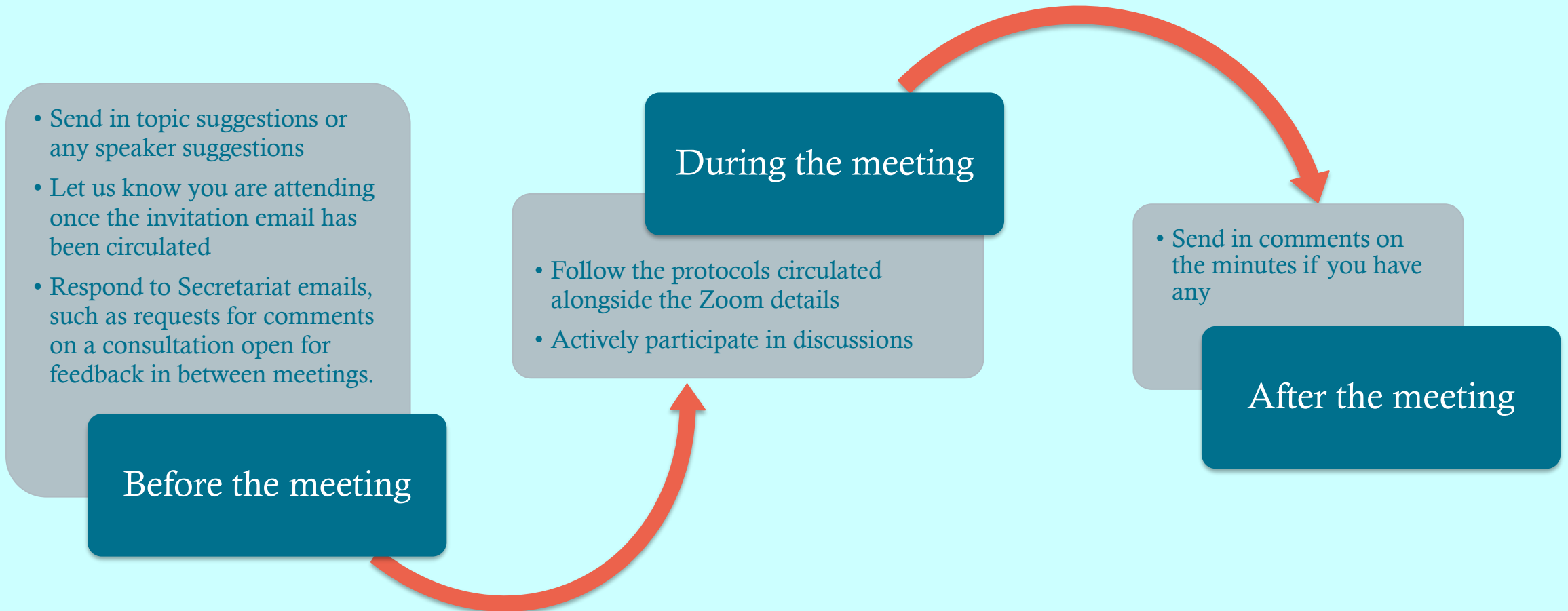
# Scoping forums in practice

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- A scoping forum establishes a **pool of expertise** available to the FMLC. That pool of expertise can guide the FMLC in **establishing priorities, allocating resources and recommending specific issue to the FMLC for analysis.**
- Scoping forum members can make non-binding suggestions as to the manner of the FMLC's engagement and nominate experts for working groups.
- They often include presentations from industry experts, individuals with first-hand experience of legal uncertainty and those working at the cutting edge of their respective fields (presenters are often all three at once).
- **Scoping forums discuss all manner of topics, issues and solutions within their chosen sector.**
- Not every issue discussed will go on to become an issue adopted by the FMLC. Scoping forums are horizon-scanning bodies and places to share and compare knowledge. They are about **learning and discovery** as much as they are about **evaluating specific issues for further consideration.**
- The Forum may examine issues arising under the current regulatory framework as well as future proposals. In this capacity, it may consider any or all of English, European, international and foreign law.
- The Forum can make recommendations as to the FMLC's work in its sector. The final decision on these matters rests with the Committee.

# The Role of the Forum Members





# Conduct of Business

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- Scoping Forums meet at least every quarter but may, if it is deemed necessary, meet more regularly.
- Members of the Forum act in a purely personal capacity. The names of the institutions that they ordinarily represent may be mentioned for information purposes only.
- For reasons of diversity of perspective, inclusion and practicality, any one organisation may have a maximum of two colleagues with membership of the Forum.
- Non-members may only be invited to attend meetings as guest speakers.
- In order to encourage individual participation, Forum members are not permitted to send alternates to attend meetings. Accordingly, Zoom details must not be forwarded on or shared with colleagues.
- So the minutes can accurately reflect attendees, please ensure you enter your full name when joining each Zoom meeting. If dialling via telephone, in please clearly state your name at the prompt when joining the call.

# Insurance and Pensions Scoping Forum 2021 Forward Schedule

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**Tuesday 2 February** 2.00pm to 3.30pm (U.K.)

**Tuesday 11 May** 2.00pm to 3.30pm (U.K.)

**Tuesday 20 July** 2.00pm to 3.30pm (U.K.)

**Tuesday 2 November** 2.00pm to 3.30pm (U.K.)

# Please keep in touch

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Katja Trela-Larsen, Forums Coordinator ([forums@fmlc.org](mailto:forums@fmlc.org))

and

Venessa Parekh, Research Manager ([research@fmlc.org](mailto:research@fmlc.org))

would be very grateful to receive your topic and speaker suggestions.

Further information about the FMLC's 10 scoping forums—as well as the agenda and minutes of previous meetings—can be found on our website at:

<http://fmlc.org/scoping-forums/>

